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AMERICAN LAW REPORTS

ANNOTATED

VOL. 6

EVA FINCH

v.

HARVEY V. FINCH, Appt.

New Jersey Court of Errors and Appeals — November 18, 1918.

(89 N. J. Eq. 563, 105 Atl. 205.)

Husband and wife — nonsupport — excuse.

The husband offered no defense to the charge of abandonment and nonsupport of his wife, but pleaded that having given her, when he left her, two out of four bank books, representing substantially the savings of the wife and gifts to her from her mother, he had fulfilled his marital duty of support. Held, that if the moneys represented by the books were his, he had made a gift of it to his wife. Held also, that his duty to support his wife was not, after the expiration of two years of continuous neglect upon his part, fulfilled by such gift.

[See note on this question beginning on page 6.]

Headnote by MINTURN, J.

APPEAL by defendant from a decree of the Court of Chancery in favor of complainant in a suit for alimony. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. Charles E. S. Simpson for appellant.

Messrs. Albert Leuly and William C. Asper, for appellee:

Defendant abandoned and separated himself from his wife without justifiable cause.

Bradbury v. Bradbury, — N. J. Eq. —, 74 Atl. 150.

Defendant refused and neglected to maintain and provide for his wife.

Beck v. Beck, 78 N. J. Eq. 544, 85 6 A.L.R.—1.

L.R.A. (N.S.) 712, 80 Atl. 550; Bacon v. Devinney, 58 N. J. Eq. 449, 37 Atl. 144; 21 Cyc. 1296; Westerfield v. Westerfield, 36 N. J. Eq. 195.

Minturn, J., delivered the opinion of the court:

There was no defense interposed by the husband to this suit for alimony by the wife, and the legal correctness of the vice chancellor's decree depends upon the answer to the

inquiry whether, under the conceded facts, the conduct of the husband was tantamount to the abandonment and neglect of his wife, as a basis for a decree of maintenance within the contemplation of the 26th section of the Divorce Act (2 Comp. Stat. 1910, p. 2038).

For twelve years after their marriage, they lived together as man and wife without the development of serious antagonism until November 11, 1914, when, owing to a morose mental condition superinduced by ill health and business embarrassment, he decided to leave home and go to his mother's home, with the expressed intention of returning when his condition had improved. "Do anything you like with the things," he said to his wife. "You can get a smaller place with less rent than what we have been paying. When I am better, I will come back." With this parting salutation and a promise to write, he left her, and neither wrote nor returned. She requested him to let her accompany him, but he cavalierly replied that he did not want to bother with her. She, nevertheless, frequently wrote him, asking for an interview; but he never replied. Her brother met him at a public house, and again at his boarding house, and interceded as an emissary for his sister, urging defendant to meet and talk with his wife; but his efforts were vain, and defendant remained obdurate.

Her solicitor in this case, Mr. Leuly, wrote him several letters, requesting him to call at his office with view to a reconciliation; but this effort also for a time proved unavailing. Finally he called with his brother, and Mr. Leuly went over the situation with him, and urged him to meet his wife, and become reconciled; but this he declined to do. Before he departed, he proposed to pay her the meager sum of \$3 per week, which sum, because of its paucity, the solicitor refused to accept, and this suit was the ultimatum.

If this résumé of the facts constituted the entire case, we would have

presented to us a case, not only of marital neglect, but of manifest abandonment and desertion. But the defendant pleaded and insisted that because, before he left his wife, he handed her two out of four bank books, containing an account of \$2,000, representing her savings and gifts to her from others, he had thereby fulfilled his marital duty of support. The learned vice chancellor found that the transfer of the books was made before the abandonment, and were given to her doubtless as a fair division in the husband's view, of what he considered the joint property.

There is no proof in the case that they were given as a means for her support, and as a release, tacitly or otherwise, of the performance of the husband's manifest duty of support. The contention that their acceptance by the wife, in the absence of evidence to that effect, was tantamount to a release of the husband from the performance of his marital duty, is opposed in principle to the well-settled rule on the subject, as evidenced by our adjudications. *Beck v. Beck*, 78 N. J. Eq. 544, 35 L.R.A. (N.S.) 712; 80 Atl. 550; *Bacon v. Devinney*, 55 N. J. Eq. 449, 37 Atl. 144; *Westerfield v. Westerfield*, 36 N. J. Eq. 195.

Husband and wife—nonsupport—excuse.

Nor can it be observed without noting the fact, as one of conspicuous importance, that over two years of continuous, obstinate neglect upon his part were allowed to pass, before the complainant, recognizing the futility of conjugal persuasion and effort to induce her husband's return, or to produce any practical acknowledgment on his part of his plain obligation of support, filed this bill to enforce her manifest right, and to compel the performance of his palpable duty.

During that interim, unless the gift made to her on the eve of his abandonment were supplemented by the result of her earnings and efforts, we may judicially indulge the presumption that the gift ere this has been seriously, if not entirely,

depleted, and the complainant thereby left to her own resources.

The decree of the Court of Chancery will be affirmed.

NOTE.

The subject of the defenses avail-

able to the husband in a civil suit by the wife for support is treated in the annotation beginning at page 6, post. The specific question as to the effect of the provision already made by the husband for the wife is discussed in subd. VI. of that note.

WILLIAM J. HUBBARD, Sa., Appt.,

v.

FLORENCE HUBBARD.

Maryland Court of Appeals — June 28, 1917.

(181 Md. 291, 101 Atl. 772.)

Husband and wife — arrest of husband — relief from duty to support.

1. That a wife had her husband arrested and asked for police protection in case he returned home does not relieve him from the duty of supporting her.

[See note on this question beginning on page 6.]

— bill for support — right to maintain.

2. A wife living apart from her husband through no fault of her own may maintain a bill in equity to compel him to furnish her with support.

[See 13 R. C. L. 1188, 1450.]

Divorce — allowance for alimony — reasonableness.

3. An allowance to a wife of \$8 per week out of a weekly salary of her hus-

band which amounted to \$20 is not unreasonable.

[See 1 R. C. L. 929.]

— alteration of allowance.

4. An allowance for alimony is subject to be increased or diminished by the court making it, according to the altered conditions of the parties as they may from time to time exist.

[See 1 R. C. L. 946.]

APPEAL by defendant from a decree of the Circuit Court of Baltimore City (Dawkins, J.) in favor of plaintiff in a suit for alimony, and for other relief. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. David Ash and Harry C. Kalben, for appellant:

The wife places her case on a strictly legal right alone. "Her suit is the sequence of her desertion."

Black v. Black, 80 N. J. Eq. 216.

An offer of reconciliation is not effective unless it is free from unreasonable conditions and requirements.

9 Am. & Eng. Enc. Law, 2d ed. 773.

An offer of reconciliation should be unconditional, especially after an unfounded charge of adultery, which in itself constitutes excessively vicious conduct and a ground for divorce.

Miller v. Miller, 34 L.R.A. (N.S.) 360, and note, 89 Neb. 239, 131 N. W.

208; *Mathewson v. Mathewson*, 18 L.R.A. (N.S.) 300, and note, 81 Vt. 178, 69 Atl. 646.

Plaintiff did not retract her groundless charge of adultery, or show any intention to live with defendant in peace.

Jenkins v. Jenkins, 104 Ill. 186; *McClurg's Appeal*, 66 Pa. 373.

Mr. James Fluegel for appellee.

Stockbridge, J., delivered the opinion of the court:

On the 27th of May, 1915, a decree was passed in a case between the same parties as those who are parties to this record, upon a bill

filed originally as a bill for alimony, and subsequently by amendment converted into a bill for divorce *a mensa et thoro*. Three days after the entry of the decree in that case an appeal was taken to this court (127 Md. 617, 96 Atl. 860), and, the case having been heard here, the decree of the circuit court No. 2 of Baltimore city was affirmed on January 21, 1916.

Shortly following the decree of the circuit court No. 2 of Baltimore city, to which reference has just been made, namely, on July 1st, 1915, Mrs. Hubbard swore out a warrant for the arrest of her husband, charging desertion and non-support. Mr. Hubbard was absent from the city at the time, and did not return to Baltimore until about the middle of that month. Immediately upon his return he surrendered himself, and the case was set for a hearing on the 19th or 20th of July.

When the matter was taken up before the magistrate there appears to have been some discussion relative to a possible reconciliation between the parties, and without final action there, either upon the theory of a lack of jurisdiction on the part of the magistrate or for some other reason, the case was sent to the grand jury, which subsequently found an indictment. The criminal proceeding does not appear to have been pushed to a conclusion, but was settled by the state's attorney without prejudice to the assertion of the rights of the parties in an equity court.

On September 28th, 1916, the bill of complaint in this case was filed. It contains three prayers: The first, for alimony *pendente lite* and permanent alimony; the second, for an injunction to restrain Mr. Hubbard from disposing of certain household effects and furniture; and third, the general prayer for relief.

The evidence consists largely of the testimony of the parties to this suit and is contradictory on material points. It would be idle to attempt to reconcile their stories, or account for the discrepancies by any sup-

posed lapse of memory. The alleged foundation for Mrs. Hubbard's suit is this; that sometime during the month of July, 1915, or approximately two months after the dismissal of her former bill for a divorce, and after the hearing before the magistrate of the proceeding instituted because of the non-support, Mr. Hubbard did return to the house on Madison avenue which belonged to the parties, and, although not occupying the same room with his wife, did during some week or ten days take his meals or some of them with his wife and others who were staying at the house, thereby affecting at least a partial reconciliation of the parties.

Mr. Hubbard, on the other hand, denies most emphatically that he ever took a meal at the house or stayed in the house overnight, and insists that the various witnesses who testified to his presence there were mistaken in their estimates of time by at least one year. He does admit that he paid a brief visit to the house for the purpose of getting some of his clothing, but insists that that was all, and that the total length of time that he was so in the house was very brief.

In the course of the examination it was admitted (record, page 28) by the counsel for Mr. Hubbard that there was nothing to prevent him from going home. Of the conflicting statements made by Mr. and Mrs. Hubbard, there is no corroboration of Mr. Hubbard's version. On the other hand, Mrs. Hubbard is supported by the testimony of the son of the parties, though apparently some animus existed between the father and son.

There is further corroboration from three apparently disinterested witnesses; a Mrs. Overlay, who spent a considerable length of time in the house in 1915, and who details with particularity the events and actions of Mr. Hubbard in the house during that week or ten days, at the expiration of which he left and did not thereafter return.

Mr. and Mrs. Haas were neigh-

bors, living on Madison avenue. Their testimony is to the effect that while neither of them saw Mr. Hubbard in the house, yet Mrs. Haas saw him entering the house, and Mr. Haas saw him in the immediate neighborhood and had a short conversation with him.

The preponderance of testimony, therefore, is to the effect that after the dismissal of the prior bill there was at least a partial reconciliation of the parties, followed by Mr. Hubbard's leaving the home, and that he has not since returned to it.

Upon one point the evidence of the parties to the case is in entire accord, namely, that since the decree of May 27, 1915, Mr. Hubbard has contributed nothing whatever to the support or maintenance of his wife.

The right of a wife to look to her husband for support, and to maintain a bill in equity therefor where

Husband and wife—bill for support—right to maintain.

the parties are not living together, and that through no fault of the wife, is

too firmly established in the law of this state to call at this time for any discussion or extended citation of authorities. Wallingsford v. Wallingsford, 6 Harr. & J. 485; McCurley v. McCurley, 60 Md. 185, 45 Am. Rep. 717.

The only pretext upon which Mr. Hubbard relied in his testimony to justify his failure to return to his wife, or to fail to provide her with a proper allowance for her support, was that she had had him arrested, and that when the parties were before the magistrate she had asked in anticipation of his returning to their home, to be afforded police protection, but such reasons,

—arrest of husband—relief from duty to support.

however galling they may have been to the husband's pride, cannot be relied upon as justifying a total fail-

ure to make any provision whatever for the support of the wife.

A large amount of the testimony taken at the trial of this case was directed to the capacity of the husband to support his wife, and the details of his business and the amount received by him from it were gone into at great length.

The facts upon the uncontradicted evidence of this branch of the case show that he was conducting a relatively small business in the shipping and selling of oysters, and that the profits at the close of the year were trifling in amount. In reaching this result there were deducted as a part of the expenses of the business weekly payments to the defendant, as salary, of \$20; to his bookkeeper of \$18; a foreman, \$15, and a driver, \$11. Without stopping to consider or discuss whether this weekly salary list was or was not out of proportion to the amount of business done, the important fact is that Mr. Hubbard had a weekly drawing account as salary, of \$20.

The decree from which this appeal was taken awards Mrs. Hubbard the sum of \$3 per week as permanent alimony, less than one fourth of the earning capacity of the husband, as shown by the salary which he was drawing. Such an allowance of alimony cannot be said to be unreasonable (Ricketts v. Ricketts, 4 Gill,

Divorce—allowance for alimony—reasonableness.

105; Harding v. Harding, 22 Md. 337); and since an allowance for alimony is subject to be increased or diminished by the court making it, according to the altered condition of the parties as

—alteration of allowance.

they may from time to time exist, no reason is apparent for disturbing the decree of the Circuit Court for Baltimore City, and that decree will accordingly be affirmed.

ANNOTATION.

Defenses available to husband in civil suit by wife for support.

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I. Scope of note.

It is the purpose of this note to discuss the defenses which a husband may have to his wife's civil action or suit for an allowance in the nature of alimony for her separate maintenance and support. The note is concerned only with actions in which an allowance is sought in an independent action, or cross action, and not as an

incident to an action for limited or absolute divorce or judicial separation. The term "alimony" is not used in any technical sense, but rather as the equivalent of an allowance by a husband to a wife for her separate maintenance and support. An independent action for separate maintenance does not appear to have been entertained in England, except perhaps

during the existence of the Commonwealth, and possibly in a few cases where the husband was absent from the Kingdom.

In Canada, an independent suit for alimony seems to have been entertained without much discussion, in the cases reviewed in this note, probably on authority of early statutes in the various provinces.

In the United States, the early tendency seems to have been to follow the English rule in the absence of statute, but the courts in some jurisdictions have held it to be an inherent power of the courts of equity in the United States to grant alimony or separate maintenance without divorce in an independent action, and this view has gained in favor as the various states have had to decide the question for the first time. In a number of the United States, statutes have been passed which authorize a wife to maintain an independent action against her husband for separate maintenance, or to apply for an order for her separate support.

No attempt has been made to set forth the cases by jurisdictions and with regard to the statutes, since with a few exceptions, which will be noticed, the statute is concerned chiefly with the question of jurisdiction, and, the right to entertain the action being established, the question of defenses is substantially the same whether the action is statutory or equitable.

The question of prior divorce between the parties as a defense is not within the scope of the note, which is concerned only with the question of separate maintenance where the relation of husband and wife exists between the parties.

In *HUBBARD v. HUBBARD* (reported herewith) ante, 3, it is held that the acts of a wife in having her husband arrested, and, when the parties were before a magistrate, asking, in anticipation of his return to their home, to be afforded police protection, cannot be relied on in her suit for alimony as justifying a total failure to make any provision whatever for her support. No other case on this exact point has been found.

II. Voluntary separation.

a. Introductory.

In this subdivision of the note it is proposed to review all cases involving the effect of the wife's misconduct on her right to recover separate maintenance in an independent suit. In many of the cases, and especially those brought under statutes giving the courts jurisdiction to entertain this action, the absence of misconduct on the part of the wife is made a part of her case, and she must allege and prove that she is "without fault" contributing to the cause of separation. This is particularly true in Illinois, where the statute authorizes a suit for separate maintenance when the wife is living separate and apart from the husband "without her fault." For this reason and because of the large number of cases, the Illinois decisions are treated in a separate subdivision. However, it would seem that even in cases which hold that the wife must allege and prove that she is "without fault," the real burden of establishing misconduct on the part of the wife which will defeat her recovery of separate maintenance or alimony is in fact on the husband, and in substance, if not in form, the misconduct of the wife is a defense, and that in fact the burden on the wife is to establish a prima facie case of proper conjugal conduct and thereby shift to the husband the burden of showing misconduct on her part which will defeat her action.

Thus, in *Hunter v. Hunter* (1905) 121 Ill. App. 330, a wife's suit for separate maintenance brought under the Illinois statute, the court says: "Ordinarily, in suits under the statute providing for separate maintenance, the wife leaves the husband, and the burden is cast upon her of showing that she had reasonable ground for leaving him. In this case the husband leaves the wife, and while the burden is still upon her to show that she is living separate and apart from her husband without her fault, yet it is of a negative character. The most that she can be expected to show in the first instance is that she reasonably performed her duty as a wife, and

then the burden is cast upon the husband to show that he had reasonable ground to leave her; and upon the whole case presented the question is, Is the wife living separate and apart from her husband without her fault?"

The court in *Pratt v. Pratt* (1916) 197 Ill. App. 530, construed the word "fault" as used in the Separate Maintenance Act to mean a voluntary separation or such misconduct of the wife as materially contributes to the disruption of the marital relation.

The cases in other jurisdictions which hold that the wife must establish her freedom from fault are also treated in this subdivision, but not by jurisdictions.

In making the distinction between "voluntary separation" and "misconduct of wife," it has not been attempted to draw the line between cases in which it appeared that the wife left the husband and cases where the husband deserted the wife, but rather under "Voluntary separation" it has been intended to collect the cases where the voluntary act of leaving is treated as a part or all of the wife's alleged misconduct, while the subdivision, "Misconduct of wife," is concerned with cases in which the question is whether the conduct of the wife has contributed to bring about the separation, regardless of which party left the husband's home. Under some circumstances, a husband in compelling his wife to leave the matrimonial domicile is, in contemplation of the law, the real deserter, and the case proceeds on the theory that he is guilty of desertion, while in another case it may be plain that the wife left her husband voluntarily in every sense of the word, and without any legal justification, and in many cases it is not clear in the opinion which party made the first move in effecting the separation.

Because of conflicting decisions under various Code provisions governing permanent alimony without divorce, the Georgia cases are reviewed in a separate subdivision.

It may be stated as a general rule that while the law, in granting separate maintenance or permanent al-

imony without divorce, does not require perfection on the part of the wife, nor that she should be so entirely blameless that her conduct under irritating circumstances should be wholly free from just criticism, yet her voluntary desertion without legal cause, or misconduct which materially contributes to the separation so that it may be said to be equal to or greater than that of the husband, is a defense to her suit for separate maintenance.

See the cases cited under the following subdivisions.

b. Act of wife.

The fact that a wife voluntarily and intentionally left a proper home provided by her husband, or refused to accompany him to a new home, will defeat her suit for separate maintenance in the absence of fault on the part of the husband.

Alabama.—*Brindley v. Brindley* (1898) 121 Ala. 431, 25 So. 751.

California.—*Mayr v. Mayr* (1911) 161 Cal. 134, 140, 118 Pac. 546.

Kentucky.—*Springer v. Springer* (1900) 21 Ky. L. Rep. 1292, 54 S. W. 710. See also *Finley v. Finley* (1839) 9 Dana, 52, 33 Am. Dec. 528.

Maryland.—*Wallingsford v. Wallingsford* (1821) 6 Harr. & J. 485.

Missouri.—*Droege v. Droege* (1892) 52 Mo. App. 84; see also *Lindenschmidt v. Lindenschmidt* (1888) 29 Mo. App. 295.

Nebraska.—*Price v. Price* (1906) 75 Neb. 552, 106 N. W. 657.

New Jersey.—*Dummer v. Dummer* (1898) — N. J. —, 41 Atl. 149.

New York.—*Reischfield v. Reischfield* (1917) 100 Misc. 561, 166 N. Y. Supp. 898. See also *Noe v. Noe* (1878) 13 Hun, 486, and *Reade v. Continental Trust Co.* (1900) 49 App. Div. 400, 63 N. Y. Supp. 395.

South Carolina.—*Hair v. Hair* (1858) 81 S. C. Eq. (10 Rich.) 163; *Rhame v. Rhame* (1826) 6 S. C. Eq. (1 M'Cord) 197, 16 Am. Dec. 597; *Wise v. Wise* (1900) 60 S. C. 426, 38 S. E. 794.

Utah.—*Nielson v. Nielson* (1919) — Utah, —, 182 Pac. 366.

Canada.—*Edwards v. Edwards* (1873) 20 Grant, Ch. (U. C.) 392; *Hill v. Hill* (1901) 2 Ont. L. Rep. 289,

affirmed in (1901) 2 Ont. L. Rep. 541; *McKay v. McKay* (1858) 6 Grant, Ch. (U. C.) 880. See also *Payne v. Payne* (1905) 10 Ont. L. Rep. 742, stated at length *infra*, III.

In *Dummer v. Dummer* (N. J.) *supra*, wherein it appeared that a wife left her home voluntarily, and not as the result of ill-treatment or other fault of the husband or because of his alleged command to do so, it was held that she was not entitled to alimony in a suit brought therefor under a section of the Divorce Act.

A wife who is voluntarily living apart from her husband is not entitled to separate maintenance. *Mayr v. Mayr* (1911) 161 Cal. 134, 140, 118 Pac. 546.

Where a wife voluntarily leaves her husband or refuses to accompany him to a new residence, without sufficient fault on his part to justify her living apart from him, she is not entitled to alimony. *Wise v. Wise* (1900) 60 S. C. 426, 38 S. E. 794.

In *Hill v. Hill* (1901) 2 Ont. L. Rep. 289, affirmed in (1901) 2 Ont. L. Rep. 541, under the rule that a wife who voluntarily leaves her husband is not entitled to alimony, where a wife was taken from an insane asylum where her husband had rightfully placed her, and where he was fulfilling as to her his marital duties so far as in the circumstances, and having regard to the mental condition of the wife, those duties could or ought to have been performed by him, it was held that she was not entitled to alimony, although on the last occasion, after having twice removed her, he was obliged to procure her admission to the asylum by way of the county jail, the asylum superintendent having refused to receive the wife a third time except as a "warrant patient," because if so admitted she could not be discharged except by the lieutenant governor, while if admitted as she had previously been, she might be taken away again at the whim of the husband, and, as he had twice removed her against the advice of the superintendent, it was not right that she should take the place of someone else for whom admission might be desired.

Where a wife voluntarily leaves her husband, it appearing that no personal violence has been used and no harsh language or unkind treatment which the wife has not brought on herself by her own improper conduct, she is not entitled to alimony. *Rhame v. Rhame* (1826) 6 S. C. Eq. (1 M'Cord) 197, 16 Am. Dec. 597.

In *McKay v. McKay* (1858) 6 Grant, Ch. (U. C.) 880, wherein it appeared that a wife left her husband's home voluntarily, not as the result of his misconduct, but pursuant to a premeditated scheme on her part adopted with a view to and for the purpose of compelling a separate maintenance, it appearing that there was great provocation by the wife for any misconduct of the husband, who offered to receive and maintain her in his home, it was held that she was not entitled to alimony.

The fact that a wife voluntarily and intentionally and without good cause abandoned the domicile of her husband which he had provided for her, it being the right and privilege of the husband to fix in good faith a domicile for himself and wife, to which it is her duty to follow him, would defeat her claim for reasonable separate support and maintenance. *Price v. Price* (1906) 75 Neb. 552, 106 N. W. 657.

Where a wife secretly abandons her husband without sufficient cause to constitute a legal abandonment by the husband, she is not entitled to separate maintenance under the statute which requires abandonment by the husband and failure to support. *Droege v. Droege* (1892) 52 Mo. App. 84.

Where a wife leaves her husband voluntarily after quarreling with him, in the absence of an offer to return or any expression of willingness to do so, although the husband acquires a residence abroad without concealing it, the fault is the wife's, and she is not entitled to alimony. *Edwards v. Edwards* (1878) 20 Grant, Ch. (U. C.) 392, wherein the chancellor said: "The wife left her husband, and she does not show any sufficient reason for doing so. In February, 1870, the

husband left Canada and went to the United States, where he has since resided; and where it is his intention, as he has declared, permanently to reside. There is evidence of his having said to his brother and to his cousin that he and his wife could not live together; what he said to his brother was that he did not think that he and his wife could ever live together; that he had left his house open for her to come back, and she had not come, and for that reason he thought they could never live together. From the whole of the evidence, I think that the wife left with no intention to return; that she could have returned if she had been so minded, but that she deliberately preferred living apart from her husband. Her returning for 'her things'—her clothing and personal belongings, I suppose—was a clear indication of her intention to live separately. On the husband's part, I see no unwillingness even, certainly no refusal, to receive back his wife, only a conviction, a natural one from her conduct, that having left his house open for her reception, and she not returning, that they could not again live together. After what had passed, it was certainly her part to offer to return. His going to reside in the United States does not in my opinion amount under the circumstances to desertion. His own declared reason for going was that he thought he and his wife could not live together, and that it was better for him to go. Whether this was really his reason or not is not very material. He had a right to reside abroad; and my only doubt in the case has been whether he was not bound to inform his wife of his place of residence abroad, in order that she might join him there if she thought fit; but, upon reflection, I think he was not bound to do this. It was her duty to join him there, her husband's domicile being properly hers; and it does not appear that there was any obstacle to her joining him, that there was any concealment of his place of residence, or that it was not in fact known to her. No communication seems to have passed from her to him; no intimation of a

desire on her part to renew their marital relations; but without any offer to live with him, or any expression of willingness to do so, she files her bill charging him with desertion. The original fault was hers. Her leaving her husband was a very grave fault; and it was her part to set herself right with him before coming to this court."

Where a wife voluntarily leaves her husband and does not offer to return to him, and refuses to do so, she is not entitled to separate maintenance, although, if the husband should refuse to receive her, her rights would then become re-established. *Reischfield v. Reischfield* (1917) 100 Misc. 561, 166 N. Y. Supp. 898.

The act of the wife in refusing to accompany her husband to a new home in another state is a voluntary desertion which will preclude recovery of separate maintenance, since the husband has the right, without the consent of the wife, to establish his domicile in any part of the world, and it is the legal duty of the wife to follow his fortunes, wheresoever he may go. *Hair v. Hair* (1858) 81 S. C. Eq. (10 Rich.) 163.

Before a decree can be passed for alimony it must be proved that the separation was not caused by the voluntary act of the wife, but was the result of the misconduct of the husband. *Wallingsford v. Wallingsford* (1821) 6 Harr. & J. (Md.) 485.

Where a wife leaves her home voluntarily, without having any trouble with her husband, who wishes her to return, the only showing of ill-treatment being some disagreement between the husband's children and the wife for which the husband was not responsible, the wife is not entitled to alimony. *Springer v. Springer* (1900) 21 Ky. L. Rep. 1292, 54 S. W. 710.

In *Brindley v. Brindley* (1898) 121 Ala. 481, 25 So. 751, it is held that if a wife abandons her home without cause her right to support from her husband ceases at once.

See also *Finley v. Finley* (1839) 9 Dana (Ky.) 52, 33 Am. Dec. 528, wherein a wife who had left her husband because of alleged cruel treatment was denied alimony, on the

theory that the husband's ill-treatment did not amount to cruelty.

In *Lindenschmidt v. Lindenschmidt* (1888) 29 Mo. App. 295, it appearing that a wife left her husband with his consent, it was held that she is bound, if he requires it, to return to his house and share the lot which he shares, whether he sees fit to allow other members of his family to live with him or not, and if she refuses to do this she will forfeit her right to support; but the husband will be bound to protect her from insult or abuse at the hands of other members of his family.

In *Noe v. Noe* (1878) 18 Hun (N. Y.) 436, wherein a wife was seeking to have certain real estate held by the husband conveyed to her for her support and maintenance, the court said that where the separation of a wife from her husband is voluntary on her part, and is caused by no infidelity or cruelty or ill-treatment on his part, equity will afford her no aid whatever in accomplishing a purpose which is deemed subversive of the true policy of the matrimonial law.

It has also been held that, as between husband and wife, if the wife sees fit to live apart from her husband she cannot recover expenses from her husband, whatever may be the right of other persons to furnish necessities to her upon her husband's credit while she is living alone. *Reade v. Continental Trust Co.* (1900) 49 App. Div. 400, 63 N. Y. Supp. 395.

c. Consent of both parties.

It has been held that the fact that a separation was by the consent of both the husband and the wife is a bar to the wife's suit for separate maintenance. *Jenny v. Jenny* (1918) — Cal. —, 174 Pac. 652; *Re Bose* (1910) 158 Cal. 428, 111 Pac. 258; *Labbe v. Abat* (1881) 2 La. 558, 22 Am. Dec. 151. See also *Powers v. Powers* (1898) 83 App. Div. 126, 53 N. Y. Supp. 346; *Desbrough v. Desbrough* (1883) 29 Hun (N. Y.) 592.

Thus, in *Jenny v. Jenny* (Cal.) *supra*, it was held that a wife's consent to a separation deprives her of the right to separate maintenance and support, although such separation by

consent is the result of a void pre-nuptial agreement between the parties; by which it is provided that they would be married, but would never live together, and would retain their separate property and secure a divorce.

In *Labbe v. Abat* (1881) 2 La. 553, 22 Am. Dec. 151, a case wherein an agreement for the separation of property was construed under the laws of Spain, it was held that the voluntary separation of husband and wife would not relieve the husband of his duty to provide for the maintenance of the wife.

A husband is not liable for the support of his wife, who is living apart from him by agreement which does not stipulate for such support. *Re Bose* (1910) 158 Cal. 428, 111 Pac. 258.

In *Powers v. Powers* (1898) 83 App. Div. 126, 53 N. Y. Supp. 346, it was held that, where a wife consented to a separation and entered into a formal agreement therefor, she was not entitled to a decree of separation on the ground of abandonment, although she had a cause of action for divorce on the ground that her husband was living in adultery with another person.

In *Desbrough v. Desbrough* (1883) 29 Hun (N. Y.) 592, an action to procure a divorce from bed and board on the ground of abandonment and neglect to provide for the wife, it was said that the fact that the wife voluntarily leaves her husband and continues to live apart from him for a consideration furnished by him and accepted by her, and that she does not propose to return, is a complete answer to the charge of abandonment by the husband.

See, however, *infra*, XI. d and e.

d. Fault of both parties.

1. Greater fault of wife.

While the law does not require a wife who leaves her husband to be blameless, misconduct on her part which materially contributes to the separation, so that it may be said that the fault of the wife is equal to or greater than that of the husband, is a defense to her suit for separate maintenance.

Iowa.—*Briggs v. Briggs* (1897) 102 Iowa, 318, 71 N. W. 198; *Vanduzer v. Vanduzer* (1887) 70 Iowa, 614, 81 N. W. 956.

Kentucky.—*Bogges v. Bogges* (1836) 4 Dana, 807; *Davis v. Davis* (1912) 151 Ky. 116, 151 S. W. 361; *Gorbrandt v. Gorbrandt* (1909) 131 Ky. 395, 115 S. W. 210; *Garrison v. Garrison* (1907) 31 Ky. L. Rep. 1209, 104 S. W. 980; *Righter v. Righter* (1909) — Ky. —, 114 S. W. 786; *Scott v. Scott* (1897) 19 Ky. L. Rep. 929, 42 S. W. 836.

Maryland.—See *Schindel v. Schindel* (1858) 12 Md. 294.

Mississippi.—*Hilton v. Hilton* (1906) 88 Miss. 529, 41 So. 262.

Missouri.—*Grant v. Grant* (1913) 171 Mo. App. 317, 157 S. W. 673.

New Jersey.—*Davis v. Davis* (1868) 19 N. J. Eq. 180. See also *Meeker v. Meeker* (1893) — N. J. Eq. —, 27 Atl. 78.

South Carolina.—*Dagnall v. Dagnall* (1914) 100 S. C. 298, 84 S. E. 870; *Anonymous* (1810) 4 S. C. Eq. (4 Desauss.) 94.

Canada.—*Payne v. Payne* (1905) 10 Ont. L. Rep. 742.

Thus, in *Davis v. Davis* (1868) 19 N. J. Eq. 180, the court said that where it appeared that the wife voluntarily left her husband against his advice and remonstrances, and that in the many difficulties and contentions between them in their married life the wife was much more to blame than the husband, the wife would not be entitled to alimony if the bill in the case had sufficiently stated an action for alimony.

In *Righter v. Righter* (1909) — Ky. —, 114 S. W. 786, in which it appeared that a wife left her husband's home voluntarily, without sufficient cause, it appearing that, while the husband was not as pleasant and kind and obliging as he should have been, the wife was at least equally at fault for the quarrels between them, it was held that the wife was not entitled to separate support and maintenance during such voluntary separation.

Where a wife abandons her husband and his home without sufficient cause, she is not entitled to alimony. *Davis*

v. Davis (1912) 151 Ky. 116, 151 S. W. 361, in which the court said: "The weight of the evidence supports the contention of appellee that his wife abandoned him and his home without sufficient cause. He had provided her with as comfortable a home as his circumstances would permit, at a place where his business required him to be; but his wife was not satisfied with the place in which they lived, and desired that appellant should locate in the town in which her parents lived. He could not do this without losing the employment in which he was engaged, and upon his refusal to gratify her wishes in this respect she left his home and went to live with her parents. Under the circumstances, she was not entitled to alimony."

Under the rule that a wife who has voluntarily abandoned her husband should not have a decree for a separate maintenance unless her abandonment of him was without her fault, and was rendered necessary for her safety or happiness, and was consistent with social order and public policy, where, although the husband's conversation and deportment were not always characterized by the delicacy or tenderness which would generally be expected of a prudent and affectionate husband, and which the utmost attainable felicity of the conjugal state will ever require, and although even also, during some occasional paroxysms of passion, produced or aggravated by an unbecoming but not very intoxicating use of ardent spirits, he was sometimes vulgar, profane, and boisterous; nevertheless, there being no pretense of rational ground for the deduction that his conduct endangered his wife's life, but the chief if not the only reason alleged for her declared apprehension of danger being that he permitted to remain on his farm a female slave whom the wife suspected of an attempt to take her life by enchantment or poison, and it appearing that there never was any attempt or design to kill the plaintiff by poison or otherwise, but that the defendant, in order to gratify her morbid feelings and lull her imaginary fears, had endeavored to sell the slave, and had hired her out

from home until a few days before the abandonment, and did, shortly afterward, sell her, the wife was not entitled to alimony. *Bogges v. Bogges* (1836) 4 Dana (Ky.) 308.

In *Anonymous* (1810) 4 S. C. Eq. (4 Desauss.) 94, it was held that the voluntary departure of a wife from her husband's home, without sufficient excuse, would defeat her right to alimony out of the private fortune of her husband, where she did not sustain her allegations that the husband failed to provide for her properly, or her allegation of cruelty, by evidence of quarrels in which it appeared that she was to some extent at fault, and the court was of the opinion that "it is much to be suspected that she drove her husband from home to seek refuge from her bickerings," on the occasions of his frequent absences.

In *Payne v. Payne* (1905) 10 Ont. L. Rep. 742, it was held that where a wife left her husband's home voluntarily, and returned subsequently with her daughter as a witness, for the purpose of goading the husband into violence so that she might bring an action for separate maintenance, she was guilty of misconduct which would defeat her action for alimony, *Boyd, C.*, saying: "The account of the condition of the plaintiff, as seen by persons later in the evening, does not throw much light on what really occurred and does not show that any blows were inflicted on the woman. True, she was laid hold of and dragged from the bed and was in some way hurt on her calling him foul names, and upon her refusal to leave the house, but I am inclined to think that the true view of the whole situation was that she came with her daughter (as a witness) on purpose to provoke the altercation, and so gain evidence to justify a charge of cruelty. Her prior conduct in dismantling the house, renting other premises to conduct some kind of medical concern against the wish and command of her husband, and returning that evening in the absence of her husband, to the dismantled tenement, and placing herself dressed in the bed, suggests some such explanation as this. She had left

the house and bed before this voluntarily, and returned for what purpose at that hour, if not to provoke a quarrel and to incite him to such act of violence as would give her a status in court? The court scrutinizes very closely acts of alleged violence which grow out of headstrong and irritating conduct on the part of the wife. She will not gain the help of the court when she misconducts herself, provokes ill-treatment, and then makes complaint that it is not safe to live with her husband. The court will hesitate to call retaliatory acts thus provoked to be acts of legal cruelty, unless the ill behavior of the wife has been visited with intemperate and excessive violence by the incensed husband. In this case the acts of violence, as proved to the judge, fall short of intemperate and excessive character, and were by him accounted as not disproportionate to the ill deserts of the wife." And the opinion by Meredith, J., reads: "The plaintiff's claim is a preposterous one. Desiring and intending to live separate and apart from her husband, she set up an establishment of her own, and then deserted him and despoiled his house, returning there again for the purpose of goading him into violence so that she might bring this action for separate maintenance, based upon such violence, and taking her daughter with her as a witness. Separate maintenance is awarded to a wife whose life or health is jeopardized by her husband's misconduct towards her, notwithstanding her willingness to perform her matrimonial duties; not to her who has deserted her home and who seeks to make the court a party to her efforts to obtain alimony by trickery."

In *Garrison v. Garrison* (1907) 31 Ky. L. Rep. 1209, 104 S. W. 980, it was held that a wife was not entitled to an allowance for her separate maintenance where she left her husband's home voluntarily, after showing indifference to the feelings of her husband's aged parents, her desertion not being justified by alleged indignities and abuses heaped upon her by the parents, consisting, during a period of

twenty-eight years, of a cold and distant treatment by the mother-in-law on several occasions in the presence of a visitor, and that the mother-in-law had on one occasion locked the dining-room door when the wife offered to get dinner, and at another time had rearranged napkins and dishes which had previously been arranged by the wife, and that the mother-in-law had told the wife she was a liar when the wife accused her of pilfering, it also appearing that the wife, simply because she was not called to breakfast, lived in her own room for three years, and permitted her feeble mother-in-law, past seventy years of age, to cook her meals, and her father-in-law of the same age to carry those meals upstairs to her.

So, in *Grant v. Grant* (1913) 171 Mo. App. 817, 157 S. W. 673, it was held that the fact, standing alone, that a wife left her husband's home, will not defeat her statutory action for separate maintenance, and if the husband's treatment of the wife is such as to make her condition intolerable, and such as would afford her ground for an action for divorce, she may leave her husband's residence and bring her action for maintenance; but when a wife's immediate reason for leaving was her husband's refusal further to feed her chickens, and it appearing that all other trouble between them was trivial, and that the husband provided for her properly under the circumstances, she was not entitled to separate maintenance, the court saying: "The fact, standing alone, that plaintiff left defendant's abode, will not deprive her of her statutory action for maintenance. If the husband's treatment of the wife is such as to make her condition intolerable, if it is such as would afford her ground for an action for divorce, she may quit their residence and bring her action for maintenance. . . . But we think the plaintiff's situation was not such as to afford her just ground for leaving her home and demanding separate support. The trouble between them was largely trivial. We do not find defendant to be responsible for much of her discontent. Their loss of prop-

erty was no more chargeable to him than to her. It was a misfortune without blame for either. His feeling for her, as is evidenced by the will, was not unkind, and we are not persuaded that she suffered for the plain comforts of life, which is all she could ask in their situation. It appears from her own testimony that she would have been willing to resume her abode with him if he would move to town, that is, to a particular part of town. More than that, it seems that defendant's failure to give her money for clothing was not the reason for her refusal to continue to live with him. The immediate cause, as she states it, was his refusal further to feed her chickens. And her refusal to forgive and still live with him was because of his accusing her 'of things I never did,' referring to the accusation of forging his name to the note for \$185. It does not appear certainly that defendant used the word 'forgery.' It was true that plaintiff had signed his name to the note; as shown above, at the request of the banker, and without authority from defendant. She no doubt did it innocently enough, and it is probable whatever defendant said about it was to remind her that he had not authorized her to do it."

In *Gorbrandt v. Gorbrandt* (1909) 131 Ky. 395, 115 S. W. 210, it was held that where a wife voluntarily left her husband because he was not as demonstrative as she thought he ought to be, and did not immediately change his manner of living, both parties being over fifty years, and each having been married before, she was at fault and was not entitled to separate maintenance, the court saying: "We have carefully read the entire record for the purpose of ascertaining whether there was any evidence of any act or speech on the part of the defendant bordering on cruelty or harshness towards the plaintiff. There is absolutely nothing that could be construed into harshness or cruelty. Doubtless it is true that the defendant was not demonstrative toward the plaintiff; that he did not show that affection and tenderness which are characteristic of youth. This, however, could

hardly have been expected. When two people past the meridian of life, who have each been married before and reared a family, again marry, it is altogether improbable that they will change their manner and habits of living. No doubt the defendant in this case was set in his ways. He lived a simple life. His pleasures were few. He found them among his children and in playing simple games of cards with them or with his tenants. Upon his marriage he did not immediately change his manner of living. Plaintiff did not stay long enough to see whether or not she could effect a change. She remained at defendant's home only two months. Perhaps if she had remained longer, and shown that she was pleased to be a member of his household, he might have been able to conform his life to her ideas. Old age is seldom demonstrative except towards those who have long been a part of its life. When people marry under such circumstances, they do so with the full knowledge that the enthusiasm of youth is gone, and with it the tenderness and sentiment which are inseparable from it. Where people are married in youth that tenderness frequently grows with each passing year, and reaches its most perfect state in the hearts of the old. Not so, however, when the marriage is contracted when the parties are past the meridian of life. It is seldom then that either is demonstrative in his or her conduct towards the other. The defendant in this case provided a comfortable home for the plaintiff. He was not cruel or harsh towards her. It may be that he was not demonstrative in his conduct, though there is some evidence to the contrary. At any rate, his conduct towards her did not justify her in leaving his home and in claiming support at his hands wherever she might desire to go. If such were the law, it would establish a precedent for every wife who became in the least dissatisfied because her husband was not as demonstrative as she thought he ought to be, to leave the home which he had provided and require him to support her elsewhere. This would be a direct blow at the

home, and in our opinion should not be permitted. Of course, there may be cases where the husband's coldness and indifference to the wife border on cruelty, and under such circumstances the wife may be justified in leaving him, and he may be required to contribute to her support wherever she may be. In this record no such state of facts is presented. Upon a reading of the whole record, we are inclined to the opinion that she left defendant because she wanted to leave. Certainly she manifested no desire to return when he made her an offer of reconciliation."

Alimony has been denied where it appeared that a wife voluntarily left her husband's home contrary to his wishes and in spite of his protest, and without sufficient cause, it appearing that the husband objected to his wife's visits to friends who had caused trouble between the parties, because he knew that the wife would be subjected to the same disturbing influence which had once before broken up his home, and that the work he required of the wife was not unreasonable, although the record tended to show that the husband on one occasion came home under the influence of whisky and broke up some furniture and cursed, but does not show that he even then offered his wife any personal violence, or cursed and abused her. *Dagnall v. Dagnall* (1914) 100 S. C. 298, 84 S. E. 870.

In *Briggs v. Briggs* (1897) 102 Iowa, 318, 71 N. W. 198, a wife's action for alimony and separate maintenance wherein the plaintiff did not sustain her allegations of cruelty and desertion, the defendant on his cross petition was granted a decree of divorce upon the ground of desertion by the wife, it appearing that although the husband failed to show his wife those attentions and courtesies which are so much in a woman's life, her treatment of him and his relatives made this inevitable, in that she had unfounded suspicions that he was trying to poison her, and was irritable and fault-finding, and found nothing in her husband or what he did to commend, and everything in his relatives and himself

to condemn, and refused medical aid offered by him, and finally left her husband voluntarily, pursuant to arrangements made before her intended departure was disclosed to him.

Where a wife abandons her husband voluntarily without conduct of the husband justifying the abandonment, she is not entitled to alimony. *Scott v. Scott* (1897) 19 Ky. L. Rep. 929, 42 S. W. 836.

Where a wife separated from her husband voluntarily, and without just cause, and refused to return except on condition that a little orphan girl whom the parties had adopted should be sent away by the husband, it was held that she was not entitled to alimony. *Hilton v. Hilton* (1906) 88 Miss. 529, 41 So. 262.

The law will in no case award separate support to the wife when she has voluntarily separated herself from her husband, and is not herself free from fault as to the cause of the separation. *Vanduzer v. Vanduzer* (1887) 70 Iowa, 614, 31 N. W. 956. See also *Meeker v. Meeker* (1898) — N. J. Eq. —, 27 Atl. 78, a suit for support and maintenance brought under the Divorce Act, wherein it appeared that the wife left her husband's home after he had told her to do so, but in anger, and it did not appear that she left through any fear of physical violence, the theory upon which the suit was prosecuted, the trouble between the parties arising over the wife's association with another man who was objectionable to the husband, it was held that the wife could not recover, the husband being willing to take her back on condition that she would not have male acquaintances who were objectionable to him.

And see *Schindel v. Schindel* (1858) 12 Md. 294, wherein it was held that where a wife separates herself from her husband without lawful cause or justification, she is not entitled to a decree for separate maintenance out of property in the possession of the husband belonging to the wife at the time of marriage, the court saying: "So far as the evidence discloses the causes which led to the complainant's alienation from her husband, there is

an entire absence of any such acts of cruelty on his part as the law declares to be sufficient to justify her separation. It is not necessary to define what is such cruelty, for in this case the acts complained of are none of them embraced within the most enlarged definition of cruelty. 'The causes must be grave and weighty, and such as show an absolute impossibility that the duties of the married life can be discharged.' This is the principle stated by Lord Stowell, who, in pronouncing the judgment of the ecclesiastical court in a case involving the duties and obligations of married persons, said, in language that cannot be too often repeated: "That though in particular cases the repugnance of the law to dissolve the obligations of matrimonial cohabitation may operate with great severity upon individuals, yet it must be carefully remembered that the general happiness of the married life is secured by its indissolubility. When people understand that they must live together, except for a very few reasons known to the law, they learn to soften, by mutual accommodation, that yoke which they know they cannot shake off; they become good husbands and good wives from the necessity of remaining husbands and wives; for necessity is a powerful master in teaching the duties which it imposes.' . . . Considering the case before us as one in which the complainant is separated from her husband without lawful cause or justification, we are of opinion that she is not entitled to a decree for separate maintenance, and the decree of the circuit court ought to be affirmed."

2. Greater fault of husband.

Slight misconduct on the part of a wife who has left her husband, which cannot be said to have contributed materially to the cause of separation, is not a defense to her suit for separate maintenance. *Carr v. Carr* (1893) 16 Ind. App. 385, 33 N. E. 807; *Summers v. Summers* (1912) — Ind. App. —, 98 N. E. 900, transferring to supreme court on rehearing (1912) — Ind. App. —, 98 N. E. 865; *Watts v. Watts* (1894) 160 Mass. 464, 23 L.R.A.

187, 39 Am. St. Rep. 509, 36 N. E. 479; *Brewer v. Brewer* (1907) 79 Neb. 726, 18 L.R.A.(N.S.) 222, 113 N. W. 161; *Taylor v. Taylor* (1908) 73 N. J. Eq. 745, 70 Atl. 323.

Thus it has been held that a husband cannot defeat his wife's statutory action for separation by showing that she left him, when it appears that she was caused to do so by his acts of adultery and her subsequent inoculation with venereal disease, since a wife is not only not required to condone her husband's adulterous conduct, but she is not required to imperil her life and health on account of his wrongdoing. *Carr v. Carr* (Ind.) supra, wherein the court said: "It is true that the plaintiff left the defendant, but she had sufficient cause for leaving him. His conduct was not only vile, but it was infamous. It was bad enough for him to violate his marital vows, but when followed up by inoculating the wife with a loathsome disease the depths of infamy had been sounded. The law does not require that the wife shall abase herself to the extent of condoning the adulterous conduct of the husband. Much less is she required to jeopardize her health and life in order that she may receive food, raiment, and shelter from his iniquitous hand. She is entitled to enjoy his good fortunes, and is bound to share his misfortunes, but she is not required to share his ignominy and shame, or to imperil her life and health on account of his wrongdoing. The law imposes an obligation upon the husband to support his wife and infant children. This obligation rests upon him, whether he dwells with them or not. The statute under which this action is brought is purely remedial. It defines the method by which the obligation may be enforced under certain circumstances. A husband may so misuse his wife that to maintain her self-respect or preserve her health or life she may be compelled to leave him. If, when sued under such circumstances, he may defeat her by showing that she left him, then the very object of the statute may be frustrated, and the husband be permitted to take advantage of his own wrong.

6 A.L.R.—2.

Although the evidence in this case shows that the wife left the defendant, it was under such circumstances that made him and not her the deserter. We are sustained in this conclusion by authority in analogous cases. If the husband drive his wife out of his house, and live in adultery with another woman, such conduct is equivalent to abandonment. *Morris v. Morris* (1852) 20 Ala. 168. So, if he make against her false charges of infidelity, and on that ground drives her from his home, he is considered in law to have abandoned her. *Kinsey v. Kinsey* (1861) 37 Ala. 393. When the wife was confined in childbirth the husband accused her of adultery, and told her that the child born was not his, that she must leave as soon as confinement was over; and the husband admitted that if she had not gone he would have removed her. It was held that the expulsion of the wife was as much compulsory as if he had used force. *Harding v. Harding* (1864) 22 Md. 337. The husband cannot relieve himself of his obligation to support his wife and children by his improper conduct towards her, or by such deportment as renders his home unfit for her residence. If, under such circumstances, she removes and lives apart from him, he will be compelled to support her, notwithstanding the constrained separation. *Shrock v. Shrock* (1868) 4 Bush (Ky.) 682. It is not always the one who leaves the matrimonial habitation that is the deserter. The husband may drive his wife away, or he may treat her so brutally as to compel her to flee for safety, or his conduct may be so cruel and malignant as to show that he means to force her away. If under such circumstances she leave him, he, and not she, is the deserter. *Skean v. Skean* (1880) 33 N. J. Eq. 148; *Warner v. Warner* (1884) 54 Mich. 492, 20 N. W. 557; *Lea v. Lea* (1868) 99 Mass. 493, 96 Am. Dec. 772; *Levering v. Levering* (1860) 16 Md. 213. Nothing less will answer as a justification of the conduct of the husband in expelling his wife from his home than that which would be sufficient cause for a divorce at his suit. *Grove's Appeal* (1860) 37 Pa. 445. We

think the evidence in this case shows that the defendant deserted the plaintiff without cause, and without leaving her sufficient provision for her support."

So, in a Nebraska case, it was said that a wife's suit for separate maintenance is not defeated by her refusal to live in a home over which the husband's mother exercises domination and control to the exclusion of the wife's right to a home consistent with her husband's condition and means, over which she shall be permitted to preside as the mistress. *Brewer v. Brewer* (1907) 79 Neb. 726, 13 L.R.A. (N.S.) 222, 113 N. W. 161, in which the court said: "As a husband is bound to support his wife and child, the plaintiff is entitled to some relief in this action, unless the requirements she made as a condition to her return to the house of defendant's mother were unreasonable. The husband has the right to direct the affairs of his own house, and to determine the place of the abode of the family; and it is in general the duty of the wife to submit to such determination. The right which the husband exercises in these matters is not, however, an entirely arbitrary power. He must have due regard for the welfare, comfort, and peace of mind of his wife. *Dakin v. Dakin* (1901) 1 Neb. (Unof.) 457, 95 N. W. 781. The cases cited by the appellant establish the doctrine that a husband may not require his wife, against her will, to reside in the family of his mother, especially in a subordinate capacity. *Powell v. Powell* (1856) 29 Vt. 149; *Shinn v. Shinn* (1893) 51 N. J. Eq. 78, 24 Atl. 1022. Every wife is entitled to a home corresponding with the circumstances and condition of her husband, over which she shall be permitted to preside as the mistress. The defendant in this case has shown a strong sense of filial duty. This is commendable, but it must not conflict with the conjugal duty he owes to his wife. The family is the unit of the social organism, and, while the institution of new families to some extent involves the disintegration of the older household, it is absolutely necessary to con-

tinued social existence. When a man marries and founds a new family, he assumes new duties and obligations; and when these conflict with his former ties they must be held paramount. The very existence of the family depends upon the enforcement of this principle. Whatever his filial obligation may be, a man may not bring his mother to preside in his new home. That place belongs to the wife. Neither may he, without her consent, take her to the home of the mother, there to be under her domination and control, and when the wife objects to this she does not thereby forfeit her right to support and maintenance." And see *infra*, V. c.

In *Summers v. Summers* (1912) — Ind. —, 98 N. E. 900, transferring to supreme court on rehearing (1912) — Ind. App. —, 98 N. E. 865, the court quotes the statement from another case to the effect that nothing less will answer as a justification of the conduct of a husband in expelling his wife from his home than that which would be sufficient cause for a divorce at his suit.

Under a statute which permits a husband or wife to apply to a court for an order concerning the support of the wife, a wife may show that she is living apart from her husband for a justifiable cause, without necessarily going so far as to show a cause which would entitle her to a divorce. *Watts v. Watts* (1894) 160 Mass. 464, 23 L.R.A. 187, 39 Am. St. Rep. 509, 36 N. E. 479.

In *Taylor v. Taylor* (1908) 73 N. J. Eq. 745, 70 Atl. 323, it appears that, by express provision of statute, to entitle a wife to alimony the husband must, without justifiable cause, have abandoned or separated from the wife, and have refused or neglected to maintain and provide for her; hence where she separates herself from her husband, and claims alimony, she must justify the separation by proof which would entitle her to divorce from bed and board.

a. Rule in Illinois.

1. Act of wife.

Under the Illinois act, the fact that

a wife voluntarily and intentionally left the proper home provided by her husband, or refused to accompany him to a new home, will defeat her action for separate maintenance, in the absence of fault on the part of the husband. *Babbitt v. Babbitt* (1878) 69 Ill. 277; *Houts v. Houts* (1885) 17 Ill. App. 439; *Rosenbleet v. Rosenbleet* (1905) 122 Ill. App. 408. Compare *Thomas v. Thomas* (1892) 44 Ill. App. 604, reversed in (1894) 152 Ill. 577, 38 N. E. 794; *Wahle v. Wahle* (1874) 71 Ill. 510.

Thus, in *Wahle v. Wahle* (Ill.) supra, a husband's action for divorce in which the wife filed a cross bill praying for separate maintenance, it was held that if a wife voluntarily abandons her husband she is not entitled to separate maintenance.

In *Rosenbleet v. Rosenbleet* (1905) 122 Ill. App. 408, it was said that if a wife leaves her husband voluntarily or by consent, she is not living apart from her husband without her fault within the meaning of the statute, and is not entitled to separate maintenance.

It has been held that if a wife voluntarily leaves her husband by refusing to accompany him to another residence reasonably suitable to his circumstances in life, she cannot recover separate maintenance. *Houts v. Houts* (1885) 17 Ill. App. 439.

So, where a wife refuses to accompany her husband to another residence, she is living separate and apart from him by her own fault and is therefore not entitled to separate maintenance in a proceeding under the statute providing for such suits. *Babbitt v. Babbitt*, supra.

The fact that a wife knowingly and voluntarily left her husband's home will defeat her action for separate maintenance, since, to recover separate maintenance under the statute, she must be living apart from her husband without her fault. *Thomas v. Thomas* (1894) 152 Ill. 577, 38 N. E. 794, in which the court said: "Paragraph 22, chapter 68, of the Revised Statutes (Starr & Curtis) provides that married women who, without their fault, now live or hereafter may

live separate and apart from their husbands, may have their remedy in equity, in their own names respectively, against their said husbands, for a reasonable support and maintenance while they so live or have so lived separate and apart.' The bill in this case is not based upon any ill-treatment by the husband, nor upon any misconduct on his part. It states that she left him and his home and returned to the place where she formerly lived. The only reason attempted to be given for doing so is that she did not then know what she was doing. The evidence clearly shows the contrary. If testimony can prove any fact, it establishes beyond doubt that she knowingly and voluntarily left the defendant and his home, and took up her residence where she had formerly lived, remaining there about three weeks before saying anything to her husband about returning. If her right, then, to the decree rendered in her favor, depended upon the question as to whether her separation from her husband was, in the first instance, without her fault, there could be no serious contention that it was not erroneous. *Bevier v. Galloway* (1874) 71 Ill. 517; *Wahle v. Wahle* (1874) 71 Ill. 510; *Jenkins v. Jenkins* (1882) 104 Ill. 134; *Johnson v. Johnson* (1888) 125 Ill. 510, 16 N. E. 891. The question then must be, Did her so living afterwards become without her fault, by reason of her offer to return and his refusal to receive her back? Even though the original separation was without any fault of the husband, still, if she afterwards in good faith offered to return and live with him, it was his duty to receive her back, and there properly provide for her. On this question the testimony shows that she wanted to return and that he was willing she should. In other words, according to the testimony of both of them, the question between them was not whether she wanted to return or whether he was willing she should, but how she should get back. If they, or either of them, are to be believed, then if she had gone back he would have been content, or if he had conveyed her back she would have been satis-

fled to return. She insisted he should take her back,—that is, provide a conveyance for her from the place where she was to his home,—and he insisted that she should come without his assistance. The distance was but 2 miles. There is no pretense that she had not ample facilities for returning. It was not necessary in order to show her good faith in returning that she should take back with her the property she had removed when she left. If she had gone back in person and he had refused to allow her to remain, or showed an unwillingness that she should do so by refusing to bring back her furniture, etc., or otherwise, then perhaps she might have truthfully said that she was living separate and apart from him without her fault. As it is, the parties are making a mere difference in sentiment as to the manner in which the wife should return a cause for living apart. It is easy to say, and truthfully, that the husband's conduct is selfish; that he is lacking in politeness, certainly in gallantry,—in refusing to escort his wife back to his home; but will the law recognize such a separation of husband and wife? Is it not so contrary to its policy that it will require the one asking its recognition to yield the mere matter of sentiment and make the direct offer to return? If this decree can be sustained on the evidence before us, we can see no reason why every wife who may for any cause be absent from her home and that of her husband may not refuse to return unless her husband will escort her back, and, if he refuses to do so, maintain her bill for separate maintenance. The marriage relation cannot be so readily thrown off. We are clearly of the opinion that the complainant below has wholly failed to show that she was, at the time of filing her bill, living apart from her husband without her fault, within the meaning of the statute as it has been frequently construed by this court, as shown by the foregoing cases." This decision reversed on the facts the judgment in *Thomas v. Thomas* (1892) 44 Ill. App. 604, reversed in (1894) 152 Ill. 577, 38 N. E. 794, wherein it was held that,

where a wife was shown by the evidence to be living apart from her husband against her wish, by his desire, it appearing that when he came to visit her on a number of occasions she had asked him to take her home and he had always postponed it indefinitely, giving vague answers, and that his conduct on other occasions indicated that he did not want her to return, and hence she was living apart from him without her fault, and was entitled to separate maintenance, the court saying: "It would not appear to be doing violence to any presumptions arising from the evidence, to adopt her statement as giving the true version of the relations of these parties. It might be difficult to reconcile the undisputed fact of her constant desire to return to his home and live with him with the assumption that his evidence of utter indifference on such occasions was correct. Accepting her evidence as true, his duty, while frequently visiting her and sustaining these relations, is not to be regarded exactly as in a case where a wife has left her husband and he neither seeks nor sustains any relations with her, but leaves her free to return and resume them at his own house, if at all. Under all the circumstances it was only reasonable, when he came to visit her and she asked to return with him, that he should have taken her back. It follows that she remained separate from him against her wish, by his desire, and therefore that she so remained and lived without her fault."

2. Fault of both parties.

Under the Illinois act, misconduct on the part of a wife who voluntarily leaves her husband, which materially contributes to the separation so that it may be said that the fault of the wife is equal to or greater than that of the husband, will preclude her recovery of separate maintenance. *Angelo v. Angelo* (1876) 81 Ill. 251; *Buchan v. Buchan* (1916) 201 Ill. App. 349; *Cooper v. Cooper* (1879) 4 Ill. App. 285; *Decker v. Decker* (1917) 279 Ill. 300, 116 N. E. 638; *Giese v. Giese* (1908) 107 Ill. App. 659; *Hosto v. Hosto* (1913) 183 Ill. App. 463; *Jenkins v. Jenkins* (1879) 3 Ill. App. 641; *Kingman v.*

Kingman (1909) 150 Ill. App. 456; **Orendorff v. Orendorff** (1900) 91 Ill. App. 61; **Pratt v. Pratt** (1916) 197 Ill. App. 530; **Rosenbleet v. Rosenbleet** (1905) 122 Ill. App. 408; **Thomas v. Thomas** (1894) 162 Ill. 577, 88 N. E. 794; **Tureman v. Tureman** (1879) 4 Ill. App. 835; **Umlauf v. Umlauf** (1881) 9 Ill. App. 517. See also **Ross v. Ross** (1873) 69 Ill. 569.

By the direct provisions of the Illinois statute, a wife must be living apart from her husband without fault on her part. **Jenkins v. Jenkins** (1879) 3 Ill. App. 641.

In **Decker v. Decker** (1917) 279 Ill. 300, 116 N. E. 688, it was held that to maintain a bill for separate maintenance a wife must show not only that she has good cause for living separate and apart from her husband, but also that such living apart is without fault on her part, and that such fault, within the meaning of the statute, is a voluntary consenting by her to the separation, or such failure of duty or misconduct on her part as materially contributes to a disruption of the marital relation.

So a wife may not recover separate maintenance where she leaves her husband because of incompatibility of temper or trivial difficulties. **Pratt v. Pratt** (1916) 197 Ill. App. 530.

In **Angelo v. Angelo** (1876) 81 Ill. 251, it was held that a wife who has left her husband without sufficient reason is not entitled to separate maintenance.

The fact that a wife left her husband without due cause, being at fault herself in that she attended dances and associated, against her husband's wishes, with persons of questionable character,—her only offer to return being shown not to have been made in good faith,—would defeat her suit for separate maintenance. **Buchan v. Buchan** (1916) 201 Ill. App. 349.

That a wife left her husband voluntarily, without his consent and without good and sufficient cause, was living apart from him in her own wrong, the immediate cause of the separation being a dispute arising between the parties with reference to a desire on the husband's part to haul corn for

his father on a certain day, and a wish on her part that he should work for himself instead of his father, which quarrel ended with a threat on her part that if he did not comply with her wish she would go home, and compel him to support her, which threat she carried into immediate execution notwithstanding the efforts made by him to alter her determination, the probable explanation being that she married her husband when too young and without maturity of judgment,—would defeat her suit for support and maintenance brought under the statute authorizing such actions. **Cooper v. Cooper** (1879) 4 Ill. App. 285.

Where a wife is shown to have indulged in reckless extravagance and constant journeys about the country against her husband's will, and is unable to sustain the burden on her to show that she was not living separate and apart from her husband without her fault, and because of his misconduct, she is not entitled to separate maintenance under the statute authorizing such action. **Kingman v. Kingman** (1909) 150 Ill. App. 456.

If a wife's misconduct has materially induced the course of action on the part of her husband upon which she relies as justifying her voluntary separation,—as where it appears that during the ten years of their married life they lived together seemingly in perfect harmony until the matter arose of collecting or extending the time of payment of a note of \$10,000 given to the husband by the wife's brother for money loaned, and that the money evidenced by this note was the savings or profit of several years' business in selling merchandise, in which it is shown that the husband had the open and undisputed legal title and management,—the wife is not without fault within the meaning of the statute, and is not entitled to separate maintenance. **Rosenbleet v. Rosenbleet** (1905) 122 Ill. App. 408.

In **Hosto v. Hosto** (1913) 183 Ill. App. 468, a separate maintenance action, under the rule that a wife must prove that she is living apart from her husband without her fault the court sustained a decree refusing sep-

arate maintenance, where it appeared that the chancellor did not err in finding nothing to convince him that alleged undue intimacy existed between the husband and another woman, with whom he had business relations, and it appeared that during the last two or three years of the married lives of the parties they had had considerable strife, and both apparently were possessed of plenty of temper, with very little disposition to bear with each other's faults, or forgive the shortcomings of each other, and were both more or less to blame for the separation.

Where a wife voluntarily left her husband and subsequently asked to return, to which her husband consented, she could not establish that she was living apart from her husband without her fault by showing that her husband would not provide a conveyance for her return, it appearing that the distance was but 2 miles. *Thomas v. Thomas* (1894) 152 Ill. 577, 38 N. E. 794.

In *Giese v. Giese* (1903) 107 Ill. App. 659, it was held that where a wife left her husband because, against her wishes and her request, the husband allowed the mother-in-law to control the household affairs absolutely, she was not entitled to separate maintenance.

A wife may not recover separate maintenance under the statute, as living apart from her husband without her fault within the meaning of the legislative intent in the use of that term, on the ground that the husband is disagreeable by reason of sickness which he cannot control. *Orendorff v. Orendorff* (1900) 91 Ill. App. 61.

In *Umlauf v. Umlauf* (1881) 9 Ill. App. 517, wherein the husband alleged that the wife voluntarily deserted him, and the wife did not succeed in showing that she was living apart from her husband without her fault, separate maintenance was denied the wife.

In *Tureman v. Tureman* (1879) 4 Ill. App. 335, wherein it appeared that a wife had no reason for leaving her husband except that she was disappointed in him and the condition in life to which she must have known at

the time of her marriage she would have to adapt herself, it was held that she was not entitled to alimony, since she was not living apart from her husband without fault on her part.

It was held in *Ross v. Ross* (1873) 69 Ill. 569, that a husband is not responsible even for the necessities furnished the wife, when residing apart from him, if she left him without good cause and against his consent.

III. Misconduct of wife.

a. Fault of both parties.

1. Equal or greater fault of wife.

While the law does not require a wife to be blameless, misconduct on her part which materially contributes to the separation, so that it may be said that the fault of the wife is equal to or greater than that of the husband, is a defense to her suit for separate maintenance.

Iowa.—*Graves v. Graves* (1873) 36 Iowa, 310, 14 Am. Rep. 525; *Snouffer v. Snouffer* (1911) 150 Iowa, 58, 129 N. W. 326.

Kentucky.—*Butler v. Butler* (1823) 4 Litt. 202; *Griffin v. Griffin* (1847) 8 B. Mon. 120.

Michigan.—*Faller v. Faller* (1906) 146 Mich. 84, 109 N. W. 47.

Nebraska.—*Chapman v. Chapman* (1905) 74 Neb. 388, 104 N. W. 880; *Price v. Price* (1906) 75 Neb. 552, 106 N. W. 657.

New Jersey.—*Bradbury v. Bradbury* (1909) — N. J. Eq. —, 74 Atl. 150.

New York.—See *Edwards v. Edwards* (1913) 155 App. Div. 904, 139 N. Y. Supp. 1069. See also *Kamman v. Kamman* (1915) 167 App. Div. 423, 152 N. Y. Supp. 579.

Oregon.—*Fowler v. Fowler* (1897) 31 Or. 65, 49 Pac. 589; *Ivanhoe v. Ivanhoe* (1913) 68 Or. 297, 49 L.R.A. (N.S.) 86, 136 Pac. 21.

Pennsylvania. — *Cunningham v. Cunningham* (1912) 48 Pa. Super. Ct. 442; *Yetter v. Yetter* (1911) 45 Pa. Super. Ct. 332.

South Carolina. — *Boyd v. Boyd* (1824) 5 S. C. Eq. (Harp.) 144.

Canada.—*Willey v. Willey* (1908) 18 Manitoba L. R. 298, 9 West. L. R. 166.

Thus, in *Griffin v. Griffin* (1847) 8 B. Mon. (Ky.) 120, a suit for separate

maintenance in which it appeared that the conduct of both parties had been reprehensible, but that the occurrences of personal violence toward the wife were generally brought about by her misconduct, it was held that while the law does not require the conduct of the wife to be entirely blameless to entitle her to alimony, the fact that she is the chief cause of all the disturbances and scenes of violence in the family would defeat her suit for alimony, the court saying: "The conduct of both is alike reprehensible. The wife seems occasionally to have been actuated by the very spirit of mischief, resorting to every species of annoyance for the avowed purpose of irritating and provoking her husband. The husband at times drank to excess, and when in a state of intoxication used, on three or four different occasions, personal violence towards his wife. These occurrences, however, were generally brought about by the misconduct of the wife, and one of them was produced by her having first used a stick upon the person of her husband. The law, with due consideration for the frailty of human nature, does not require the conduct of the wife to be entirely blameless to entitle her to alimony. But when it is evident that she has been the chief cause of all the disturbances and scenes of violence in the family, and has pursued a systematic course of petty annoyances with a view, as expressed by herself, to harass her husband and drive him to desperation, to sustain her claim to alimony under such circumstances would be to encourage family dissensions and a contemptuous disregard of those duties imposed by the marriage relation. It is the policy of the law, and necessary to the purity and usefulness of the institution of marriage, that those who enter into it should regard it as a relation permanent as their own lives, its duration not depending upon the whim or caprice of either, and only to be dissolved when the improper conduct of one of the parties (the other discharging its duties with fidelity, as far as practicable under the circumstances) shall render the connection

wholly intolerable or inconsistent with the happiness or safety of the other. The wife in this instance continued to live with the husband for some years after the occurrence of these scenes of personal violence. It is, therefore, apparent she did not consider her life in danger, or apprehend any further cruel treatment from her husband, although their quarreling continued as violent as ever. We are of opinion, therefore, there was no error in the refusal of the court to decree her alimony, for the purpose of a separate maintenance. She is, however, still the wife of the defendant. It is his duty to receive her and maintain her at his own house. If he refuses to do so, or if, upon her return with his consent, she conducts herself with reasonable propriety and his treatment should be unkind and cruel, in either event she will be entitled, by invoking the aid of the chancellor, to a decree for alimony."

So, in *Snouffer v. Snouffer* (1911) 150 Iowa, 58, 129 N. W. 326, a wife's suit for separate maintenance on the grounds of cruelty and adultery, in which the defendant husband filed a cross petition for divorce on the grounds of cruelty and desertion, and there was evidence of misconduct on the part of both parties, the court found that their attitude toward each other did not involve danger to either, and refused to grant any relief.

An overt act of a wife, inconsistent with her duty as a wife, will defeat her claim for a reasonable separate support and maintenance. *Price v. Price* (1906) 75 Neb. 552, 106 N. W. 657.

In *Ivanhoe v. Ivanhoe* (1918) 68 Or. 297, 49 L.R.A.(N.S.) 86, 136 Pac. 21, there was involved an act providing as follows: "It shall be lawful for any married woman to apply to the circuit court of the county in which she resides for an order upon her husband to provide for her support and the support of her minor children, if any, by said husband, living with her." By the act, the court was empowered to hear the parties, and, if the husband is found to be remiss in his duty to support his wife, to make such a de-

cree enforcing his matrimonial obligation in that respect "as shall be equitable in view of the circumstances of both parties." It was held that equity will not allow separate maintenance to a wife where both parties are at fault.

In *Boyd v. Boyd* (1824) 5 S. C. Eq. (Harp.) 144, it was held that a wife's suit for alimony was defeated by a showing that her own conduct was impeachable with such violence or savitia as might provoke the husband to retaliate, it appearing that on the day before the alleged violence of the husband she struck him, and that at the time the alleged violence was offered she called him a liar.

In *Cunningham v. Cunningham* (1912) 48 Pa. Super. Ct. 442, a suit for separate maintenance, there was involved the construction of an act which provides as follows: "If any man shall separate himself from his wife without reasonable cause, and, being of sufficient ability, shall neglect or refuse to provide suitable maintenance for his said wife, such wife shall be and is hereby empowered to bring her action at law or in equity against such husband, for maintenance, in the court of common pleas where the desertion occurred, or where she is domiciled; and the said court shall have power to entertain a bill in equity in such action, and shall make and enforce such orders and decrees as the equities of the case demand." It was held that the wife's misconduct would defeat recovery, it appearing that she had, over a period of fourteen years, refused to consummate the marriage, pursuant to her interpretation of an antenuptial contract to live a pure life during marriage, and it also being shown from the husband's testimony that the wife was continually faultfinding, unreasonable, and disagreeable, so that by this persistent course of treatment his health became seriously impaired, due to nervousness and loss of sleep. The court said: "After the marriage contract is entered into, the rights, duties, and obligations of the parties are fixed by the law. The relation is said to be the parent and not the child of

civil society, regulated and prescribed by law, and endowed with civil consequences. It is more than a civil contract; it is an institution of the state. It supersedes all other contracts between the parties in relation to it, and with certain exceptions it is inconsistent with the power to make new ones. See *Kilborn v. Field* (1875) 78 Pa. 194. Our whole social system is founded on the theory of husband and wife living together as such, and the natural and reasonable expectancy is that children shall be born in that lawful wedlock. This act does not require a chancellor to decide whether the parties should be divorced or not. The only question is, Has she presented a case which entitles her to equitable relief? She is met at the threshold with certain requisite maxims which are general guiding principles. 'He who seeks equity must do equity.' 'He who comes into equity must come with clean hands.' 'Equity regards the substance and intent, not the form.' Where the equities are equal the law will prevail. She does not seek a severance of the contract of marriage, but asserts it to compel her husband to maintain her while living apart from him. She interprets her duty in a way that is opposed to universal law, the dictates of humanity, and public policy; and this after repeated refusals to live in a home of his own making. She attempts to read into the marriage contract a clause which would practically annul it and defeat its purpose as a civil institution, and this solely on account of an unnatural and perverted view of what constitutes purity of the marital relation. While the refusal to have sexual intercourse is not of itself legal cruelty, within the meaning of our divorce statutes (*Platt v. Platt* (1909) 88 Pa. Super. Ct. 551, and cases therein cited), we are, in this case, asked to take a long step in advance of those decisions and hold that a wife, who, without reasonable cause shown, persistently refuses to perform in good faith her conjugal duties, is entitled by this extraordinary remedy to equitable relief to enforce the marriage contract so far as her maintenance is con-

cerned. She suggests no physical defect in the husband, or any reason other than an unreasonable antenuptial agreement. In these statutes as in that of 1867, maintenance is the sole object (*Com. ex rel. Dilks v. Dilks* (1911) 45 Pa. Super. Ct. 389), and to entitle the wife to the equitable relief provided by the Act of 1909, she must show specially that she is without fault on her own part (*Yetter v. Yetter* (1911) 45 Pa. Super. Ct. 332). The husband's case does not depend alone on his deprivation of his expectations in regard to sexual intercourse and to have children, but he submits a series of acts which continued through years, and culminated in his declaration to his wife, 'Irene, if you are not human, I am,' and left, 'because it was unbearable, my health was breaking down,' and her refusal to resume the marital relation with him under any condition; these are not denied by the wife, and she presents on the whole record an abnormal condition of affairs, entirely of her own making, and which does not entitle her to this special remedy. The court erred in finding as a fact that the defendant separated himself from his wife without reasonable cause, and in making the decree entered in the case."

In *Butler v. Butler* (1823) 4 Litt. (Ky.) 202, wherein alimony was refused because of sufficient support by the husband, the court indicated that a wife's right to alimony might be barred by her own abandonment, or lewd conduct, or other sufficient misconduct in the home, saying: "The abandonment is confessed in the answer, and the intention made out in proof, and the fortune of the defendant is ample, and no abandonment or lewd conduct is shown on the part of the wife to bar her right; but still it must be confessed that the conduct of the husband is not without strong palliating circumstances, and that the claim of the complainant is not very meritorious. Her temper is insufferable, and her conduct to her husband and his children has been aggravating and provoking; and in one case she appears to have resorted to weapons and to have injured him considerably.

And often when such violence was not resorted to, conduct calculated to wound his sensibility deeply appears to have been practised by her. Of her improprieties she seems sometimes to have been sensible, and then to have made concessions and promises of amendment. But these resolutions were soon broken, and no reformation succeeded, but soon a repetition of the same offenses. Under such circumstances, we can scarcely see what else the husband could do than to retire from her company, as it became a torment instead of conjugal happiness. Without deciding, however, whether he was or was not completely justifiable, we are certain that the bare act of his taking a different house near at hand is not sufficient to induce the chancellor to decree alimony. Something more is necessary. He must have withdrawn the means of support from her, or have refused to provide for her before he could be liable to a decree. He has done neither. It is not shown, even during the progress of the cause, that he refused her the means of support or disturbed her in the occupancy of the dwelling in which he had left her. Before the bill was filed, he did set apart what, in the opinion of two or three of his neighbors, was sufficient for her maintenance for a considerable length of time, and before this time expired she filed her bill. It is insisted that in this provision there was a deficiency of some small necessary articles, but it does not appear that she was without or needed these articles. It is also in proof that this provision was assigned by these neighbors as adequate, taking into consideration what her own labor would produce, and hence it is contended that it was too scanty, and ought to induce the chancellor to interfere. We do not think so. If the parties had lived together, notwithstanding the competent fortune of the husband for the purposes of living, industry was necessary to take care of, if not to increase, their means of living; and however far a husband who was guilty of causeless abandonment or of cruel treatment might be bound to extend the provision for a deserted

wife, we do not conceive, in a case where she has been the cause of the separation, that she ought to be raised by means of the husband, above, or be excused from, that kind of labor which suits her sex. We therefore conceive that she was, in this instance, too hasty to have the benefit of the statute; and that without the statute she has not shown a case which ought to induce the chancellor to interfere."

Where it was not shown that a husband had failed in his duty to support his wife, and both were at fault, and it did not appear that the husband was, more than the wife, responsible for the trouble between them, the wife was refused separate maintenance, in *Faller v. Faller* (1906) 146 Mich. 84, 109 N. W. 47.

In *Wiley v. Wiley* (1908) 18 Manitoba L. R. 298, 9 West. L. R. 166, a suit for alimony in which it appeared that any misconduct of the husband, not condoned, was provoked or accompanied by misconduct of the wife, and that, while the husband probably used more force than a humane man would have done, the wife was the aggressor, it was held that she had no right to complain of what she brought upon herself, and that she had not made out a case of legal cruelty entitling her to live apart from her husband.

In *Yetter v. Yetter* (1911) 45 Pa. Super. Ct. 332, a suit to compel a husband to support his wife, brought under a statute providing "that if any man shall separate himself from his wife without reasonable cause, and being of sufficient ability, shall neglect or refuse to provide suitable maintenance for his said wife, such wife shall be, and is hereby, empowered to bring her action at law or in equity against such husband for maintenance, in the court of common pleas of the county where the desertion occurred, or where she is domiciled, and the said court shall have power to entertain a bill in equity in such action, and shall make and enforce such orders and decrees as the equities of the case demand," in which it appeared that the actual separation had been preceded by a series of acts on the part of the wife which were continuing

and cumulative, she having admitted that she used profane language to him, pulled his hair with both hands, struck him in the face a number of times, threw table furniture at him, called him a damned fool, said she did not give a damn for him, and frequently said that she hated him and would not live with him, was disagreeable to his friends when in his home, and other acts of similar gravity, and that two days prior to the husband's leaving, while they were at the table, she threw a number of articles of table silver at him. There was but very slight evidence of any impropriety on the part of the husband, except that they differed in regard to marital relations, and that on one occasion he slapped his wife with an open hand on the face at a time when she knocked some medicine out of his hand which he was attempting to give to their sick baby, and several times he retorted angrily to her when they disputed about household affairs. The court said that had this been a divorce case the evidence would have justified the court in finding that the husband had reasonable cause for separating himself from his wife, and, on the wife's unqualified refusal of the husband's offer to take her back, dismissed the bill for separate maintenance.

In *Fowler v. Fowler* (1897) 31 Or. 65, 49 Pac. 589, the suit was brought under a statute providing "that it shall be lawful for any married woman to apply to the circuit court of the county in which she resides for an order upon her husband to provide for her support, and the support of her minor children, if any, by said husband, living with her," and that "if it shall appear to the court, after hearing the parties, that said husband is able to support or contribute to the support of his wife and said children, if any, and that he neglects or refuses to perform his duty in that respect," it shall have power to make such decree as to her support as shall be equitable, in view of the circumstances of both parties. It was held that, as the husband's duty to support his wife is conditional on her not breaking up the marital relation without his fault or consent, she

must allege and show by competent evidence that the estrangement is without her fault, and that the husband is at fault, before she can compel him to contribute to her support, the court saying: "To entitle a wife living separate and apart from her husband to prevail in a proceeding under this statute, she must not only allege, but must show by competent evidence, that the separation is without her fault, and that the husband has, without just cause, neglected or refused to support her. The statute was not designed to change the rule of the common law as to the liability of the husband for the support of his wife living apart from him. It was intended to give her a remedy directly against him, instead of having it worked out through some third person, as it had to be at common law. But it is only in cases where the husband could be compelled at common law to pay for necessities furnished his wife, living separate and apart from him, that she is entitled to an order for support under this statute. In either instance she must have a just cause for the separation. The husband's duty to support his wife is conditioned upon her not breaking up the marital relation without his fault or consent, and therefore, if she is living separate and apart from him, she must allege and prove that the estrangement is without her fault, before she can compel him to contribute to her support, under the provisions of the statute."

To justify an abandonment of a wife by her husband and a refusal to support her, the husband must show the wife to have been guilty of a matrimonial offense such as will entitle him to a divorce. *Bradbury v. Bradbury* (1909) — N. J. Eq., 74 Atl. 150.

Whichever spouse has first repudiated the marital relation and obligations is rightly called on to give a valid reason for so doing, so that where the husband has deserted the wife he must justify his action by the misconduct of the wife, to defeat her action for separate maintenance. *Chapman v. Chapman* (1905) 74 Neb. 388, 104 N. W. 880, in which the court said: "The

foremost and principal of his remaining complaints is the assignment that there is no evidence that the plaintiff below is a person of good character and free from fault in her marital relations with the defendant. As showing the validity of this objection, counsel cites *Stewart, Marriage and Divorce*, § 179, and several judicial decisions by courts of other states, to the effect that a wife who is living apart from her husband must, in order to sustain an action of this kind, aver and prove that she herself is free from fault, and that the separation was not due to her own wrong. But we do not think that this rule is intended to impose an unequal burden on the wife, or to deprive her of the benefit of the ordinary presumptions of innocence that obtain in favor of one regularly indicted by a grand jury for an alleged offense. There is enough in the record to show, and indeed it is not disputed, that the defendant deserted his wife within a short time after his marriage, and about ten years before the beginning of this action. If he had valid excuse or justification for such conduct, it is surely incumbent upon him to make known its nature and establish it by proof. Upon the face of the transaction he is himself a wrongdoer, and it appears to us that it would be a glaring injustice both to exonerate him from explaining his desertion and to require the plaintiff to show affirmatively that she has been guilty of no act calculated to provoke it. We do not think that the rule invoked by counsel, or any of the authorities cited by him, sanctions such a practice. The case would be quite different if the plaintiff had left the bed and board of the defendant. In such a case, there would be no impropriety in calling upon her to prove her own freedom from fault, as well as a justification for her own conduct by that of her husband. In short, the gist of the rule is that whichever spouse has first repudiated the marital obligations is rightly called upon to give a valid reason for so doing."

In a suit for separate maintenance, the wife must establish not only the

fact of separation, but that such fact rightly and properly exists by reason of the wrongful conduct of the husband, and without fault on her part. *Graves v. Graves* (1873) 36 Iowa, 310, 14 Am. Rep. 525. See also *Edwards v. Edwards* (1913) 155 App. Div. 904, 139 N. Y. Supp. 1069, in which it was said that, where a husband's act in leaving his home is not abandonment because it was justified by cruel and inhuman treatment, the court has no power to make provision in the judgment constraining the husband to furnish support, but that there is the usual remedy should he not fulfil his duty. And see *Kamman v. Kamman* (1915) 167 App. Div. 423, 152 N. Y. Supp. 579, in which it appears that a prior suit by the wife for support and maintenance was dismissed because the wife had left her husband's home, and both parties were at fault.

In *Mattson v. Mattson* (1919) — Cal. —, 183 Pac. 443, however, the court cites 21 Cyc. 1602, to the broad proposition that even "if the parties are both at fault and cannot live together, alimony may, however, be decreed." The decision on its facts, however, is perhaps not inconsistent with the proposition at the beginning of the subdivision, as the husband was found to have been guilty of actual physical cruelty, while the charge against the wife was of mental or constructive cruelty.

B. Greater fault of husband.

Slight misconduct on the part of a wife which cannot be said to have contributed materially to the cause of separation is not a defense to her suit for separate maintenance.

California. — *Brandt v. Brandt* (1918) — Cal. —, 174 Pac. 55.

Iowa. — *Smith v. Smith* (1915) 172 Iowa, 329, 151 N. W. 1085.

Kentucky. — *Hodgen v. Hodgen* (1914) 160 Ky. 267, 169 S. W. 713; *Logan v. Logan* (1841) 2 B. Mon. 142.

Maryland. — *Jamison v. Jamison* (1847) 4 Md. Ch. 289.

Missouri. — See *Hooper v. Hooper* (1854) 19 Mo. 355.

Nebraska. — See *Keup v. Keup* (1915) 98 Neb. 321, 152 N. W. 555.

New Jersey. — *Boyce v. Boyce* (1878)

23 N. J. Eq. 387; *Irwin v. Irwin* (1917) 88 N. J. Eq. 139, 102 Atl. 440.

Ohio. — *Bascom v. Bascom* (1834) Wright, 632.

Rhode Island. — *Batthey v. Batthey* (1845) 1 R. I. 212.

South Carolina. — *Levin v. Levin* (1903) 68 S. C. 123, 46 S. E. 945; *Prather v. Prather* (1809) 4 S. C. Eq. (4 Desauss.) 33.

Canada. — *Jackson v. Jackson* (1860) 8 Grant, Ch. 499; *Severn v. Severn* (1852) 3 Grant, Ch. 431.

Thus, in *Smith v. Smith* (1915) 172 Iowa, 329, 151 N. W. 1085, an action for separate maintenance wherein it appeared that the wife was partly to blame for the separation, but a greater blame was clearly on the husband, who imputed infidelity to the wife, it was held that there should be separate maintenance allowed, the court saying: "If the plaintiff had been at all times free from the faults of provocation, there could be no question of her right to relief. We infer that the trial judge denied her relief because he deemed her partly to blame. The result thus reached, however, is something less than justice. The greater blame is clearly upon the defendant. The greatest obstacle in the way of reconciliation is the attitude of the defendant, imputing infidelity to his wife. Assuming her to be innocent, as we must upon this record, no greater cruelty could be perpetrated upon her than these imputations. It is idle for him to testify to his willingness to live with her while professing convictions of this kind. This is an obstacle which is wholly within the control of the defendant. Assuming, therefore, that both parties have a measure of blame, it is still against good conscience to permit the husband, the stronger one, to keep the fruit of the toil of the years and to abandon the weaker one to starvation. This is to award a premium to the greater wrongdoer. She cannot be expected to return to her husband's arms while he spurns her character as to chastity. This is the serious thing in the case, so far as the possible reconciliation is concerned. The plaintiff has the custody of the minor child. The rights

of the child demand proper protection of the mother. We have avoided the mention of one circumstance of great ugliness which has been much discussed in the record. This relates to the charge of the attempted poisoning of the plaintiff by the defendant. The evidence is largely circumstantial. Some of the circumstances are very significant. The explanatory testimony of the defendant is not wholly satisfactory. And yet the chances of wrong conclusions are very great. Much depends upon a mere data. This was not preserved, except in the casual memory of witnesses, and is in dispute. The question thus presented is serious in the highest degree. In view of the state of the record, we are disposed to leave the question undetermined. Our conclusion is that there should be separate maintenance allowed. Notwithstanding that the plaintiff has not been wholly free from fault in many of the controversies, this is not sufficient to justify or excuse the major blame which rests upon the defendant, and which makes the separate maintenance, for the time being, at least, a necessity. We think that some proper order for a reasonable monthly allowance should be made to the plaintiff."

In *Boyce v. Boyce* (1873) 23 N. J. Eq. 337, it was held that it is not a defense to a wife's action for separate maintenance after desertion by the husband that the wife had an ungoverned temper, was subject to frequent outbursts of passion, and used abusive and scurrilous epithets, and persevered in tantalizing the husband, since incompatibility of temper is not a ground for desertion. The court, after relating the acts of the husband in taking the wife to a remote and uncomfortable boarding place or tavern and leaving her there, said: "From these facts the conclusion is inevitable that the defendant did separate himself, and intended to separate himself, from his wife; that when he left he intended not to come back to her, or to that place, and that his manner of leaving in her absence, without advising her of his intentions, and concealing from her and the Ackersons

the place to which he had gone, was designed to produce the impression on her that he had abandoned her, and to influence her conduct. He had before expelled her from his bed; had, against her will, broken up housekeeping; and had taken her, without consulting her and without her consent, to a place disagreeable of itself, such as he knew must be repulsive and intolerable to her. He then privily deserted her, leaving her with no companionship, at an ordinary country tavern, with no money to pay her board, and no assurance from anyone that her board was provided for until her second return from New York. These facts constitute a separation from his wife, and an abandonment of her. He did this without providing for her maintenance and support. The arrangement he made with Ackerson was not such provision as satisfies the statute. The wife is bound to follow her husband when he changes his residence, even without her consent, provided the change is made by him in the bona fide exercise of his power as head of the family, of determining what is the best for it. Even this may have its limits, and it may be questioned whether a husband has a right to require his wife to leave all her kindred and friends, and follow him to Greenland or Africa, or even to Texas, Utah, or Arizona. Clearly he has no right to take her to such places as a punishment for her disobedience, extravagance, or ungovernable temper. No husband has the right to take his wife to any such place, where he does not intend to reside with her himself, and compel her to stay there at his pleasure, alone, without him. Else he might take a wife who had offended him from a comfortable or luxurious home among the most cultivated inhabitants of the state, to a hut in the pines of West Jersey, among charcoal burners, fishermen, and furnacemen, and, by placing her in a comfortable log cabin in a pure healthy atmosphere, with wholesome, well-cooked, nutritious food, while he himself went to Saratoga or Niagara, or returned to his luxurious home, be held to have complied with the law by

thus providing for her support. The defendant had no right to annex as a condition to the provision for the support of his wife that she should stay without him or any companion, at a place like Ackerson's tavern. Besides, if it had been a proper place, the mere provision for board and lodging is not a sufficient provision. She had no money at her command to employ a physician, to send for medicine, or to get away from this place to her relatives, if they should be sick or dying, or to go anywhere for the necessities of life, or for any society or enjoyment. There is no justifiable cause for the abandonment shown. I shall not consider whether her ungoverned temper, her frequent outbursts of passion, the abusive and scurrilous epithets bestowed on him, and her perseverance in tantalizing him were not occasioned or justified by his harsh treatment of her in the instances before mentioned, and others. But if they were not provoked by him, they are not crimes, but the infirmities and defects which, in consideration of law, a husband undertakes to put up with when he takes his wife for better or worse. In morals, it may be different. A man cannot desert his wife because she is extravagant, or lazy, or swears, or uses coarse language, or is sickly, fretful, or of violent temper, or because she wreaks her temper or showers her coarse or profane language upon him, and thus makes his life uncomfortable. Incompatibility of temper has not as yet, in New Jersey, been made by law a ground of divorce or for desertion."

Misconduct or faults of a wife, due to a highly organized and nervous temperament and a natural tendency to melancholia, and the neglect of her husband to give her the small attentions which she craved, were held not sufficient to justify his desertion or defeat the wife's action for support and maintenance, in *Hodge v. Hodge* (1914) 160 Ky. 267, 169 S. W. 713, wherein the court said: "Defendant justifies his abandonment of his wife by the production of certain papers written by her, and which he filed with his answer. We deem it unnecessary

to copy these papers in full. They are not addressed to anyone, and are not susceptible of the construction that plaintiff was in love with anyone else. In these letters she refers to the fact that she married the one that she loved best, but not the one that loved her best. She speaks of her husband's lack of affection and of her consequent unhappiness. While it is true that she speaks of some unknown person who had loved her, and whose love had never changed, and of the fact that he had come to her in her dreams and had made her happy, there is no suggestion of impurity or unfaithfulness on her part, but merely an expression of the consolation afforded her by the fact that someone else loved her and stayed by her in her unhappiness. Indeed, the letters are nothing more than the outpourings of a sensitive heart, made unhappy by the belief that her husband, whom she had loved best, no longer loved her, and a silent appeal to someone else to come and help her bear her troubles. It does not appear that these letters to an unknown person were ever intended for human eyes. They were not addressed to anyone, nor were they ever given to anyone to be delivered. Since, in our opinion, they do not contain even a suggestion of impurity or unfaithfulness, we conclude that they do not offer any reasonable ground for defendant's abandonment of his wife, especially in view of the fact that they were the offspring of a condition of mind which defendant had helped to bring about by his own indifference, which, considered in the light of her highly organized and nervous temperament, and her natural tendency to melancholia, of which he was fully aware, amounted to a species of cruelty on his part. While we cannot say that plaintiff was altogether free from fault, yet when we consider that on the one side is a woman of a nervous and sensitive nature, demanding love and affection, while on the other side is a man of more than ordinary force and strength, who begrudged her those little attentions which would have gratified the cravings of her heart, we conclude that his fault is the greater.

Out of it grew those conditions which are in a great measure responsible for any shortcoming which may be justly charged to plaintiff. It follows that the chancellor did not err in requiring the defendant to make suitable provision for the maintenance and support of his wife and child."

A wife's alleged habits of intemperance and improper language are not a defense to her action for alimony, where the husband's acts of extreme cruelty and brutal violence in beating and kicking her are such as could not be justified by any provocative acts on the part of the wife. *Severn v. Severn* (1852) 3 Grant, Ch. (U. C.) 431, wherein the court said: "Upon the whole, I cannot say that I entertain any doubt as to the justice of the present case. That the plaintiff was altogether free from the debasing habit imputed to her cannot certainly be affirmed. That her language was at times gross and offensive, and her whole conduct unbecoming, is, I fear, too plain to admit of doubt. It must be admitted that such conduct would excuse considerable severity in the husband; but it affords no sufficient justification for the reckless and unmanly cruelty in which he so frequently indulged. The engagement between husband and wife is an engagement most solemn in its kind, and most extensive in its consequences. Those who enter into that engagement do so for better or for worse. The well-being of society requires that it should be so. Conscious as we all are of manifold infirmities, we must neither expect nor require perfection in others; and, where the result fails to realize all our anticipations, it is our manifest duty to bear and forbear. The true happiness of those more immediately concerned, and the well-being of our whole social system, rest upon this foundation of mutual forbearance. It were lamentable, indeed, for the parties themselves, for their offspring, for the order of civil society, were every pique of pride or gloom of humor made the occasion for rushing upon separation, or violence which must lead to separation, or something worse. I will not relin-

quish the hope that the parties now before the court may be yet brought to a better understanding of their real interests, and that a way may be thus opened for them out of these scenes of misery and discord back to domestic happiness and peace. But, as matters stand at present, the plaintiff must be maintained from the defendant's estate."

A wife's right to alimony after being abandoned by her husband cannot be barred by conduct on her part which does not furnish him with legal excuse for separation, and is not defeated by incompatibility or austerity of temper, domestic discord, or reproachful words, however violent, or vulgar, or undeserved. *Logan v. Logan* (1841) 2 B. Mon. (Ky.) 142, an action for alimony, wherein the court said: "Although Mr. Logan may have acted conscientiously, under a firm conviction that the course he adopted was accordant with his wife's desire and necessary for his own health and tranquillity, and even that there could be no hope of an amelioration of her feelings and conduct towards him, yet nevertheless, unless in her excited moments she had so acted towards him as to jeopardize his personal security, the Code of law which rules in this forum does not justify his abandoning his home and his wife 'with a view to a permanent separation.' Marriage, being more fundamental and important than any of the social relations, is controlled as to its obligations, by a peculiar policy deemed essential to the permanent welfare of the whole social community. Being a contract for life, indissoluble by the consent of the parties merely, it should not be dissolved by the sovereign will for any other causes than such as are subversive of its essential ends or inconsistent with the general welfare. And it is certainly important to the general stability and harmony of that relation that the parties should know that, having taken each other with all their infirmities, and vowed reciprocal fidelity and forbearance for life, it is their interest, as well as their duty, to 'bear and forbear' as far as the resources of love, philosophy, and religion can en-

able them. And this, to an essential if not to the whole extent, is the law of the land, which will not countenance or permit separation from bed or board for incompatibility or austerity of temper, alienation of affection, domestic discord, or reproachful words, however vulgar, or violent, or undeserved, but requires, by the strongest of all temporal sanctions, that all difficulties resulting from such avoidable causes shall be either adjusted in the domestic forum, or borne with patience as contingent incidents of the union the parties had mutually promised to cement by love and adorn by grace of life. Parties so unfortunately united in the most sacred and endearing of all earthly relations must submit to the misfortune as one of the consequences of an injudicious choice. They must strive to conciliate by kindness and forbearance, 'must subdue by decent resistance or prudent conciliation; and, if this cannot be done, both must suffer in silence.' This is our law, human and divine; 'and if it be complained that by this inactivity of the courts much injustice may be suffered and much misery produced, the answer is that courts of justice do not pretend to furnish cures for all the miseries of life. They cannot make men virtuous, and, as the happiness of the world depends on its virtue, there may be much unhappiness in it which human laws cannot undertake to remove.' The law prudently determines that even the most offensive ebullitions of passion in words or acts which neither injure the person nor endanger personal security will not authorize a divorce a mensa et thoro. There must be *sævitia* to justify such a separation. Less severity than this will not authorize a court in this state to 'put asunder' those whom 'God hath joined together.' And were it otherwise, domestic quarrels might mischievously engross all the services of courts of justice."

That a wife orally abused her husband will not defeat her suit for alimony on the ground of ill usage and being turned away by her husband. *Prather v. Prather* (1809) 4 S. C. Eq. (4 Desauss.) 33.

In *Jamison v. Jamison* (1847) 4 Md. Ch. 289, a wife's suit for alimony, it is said that although it appears that both husband and wife have been at fault, and that each occasionally has yielded too far to the dominion of temper and the spirit of dissension, where the separation commenced and has continued by the act of the husband, who refuses and neglects to make provision for the wife's support, the wife is entitled to recover alimony if it were in the power of the court to grant such relief independent of divorce, which is discussed at length in the opinion, the court coming to the conclusion that there must be some method by which the husband may be compelled to maintain his wife, and when the restitution of conjugal rights cannot be decreed, alimony must; but, the defendant having died before a decree, the case having been referred to an auditor to ascertain the value of the husband's property, no allowance was made.

In *Irwin v. Irwin* (1917) 88 N. J. Eq. 139, 102 Atl. 440, a wife's bill for maintenance was brought under a section of the Divorce Act which provides "that where the husband abandons and neglects and refuses to support his wife, it shall be lawful for the court of chancery to decree and order such suitable support and maintenance as the nature of the case and the circumstances of the parties render suitable and proper, in the opinion of the court." The court said that a man cannot rid himself of his obligation to support his wife merely because they are always quarreling, but where the wife's conduct does not amount to extreme cruelty, he must provide her with separate maintenance if he desires to live apart from her.

In *Jackson v. Jackson* (1860) 8 Grant, Ch. (U. C) 499, it was held that a wife who left her husband was entitled to alimony where it appeared there had been personal violence amounting to legal cruelty on the part of the husband, with a reasonable apprehension on the part of the wife that on slight occasion similar violence might be resorted to again, although the court subscribed fully to the doctrine that it is the duty of a

wife to conform to the tastes and habits of her husband, and to sacrifice much of her own comfort and convenience to his whims and caprices, to submit to his commands, and to endeavor, if she can, by prudent resistance and remonstrance to induce a change and alteration.

That an accusation of adultery made by a wife is not proven is not necessarily extreme cruelty which will justify the husband in leaving her, but is at most an accusation which, if unfounded and unjustified, may amount to such cruelty. *Brandt v. Brandt* (1918) — Cal., —, 174 Pac. 55.

In *Levin v. Levin* (1903) 68 S. C. 123, 46 S. E. 945, it appeared that there were serious disagreements on the wedding journey, arising from the husband's grossness of conduct and jealous disposition, and that before leaving the wife, at a later date, the husband insisted on sexual intercourse at a time when her physical condition made his doing so indecent, to the extent that she was compelled to leave his room and seek refuge with her mother. On leaving, he charged her with pretending to be sick and made no provision for her maintenance. When she first became pregnant he insisted that he had not known his wife sexually, and strongly intimated that if she was pregnant she had been unchaste. It was held that such outrages amounted to intolerable cruelty and gross misconduct, justifying her separation from him, and that any fault on her part, such as an accusation made by her that her husband had imparted to her a venereal disease, which she believed at the time, had such excuse as to make it insufficient to deprive her of support. The court said: "It should also be said in this connection that the time has passed when assent can be given to the statement made in *Hair v. Hair* (1858) 31 S. C. Eq. (10 Rich.) 173: 'No words of reproach and insult amount to legal cruelty; no affront and indignity, no torture of the feelings and sensibilities, however severe and grievous to be borne, unaccompanied by bodily injury or a well-grounded apprehension of such, will authorize the wife to

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leave the bed and board of her husband, and to claim thereupon from this court a decree for alimony.' At the same time, we fully accept the language used in *Evans v. Evans* (1790) 1 Hagg. Eccl. Rep. 39, 161 Eng. Reprint, 467, quoted with approval in *Rhame v. Rhame* (1826) 6 S. C. Eq. (1 M'Cord) 206, 16 Am. Dec. 597: 'What merely wounds the mental feelings is, in few cases, to be admitted, where they are not accompanied with bodily injury, either actual or menaced. Mere austerity of temper, petulance of manners, rudeness of language, a want of civil attention and accommodation, even occasional sallies of passion (if they do not threaten bodily harm), do not amount to legal cruelty.' One of these few cases arises when a husband habitually uses to his wife abusive language which she cannot endure without a complete surrender of self-respect, or strikes at the vital point of female character by making and maintaining the charge of unchastity. The husband's right of dominion and the wife's duty to live with him and obey him cease to exist when the husband ceases to support them by at least decent respect and consideration. The general view of the law above stated will no doubt receive ready assent; but the delicacy of the subject makes the application of principle to the facts of each case the real judicial task. While each case that has arisen in this state differs widely as to its facts from every other, a review of the cases leads to the conclusion that the decision of this case should depend upon the following questions: (1) Has the defendant inflicted on the plaintiff such physical violence or personal indignity as would make her residence with him as a wife intolerable? (2) Has the wife deserted her husband or so contributed to the alienation that the law will deny her separate support? (3) Has the wife so condoned the alleged wrongs that her claim must fail? (4) Does the defendant's invitation to the plaintiff to come to his home as his wife discharge him of any liability he may have incurred for her separate support?"

In *Bascom v. Bascom* (1834) Wright

(Ohio) 632, it was held that a wife's misconduct would not defeat her suit for separate maintenance where it appeared that the parties could not live together in harmony, and that, while the wife's temper in the family was intolerable, she was provoked beyond endurance by the husband's cruelty and physical violence, the court saying: "It appears evident these parties cannot live together in harmony. Not only the household, but the neighborhood, is annoyed by the strife and bickerings between them. Neither of them is without fault; indeed, both seem much to blame. The defendant's leaving her in Vermont, without previous information or conversation with her or her friends, was decidedly reprehensible. Her temper in the family was intolerable, and only finds a palliation in the circumstances in which she was placed. Imprisoned in her own house, limited in her range through it to the will of hirelings and the stepchildren, driven to the out-house to cook her food, tantalized with threats of taking her child from her, her clothes torn, and her back lacerated with a cowhide, it required more than ordinary philosophy and extraordinary good temper to pursue a mild and prudent conduct such as would become a lady. A man cannot justify under hardly any possible circumstances inflicting bodily chastisement upon a woman; much less can a husband be tolerated or justified in taking a cowhide to his wife. She has given away to her temper, but has she not been provoked by her cooler husband beyond endurance? The circumstances show that to be the case. At any rate they are unfit to live together. Out of their joint means she and the child should be supported, and we order the child to her custody and guardianship."

In *Batley v. Batley* (1845) 1 R. L. 212, it was held that in order to sustain a petition for separate maintenance it must be made to appear to the satisfaction of the court that the petitioner is in no fault, that the cause of the separation is the unprovoked wrong of the respondent, of such a nature, springing from continuously op-

erative causes in the ordinary course of events, to operative and permanent separation, and like in kind if not equal, to the offenses that are causes of divorce, the amount of wrong or injury sufficient to justify the separation to be determined by the facts in the particular case.

In *Hooper v. Hooper* (1854) 19 Mo. 355, it was held that a petition stated a case which came within the provisions of a statute providing that when the husband, without good cause, shall abandon his wife and refuse or neglect to maintain or provide for her, the court shall decree suitable support and maintenance to be paid by the husband.

In *Keup v. Keup* (1915) 98 Neb. 321, 152 N. W. 555, a decree for separate maintenance was affirmed, it appearing that the trial court did not exact of the husband the performance of any duty beyond the marital obligations imposed on him by law, and it not being shown that the wife had forfeited her right to the relief granted, each having alleged extreme cruelty on the part of the other.

b. Wife's adultery.

1. In general.

A wife's adultery is a defense to her suit for separate maintenance.

Alabama.—*Bickley v. Bickley* (1902) 186 Ala. 548, 34 So. 946.

Colorado.—*Elliott v. Elliott* (1905) 34 Colo. 298, 83 Pac. 630.

Connecticut.—*State v. Schweitzer* (1888) 57 Conn. 532, 6 L.R.A. 125, 18 Atl. 787.

New Jersey.—*Bradbury v. Bradbury* (1909) — N. J. Eq. —, 74 Atl. 150; see also *Maas v. Maas* (1881) 34 N. J. Eq. 113.

New York.—*Roth v. Roth* (1912) 77 Misc. 673, 138 N. Y. Supp. 573; *Wise v. Wise* (1913) 159 App. Div. 575, 144 N. Y. Supp. 649.

North Carolina.—Compare *Skittletharpe v. Skittletharpe* (1902) 130 N. C. 72, 40 S. E. 851.

Ohio.—See *Mayer v. Mayer* (1877) 5 Ohio Dec. Reprint, 444, *infra*, IX.

South Carolina. — *Hair v. Hair* (1858) 31 S. C. Eq. (10 Rich.) 163.

England.—*Watkins v. Watkins* (1740) 2 Atk. 96, 26 Eng. Reprint, 460.

Canada.—*Campbell v. Campbell* (1875) 22 Grant, Ch. (U. C.) 322; *Severn v. Severn* (1867) 14 Grant, Ch. (U. C.) 150; *Leib v. Leib* (1907) 6 Terr. L. R. 308, on appeal (1908) 1 Sask. L. R. 363; *Nelligan v. Nelligan* (1894) 26 Ont. Rep. 8.

Adultery of the wife is a defense to her action for alimony alone. *Bickley v. Bickley* (1902) 136 Ala. 543, 34 So. 946.

Adultery of the wife is a good defense to her suit for separate maintenance. *Bradbury v. Bradbury* (1909) — N. J. Eq. —, 74 Atl. 150.

In *State v. Schweitzer* (1889) 57 Conn. 532, 6 L.R.A. 125, 18 Atl. 787, a prosecution for nonsupport, it was held that adultery of the wife, if proved, was a sufficient defense, and that a husband may refuse to support an adulterous wife.

Thus in *Hair v. Hair* (1858) 31 S. C. Eq. (10 Rich.) 163, the court said that if a wife elopes or commits adultery, or violates or omits to discharge any of the important hymeneal obligations which she has assumed, the husband may abandon her without providing for her support, and such conduct would be a defense to her suit or claim for separate maintenance.

Adulterous intercourse by a wife is a defense to her alimony suit. *Campbell v. Campbell* (U. C.) supra, where in the court said: "On the whole case presented, I am of opinion that the defendant has succeeded in the defense which he has set up as an answer to the claim of the plaintiff, and that the evidence establishes an adulterous intercourse to have taken place between the plaintiff and Gordon. It is almost needless to add the very great pain the consideration of this much-to-be-lamented case has caused me. It is deplorable to witness the ruin which has been brought upon a household where existed, at one time, all that could have been thought necessary to render its members reasonably happy, if only self-control had been exercised. I deeply sympathize with both the parties to the unfortunate proceedings. The failure of the attempt at settle-

ment made during the progress of the cause shows how useless it is now to look for any display of the spirit of forgiveness. The finding at which I have arrived, looking at the view taken of the offense in question by the cold charity of the world, removes any hope that may ever have existed of a reconciliation taking place. I desire not in any way to make light of or to palliate the grievous crime of adultery, but I know not why it should be looked upon as 'the unpardonable sin,' and why, when an unfortunate woman once becomes thus a sinner, she should, no matter how repentant, be by her fellow sinners condemned forever, and thenceforth be shunned by all earth's dainty clay. I know not why husband and wife should not, when suing from their common Father for that mercy in which alone, tampering justice, must be found all their hope in the great Hereafter, be led towards each other 'to render the deeds of mercy,' and thus seek that double blessing which flows from the exercise of this God-like attribute. It is not, however, within my province to enter into the discussion of these questions; my duty ends with the dismissal of the bill."

In *Leib v. Leib* (1907) 6 Terr. L. Rep. (Can.) 308, a wife's action for alimony on the grounds of desertion, cruelty, and adultery on the part of the husband, it was held that the adultery of the wife was a defense or bar to the action. And in the same case, on appeal, it was held that adultery of the wife after the husband's desertion is a bar to the wife's suit for alimony, especially where the wife is able to earn a good living, and although adultery of the husband is also shown. (1908) 1 Sask. L. R. 363.

In *Nelligan v. Nelligan* (1894) 26 Ont. Rep. 8, there was involved a statute providing as follows: "The high court shall have jurisdiction to grant alimony to any wife who would be entitled to alimony by the law of England, or to any wife who would be entitled by the law of England to a divorce and to alimony as incident thereto, or to any wife whose husband lives separate from her without any

sufficient cause, and under circumstances which would entitle her, by the law of England, to a decree for restitution of conjugal rights." After quoting the statute, the court said that to a suit for the restitution of conjugal rights there was no bar or legal opposition except cruelty or adultery on the part of the promoter, which would seem to warrant the deduction that in a wife's suit for alimony in Canada, brought under this statute, her adultery is a complete defense.

In *Severn v. Severn* (1867) 14 Grant, Ch. (U. C.) 150, a petition to deprive a wife of alimony because of her adultery was granted.

In *Roth v. Roth* (1912) 77 Misc. 673, 138 N. Y. Supp. 573, an action to recover an instalment due under a separation agreement, assumed by the court to be valid, it was held that gross misconduct of the wife, including adultery, was a defense to the action, the court in the discussion stating that in cases cited in civil actions for separation, brought under the Code, it has been held that the adultery of the plaintiff furnishes a perfect defense to the action, and further quoting from a cited case the rule that it is settled that the adultery of the wife relieves the husband from the obligation to support her.

In *Watkins v. Watkins* (1740) 2 Atk. 96, 26 Eng. Reprint, 460, a bill brought against the husband to have maintenance out of the wife's fortune, which appears to be an exception to the English rule that a court of chancery has not jurisdiction to compel the husband to pay separate maintenance to the wife unless upon agreement between them, or after a divorce, it was held that upon full proof of the adultery of the wife the court will not allow her maintenance.

In *Maas v. Maas* (1881) 34 N. J. Eq. 113, a suit brought to compel a husband to provide a proper support for his wife and child, the court considered the husband's defense of adultery by the wife, but held that it was not sustained by the evidence.

However, in *Skittletharpe v. Skittletharpe* (1902) 130 N. C. 72, 40 S. E. 851, there was involved a statute read-

ing as follows: "If any husband shall separate himself from his wife and fail to provide her with the necessary subsistence according to his means and condition in life, or if he shall be a drunkard or spendthrift, the wife may apply for a special proceeding to the judge of the superior court for the county in which he resides, to have a reasonable subsistence secured to her and to the children of the marriage from the estate of her husband, and it shall be lawful for such judge to cause the husband to secure so much of his estate as may be proper according to his condition and circumstances, for the benefit of his said wife and children, having regard also to the separate estate of the wife." It was held that the statute applied only to independent suits for alimony, and that under the statute only two material questions of fact could arise: First, as to whether the marriage relation existed at the time of the institution of the proceeding; and, second, whether the husband had separated himself from the wife. It was therefore held that it was harmless error for the court to inquire into the husband's allegation that he left his wife because of her acts of adultery, since the defendant's reasons and excuses for separating himself from his wife were irrelevant and might have been stricken out on motion.

2. Adultery of both parties.

The general rule that a wife's adultery is a defense to her suit for separation is supported in a case wherein it appeared that the husband was also guilty of adultery, by a decision of the New York court of appeals, which overruled the contrary view formerly held by the appellate division of the New York supreme court. *Hawkins v. Hawkins* (1908) 193 N. Y. 409, 19 L.R.A.(N.S.) 468, 127 Am. St. Rep. 979, 86 N. E. 468, 15 Ann. Cas. 371, reversing (1907) 121 App. Div. 896, 105 N. Y. Supp. 889, wherein it was held that, under the particular Code provision, the adultery of the wife relieves the husband of the obligation to support her, and such conduct is a defense to the wife's statutory separation action, although the husband is also

shown to have been guilty of adultery, the court saying: "Section 1762 provides that a wife may have judgment of separation and for support for either of the following causes: ' . . .

(3) The abandonment of the plaintiff by the defendant; (4) . . . the neglect or refusal of the defendant to provide for her.' The respondent alleged and has proved that at a certain date the appellant left her and since then has refused either to live with her or support her, and on these facts she would be entitled to the judgment which was awarded to her in the court below. But § 1765 provides that in such an action as this 'the defendant may set up, in justification, the misconduct of the plaintiff; and that if that defense is established to the satisfaction of the court, the defendant is entitled to judgment.' Under this section the appellant alleged, and has established beyond controversy, that his refusal to live with and support the respondent immediately followed and was the result of his discovery that she had been guilty of adultery. On these facts, added to the others above stated, appellant unquestionably would be entitled to judgment dismissing the action, for it is settled that the adultery of the wife relieves the husband from the obligation to support her, and such misconduct is a defense to an action of this character. . . . But still further facts are established which it is claimed materially qualify the force of those last recited. It appears that the appellant was guilty of adultery before the respondent, although not known to the latter at the time of her offense, and that in an action brought by the former for absolute divorce the latter made a counterclaim based upon the appellant's wrongdoing, and the court, on familiar principles, refused to grant relief to either party. Under these circumstances the respondent argues in support of her judgment that the appellant's misconduct somehow prevents him from successfully urging hers under § 1765, as a defense to this action, and especially that, inasmuch as the court refused to dissolve the marriage obligation on account of the said

mutual acts of adultery, said obligation continues in full force notwithstanding those acts, and as an incident thereto the appellant can be compelled to support his wife. I am unable to agree with these contentions. In the first place, and disregarding for the moment the judgment in the divorce action, it is to be kept in mind that the respondent is not basing her action on general principles of law, under which the court might be urged somehow to set off and balance against each other the mutual misdeeds of the parties and so leave the respondent with all her original marital rights and claims unimpaired. On the other hand, her right of action is based on and limited by the absolute statutory provisions which have been quoted. One of these in effect provides that, even though she establishes the usual elements of an action for separation and support, she will not be allowed such affirmative relief based on the marriage contract which she herself has disregarded. It does not favor an assertion of marital obligations which is accompanied or preceded by their violation. This being so, and it fully appearing that respondent had been guilty of misconduct which is made a bar under the statute to her recovery, I fail to see how it justifies or excuses her misconduct, or changes the nature of her act, or avoids the consequences thereof, or contributes an element of support to her cause of action, to prove that her husband also at some time has been guilty of a similar violation. And especially is this so where, as here, there is no claim that the latter violation, even as a matter of moral influence, conduced to or mitigated the evil of the former. It is also to be borne in mind that this is not a case where the husband has been continuing and living in profligacy while he casts his wife off for a single offense. Of course if the appellant were seeking affirmative relief his conduct would be important and subject to the strictest scrutiny, and no other rule should be applied to him than is being urged against the respondent. But he is not. The respondent alone is seeking legal relief, and in my opin-

ion the only material question relates to her act. Neither do I perceive how the force of this reasoning and conclusion, if otherwise correct, is affected or impaired by the decree in the divorce action. On the other hand, the logic of that judgment which refused relief with respect to the marriage obligation, to the husband who had been guilty of violating it, seems to aid the appellant rather than otherwise. Certainly if the respondent is permitted to maintain this action notwithstanding her adultery, she will be enabled to secure part of the relief which was denied to her in the former action because of such adultery. There was nothing in that decree which technically bars the appellant from urging the respondent's adultery as a defense in the present action. It refused to give him affirmative relief on account thereof in the former action, because of his own similar fault, but that is not inconsistent with his right to urge the same act under the express provisions of the statute, as a defense to the wife's request for affirmative relief in this action."

3. Collusion of husband.

In *White v. White* (1917) 87 N. J. Eq. 354, L.R.A.1917D, 639, 100 Atl. 235, a suit brought under a statute providing that "in case a husband, without justifiable cause, shall abandon his wife or separate himself from her, and refuse or neglect to maintain and provide for her, it shall be lawful for the court of chancery to decree and order such suitable support and maintenance," it was held that the wife's adultery, brought about by the collusion of the husband, is not that justifiable cause which, under the statute, will relieve the husband from his duty of providing a suitable support and maintenance for his wife, the court saying: "The relation of husband and wife, though formed by contract, is something more than a contract. The husband and wife cannot contract to disregard their marital obligations. They cannot contract to dissolve the relationship. The relation is always regulated by government. *Wade v. Kalbfleisch* (1874) 58 N. Y. 282, 17 Am. Rep. 250. It would be both illog-

ical and immoral to permit a husband to consent to or to connive at his wife's adultery, and then permit him to use the adultery of his wife as a shield or excuse to shirk his duty to society, by relieving him from providing a support for her, under the guise of a 'justifiable cause,' the result of his collusion or consent. Justifiable means 'warrantable,' 'defensible.' Thus we speak of justifiable homicide as a homicide without legal guilt; so here, a justifiable cause which will relieve the husband from his legal obligation to maintain and provide for his wife is a cause which he has not helped to create, a result that has not been produced, in part at least, by his own misconduct, an adultery of the wife, free from legal guilt or connivance on his part."

c. Wife's improprieties short of adultery.

In Canada, it has been held that proof of a wife's grave misconduct, not sufficient to establish adultery, is not a defense to her suit for separate support. *Aldrich v. Aldrich* (1891) 21 Ont. Rep. 449, in which the court said: "I now turn to the justification and defense of the husband. Circumstantial evidence has been given by one witness of conduct on the part of the plaintiff which, unexplained and uncontradicted, would lead to the conclusion that she had been guilty of adultery. The husband also swears that the wife confessed her guilt before they separated in August, 1890. This one witness, being by confession of loose character, would not be sufficient in these circumstances to prove adultery, unless corroborated. *Ginger v. Ginger* (1865) L. R. 1 Prob. & Div. (Eng.) 37. But the corroboration by the admission deposed to by the husband does not weigh with me. The tone of his correspondence thereafter with his wife down to the 18th December, 1890, was so genial and friendly as to repel the idea that he was addressing an adulterous wife. There is, besides, essential contradiction in other parts of the evidence of the husband and his one witness which so detracts from it that I prefer to accept the denials and explanations of the wife and those implicated with her.

But while the distinct offense has not been proved, I cannot pass over unnoticed the indiscreet acts and conduct of the plaintiff which are not disputed. The wife's conduct with the man named has not been disposed of to my satisfaction. He was much with her; they drove together in cabs; he admits being seated with her alone and holding her hand. Against the husband's wish, he accompanied her from Ottawa, and saw her on shipboard; he went to meet her on her return; and during the interval they corresponded clandestinely through the intervention of a young lady in Montreal who signs herself 'Jim.' Passages in a letter written by this person to the plaintiff (which came to the house of the mother-in-law in England after the plaintiff left, and was forwarded to the husband), referring to 'F.,' are so equivocal in meaning that I thought an opportunity should be given of calling the writer as a witness. This has not been done by either party, and, although I might delay judgment indefinitely till this person was produced as a witness, I have thought it best to decide according to the weight of authority upon similar demerits. The latest decision I have found is in 1876, of *Rippingall v. Rippingall*, 24 Week. Rep. (Eng.) 967, in a suit by the wife for restitution of conjugal rights. The defense was adultery, but the proof failed to show more than visiting at the lodgings of the correspondent, under circumstances that amounted to grave misconduct. It was held by Hannen, P., that she was entitled to require her husband to take her back, as her conduct fell short of a matrimonial offense. To the same effect in *Scott v. Scott*, 4 Swabey & T. (Eng.) 115, 34 L. J. Prob. N. S. 23, 12 L. T. N. S. 211, in 1865. In *Haswell v. Haswell* (1859) 1 Swabey & T. (Eng.) 504, 29 L. J. Prob. N. S. 21, 1 L. T. N. S. 69, 8 Week. Rep. 76, it was doubted by the court whether even indecent liberties permitted by the wife would form an answer to such a suit for restitution. So, in *Burroughs v. Burroughs* (1861) 2 Swabey & T. (Eng.) 303, 30 L. J. Prob. N. S. 186, 7 Jur. N. S. 610, 4 L. T. N. S. 374, 9 Week. Rep. 680, it

was held on demurrer that a plea of strong and reasonable suspicion of adultery was no answer to the wife's claim in a suit. See also *Bancroft v. Bancroft* (1865) 4 Swabey & T. (Eng.) 84, 34 L. J. Prob. N. S. 70, 12 L. T. N. S. 236, 13 Week. Rep. 548, and *Williamson v. Williamson* (1882) L. R. 7 Prob. Div. (Eng.) 76. In the Irish court it was held, in 1873, that conjugal rights can be defeated only by acts sufficient to found a decree for divorce. *Manning v. Manning*, Ir. Rep. 7 Eq. 520. The rather anomalous state of the law on this head is commented on by Lord Penzance, in *Yeatman v. Yeatman* (1868) L. R. 1 Prob. & Div. (Eng.) 489, and the whole question is much and ably discussed in the Scotch court, with a difference of opinion among the judges, in *Chalmers v. Chalmers* (1868) 6 Sc. Sess. Cas. 3d series, 547; the majority, however, holding the general rule of law, as of morals, is that the vows of marriage can be dissolved by nothing but adultery or *sævitia*, and that nothing is a good defense of the act of wilful desertion that would not be a good defense in an action of adherence. No distinct matrimonial offense is proved against the plaintiff, and the husband could not, therefore, be justified in refusing to receive her if she is disposed to return. But he, having committed adultery, cannot insist upon her return if she is disposed to live apart."

But in an Alabama case, it was held that a wife's acts of abandonment and improprieties with other men would defeat her suit for alimony without divorce. *Brindley v. Brindley* (1898) 121 Ala. 431, 25 So. 751, in which the court said: "From the evidence, the complainant utterly failed to make out the charges she preferred against her husband as grounds for alimony. Instead of his abandoning her, it is made plain that she abandoned him without any legal excuse therefor. The allegation that he 'accused her of adultery, and made base and vile charges against her without shadow of foundation for them,' finds no support in the evidence, but is satisfactorily disproved. In his opinion the chancellor, employing language much more tem-

perate than he would have been justified in employing, said: 'She was guilty of the abandonment, and manifested no willingness to continue to reside with her husband, and, furthermore, was guilty of improprieties with other men.' A careful examination of the evidence leads us to approve this conclusion. It satisfies us, as it did the court below, that the complainant's suit is oppressive and entirely wanting in merit. The defendant, so far as the evidence tends to show, while not profuse in his attentions to her, accountable for reasons that are pardonable, was never harsh or cruel to his wife. He was poor and perhaps unable to supply more abundantly than he did, and seems to have manifested a submissive rather than a revengeful spirit under most provoking circumstances. In such a case, can it be manifested on any principle known to a court of equity that the respondent should be made by its decree to contribute of his means to such an unjust and oppressive demand as is presented in this case? Its disposition to administer justice would be seriously questioned, if not displayed to prevent exactions so shocking to the sense of justice."

d. Wife's misconduct affecting amount of allowance.

Misconduct of a wife not sufficient to constitute a defense to her suit for separate maintenance has been considered as affecting the amount of the allowance. *Chapman v. Chapman* (1859) 13 Ind. 396; *Symington v. Symington* (1896) — N. J. Eq. —, 36 Atl. 21.

Thus in the case last cited, it was said that in fixing the amount to which a wife is entitled as an allowance for separate maintenance, a court always takes into consideration the conduct of the wife as well as that of the husband.

So it has been held that, if a husband's desertion was mitigated by the misconduct of the wife, alimony might be restricted to an amount necessarily required for support in connection with the wife's earnings, in *Chapman v. Chapman* (Ind.) *supra*, wherein the court said: "It may be here observed

that, in determining the question of alimony upon a divorce, the court may, touching the amount, hear evidence as to the cause of abandonment on the part of the husband. So, in this case, the court may ascertain the cause and circumstances of the abandonment. If it occurred under circumstances which mitigated if they did not justify it, as if from the malignity of disposition, or the irritating vexatious conduct, long continued, of the wife, the husband to secure his own peace was compelled to abandon her, there would not seem to be a very equitable case made out for giving, at least beyond what necessity required for a support in connection with her own earnings, in a case where the entire property of the husband amounts to but \$700."

e. Rule in Illinois.

1. Fault of both parties.

(a) Greater fault of wife.

Under the Illinois statute, while a wife is not required to be blameless, misconduct on her part which materially contributes to the separation, so that it may be said that the fault of the wife is equal to or greater than that of the husband, is a defense to her suit for separate maintenance. *Umlauf v. Umlauf* (1882) 103 Ill. 651; *Jenkins v. Jenkins* (1882) 104 Ill. 134; *Hunter v. Hunter* (1880) 7 Ill. App. 253; *Anderson v. Anderson* (1892) 45 Ill. App. 168; *Porter v. Porter* (1895) 58 Ill. App. 670; *Harris v. Harris* (1902) 109 Ill. App. 148; *Winterberg v. Winterberg* (1913) 177 Ill. App. 493; *Hassett v. Hassett* (1914) 189 Ill. App. 342; *Pratt v. Pratt* (1916) 197 Ill. App. 530; *Von Der Brelie v. Von Der Brelie* (1916) 198 Ill. App. 187, writs of error dismissed in (1916) 275 Ill. 484, 114 N. E. 181.

Thus the word "fault," in an act authorizing a wife to bring an action for separate maintenance where she is living apart from her husband, was defined as a voluntary separation or misconduct of the wife which materially contributes to the disruption of the marital relation, in *Pratt v. Pratt* (1916) 197 Ill. App. 530.

A wife's right to separate maintenance depends on whether she is living

apart from her husband without her fault. *Umlauf v. Umlauf* (1882) 103 Ill. 651.

So, although mere incompatibility of temper, occasional ebullition of passion, trivial differences, or slight moral obliquities will not justify a legal separation, a wife can bar her right to a decree for separate maintenance by failure to perform her duties to her husband, or by misconduct on her part which contributes materially to the cause of separation. *Harris v. Harris* (1902) 109 Ill. App. 148.

In *Anderson v. Anderson* (1892) 45 Ill. App. 168, a suit for separate maintenance brought after the wife had left her husband's home for a third time, it was held that while the law, in granting separate maintenance to a wife, does not require perfection on her part, nor that she should be so entirely blameless that her conduct under irritating circumstances should be wholly free from just criticism, where the wife was guilty of misconduct, having an ungoverned tongue, continuously scolding and quarreling with her husband, and assaulting him with a broomstick, and throwing hot coffee in his face, which materially contributed to his misconduct, relied on as justifying the separation, such as his desire to run the kitchen, his acts in selling their buggy, requiring her to ride on a wagon without a suitable seat, and allowing pigs and calves to run in the front yard and destroy the sod and flowers to her annoyance, and building a fence without a gate to the woodpile, she was not without fault within the meaning of the statute, and hence not entitled to a decree for a separate maintenance.

In *Porter v. Porter* (1895) 58 Ill. App. 670, it appeared that the husband had suffered more than the wife, and that his patience was severely tried by the course of their family life, and that few persons could have acted more mildly than he did under the wife's unjustified charge of incest, which was the immediate cause of the separation. The husband offered his home to her, and to receive and treat her kindly. It was held that the wife was not, "without her fault, living

separate and apart from her husband," and was not entitled to separate maintenance.

A wife who had trouble with her husband for twelve years, and who subjected him to a vexatious suit on a groundless charge of extreme cruelty, and who also subjected him to another vexatious suit on a groundless charge of adultery, and who, while the latter suit was still pending, and after a voluntary absence from her husband's home for years, suddenly arrived there with a party of friends, and, without retracting her groundless charges, acted in a manner to excite strongly the suspicion that she sought a refusal of shelter on his part, rather than a home in his house, was not living apart from her husband without her fault, and was not entitled to separate maintenance. *Jenkins v. Jenkins* (1882) 104 Ill. 134.

Evidence that a wife had left her husband six years before, and that on one occasion she met him, crying and cursing as he came home, and that she was very nervous and irritable, and that they had had words about divorce about twelve years before, but that they had again lived together, and that she had called him a liar, together with charges of uncleanness, abuse, and insults which were not supported by statements of fact, did not establish such cruelty on the part of the wife as would be a defense to her action for separate maintenance. *Winterberg v. Winterberg* (1913) 177 Ill. App. 493.

To authorize a decree for separate maintenance of a wife other than for causes for which a divorce will be granted, it ought at least to be proved that there was a reasonable danger of personal violence to her, or a persistent unjustifiable course of conduct on the part of the husband which would necessarily render her miserable if she continued to remain with him, and that the conduct of the husband was not in any considerable degree induced by her fault. *Hunter v. Hunter* (1880) 7 Ill. App. 253.

In *Hassett v. Hassett* (1914) 189 Ill. App. 342, it appears from the abstract of the decision that a wife

whose conduct was unreasonable, and not that of a devoted and loving wife, was not without fault within the meaning of the statute, and was not entitled to separate maintenance, although the husband's cross bill for divorce was dismissed because the wife's act in leaving her husband was caused by his mistreatment of her, and was pursuant to his suggestion, and therefore did not constitute desertion.

Where a husband is compelled by the conduct of his wife, and pursuant to the advice of a physician, to leave the wife for a period of rest, there is not a desertion which will entitle the wife to separate maintenance. *Von Der Brelie v. Von Der Brelie* (1916) 198 Ill. App. 187, writ of error dismissed in (1916) 275 Ill. 484, 114 N. E. 181.

(b) *Greater fault of husband.*

Under the Illinois statute, slight misconduct on the part of a wife, which cannot be said to have contributed materially to the cause of separation, is not a defense to her suit for separate maintenance. *Wahle v. Wahle* (1874) 71 Ill. 510; *Johnson v. Johnson* (1888) 125 Ill. 510, 16 N. E. 891; *Bartlow v. Bartlow* (1904) 114 Ill. App. 604; *Jones v. Jones* (1906) 124 Ill. App. 201; *Finch v. Finch* (1911) 160 Ill. App. 639; *Judd v. Judd* (1911) 169 Ill. App. 21; *Barginde v. Barginde* (1914) 189 Ill. App. 390.

Thus in *Wahle v. Wahle* (Ill.) supra, it was said that the statute does not contemplate that merely because of incompatibility of disposition or occasional exhibitions of passion or imprudence in speech, which may have been provoked by herself, the wife shall be justified in abandoning her home with the view to compel her husband to maintain her elsewhere, but to authorize a decree for the separate maintenance of the wife, other than the causes for which a divorce will be granted, it must appear that there was reasonable danger of personal violence to her, or persistent unjustifiable conduct of the husband, which would render her miserable if she continued to remain with him, and that such conduct was not in any considerable degree induced by her fault.

In *Johnson v. Johnson* (1888) 125 Ill. 510, 16 N. E. 891, it was held that mere ebullitions of temper or trivial delinquencies of conduct by a wife cannot be made a pretext for conduct by the husband which will justify a separation, and, where the wife is compelled to leave her husband under such circumstances, she is living apart without legal fault on her part.

So, in *Judd v. Judd* (1911) 169 Ill. App. 21, it was held that the act of a wife in keeping boarders in order to raise money to pay building association dues and save her home was not misconduct on her part which would justify her husband in deserting her, and would not defeat her action for separate maintenance, brought under the statute authorizing such actions where the wife is living separate and apart from her husband without her fault.

Where a husband has left his wife and is living apart from her, the wife is entitled to separate maintenance, notwithstanding she may not have been entirely without fault in the domestic difficulties which preceded the separation, when the fault of the wife was not such as to entitle the husband to a divorce. *Finch v. Finch* (1911) 160 Ill. App. 639.

In *Barginde v. Barginde* (1914) 189 Ill. App. 390, it would appear from the abstract of the opinion that it was held that a showing of quarrelsome conduct on the part of the wife will not defeat her action for separate maintenance.

In *Jones v. Jones* (1906) 124 Ill. App. 201, under the statute providing for the recovery of separate maintenance by a wife where she is living separate and apart from her husband without her fault, it was held that, where the husband left the wife, the fact that the wife was at fault in quarrels anterior to the separation would not defeat her action for separate maintenance where there is no cause for divorce, the court saying: "We have failed to find any case where the abandonment or separation was the act of the husband, in which the supreme court or this court has decided that the wife was not entitled to a

separate maintenance under the statute, because of her fault in quarrels or difficulties anterior to such separation. We do not think there is any such case. Where the wife claims that by bad conduct on the part of the husband she has been justified in leaving him, and then sues for separate maintenance, the court will look into the differences existing before the separation, to see if her leaving her husband was necessary. If not, of course she is not without fault in the living apart. In considering the question whether she were justified in leaving her husband, the court will look to see whether her conduct materially contributed to produce the conditions which she claims justified her in leaving him. If it did, the court has held that her leaving was not justified, and therefore that her living apart was not 'without her fault.' This is the meaning and extent of the cases cited by the appellant (*Anderson v. Anderson* (1892) 45 Ill. App. 168, and *Jenkins v. Jenkins* (1882) 104 Ill. 134) and of other cases like them which we have investigated. But the statute evidently does not mean that a husband who deserts his wife or turns her out of his home against her will is excused from providing a separate maintenance for her, because in the preceding domestic difficulties she has not been 'without fault.' It is said by the supreme court in *Johnson v. Johnson* (1888) 125 Ill. 514, 16 N. E. 891, that no encouragement can be given to the living apart of husband and wife, and that slight moral obliquities, even, will not justify separation; and in *Razor v. Razor* (1894) 149 Ill. 621, 36 N. E. 963, *supra*, although the supreme court said the possession of letters of the character of those found among the wife's effects was wholly inconsistent with the duties and obligations of a wife, yet it held that the letters were properly excluded from evidence in defense to her bill for separate maintenance, and affirmed the decree which granted a separate maintenance. The object of the statute is stated in *Ross v. Ross* (1878) 69 Ill. 569, to be 'to confer jurisdiction on a court of equity to enforce the com-

mon-law duty of the husband to furnish support and maintenance for the wife suitable to the condition of the parties in life, upon her application in all cases where she is living separate and apart from him without her fault, or, in other words, under such circumstances as would enable her to avail herself of the common-law remedy of obtaining such support upon the credit of her husband.' There can be no question in the case at bar that the appellee would be able to avail herself of this common-law remedy. Men who make such mistakes in marriage as appellant claims to have made cannot easily escape the obligations they have assumed. In certain cases they are relieved by the wife's voluntary flight from home; in others they are able to prove charges which give them a release by divorce; if they are not thus discharged from their obligations, they must face them, either by bearing the domestic cross, or providing for their wives a suitable living apart."

2. *Wife's adultery.*

It is held in cases brought under the Illinois statute that a wife's adultery is a defense to her suit for separate maintenance. *Wahle v. Wahle* (1874) 71 Ill. 510; *Angelo v. Angelo* (1876) 81 Ill. 251; *Razor v. Razor* (1894) 149 Ill. 621, 36 N. E. 963; *Rawson v. Rawson* (1888) 37 Ill. App. 491; *Leafgreen v. Leafgreen* (1906) 127 Ill. App. 184. See also *Hunter v. Hunter* (1905) 121 Ill. App. 380.

If a wife is compelled to leave her husband on account of her adultery, or her wicked conduct, she is not entitled to separate maintenance. *Wahle v. Wahle* (Ill.) *supra*.

A husband may justify a separation on the ground of the wife's adultery. *Razor v. Razor* (1894) 149 Ill. 621, 36 N. E. 963.

Adultery on the part of the wife operates as a discharge of the husband from all obligations to support her. *Rawson v. Rawson* (1888) 37 Ill. App. 491.

In *Angelo v. Angelo* (1876) 81 Ill. 251, a suit for divorce on the ground of adultery, in which the wife filed a cross bill for separate maintenance, it appearing that the clear preponder-

ance of the evidence was in favor of the husband's original bill although the jury had found for defendant, a decree allowing the wife to live separate and apart from her husband was reversed, and the cause remanded for further proceedings.

In *Leafgreen v. Leafgreen* (1906) 127 Ill. App. 184, a suit for separate maintenance, evidence was admitted in support of the husband's cross bill for divorce on the ground of adultery, but the fact of the wife's adultery was not established.

However, in *Hunter v. Hunter* (1905) 121 Ill. App. 380, it was held that alleged adultery of the wife which had been condoned by the husband by subsequent cohabitation was not a defense to her suit for separate maintenance.

f. Rule in Georgia.

In Georgia, the decisions are conflicting, apparently because of the various Code provisions controlling a wife's right to alimony without divorce, and, although it is believed that the present rule in Georgia with regard to a wife's misconduct as a defense to her suit for separate maintenance is in accord with the weight of authority, the Georgia decisions touching this question will be set out in chronological order, without attempt to reconcile or distinguish them.

In *Hawes v. Hawes* (1880) 66 Ga. 142, it appeared that by direct provision of the Code in cases of a voluntary separation of husband and wife, or where the wife is abandoned or driven off by the husband against her will, the husband may make by voluntary deed, adequate provision for her, consistent with his means and her former circumstances, which shall be a bar to her right to permanent alimony, and it was held that (irrespective of other facts) a husband, by orally agreeing to separate from his wife and to support her apart from him, brought himself within that liability which exists where there is a voluntary separation.

In *Glass v. Wynn* (1886) 76 Ga. 319, it was held that under a Code section authorizing a wife's petition for alimony when husband and wife are liv-

ing separately, or are bona fide in a state of separation, there being no action for divorce pending, it is immaterial what brought about the separation, the court further saying that *Hawes v. Hawes* (Ga.) supra, does not conflict with this view of the section, and if so the remark is obiter. The remark in *Hawes v. Hawes* referred to is that if the facts had been different the case would have been governed by another section of the Code not quoted.

In *Rorie v. Rorie* (1910) 134 Ga. 69, 67 S. E. 410, a suit for permanent alimony without divorce brought by a wife seven years after a separation, in which conflicting evidence authorized a finding that the wife voluntarily left her husband's home without sufficient cause, and continued to remain away without his consent, and the verdict denying alimony and a motion for new trial was refused, it was held that the evidence did not require a verdict for the wife, and the discretion of the trial judge in refusing to grant a new trial would not be disturbed,—citing Civil Code, § 2404.

In *Knox v. Knox* (1911) 139 Ga. 480, 77 S. E. 628, an application for permanent alimony wherein there was conflicting evidence concerning the conduct of the parties toward each other before the separation, and as to cruel treatment on the part of each, the issue being whether sufficient cause was shown by the wife for remaining away from the defendant's home, it was held that it was inaccurate to charge the jury: "I charge you, if you find from the evidence that the plaintiff was wholly at fault and the defendant was entirely without fault, and she left him without any reason, he being without fault, then she cannot recover any alimony," and, "Now if you should determine that question against her, that is, determine that she was wholly at fault, and he was without fault, and she left without any cause, of her own free will and without any cause, then you would find in his favor generally." One of the judges, however, dissented from this holding on the ground that, where the defendant alleged and testified that the wife was wholly at fault, it was not error to give the instruc-

tions complained of. Hence, the question seems to have been the propriety of giving the instruction, and it would seem that perhaps the court would have approved it as a correct statement of law if it had considered that the evidence justified it.

In *Sikes v. Sikes* (1915) 143 Ga. 314, 85 S. E. 198, a suit for permanent alimony, it was held error to grant a nonsuit where the evidence tended to show that husband and wife were living bona fide in a state of separation, and that the separation resulted from the husband's cruel treatment.

In *Ward v. Ward* (1915) 144 Ga. 312, 87 S. E. 17, a suit for permanent alimony decided a few months after *Sikes v. Sikes* (Ga.) *supra*, wherein it appeared that the wife voluntarily left her husband's home, and the issue, on conflicting evidence, was whether the husband's conduct justified the wife in leaving, it was held that it was not error against the plaintiff to charge as follows: "If the wife leaves the husband without sufficient cause, voluntarily on her part, and she in that way abandons him when he is willing to take care of her and support her, provide a home for her, I charge you that if the wife leaves the husband under those circumstances, then the jury would be authorized in that event to find no alimony for her, if they think it just and proper to do so."

See also *George v. George* (1908) 130 Ga. 608, 61 S. E. 401, wherein it is said in the official headnote that the trial court properly refused temporary alimony where the evidence was conflicting as to whether the wife left voluntarily and without excuse, or because of the husband's cruel treatment.

IV. *Previous unchastity of wife.*

Unchastity of the wife anterior to the marriage is not of itself a defense to her suit for separate maintenance. *Steele v. Steele* (1894) 96 Ky. 382, 29 S. W. 17; *Verner v. Verner* (1886) 64 Miss. 184, 1 So. 52; *Fairchild v. Fairchild* (1887) 43 N. J. Eq. 473, 11 Atl. 426; *A. v. A.* (1905) 15 Manitoba L. R. 483. See also *Tolman v. Tolman* (1898) 1 App. D. C. 299.

Thus where a husband before mar-

riage had knowledge that there were reports concerning his proposed wife, affecting her character for chastity, and was not only entirely free to investigate the truthfulness of such reports, but was told by her father not to marry her if they turned out to be true, it appearing that the father thought the husband responsible for the wife's pregnancy at the time of the marriage, which was at first admitted by the husband, the husband cannot be heard to say, in a suit for separate maintenance, that he was induced by fraud of his wife and friends to marry her, in support of his counterclaim for absolute divorce. *Steele v. Steele* (Ky.) *supra*.

In *Verner v. Verner* (1886) 64 Miss. 184, 1 So. 52, a wife's suit for alimony, it was held that the husband cannot sever the marital ties and escape marital responsibilities because of rumors affecting the wife's chastity which were in circulation anterior to her marriage, and seemed to rest on no just suspicion, where it appears that she has by the only accessible evidence, that of her family and attending physicians, proved them to be unfounded.

In *Fairchild v. Fairchild* (1887) 43 N. J. Eq. 473, 11 Atl. 426, although the action was for a judicial separation and alimony, the court held that it was no defense to a suit for alimony that the complainant and defendant met at the house of complainant's father, which was her home, and that on two occasions the defendant had sexual intercourse with her there, and that a short time thereafter they met again on board a steamboat, when she told him she was in trouble by him, and that, believing her statement, he married her, and that though he married her there was no previous promise of marriage, and no affection on his part toward the complainant, nor on her part towards him, and that her statement that she was with child by him was untrue, since the fact that the wife has falsely declared herself to be with child by the husband, as an inducement for him to marry her, is no ground for annulling the marriage or resisting a claim for maintenance.

Unchastity of the wife before mar-

riage, resulting in her pregnancy by another man at the time of the marriage and the birth of a fully developed child about four months after the marriage, not being a matrimonial offense, was held not a defense to the wife's suit for alimony, in *A. v. A. (Manitoba)* supra, wherein the court said: "In the present case there is no evidence of adultery, and unchastity before marriage is not a matrimonial offense. Counsel for the defendant argued that there was cruelty on the part of the wife since marriage, by her concealment of her condition. Her behavior after marriage did not constitute legal cruelty as recognized in matrimonial cases. Withholding disclosure of a disagreeable or disgraceful fact cannot be regarded as cruelty.

... The plaintiff in the case I am deciding inflicted on her husband one of the greatest wrongs a woman could do to a man. She humiliated him in the eyes of the world and made their marriage a subject for mockery. In such painful circumstances the wisest thing a man can do is to make the best arrangement he can with the unhappy woman who has done him the wrong, but who bears his name and is his wife. This, I think, was what the defendant intended when he sent his wife away after her September visit. If he had continued to pay her the pittance he promised her, she states she would have brought no action. He discontinued the payments for a reason which does not appear to me sufficient or justified by the facts. I have therefore to deal with the case upon the bare legal rights of the parties, and apart from all sympathy for the defendant. In *Russell v. Russell*, L. R. [1895] P. (Eng.) 315, 64 L. J. Prob. N. S. 105, 73 L. T. N. S. 295, 44 Week. Rep. 213, the harshness of the law in cases like this was admitted, but the judges felt that they were bound to apply the law as they found it, not to make it. I feel myself bound to allow alimony to the plaintiff."

See also *Tolman v. Tolman* (D. C.) supra, a suit for permanent alimony, in which the defendant by answer insisted that the marriage was a mere matter of formality to gratify the

plaintiff. It was held that matter in the answer which tended to degrade the character of the plaintiff, having reference to the relations that subsisted between the defendant and the plaintiff prior to their marriage, was properly stricken from the record, since, being *particeps criminis*, the defendant may not set up such matter to shield himself, and cannot, in defense to the action, be allowed to treat the marriage as a merely formal or meretricious affair, such attempted defense being but an aggravation of the wrong, both to the wife and to society.

V. Offer to resume marital relation.

a. Bona fide offer as defense.

A bona fide offer by a husband to receive his wife in his home and resume marital relations with her and to provide for her according to his means and station in life, is a complete defense to the wife's independent action for separate maintenance and support.

California.—*McMullin v. McMullin* (1899) 123 Cal. 653, 56 Pac. 554.

Illinois.—*Angelo v. Angelo* (1876) 81 Ill. 251; *Johnson v. Johnson* (1888) 125 Ill. 510, 16 N. E. 891; *Thomas v. Thomas* (1894) 152 Ill. 577, 38 N. E. 794, reversing (1892) 44 Ill. App. 604.

Kentucky.—*Logan v. Logan* (1841) 2 B. Mon. 142; *Scott v. Scott* (1897) 19 Ky. L. Rep. 929, 42 S. W. 836; *Clubb v. Clubb* (1901) 23 Ky. L. Rep. 650, 63 S. W. 587.

Louisiana.—*Holbrook v. Her Husband* (1866) 18 La. Ann. 643.

Mississippi.—*Hilton v. Hilton* (1906) 88 Miss. 529, 41 So. 262.

Missouri.—*Creasey v. Creasey* (1912) 168 Mo. App. 109, 151 S. W. 215.

New Jersey.—*Dummer v. Dummer* (1898) — N. J. —, 41 Atl. 149; *Howey v. Howey* (1910) 77 N. J. Eq. 591, 78 Atl. 696.

Ohio.—*Quallich v. Quallich* (1905) 83 Ohio C. C. 76, affirmed in (1905) 72 Ohio St. 671, 76 N. E. 1131.

Pennsylvania.—*Com. ex rel. Perry v. Perry* (1897) 7 Pa. Dist. R. 240; *Yetter v. Yetter* (1911) 45 Pa. Super. Ct. 332.

South Carolina.—Anonymous (1810) 4 S. C. Eq. (4 Desauss.) 94; Hair v. Hair (1858) 31 S. C. Eq. (10 Rich.) 163; Wise v. Wise (1901) 60 S. C. 426, 38 S. E. 794.

Canada.—Edgeworth v. Edgeworth (1904) 3 Ont. Week. Rep. 71; Hummel v. Hummel (1908) 11 Ont. Week. Rep. 113; Evans v. Evans (1916) 27 Ont. Week. Rep. 69; Howey v. Howey (1879) 27 Grant, Ch. (U. C.) 57; Roblin v. Roblin (1881) 28 Grant, Ch. (U. C.) 439; Payne v. Payne (1905) 10 Ont. L. Rep. 742, 6 Ont. Week. Rep. 428; Aldrich v. Aldrich (1891) 21 Ont. Rep. 447; Moon v. Moon (1913) 6 Sask. L. R. 41, 9 D. L. R. 679. See also Walsh v. Walsh (1868) 1 Ch. Chamb. Rep. (U. C.) 234.

Thus in South Carolina, as early as 1810, in Anonymous, *supra*, a suit by a wife to recover alimony or some allowance to support her in living apart from her husband, it was said that had the defendant in his answer unequivocally made the wife an offer to return to him, perhaps, on the authority of cases cited, the court must have refused to grant the wife anything. And in a more recent case, Wise v. Wise (1901) 60 S. C. 426, 38 S. E. 794, a wife's action for alimony, the decree of the circuit court, which was confirmed by the appellate court, stated that an offer in good faith by the husband to receive back his wife in his home and treat her properly will prevent a decree for alimony.

In Pennsylvania, there are decisions under a statute authorizing a proceeding by a wife to compel her husband to make an allowance for her support.

In Yetter v. Yetter (Pa.) *supra*, it was held that where a husband who had separated from his wife because of her acts of abuse offered to take his wife back and live with her again, both before and during the trial, she was not entitled to separate maintenance, the court saying: "The court could have put the defendant to the test of his good faith by continuing the case for a reasonable time, but this was not done. The defendant promptly attempted a reconciliation with his wife. There was nothing inconsistent in his attitude toward her. He tried

to save the home furniture, and sold it only after the wife had four times refused to return to him. He was not shown to be of evil or dissolute habits, or that he was actuated by any other than a proper motive in resuming his home relation with his wife and baby. He was engaged in honorable employment, at fair wages, and could readily perform his undertaking, and, so far as this record shows, he was entitled to have his promise made under oath taken at its face value. How else could he make manifest his sincerity and good faith? Being the plaintiff in such a proceeding, equity expects of her that she shall at least meet her husband half way. This she has persistently refused to do, and is not entitled to the relief furnished by the act under which she has proceeded."

And in Com. ex rel. Perry v. Perry (Pa.) *supra*, it was held that although a wife has separated herself from her husband because of unkind and brutal treatment, where the husband offers her a home, promises to treat her kindly, and to provide for her the comforts of life, which she refuses to accept, she is not entitled to an order for support under the statute.

In Logan v. Logan (Ky.) *supra*, a wife's suit for alimony, the court said that if the husband had made a satisfactory offer of reconciliation, and it had been rejected without sufficient cause, the bill ought to have been instantly dismissed. And in Scott v. Scott (1897) 19 Ky. L. Rep. 929, 42 S. W. 886, it was held that a wife could not recover alimony if the husband sought to have her live with him after the abandonment took place, the court saying: "There is some proof in the record that tends to establish the fact that the appellee sought to have her live with him after the abandonment took place. She has never returned to her home, or showed any desire to again take the position of wife in the defendant's home. Under these circumstances she is not entitled to alimony."

In Clubb v. Clubb (Ky.) *supra*, it was said that if the husband should procure a residence suitable to his situation in life, and in a locality

which is reasonably so adapted, and in good faith will take his wife there and treat her as a husband ought, no further allowance should be made thereafter, since, if a husband is ready and willing to properly support and take care of his wife, he cannot be compelled by a court to pay any sum of money for her separate maintenance.

In *Creasey v. Creasey* (Mo.) *supra*, it was held that an offer by a husband to resume his marital relations and obligations would defeat the wife's suit for maintenance, the court saying: "There does not seem to be any question that a sincere offer on the husband's part to take back and maintain the wife, and treat her with conjugal kindness and affection, will generally defeat her right to a separate allowance. . . . The wife gets no vested right to separate maintenance because her husband has abandoned and refused to provide for her. Such right ceases if he does not persist in such wrongful conduct, and sincerely offers to resume his marital relations and obligations. *Schraeder v. Schraeder* (1888) 26 Ill. App. 524. Nor is the husband's offer to deal rightly by his wife any the less effective to defeat his wife's right to separate maintenance because made after being sued for separate maintenance, or even after a judgment in such suit, though of course the lateness of his repentance might be considered in adjudging the question of his sincerity. *Ibid*. In fact, the judgment should be so framed as to anticipate that contingency, and allow only for a separate support to the wife until he will take her back and treat her with conjugal kindness and affection; and such are the usual terms of such judgments. 1 Bishop, Marr. Div. & Sep. § 1417. If he should sincerely become willing and offer to do that, the necessity for separate maintenance would cease. *Skittletharpe v. Skittletharpe* (1902) 130 N. C. 72, 40 S. E. 851. If the judgment was otherwise drawn, it would still be the duty of the court to refuse to enforce it, if it appeared that the parties had come together again, or that the husband was willing to as-

sume his marital relations and obligations, and was prevented only by his wife's refusal from doing so. *Reid v. Robinson* (1864) 9 Lower Can. Jur. 103. Our statute is in harmony with the foregoing ideas, for it provides that the support and maintenance shall be 'for such time as the nature of the case and the circumstances of the parties shall require,' and that the court shall 'from time to time make such further orders touching the same as shall be just.' Rev. Stat. 1909, § 8295. Applying these principles to the facts of the case at bar, it is evident that the trial court did not err in denying plaintiff a judgment for separate maintenance; it being satisfied by substantial evidence that defendant was willing and had repeatedly offered to resume his marital relations and obligations, and was prevented from doing so only by the refusal of his wife."

In order to defeat a wife's action for separate maintenance, an offer on the part of the husband to take back his wife must be in good faith and under circumstances giving reasonable assurance of amendment on his part. *Johnson v. Johnson* (1888) 125 Ill. 510, 16 N. E. 891.

In *Angelo v. Angelo* (1876) 81 Ill. 251, a husband's suit for divorce wherein the defendant filed a cross bill for separate maintenance, it was held that the defendant was not entitled to the relief sought, where it appeared that shortly after the separation the husband had made two successive applications to her to return, but she peremptorily refused to do so.

In *Thomas v. Thomas* (1894) 152 Ill. 577, 38 N. E. 794, reversing (1892) 44 Ill. App. 604, a wife's suit for separate maintenance, it was held that the willingness of the defendant to take the plaintiff back and provide for her according to his means would defeat the action, although he refused to provide the wife with a conveyance from her residence to his home, but insisted that she should return without his assistance, the distance being 2 miles, since the statute requires that the wife be living apart from her husband without her fault.

Where a husband has tendered to his wife a suitable home, and no reason appears why she should refuse this offer, she is not entitled to an allowance for alimony without divorce under the statute, and her petition therefor will be dismissed. *Quallich v. Quallich* (1905) 33 Ohio C. C. 76, affirmed in (1905) 72 Ohio St. 671, 76 N. E. 1131.

Where a husband made repeated attempts at reconciliation with his wife who had separated from him without just cause, and the wife refused to return except on condition that a little orphan girl whom they had adopted be sent away, which the husband refused to do, and it did not appear from the evidence that the husband's offer to take his wife back was insincere, the wife was not entitled to alimony in her suit seeking alimony without divorce. *Hilton v. Hilton* (1906) 88 Miss. 529, 41 So. 262.

In *Holbrook v. Her Husband* (1866) 18 La. Ann. 643, a suit by a wife against her husband, wherein the plaintiff prayed that the defendant be ordered to receive her in a proper home and furnish her with the conveniences of life, or in default thereof to provide her with separate maintenance and support, the court held that if before the trial of the suit the defendant complies with the demand made upon him as a husband, he should be allowed to show that fact and put an end to the litigation, saying: "Should the plaintiff have been allowed to introduce evidence in support of the allegations of her petition, before the defendant could be permitted to prove the fact set up in the exception as a bar to the action? The exception, fairly construed, means this: Admitting the allegations of the petition, the plaintiff, by consenting to live with the defendant as his wife, has extinguished her cause of action, and in our opinion the defendant can insist upon the trial and decision of his exception before a trial on the merits, as, if sustained by evidence, it would dismiss the suit, there being nothing left for the court to adjudge between the parties. The object of plaintiff's suit is to compel the defendant to re-

ceive and support her as his wife, and, in default of his doing so, to condemn him to support her elsewhere. If before the trial of the suit the defendant complies with the demand made upon him as a husband, he has a right to show the fact and put an end to such litigation, if the wife could be considered as wishing a trial on the merits under such circumstances. There is no exception to plaintiff's right to institute such an action as this. The evidence satisfied the district judge that the defendant had complied with plaintiff's demand, and that the parties were living together as husband and wife, and we see no reason to disturb his judgment."

In *McMullin v. McMullin* (1899) 123 Cal. 653, 56 Pac. 554, a wife's action under the Code for maintenance without divorce, it was held that an offer made in good faith by the defendant over fifteen months after the commencement of the action, to provide a home for the plaintiff at any reasonable place of her own choosing, and to return and live with her as husband and wife, coupled with a request that the plaintiff return and fulfil the marriage contract, was a defense to the action.

An offer by a husband to receive his wife in his home will defeat her action for separate maintenance, although the husband insists that his two children by a former marriage and an aged and infirm sister shall continue to be a part of his household, and the wife cannot annex as a condition to her proposed return the husband's guaranty and assurance that she shall not be interfered with in the performance of her marital duties by the sister or daughters, where it appears that the previous interferences and annoyances complained of did not amount to justifiable cause for leaving the husband; but the only legal course left open to the wife is to accept without condition the husband's offer of his home, and, if permitted to do so, to re-enter there on the performance of her marital duties, and then if the husband declines to receive her, or if on her return he acts in such disregard of her rights as to en-

title her to a judicial separation, there will be no bar to her success in such suit. *Dummer v. Dummer* (1898) — N. J. —, 41 Atl. 149. See to the same effect *Howey v. Howey* (1910) 77 N. J. Eq. 591, 78 Atl. 696, and see *V. b.*

However, the rule was not strictly enforced because of the circumstances in *Marschalk v. Marschalk* (1916) 45 App. D. C. 455, a suit by a wife against her husband, seeking an order for maintenance wherein it appeared that at the time of their marriage the plaintiff and the defendant had purchased a house, for which plaintiff had made a cash payment out of her own funds, and with the defendant had entered into an agreement for a stipulated monthly payment until the house should be paid for, and it was shown that the plaintiff had remained in the house since defendant's departure. It was held that under these circumstances defendant's offer to provide a home for the plaintiff on another street would not defeat the action, since the wife is not compelled to give up the suitable home that had been selected by the parties, with the probable risk of forfeiture of the title. The court, while upholding the decision in *Bernsdorff v. Bernsdorff* (1906) 26 App. D. C. 520, distinguished that case, saying: "As held in that case, if the husband in good faith procures a suitable home and invites the wife to reside there with him, she will not be allowed a decree for separate maintenance elsewhere. In that case the parties had no acquired home and were living with the mother of the plaintiff. The living with the mother-in-law became disagreeable to the husband, and his offer to procure a permanent home elsewhere without the mother-in-law was refused by the wife. They had no family home, and this conclusion had reference to the future condition of the parties."

In Canada, the rule stated seems to have been followed with one apparent exception. Thus in *Evans v. Evans* (1916) 27 Ont. Week. Rep. 69, it is held that an undertaking by a husband to receive his wife if she will return to him, and treat her in every way as a husband should, is a com-

plete answer to her action for alimony.

And in *Moon v. Moon* (1913) 6 Sask. L. R. 41, 23 West. L. Rep. 153, 9 D. L. R. 679, an action for alimony, where it appeared that the defendant through his solicitors informed the plaintiff that he was ready and willing to take her back, and that he himself made a statement to the same effect, although in making this offer the defendant did not in any way retract or apologize for a prior charge of adultery or his conduct in connection therewith, judgment was for the defendant, such charge being the only matter influencing the plaintiff in staying away, and it not constituting cruelty such as is contemplated in an action of this character, the court at the same time saying that it was not disposed to deal leniently with the defendant under the circumstances, but must administer the law as it was found. In *Howey v. Howey* (1879) 27 Grant, Ch. (U. C.) 57, a suit for alimony, it was held that after a husband had excluded his wife from his house, and committed other acts justifying her in living apart, in order to set himself right with her he must offer to receive her back. In *Edgeworth v. Edgeworth* (1904) 3 Ont. Week. Rep. 71, the court dismissed a claim for alimony where it appeared that the defendant had a comfortable home for the plaintiff, was anxious that she should return and live with him, had sent away his daughter who caused trouble between the parties, and the court was not convinced that the plaintiff was afraid to live with her husband. In *Roblin v. Roblin* (1881) 28 Grant, Ch. (U. C.) 439, a suit for alimony in which the defense was that the parties were not married because, as the result of a conspiracy, defendant was induced to go through a marriage ceremony with the plaintiff while so intoxicated that he did not know what he was doing, but said that if the plaintiff was found to be his wife he would receive her as such, the parties were declared man and wife, and the bill dismissed upon the defendant's undertaking to receive and maintain the plaintiff.

Where a husband offered in good

faith to let his wife come back "if she will behave herself," which she refused to do, and it appeared that she would not be in danger of life or limb if she should go back, being a powerful and robust woman, her action for alimony was dismissed. *Hummel v. Hummel* (1908) 11 Ont. Week. Rep. 113. See also *Walsh v. Walsh* (1868) 1 Ch. Chamb. Rep. (U. C.) 234, wherein it was held that a bill for alimony should allege that the husband has refused to receive his wife, since she is bound to live with him if he will receive her.

However, it has been held that the husband cannot insist on his wife's return if she is disposed to live apart, when the husband has committed adultery. *Aldrich v. Aldrich* (1891) 21 Ont. Rep. 447.

And in one Canadian case, *McKay v. McKay* (1860) 6 Grant, Ch. (U. C.) 380, a wife's suit for alimony, it was said that an offer by the husband to receive his wife back and maintain her in his house would not affect the plaintiff's right to a decree, when the case is established upon sufficient evidence.

b. Offer not made in good faith.

But if a husband's offer to take back his wife is not in good faith, it will not defeat the wife's action for separate maintenance.

Alaska.—*Olsen v. Olsen* (1909) 3 Alaska, 616.

California.—*Sheppard v. Sheppard* (1911) 15 Cal. App. 614, 115 Pac. 751.

Connecticut.—*Belden v. Belden* (1909) 82 Conn. 611, 74 Atl. 896.

Illinois.—*Mellanson v. Mellanson* (1904) 118 Ill. App. 81; *Porter v. Porter* (1896) 162 Ill. 398, 44 N. E. 740; *Wilson v. Wilson* (1896) 67 Ill. App. 522; *Winterberg v. Winterberg* (1913) 177 Ill. App. 493.

Iowa.—*Farber v. Farber* (1884) 64 Iowa, 362, 20 N. W. 472; *Smith v. Smith* (1915) 172 Iowa, 329, 151 N. W. 1085.

Maryland.—*McCaddin v. McCaddin* (1911) 116 Md. 567, 82 Atl. 554.

Missouri.—*Spengler v. Spengler* (1889) 38 Mo. App. 266; *Wyrick v. Wyrick* (1912) 162 Mo. App. 737, 145 S. W. 144.

New Jersey.—*Elliott v. Elliott*

(1891) 48 N. J. Eq. 231, 21 Atl. 381; *Parker v. Parker* (1899) 57 N. J. Eq. 577, 42 Atl. 160; *Howey v. Howey* (1910) 77 N. J. Eq. 591, 78 Atl. 696; *Irvine v. Irvine* (1912) 81 N. J. Eq. 20, 88 Atl. 377; *Enslin v. Enslin* (1897) — N. J. Eq. —, 37 Atl. 442; *Eisenger v. Eisenger* (1917) — N. J. Eq. —, 100 Atl. 840.

Pennsylvania.—*Delaware County v. Mercer* (1843) 2 Clark, 75.

South Carolina.—*Briggs v. Briggs* (1886) 24 S. C. 377; *Levin v. Levin* (1904) 68 S. C. 123, 46 S. E. 945; *Taylor v. Taylor* (1811) 4 S. C. Eq. (4 Desauss.) 167; *Threewits v. Threewits* (1815) 4 S. C. Eq. (4 Desauss.) 560; *Williams v. Williams* (1811) 4 S. C. Eq. (4 Desauss.) 183.

Canada.—*Ferris v. Ferris* (1889) 7 Ont. Rep. 496; *E—— v. E——* (1904) 15 Manitoba, L. R. 352; *Rodman v. Rodman* (1873) 20 Grant, Ch. (U. C.) 428; *Rae v. Rae* (1899) 31 Ont. Rep. 321, 19 Can. L. T. 314; *Lovell v. Lovell* (1905) 11 Ont. L. Rep. 547, affirmed in (1906) 13 Ont. L. Rep. 569.

A proceeding for separate maintenance is not defeated by an invitation by the husband to return to his house, which was not made with the view of an honest reconciliation between himself and wife, or with the purpose of leading her to understand that he was willing to atone for his past conduct toward her, but was made for the selfish purpose of the better protecting himself against the action for separate maintenance, and which was, at most, a qualified notice that she might return, accompanied by the information that he did not desire her to do so. *Porter v. Porter* (1896) 162 Ill. 398, 44 N. E. 740.

In *Mellanson v. Mellanson* (Ill.) supra, a wife's suit for separate maintenance, the court held that it was not error to decree separate maintenance although it was suggested that the defendant offered to receive the complainant back and live with her, it appearing that he had never provided her with a home or done anything indicating his good faith in making such offer, and, taking all the evidence together, the court was inclined to think that the proposition to live with his

wife was made by the husband to meet the exigency of his otherwise hopeless defense to the suit, and with no purpose or preparation to carry it out.

In *Wilson v. Wilson* (1896) 67 Ill. App. 522, a wife's action for separate maintenance, although the question was with respect to an order for temporary alimony, it was said that the court is not required to believe that a husband's offer to live with his wife again and support her is sincere.

In view of a husband's positive refusal to receive his wife prior to her action for alimony, the wife is warranted in concluding that the husband's consent, given in open court, that she should return to him and share the same home and support he has, is not made in good faith. *Farber v. Farber* (Iowa) *supra*.

In *Howey v. Howey* (1910) 77 N. J. Eq. 591, 78 Atl. 696, a wife's suit for maintenance, the vice chancellor said that a husband is entitled to a home of his own and to the society of his wife in that home, and if he provides that home, and in good faith invites his wife to come to it, she must come, and alimony must cease from the time the court is apprised of the fact that the husband has in good faith offered to provide her with the home, but that the offers in the instant case did not appear to have been made in good faith, or within the ability of the defendant. In that case it was said further: "It is works rather than words which are forceful and carry conviction, and I do not think the complainant was required to accept the statement of the defendant that he would provide her a home, when he made no effort and had no means to accomplish that purpose,—no apparent present opportunity to accomplish it, at any rate."

An offer by the husband, after the commencement of a suit for separate support, to take back his wife as the mistress of his house, will not defeat the suit where it appears that such offer was a mere pretense to avoid the making of a mandatory order on him to maintain her. *Parker v. Parker* (1899) 57 N. J. Eq. 577, 42 Atl. 160.

In *Eisenger v. Eisenger* (N. J.) *supra*, a wife's suit against her husband, seeking, among other things, separate maintenance, the wife had a decree for maintenance, although the defendant stated that he had endeavored to get the complainant to return to him, and that he tried to call upon her, and that the family refused to tell him where she was, it appearing that the defendant had no copy of the letter, which was not produced or called for, and the court was therefore unable to determine whether the letter contained any expressions of repentance, or promises of reformation on the part of the husband, and the court's personal recollection of the defendant on the stand, and another letter written to the wife by the defendant, induced a belief that the letter did not contain such expressions.

An offer by a husband to live with his wife, which appears to have been made for the mere purpose of technically complying with the views of the court expressed in a former case, will not defeat an action for alimony. *Enslin v. Enslin* (1897) — N. J. —, 37 Atl. 442.

In *Irvine v. Irvine* (1912) 81 N. J. Eq. 20, 88 Atl. 377, a wife's suit for alimony and maintenance, the court said in granting temporary alimony that the wife had presented a *prima facie* case entitling her to a trial of the question whether the circumstances of the separation were such as to make the husband's present offer, pending suit, of rooms to live in with him, no defense to the suit, because not made with any right to expect it to be accepted.

A mere assertion by a husband that he is ready and willing to support his wife if she will live with him is not a defense to the wife's action for alimony, where there is no evidence tending to show that the husband has made any effort to have the wife return to his home, or has offered to provide her with a home there or elsewhere, but if they become willing to live together they can do so, and the alimony will cease. *McCaddin v. McCaddin* (1911) 116 Md. 567, 82 Atl. 554.

So, in *Elliott v. Elliott* (1891) 48 N. J. Eq. 231, 21 Atl. 381, an action by a wife for alimony and maintenance, brought under the Divorce Act, it was held that an offer by the defendant to discharge his marital duties, made after the suit was commenced, was not a defense where there was no manifestation by act or effort on his part that his proposition was sincere, or made with the expectation that it would be accepted.

In *Wyrick v. Wyrick* (1912) 162 Mo. App. 737, 145 S. W. 144, a wife's action for maintenance brought under a statute although the issue was the allowance of alimony pendente lite, the court held that an offer on the part of the defendant husband to take the plaintiff back into his home as his wife, and her refusal to return, are not a bar to the action, when such offer is not made in good faith and the wife cannot reasonably expect the husband to keep his promises.

Where a wife left her husband with his consent, in order to defeat her right to separate maintenance under the statute he must request her to return and give her assurance of better treatment if she should return, both on the part of himself and his relatives who live with them, since the husband must furnish his wife with a home in which her domestic happiness is considered. *Spengler v. Spengler* (1889) 38 Mo. App. 266.

In an early South Carolina case, *Taylor v. Taylor* (1811) 4 S. C. Eq. (4 Desauss.) 167, a suit for alimony, it was held that an offer by the defendant in open court to take back the complainant as his wife, and to cohabit with her, would not preclude the recovery of alimony by the wife until such time as both parties might be somewhat cooled, and the wife might return with some kind of safety to her husband, it appearing that the defendant had, before their separation, subjected his wife to violent and outrageous treatment, and her fears were expressed to everyone who spoke to her about reconciliation, the opinion of the court being that from all that was related of the violent temper of the

husband such fears were not groundless.

Where a husband has previously violated his promises of reform upon his wife's return to him, and returned to his former habits of cruelty and ill usage on each occasion, the court will not believe that his offer to take back his wife and treat her kindly and affectionately, as a husband ought to do, is made with a fixed intent to reform and behave better to his unfortunate wife, and will not, under such circumstances, permit the offer to defeat the wife's right to a provision for her support. *Threewits v. Threewits* (1815) 4 S. C. Eq. (4 Desauss.) 560, in which the court said: "But it is insisted that the defendant has offered to take back his wife, and treat her kindly and affectionately as a husband ought to do. If this offer were made bona fide, in good earnest, with a view to keep his promises and not merely to elude the effects of the breach of former promises, the court would most willingly listen to it, and endeavor to obtain its reception by the wife. But there is little reason to believe that this offer is made with that fixed intent to reform and behave better to his unfortunate wife, on which reliance can be placed. I speak the language of his nearest kinsman, the respectable old witness, Major Threewits, when I say that I have no hope of this reform and no confidence in these promises. His violation of all former ones forbids it; and it would be a miserable elusion of justice to permit the defendant to disarm the court, and to send back his wife to his cruelty, on the faith of promises so often broken."

When the past misconduct of a husband has justified his wife in leaving him, a mere invitation to her to return to him does not impose on the wife any obligation to return at the risk of like treatment, but his invitation must be accompanied by such expression of sorrow as would lead a court to hold that the wife had reasonable ground to expect ordinary respect and consideration in the future, so that a wife's refusal to return is justified by the husband's charge of unchastity,

concerning which he offers no word of retraction or regret. *Levin v. Levin* (1903) 68 S. C. 123, 46 S. E. 945.

So, in *Briggs v. Briggs* (1886) 24 S. C. 377, a wife's action for alimony, it was held that the rule that an offer by her husband to take back his wife should condone all past offenses is not satisfied by a statement in the answer that the defendant has at all times been willing to provide plaintiff with a home in his residence, and to support and maintain her in such comfort as his condition and circumstances will justify, etc., it not being satisfactorily shown by the evidence that the defendant has ever made such an offer in plain unequivocal terms, the court saying: It does not strike us that the rule which declares that an offer to take back should condone all past offenses is fully satisfied by a cold, formal proposition to give the wife of his youth and the mother of his children merely house room and supplies sufficient to appease hunger and support animal life. The heart of a true wife craves and is entitled to something more than that. As we understand it, the invitation back which the rule contemplates is a cordial overture by the husband to return to the bosom of his family, and there, as its head, to discharge her household duties and to be cherished and supported as a wife should be, and be treated with respect and conjugal love and tenderness. The invitation of Mr. Briggs, after all that had occurred, after frequently declaring that he would never again live with the plaintiff, and especially in view of the fact that he was then living in adultery with a woman of bad character, was too apparently a mere affectation, and it is not at all surprising that the wife declined it as a hollow mockery of her rights as his wedded wife, the mother of his children, and the rightful mistress of his house and heart. We cannot say that in this respect the judge erred in decreeing alimony."

A wife's right of action for maintenance is not prejudiced by the husband's offer to live with her and resume marital relations, if the offer is made with bad grace, or to defeat the

suit, and is not made in good faith and with the intention of returning to his wife and giving to her the treatment and home and support due her, taking into consideration his ability and surrounding circumstances. *Olsen v. Olsen* (1909) 3 Alaska, 616.

The prior offer of a husband to receive his wife and maintain her will not defeat an action by the directors of the poor to indemnify the county for the support of the wife, and to secure an order appropriating property of the husband, unless the court is convinced that the offer is made in sincerity and that from the character and conduct of the husband there is a reasonable probability that it will be faithfully adhered to. *Delaware County v. Mercer* (1843) 2 Clark (Pa.) 75, in which the court said: "It is generally true that where a husband, after a separation, offers in good faith to receive his wife and expresses his willingness to maintain her if she will come home and do her duty, the court will not by this summary mode devote his property to her support without his consent. But this rests in the discretion of the court; and it ought to be convinced not only that the offer is made in sincerity, but that from the character and conduct of the man there is a reasonable probability that it will be adhered to. Under certain circumstances, such an offer would be a mockery, as where the husband is habitually intemperate and therefore violent; or, without being the subject of habits of intoxication, is, from ungovernable passions or calculating malignity, dangerous. To compel a wife to trust herself to such a protection as this would, as was justly remarked in an analogous case, *Kinsey v. Kinsey* (1791) 1 Yeates (Pa.) 78, 'be cruel in the highest degree to unfortunate married women.'"

In *Winterberg v. Winterberg* (1913) 177 Ill. App. 493, it was held that a husband's cruel and unwarranted denunciations of his wife warranted the conclusion of the trial court that the husband's offer at the trial to live with his wife was not made in good faith.

The law does not impose on a husband the duty of supporting a wife

who lives separate and apart from him against his will and consent, where on his part, and notwithstanding past offenses, he offers to fulfil the marriage contract, but such offer must be made in good faith,—a question of fact to be determined by the trial court,—and such offer is not shown to be in good faith where it does not appear that the husband has offered to dismiss or discontinue an action for divorce which was instituted while the plaintiff and defendant were living together. *Sheppard v. Sheppard* (1911) 15 Cal. App. 614, 115 Pac. 751.

It is idle for a husband to testify to his willingness to live with his wife while professing convictions as to her infidelity. *Smith v. Smith* (1915) 172 Iowa, 329, 151 N. W. 1085.

In *Williams v. Williams* (1811). 4 S. C. Eq. (4 Desauss.) 183, in which, at the trial, the defendant stated that he was anxious for his wife's return to him, and that he offered to receive her in his home, the court did not discuss the offer, but decreed suitable alimony, it appearing that the husband kept a mistress in his house.

In *Belden v. Belden* (1909) 82 Conn. 611, 74 Atl. 896, an action by a wife to compel her husband to contribute a reasonable sum for her support, brought under a statute providing for support by certain relatives, in which, although the court held that the statute under which the proceedings were brought is one designed for the protection of the public interest, and not for the enforcement by a wife of her marital rights of support and maintenance, since for the latter purpose other methods are provided, and the statute, therefore, may not be resorted to to compel a husband to provide a maintenance for his wife commensurate with his standing and means and the standard of living to which he may have accustomed her, or which is usual in the station in life in which he may have placed her, it was further held that where the record disclosed that during the latter portion of the time when the wife continued to be a part of the household there was such disregard of her necessities, and she was subjected to such indignities, humil-

iating treatment, and personal abuse that her life there was rendered unendurable, a proffer of support by the husband under such conditions was not one which the law countenances or recognizes and hence was not a defense to the action.

In Canada, the rule that the husband's offer must be made in good faith finds support in a number of cases. Thus, in an action for alimony, an offer by the husband to take the wife back is not a defense when it does not appear to be a bona fide, but is insincere and made to afford a defense to the action. *Lovell v. Lovell* (1905) 11 Ont. L. Rep. 547. In a wife's action for alimony on the ground of desertion, in order to give effect to the husband's offer and willingness to receive back his wife as a defense to the action, the court must be satisfied that the offer is made bona fide, and is not merely set up to prevent the pronouncement of judgment against him. *Rae v. Rae* (1899) 31 Ont. Rep. 321, 19 Can. L. T. 314. Although a husband offers to take his wife back, the court should be very slow to accept repentances made at the eleventh hour, and under the provocation of a decree for alimony hanging over the head of the supposed penitent. *Blake, V. C.*, in *Rodman v. Rodman* (1873) 20 Grant, Ch. (U. C.) 428. A husband's offer to receive his wife at any time when she is prepared to reside with him, and to accept the home he is able to provide for her, and to conduct herself as a wife reasonably should, will not defeat the wife's action for alimony where the court is convinced that such offer is made with the sole object of preventing the plaintiff from obtaining the relief sought, and not because the defendant is really willing to receive her back as his wife. *E——— v. E———* (1904) 15 Manitoba L. R. 352. So, in *Ferris v. Ferris* (1889) 7 Ont. Rep. 496, in a wife's action for alimony, where it appeared at the trial that the husband was willing to receive back and support his wife, but the court was not convinced that the offer was bona fide or made with the honest intention of carrying it out, final decision was

withheld for a month or six weeks, during which period the action would be dismissed if the husband could show to the satisfaction of the court by affidavit or depositions that he had done all that he could to effect a reconciliation, but it was held that failing such showing the wife was entitled to a decree for alimony.

c. Improper home offered.

Where the home in which the husband offers to receive his wife is not a proper one, the wife's action for separate maintenance will not be defeated by his offer to take her back and resume the marital relation. *Bernsdorff v. Bernsdorff* (1906) 26 App. D. C. 520; *Parker v. Parker* (1910) 134 Ga. 316, 67 S. E. 812; *Fred v. Fred* (1904) 67 N. J. Eq. 495, 58 Atl. 611; *Almond v. Almond* (1826) 4 Rand. (Va.) 662, 15 Am. Dec. 781; *Weir v. Weir* (1864) 10 Grant, Ch. (U. C.) 565.

Thus in *Bernsdorff v. Bernsdorff* (D. C.) *supra*, a suit by a wife against her husband for maintenance and support, it was held that the suit could not be defeated by an offer by the husband of a home in his mother's Virginia residence, it appearing that the mother had no house, but was employed by the owner of a farm in Virginia, who lived elsewhere, and received her wages and board and occupied the farmhouse, without a lease of the house or contract for a definite period of service, although there was ample room in the house, and the owner was willing that plaintiff and defendant should occupy it also while the mother remained. It was further stated by the court that if the husband should thereafter in good faith procure a suitable home and invite his wife to take up her residence therein, her declination would afford ample ground for discharging him from further charge of maintenance.

In *Fred v. Fred* (1904) 67 N. J. Eq. 495, 58 Atl. 611, a suit to compel the defendant to provide suitable support and maintenance for his wife and child, the court held that the wife was not required to accept offers on the part of the husband to receive her back in his home, where it appeared that the offers were not sincere, and

also that the husband was living with another woman whom he recognized as his wife, saying: "The defendant offered some testimony tending to show that he had requested his wife to come to Newark and live with him, offering to provide for her and her child, but I have no hesitation in saying that if the testimony of the witnesses called on this point is to be credited such offers were not, in my opinion, made in good faith. Each offer related to a time when he was under arrest, or seeking to escape from an obligation his wife was endeavoring to enforce, and, if made, were only intended for the purpose of affording a temporary relief from his then present difficulty. In addition to this, the wife was not bound to return to the home of her husband with her young daughter, when at that time the husband was living in open adultery with another woman whom he recognized as his wife."

In *Almond v. Almond* (1826) 4 Rand. (Va.) 662, 15 Am. Dec. 781, the court stated the rule that, where a separation has taken place and the wife sues for support, if the husband in his answer states that she left him of her own accord, that he has offered to receive her and is willing to receive her and treat her well, the court shall refuse maintenance, but said that there must be exceptions to this rule, and that where it should be fully proved to the court that the husband was in the constant habit of intoxication, and that when drunk he was a madman and his anger particularly pointed at his wife, surely the court would not, because of the offer to take her back, refuse a support and thus force her either to hazard her life or depend on charity.

A husband's willingness to receive his wife in his home will not defeat her claim for alimony where it appears that when her husband took her home on a former occasion his adult children prevented her entrance, and it appears that she would not be allowed to remain if she should again venture a visit, and an adult son swears that neither he nor his brothers and sister will have her there. *Weir v. Weir* (U. C.) *supra*.

In *Parker v. Parker* (1910) 134 Ga. 316, 67 S. E. 812, a wife's action for permanent alimony, in which it appeared that the husband had moved alone to a place in which the wife could not live because of an incurable disease, it was held in the official syllabus that the trial court properly refused to instruct the jury that the plaintiff could not recover if the defendant endeavored to persuade his wife to remove to such place, and she refused when physically able to do so, or if she afterwards became physically able to move and refused to move to such place and reside with the husband, and he was at all times willing to receive her in his home.

d. Conditional offer.

A husband may not impose unreasonable conditions on his offer to receive his wife in his home, although the fact that the offer is conditional will not necessarily entitle the wife to reject it. *Schraeder v. Schraeder* (1888) 26 Ill. App. 524; *Cash v. Cash* (1915) 201 Ill. App. 151; *Lindenschmidt v. Lindenschmidt* (1888) 29 Mo. App. 295; *Coulter v. Coulter* (1913) 175 Mo. App. 1, 161 S. W. 281; *Meeker v. Meeker* (1893) — N. J. Eq. —, 27 Atl. 78; *Keith v. Keith* (1877) 25 Grant, Ch. (U. C.) 110.

In *Cash v. Cash* (1915) 201 Ill. App. 151, a wife's suit for separate maintenance, it appears from the published abstract of the decision that it was held that the defendant's offer to receive the complainant back as his wife would not defeat the action, because the offer was coupled with so many conditions and limitations that no self-respecting woman could comply therewith.

In *Coulter v. Coulter* (1913) 175 Mo. App. 1, 161 S. W. 281, an action under the statute for maintenance, it was held that the failure of a husband to offer his wife necessary traveling expenses deprived his offer to receive her back and provide for her of any legal force.

However, in *Schraeder v. Schraeder* (1888) 26 Ill. App. 524, a wife's action for separate maintenance, it was held that the husband's request, after

the suit was filed, that the wife should return to him, justified the chancellor in dismissing the bill, it appearing that the husband at the hearing swore that he was willing to live with his wife if she would treat him right and not quarrel with him, and that if she had come back alone when she came with witnesses, on a former occasion, he would have received her. The court said: "There seems to be no reason why they should not be reconciled and live together as husband and wife. She did not get a vested right to separate maintenance simply because her husband refused to receive her when she went back, and under the circumstances we think she ought to have gone back when he requested her after the bill was filed. The policy of the law is to maintain the marriage relation after it is entered upon, and not to allow separations for trivial causes, and we think the court below was right in dismissing the bill and leaving complainant to return to her husband in a wifely manner, and in good faith make the attempt to live with him. If he should illtreat her, or if, upon an unequivocal attempt to return to him, he shall repulse her or refuse to cohabit with her as her husband, the decree in this case will not bar her remedy against him. A large discretion is lodged in the chancellor in separate maintenance cases, and it is properly exercised in discouraging rather than encouraging the permanency of separation between husband and wife, and under the circumstances appearing in the record, we think the discretion was wisely exercised in this case."

Likewise a husband may properly annex to his offer to take his wife back and provide for her comfort and support, a condition with regard to his wife's male acquaintances who were objectionable to him. *Meeker v. Meeker* (1893) — N. J. Eq. —, 27 Atl. 78.

In *Lindenschmidt v. Lindenschmidt* (1888) 29 Mo. App. 295, a wife's action for maintenance, it was held that a wife was bound, if her husband required it, to return to his home and share the lot which he shared, wheth-

er he saw fit to allow other members of his family to live with him or not, although he would be required, in case of her return, to protect her from insult or abuse at the hands of other members of his family.

Where the defendant in a suit for alimony, by his answer, offered to receive the plaintiff as his wife whenever she should bring his children back to him, and the plaintiff, without calling any evidence, declared her willingness to return and live with her husband, a decree was made accordingly. *Keith v. Keith* (1877) 25 Grant, Ch. (U. C.) 110.

In *Jelineau v. Jelineau* (1801) 2 S. C. Eq. (2 Desauss.) 45, a wife's suit for alimony for the maintenance of herself and child, it was held that an offer by the defendant in his answer to the effect that if the court should think it proper that he should receive his wife and maintain her at his house he was ready to do so, and treat her with the same respect as she should treat him, would not defeat the wife's suit, where it appears from the sworn answer of the defendant that the parties could not live happily together.

e. Husband's adultery.

A husband who has committed adultery cannot insist on his wife's return, if she is disposed to live apart. *Aldrich v. Aldrich* (1891) 21 Ont. Rep. 447; *Falvey v. Falvey* (1903) 2 Ont. Week. Rep. 832.

f. Offer subsequent to decree or order.

The rule that a husband's bona fide offer to resume marital relations with his wife will defeat her action for separate maintenance is applicable to a bona fide offer, made after the decree or order for a separate allowance, which will relieve the husband of the duty to pay an allowance decreed.

California.—*Sheppard v. Sheppard* (1911) 15 Cal. App. 614, 115 Pac. 751.

District of Columbia.—*Shaw v. Shaw* (1894) 2 App. D. C. 204.

Mississippi.—*Kenley v. Kenley* (1838) 2 How. 751.

New Jersey.—*Enslin v. Enslin* (1897) — N. J. Eq. —, 37 Atl. 444; *Lamsback v. Lamsback* (1908) — N. J. Eq. —, 71 Atl. 387.

South Carolina.—*Rhame v. Rhame* (1826) 6 S. C. Eq. (1 M'Cord) 197, 16 Am. Dec. 597; *Hair v. Hair* (1858) 31 S. C. Eq. (10 Rich.) 163.

Virginia.—*Purcell v. Purcell* (1810) 4 Hen. & M. 507.

England.—*Whorewood v. Whorewood* (1675) 1 Ch. Cas. 250, 22 Eng. Reprint, 785.

Canada.—*Cronk v. Cronk* (1872) 19 Grant, Ch. (U. C.) 283.

Though alimony has been decreed, if the husband makes a bona fide offer to take back the wife whom he has deserted, and to treat her with conjugal kindness and affection, and the wife refuses such offer on application by the husband the court will, if satisfied of the sincerity of the husband's offers, rescind the decree for alimony. *Hair v. Hair* (1858) 31 S. C. Eq. (10 Rich.) 163.

It has been held that though a wife had separate maintenance decreed to her on just grounds of cruel treatment, it will be discontinued on the bona fide offer of the husband to cohabit with her, and his promise to treat her kindly and affectionately in the future. *Kenley v. Kenley* (1838) 2 How. (Miss.) 751.

In *Rhame v. Rhame* (1826) 6 S. C. Eq. (1 M'Cord) 197, 16 Am. Dec. 597, the court said that alimony is usually allowed until the husband shall agree to take his wife back and treat her with conjugal affection, and that whenever the husband professes to have complied with those terms, and comes to be relieved from the payment of alimony, the court will grant the relief upon his faithfully performing the condition.

In *Shaw v. Shaw* (1894) 2 App. D. C. 204, alimony to a wife was ordered until such time as the husband should be willing to resume his marital duties and obligations in good faith.

Separate maintenance should not continue longer than until the husband is willing to restore his wife to the comforts of bed and board, and to give satisfactory assurances for her enjoyment thereof, which, if she should refuse the allowance made for her support, would, at his instance, be

taken away. *Purcell v. Purcell* (1810) 4 Hen. & M. (Va.) 507.

In *Whorewood v. Whorewood*, 1 Ch. Cas. 250, 22 Eng. Reprint, 785, a decree for alimony made during the "suspension of the ecclesiastical jurisdiction" was, in 1675, on the offer of the husband to be reconciled and cohabit with his wife, suspended during a cohabitation of half a year ordered by the court.

It has been said that under the provisions of the California Civil Code authorizing the court to vary, alter, or revoke an order awarding separate support and maintenance to a wife, on a proper application for a modification or revocation of such order, accompanied by an offer on the part of the husband to furnish his wife with a suitable home within his means, and a proposal made in good faith to treat her with conjugal kindness, the court will lend its aid in effecting a reconciliation. *Sheppard v. Sheppard* (1911) 15 Cal. App. 614, 115 Pac. 751.

If a husband, subsequently to a decree for alimony in a wife's suit for separate support, can show that he has in good faith prepared a home for his wife, his petition to modify or discharge the order for alimony will be heard. *Enslin v. Enslin* (1897) — N. J. Eq. —, 37 Atl. 444.

On a husband's petition to modify a decree for alimony, the conduct of the husband as disclosed at the former hearing not being such as to bar him of his entire rights as a husband, and it appearing that he is denied the right of personal intercourse with his wife, and of the privilege of calling upon her and making an attempt to win her affections, he is entitled to an order terminating the alimony, since if he is repentant for prior faults, and is sincere in his determination to treat his wife properly and to do by her as a husband should by a wife, he is entitled to the benefit of his repentance. *Lamsback v. Lamsback* (1908) — N. J. —, 71 Atl. 387.

However, in *Cronk v. Cronk* (1872) 19 Grant, Ch. (U. C.) 283, it was held that a husband does not have an absolute right to have a decree for alimony rescinded or suspended because he is

willing to have his wife live with him again, but must obtain her consent, and give some binding assurance that her small allowance will not be imperiled or lost by her compliance with his wishes, the court saying in part: "If the defendant really wishes to be reconciled to his wife for any other purpose than the contemptible one of getting rid of the small allowance which the master has made to her (and which is a mere bagatelle to a man of the defendant's proved wealth), let him obtain his wife's consent to return to him; let him withdraw the foul aspersions which he has cast upon her, and did not attempt to prove; and let him offer to give a binding stipulation that her little allowance shall not be imperiled or lost by her acceding to his professed wishes, but shall be continued notwithstanding the renewal of cohabitation. But for the court to attempt, after all that has passed between these parties, to compel the wife's return by vacating the decree which she has obtained, would be a gross injustice which I think there is no law entitling the defendant to demand."

So it has been held that the fact that, subsequent to a conviction and order to pay his wife a weekly amount, the husband offered to live with and support her, could not be shown in an action for arrears on his bond. *Tully v. Stout* (1905) 96 N. Y. Supp. 1080.

g. Cohabitation or reconciliation terminating allowance.

Where separate maintenance has been ordered or decreed a reconciliation or resumption of cohabitation by a husband and wife will terminate the wife's right to separate support.

Colorado.—*Hanscom v. Hanscom* (1895) 6 Colo. App. 97, 39 Pac. 885.

Illinois.—*Umlauf v. Umlauf* (1882) 103 Ill. 651.

Iowa.—*Goldie v. Goldie* (1904) 123 Iowa, 178, 98 N. W. 630, 99 N. W. 707.

Kentucky.—*Lockridge v. Lockridge* (1835) 3 Dana, 28, 28 Am. Dec. 52; *Logan v. Logan* (1841) 2 B. Mon. 142; *Hulett v. Hulett* (1882) 80 Ky. 364.

Maryland.—*Hewitt v. Hewitt* (1825) 1 Bland, Ch. 101; *Polley v. Polley* (1916) 128 Md. 60, 97 Atl. 526; Wall-

ingsford v. Wallingsford (1823) 6 Harr. & J. 485; Macnamara's Case (1707) 2 Bland, Ch. 565, note; Scott's Case (1747) 2 Bland, Ch. 565, note.

Massachusetts.—McIlroy v. McIlroy (1911) 208 Mass. 458, 94 N. E. 696, Ann. Cas. 1912A, 934.

Nebraska.—Price v. Price (1906) 75 Neb. 552, 106 N. W. 657; Keup v. Keup (1915) 98 Neb. 321, 152 N. W. 555.

New Jersey.—Kuntz v. Kuntz (1912) 80 N. J. Eq. 429, 83 Atl. 737.

North Carolina.—Skittletharpe v. Skittletharpe (1902) 130 N. C. 72, 40 S. E. 851; Crews v. Crews (1918) 195 N. C. 168, 95 S. E. 149.

South Carolina.—Prather v. Prather (1809) 4 S. C. Eq. (4 Desauss.) 33; Rhame v. Rhame (1826) 6 S. C. Eq. (1 M'Cord) 197.

Tennessee.—Cureton v. Cureton (1906) 117 Tenn. 103, 96 S. W. 608.

England.—Oxenden v. Oxenden (1705) 2 Vern. 493, 23 Eng. Reprint, 916, Gilb. Eq. Rep. 1, 25 Eng. Reprint, 1, Prec. in Ch. 239, 24 Eng. Reprint, 116; Williams v. Callow (1717) 2 Vern. 752, 23 Eng. Reprint, 1091.

Canada.—Reid v. Robinson (1864) 9 Lower Can. Jur. 103.

Thus in Macnamara's Case (1907) 2 Bland, Ch. (Md.) 565, note, separate maintenance was granted to a wife until the parties should mutually reconcile themselves and cohabit.

So, in Keup v. Keup (1915) 98 Neb. 321, 152 N. W. 555, separate support was granted until further order of the court, or until such time as the husband should provide a suitable home for the wife.

And in Prather v. Prather (1809) 4 S. C. Eq. (4 Desauss.) 33, alimony without divorce was granted during the time the husband and wife should live apart, or until he should agree to cohabit with her and to treat her as becomes a man to treat his wife.

So it has been held that where alimony is decreed it should be allowed only during the joint lives of the husband and wife, or until reconciliation and recohobitation, since no obstacle to a restoration of the conjugal relations should be interposed by a decree for maintenance, to which the

wife is entitled only during the separation; but the reconciliation must be permanent, and not a momentary reunion for the purpose of frustrating a decree for alimony. Lockridge v. Lockridge (1835) 3 Dana (Ky.) 23, 23 Am. Dec. 52.

In Goldie v. Goldie (1904) 123 Iowa, 178, 98 N. W. 630, 99 N. W. 707, a husband's suit for divorce, in which the wife in a cross petition asked for separate maintenance, and the husband abandoned his suit and left the country while the wife's action for separate maintenance was pending, although defense was made for him at the trial, at which he was not present, it was held that under the facts of the case the husband's only offense appearing in the report of the case being desertion, the wife was only entitled to separate maintenance so long as the husband should neglect or refuse to properly support her, and if he should make provision for her proper support and comfort in his own home, she could no longer demand separate maintenance.

Alimony is usually allowed until the husband agrees to take his wife back and treat her with conjugal affection, and whenever the husband professes to have complied with those terms, and comes to be relieved from the payment of alimony, the court will grant the relief only upon his faithfully performing the condition. Rhame v. Rhame (1826) 6 S. C. Eq. (1 M'Cord) 197.

In Hewitt v. Hewitt (1825) 1 Bland, Ch. (Md.) 101, the decree for alimony was made to continue during the natural lives of the parties so long as they should live separate and apart from each other, subject to revision.

In Scott's Case (1747) 2 Bland, Ch. (Md.) 565, note, maintenance was decreed a wife during the joint lives of both parties, unless they should be reconciled and mutually agree to cohabit together, but in case of such reconciliation and cohobitation the payment to cease.

Under a statute providing that, if a husband shall separate himself from his wife and fail to provide for her necessary subsistence according to his

means and condition in life, the wife may by special proceeding have a reasonable subsistence secured to her from the estate of her husband, it was held that if the husband should return to the wife and resume his marriage relations and obligations, the necessity for such a provision would cease. *Skittletharpe v. Skittletharpe* (1902) 130 N. C. 72, 40 S. E. 851.

Alimony is a maintenance afforded to the wife where the husband refuses to give it, or where from his improper conduct he compels her to separate from him, and is a provision for her support, to continue during their joint lives or so long as they continue to live apart, and upon their mutual consent to live together it ceases. *Wallingsford v. Wallingsford* (1823) 6 Harr. & J. (Md.) 398.

In *Polley v. Polley* (1916) 128 Md. 60, 97 Atl. 526, a suit for alimony under the Code, the court said that on the mutual consent of husband and wife to live together alimony ceases.

In *Umlauf v. Umlauf* (1882) 103 Ill. 651, it was said that the resumption of the conjugal relation or the death of either party would operate as the extinguishment of the wife's claim to an allowance for separate maintenance.

Monthly payments for separate maintenance should continue only until a reconciliation shall have been effected between the husband and wife, and until the husband shall have returned, but the chancellor should be fully satisfied as to the facts before ordering that the payments be discontinued. *Cureton v. Cureton* (1906) 117 Tenn. 103, 96 S. W. 608.

In *Price v. Price* (1906) 75 Neb. 552, 106 N. W. 657, maintenance was ordered until the husband should have provided a home for plaintiff in which she can live with him as his wife.

A judgment for alimony awarded as an independent right under statute terminates on the reconciliation of the parties, and on motion and sufficient evidence. *Crews v. Crews* (1918) 195 N. C. 168, 95 S. E. 149.

In *Logan v. Logan* (1841) 2 B. Mon. (Ky.) 142, it was held that if, after the premature filing of a bill for alimony, a husband had made a satisfac-

tory offer of reconciliation, and it had been rejected without sufficient cause, the bill ought to have been instantly dismissed.

Where a separation was proper by reason of the cruel treatment of the husband, the chancellor has the power to require the husband to support the wife during coverture, or until a reconciliation takes place between the parties. *Hulett v. Hulett* (1882) 80 Ky. 364.

If successful in a suit for separate maintenance, a wife is entitled to a reasonable amount during coverture, or until reconciliation, estimated with reference to the means of her husband, and payable out of his estate. *Hanscom v. Hanscom* (1895) 6 Colo. App. 97, 39 Pac. 885.

In *Kuntz v. Kuntz* (1912) 80 N. J. Eq. 429, 83 Atl. 787, a wife's suit for maintenance under the statute, the court said that the return of the wife to her husband, and the resumption by the parties of their wonted marital relations, had ended all litigation between them, rendering it impossible for the court to make any adverse order in the cause, or perhaps any order whatever, except an order dismissing the bill.

In *Reid v. Robinson* (1864) 9 Lower Can. Jur. 103, it was held that where a wife became reconciled with her husband after an alimentary allowance had been made, pending the wife's action en separation de corps et de biens, such reconciliation terminated her right to the allowance and made it necessary for her to begin the action again.

In *Williams v. Callow* (1717) 2 Vern. 752, 23 Eng. Reprint, 1091, the allowance for a wife's separate maintenance was for her necessary support and maintenance until the husband should have applied himself to some course of business or some way of living suitable to receive his wife, he having put the wife in danger of her life by firing a pistol at her, and other rude and cruel treatment, she having been turned out of doors by the plaintiff's father.

In *Oxenden v. Oxenden* (1705) Gilb. Eq. Rep. 1, 25 Eng. Reprint, 1, 2 Vern. 493, 23 Eng. Reprint, 916, Prec. in Ch.

289, 24 Eng. Reprint, 116, it appears that the separate maintenance allowed a wife was until there should be a resumption of cohabitation.

However, in *McIlroy v. McIlroy* (1911) 208 Mass. 458, 94 N. E. 696, Ann. Cas. 1912A, 934, it was held that the right of a wife to obtain and enforce an order for her support by her husband was not necessarily destroyed by the fact that she had returned to his home, and the order once made should continue in force until revised or altered by the court itself, upon proper application and due hearing, but the decree is not annulled either permanently or temporarily by acts of the parties.

VI. Allowance or necessities furnished.

a. Allowance.

It seems that the fact that a husband is making his wife a suitable and regular allowance is a defense to her action for separate support and maintenance. *Lathrop v. Lathrop* (1906) 78 Conn. 650, 63 Atl. 514; *Dudley v. Dudley* (1916) 86 N. J. Eq. 245, 98 Atl. 452; *Symington v. Symington* (1896) — N. J. Eq. —, 36 Atl. 31.

Thus in *Dudley v. Dudley* (1916) 98 N. J. Eq. 245, 98 Atl. 452, a wife's action for maintenance brought under the Divorce Act, which provides that a wife may secure support and maintenance where her husband, without justifiable cause, abandons or separates himself from her and neglects or refuses to maintain and provide for her, it was held that the wife was not entitled to a decree for separate maintenance where, almost immediately after the separation, the defendant offered to make a reasonable monthly allowance for the wife, has constantly been ready to make such allowance, and has frequently attempted to persuade her to accept it for her maintenance and support, since, under the statute, to entitle the wife to relief it must appear not only that the husband has abandoned her or separated himself from her, but also that he refuses or neglects to maintain and provide for her in such a manner as the circumstances of the parties make suitable.

In *Lathrop v. Lathrop* (Conn.) supra, an action brought by a wife against her husband for support under a statute authorizing such action where any person shall become poor and unable to support himself or herself, and family, and shall have a husband, father, or mother, etc., who are able to provide such support and shall neglect to do so, in which the court accepted as the standard by which the defendant's alleged neglect was to be determined that by which the law measures his marital duty of maintenance, it was held that an allowance by the husband which was not palpably inadequate or unsatisfactory to the plaintiff, and of which she accepted the first monthly instalment, would defeat the action, since there was not on the defendant's part a neglect to provide a suitable support within the meaning of the statute. The court said: "The facts found are that on June 5th, 1903, the defendant notified the plaintiff that he had made up his mind they could not live together happily any longer, that he intended to break up housekeeping; that she might remain in their then home until July 1st; that he would then cease paying rent therefor; that she could then secure a tenement or flat, or board, as she saw fit; that she might take such furniture as she wished; and that he would allow her \$50 a month toward her support. He requested her to confer with his counsel as to terms of separation, and such conference she shortly had. She was then informed that she would be allowed \$50 a month for her support, and an additional amount if it should become necessary. The plaintiff did not agree to accept these as definite terms of settlement, but she accepted counsel's check for \$50 as the first monthly payment, and thereafter continued to do so until the following March, when other events which are made the subject of the special defense had intervened. The present action was instituted July 9th, 1903. It does not appear that the tentative arrangement proposed by counsel was not acceptable to the plaintiff as such, or that she objected to it, or then or

thereafter, before suit was begun, represented to the defendant or his counsel that the allowance made was inadequate or unsatisfactory, or made a request for a larger one. There is nothing in the finding that puts the defendant in the attitude of refusing any request or demand made upon him, or of making a palpably inadequate provision, or of withholding what he had reasonable cause to believe was a reasonable and proper one. The committee in March, 1905, found, in the light of events as they had transpired, that \$100 a month from and after the institution of the action was a necessary and reasonable sum for the plaintiff's support in the manner in which she had been accustomed to live since her marriage. *Cunningham v. Cunningham* (1902) 75 Conn. 66, 52 Atl. 318. That such was the case at the time of the separation, or if so, that the defendant had reasonable cause to know or believe that his provision of a less sum was inadequate, does not appear. From such a state of facts, the legal conclusion that there was on the defendant's part a neglect to provide suitable support, within the meaning of the statute, cannot be drawn."

And see *Symington v. Symington* (1896) — N. J. Eq. —, 36 Atl. 21, wherein a wife's bill for separate maintenance was dismissed without prejudice to renew the application in case the husband should refuse to pay a small allowance made by him previous to the filing of the bill by the wife, it appearing that the husband's invitation to his wife to return to him was made for the purpose of evading the payment of additional support, but that the wife's visit was not made with the purpose of making her permanent home with her husband.

But where the allowance made by the husband is not sufficient, it is not a defense to her suit for separate maintenance. *Youngs v. Youngs* (1899) 78 Mo. App. 225; *O'Brien v. O'Brien* (1892) 49 N. Y. Eq. 436, 23 Atl. 1073; *Mackey v. Mackey* (1914) 88 N. J. Eq. 650, 91 Atl. 316.

Thus, in *Youngs v. Youngs* (Mo.) supra, a suit by an abandoned wife

for support and maintenance, brought under a statute giving a cause of action in such cases where there has been an abandonment by the husband and a refusal or neglect to maintain and provide for the wife, it was held that an allowance made by the husband which was not sufficient, in view of the husband's income, to supply the wife with the ordinary and reasonable necessities of one in her station in life, was not a defense to the action.

In *Mackay v. Mackay* (N. J.) supra, it was held that where an allowance made for the maintenance of a wife was not suitable and proper according to the husband's income, the trial court is warranted in finding that the husband was guilty of refusing and neglecting suitably to maintain and provide for his wife in the sense in which the words were used in the statute authorizing such maintenance.

Where a statute authorizes the court to order such suitable support and maintenance of a wife as the nature of the case and circumstances of the parties render suitable and proper in the opinion of the court, it is not a defense to a wife's action for separate maintenance, such as will preclude examination by the court into its sufficiency, that a provision made by the husband, such as allowing the wife to live in his tenement and collect the rent of certain other tenements, would enable the wife to live in decency, but it is the duty of the court, under such circumstances to determine whether the amount already provided is such as the nature of the case and the circumstances of the parties render suitable and proper. *O'Brien v. O'Brien* (1892) 49 N. J. Eq. 436, 23 Atl. 1073.

b. Necessaries.

In cases where the husband is furnishing the wife with necessaries there is some conflict as to her right to maintain an action for support. Thus it is held that there must be a refusal or neglect to provide for the wife, which would support the view that the fact that the husband is furnishing necessaries would defeat the wife's action for separate maintenance. *Butler v. Butler* (1823) 4 Litt. (Ky.) 201; *Kindorf v. Kindorf* (1918)

178 Mo. App. 635, 161 S. W. 138; *Schonborn v. Schonborn* (1902) 27 Wash. 421, 67 Pac. 987.

To recover under the statute, there must be not only an abandonment by the husband, but a refusal or neglect on his part to maintain and provide for the wife. *Kindorf v. Kindorf* (1913) 178 Mo. App. 635, 161 S. W. 318.

Where no refusal of the husband to provide for the wife is shown, the court should sustain a motion to dismiss. *Schonborn v. Schonborn* (Wash.) *supra*.

So the bare act of a husband taking a different home near at hand is not sufficient to induce the chancellor to decree alimony, but the husband must have withdrawn the means of support from the wife, or have refused to provide for her, before he could be liable to a decree. *Butler v. Butler* (Ky.) *supra*.

And it has been held that the amount of necessities furnished by a husband living apart from his wife, secured by her from business houses by having them charged to the defendant, should be deducted from an allowance decreed for separate maintenance of the wife in her suit for such maintenance. *Gans v. Gans* (1914) 157 Ky. 775, 164 S. W. 96.

But the fact that the husband is furnishing some support is not a defense, where it is shown that such support is inadequate under the circumstances. *Wray v. Wray* (1858) 33 Ala. 187; *FINCH v. FINCH* (reported herewith) ante, 1; *Herrett v. Herrett* (1910) 60 Wash. 607, 111 Pac. 867.

Thus in *Wray v. Wray* (Ala.) *supra*, a wife's suit for alimony, it was claimed for the husband that he had proposed to provide for his wife, and that he had actually made some provision for her, and that he should not be decreed to do what he has already done. The court said that if the husband had, up to the time of the trial, made a sufficient provision independent of any coercive measures through the courts of the country, it would consider the legal question presented, but that a decision of the question was rendered unnecessary by the fact that

the support offered and supplied was greatly inadequate.

In *Herrett v. Herrett* (Wash.) *supra*, a husband could not defeat his wife's action for separate maintenance on the ground that he has provided groceries, and paid for the laundry and medicines and doctor's bills, and bills of that character, it appearing that for a year prior to the action the parties, while residing in the same house, had not cohabited, and for more than three months the defendant had refused to converse with the plaintiff, and had repeatedly urged her to secure a divorce from him, and had refused to give her the means to secure the comforts and necessities of life, and had refused her credit with merchants for her personal needs, since it is as much the duty of the husband to supply his wife with clothing befitting her station in life as it is to furnish her with groceries.

In *FINCH v. FINCH*, a suit for alimony, it was held that a gift of bank books by the husband to the wife, prior to his desertion two years before the suit, was not performance of his duty of support, and an acceptance by the wife was not tantamount to a release by the wife of the husband from the performance of his marital duty.

But in other jurisdictions, it is held that the fact that a husband is furnishing his wife with necessities is not a defense to an action for separate maintenance. *Sweasey v. Sweasey* (1899) 126 Cal. 123, 58 Pac. 456; *Cooper v. Cooper* (1911) 160 Ill. App. 449. See also *Earle v. Earle* (1895) 60 Ill. App. 360.

Thus in *Cooper v. Cooper* (Ill.) *supra*, a wife's action for separate maintenance, it was contended by the defendant that the complainant was not living separate and apart from him while she occupied the home furnished by him, and continued to be supported by him through his credit at stores where the parties traded, and had checks from the defendant of \$5 per week for incidental expenses; and although the question raised was the wife's right to temporary alimony, the court said that if the defendant was living in an adulterous relation with

another woman, as stated in the bill, it was immaterial where the complainant resided, provided she was not living with the defendant, and immaterial that defendant paid the complainant's necessary household expenses, and that if the allegations of the bill were true, the complainant would unquestionably be justified in leaving the home if the defendant should return to live there, and that complainant was entitled to a decree for separate maintenance.

And in *Sweasey v. Sweasey* (Cal.) *supra*, an action under the Code by a wife against her husband to secure an allowance for separate maintenance, in which there was a cross complaint asking for divorce, it was held that the fact that the husband allowed the wife to live at their hotel and to use his credit to obtain necessities was not a defense to her action for separate maintenance, the court saying: "If the trial court did, as surmised, rule that plaintiff could not have a provision made for her in her own suit because she can live at the hotel and has not been prevented from the use of his credit to obtain necessities, this was plainly error. A wife who is left otherwise unprovided for may always use his credit to obtain necessities. It needs no decree of court to secure that right, but she may be entitled to more than what is absolutely necessary, and she is not compelled to rely upon his whim and temper for them. She is entitled to an allowance and security for its payment, or an execution to enforce its payment, or perhaps to have a receiver appointed, as provided in § 140 of the Civil Code."

So in *Earle v. Earle* (Ill.) *supra*, wherein it appeared that when the wife filed her bill she was already provided by the husband with a home which had been deemed by them to be a suitable one to live in, and she was living in it undisturbed by the husband, and it not appearing that she was held responsible for bills incurred for her support, a decree in her favor for separate maintenance would give her but little more, and until she has shown some refusal by him, beyond his mere absenting himself from their

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home, it was said that a court of equity should refuse to aid her to reside *pendente lite* in expensive hotels.

VII. *Necessity of separation.*

a. *In general.*

It is generally held that the parties to an action for separate maintenance must be living apart at the time the action is commenced, and hence the fact that the parties are not separated will be a defense to the action, and this is especially true where the action is brought by virtue of a statute providing that a wife who is living apart from her husband without her fault is entitled to an allowance for maintenance and support. *Earle v. Earle* (1895) 60 Ill. App. 360; *Will v. Will* (1907) 134 Ill. App. 67; *Raab v. Raab* (1909) 150 Ill. App. 554; *Margarum v. Margarum* (1898) 57 N. J. Eq. 249, 41 Atl. 357; *Batthey v. Batthey* (1845) 1 R. I. 212.

Thus in *Batthey v. Batthey* (R. I.) *supra*, it was said that before a petition for separate maintenance can be rightfully preferred the relation of cohabitation must already have been broken up, there must already be a separation of the parties, since the power of the court under the statute is not to decree a separation, but a separate maintenance.

The wife seeking separate maintenance must, by proof, demonstrate that her case is within the statute and that she is living separate and apart from her husband without her fault, before the court can decree a separate maintenance. *Raab v. Raab* (1909) 150 Ill. App. 554.

In *Earle v. Earle* (Ill.) *supra*, an action for separate maintenance of a wife, brought by virtue of a statute giving such relief to a wife who is living apart from her husband without her fault, the court held that it is indispensable to the maintaining of a bill for separate maintenance that, at the time of beginning the suit, the wife should be living separate and apart from her husband.

Under a statute authorizing separate maintenance to a wife where her husband abandons her and does not support her, it was held that a wife

could not have separate maintenance from her husband who, although he was financially incapable and never had much earning power, did not abandon his wife, and at all times desired to live with her, but was forced by her to live elsewhere. *Margarum v. Margarum* (1898) 57 N. J. Eq. 349, 41 Atl. 357.

In *Will v. Will* (1907) 134 Ill. App. 67, a wife's action for separate maintenance brought under a statute giving a remedy in equity to married women who are living separate and apart from their husbands without their fault, it was held that the wife could not recover upon a showing that, although marital relations between her and her husband had ceased, the defendant was providing her with a home which had been deemed by them a suitable one for them to live in, and she was living in it undisturbed by the defendant, and he was paying all bills incurred without objection or complaint, and that the plaintiff and defendant were living together in their apartment at the time of the filing of the bill and afterwards, and hence complainant was not living separate and apart from the defendant as provided by the statute.

b. Parties living under same roof.

1. Allowance granted.

In cases where the parties to an action for separate maintenance are living under the same roof, the decisions are somewhat conflicting, although, as the real question involved is whether the parties are living apart, it is possible in the cases reviewed that the weight given to other facts has influenced the decisions and that the cases might be reconciled. It has been held that a wife may recover separate maintenance, although the parties are still living under the same roof, but not cohabiting as man and wife. *Bucknam v. Bucknam* (1900) 176 Mass. 229, 48 L.R.A. 785, 57 N. E. 343; *McIlroy v. McIlroy* (1911) 208 Mass. 458, 94 N. E. 696, Ann. Cas. 1912A, 984; *Polster v. Polster* (1909) 145 Mo. App. 606, 123 S. W. 81; *Anshutz v. Anshutz* (1863) 16 N. J. Eq. 162; *Smith v. Smith* (1915) 172 Iowa, 829, 151 N. W. 1085.

Thus in *Polster v. Polster* (1909) 145 Mo. App. 606, 123 S. W. 81, a suit under a statute by a wife against her husband for maintenance, it was held that a wife would not forfeit her right of separate maintenance merely because she continued living under the same roof, but separate and apart from her husband, after he has added insult to injury by both maltreatment and refusal to support, but that the mere fact that the parties continued to reside in the same house at the time the suit was instituted was wholly immaterial.

So, under a statute providing that the court may make an order concerning the support of a wife when a husband fails without just cause to furnish suitable support for her, or has deserted her, or when the wife for justifiable cause is actually living apart from her husband, it was held that a wife could recover such support where the agreed facts showed that the parties do not occupy the same room or bed, that they do not eat together, or have any conversation except such as is absolutely necessary, though she cooks the food furnished by him for both, and she is in great need of clothing, medicine, and other things which he refuses to furnish. *Bucknam v. Bucknam* (Mass.) *supra*.

And in *McIlroy v. McIlroy* (1911) 208 Mass. 458, 94 N. E. 696, Ann. Cas. 1912A, 984, it was said that an order for the support of a wife might be made, although the wife had never left her husband's house.

In *Anshutz v. Anshutz* (1863) 16 N. J. Eq. 162, a wife's suit for alimony for the support and maintenance of herself and children, it was said that a wife has no right to the interference of the court for her maintenance until the abandonment or separation has taken place, although there may be an abandonment or separation within the sound construction of the statute, while the parties continue under the same roof, as where the husband utterly refuses to have any intercourse with his wife, or to make any provision for her maintenance; thus he may seclude himself in a portion of his house and take his meals alone, or

heard elsewhere than in his house, and thus as effectually separate himself from her and refuse to provide for her as in case of an actual abandonment, although in whatever form it may exist there must be an abandonment or separation from the wife.

In *Smith v. Smith* (Iowa) *supra*, separate maintenance was granted to a wife on sufficient reasons although it appeared, without discussion thereof, that the parties continued to live under the same roof, but did not occupy the same bed.

2. Allowance refused.

In Illinois, separate maintenance has been refused where the parties are still living in the same house. *Klemme v. Klemme* (1890) 37 Ill. App. 54; *Rathmann v. Rathmann* (1915) 196 Ill. App. 20.

Thus in *Klemme v. Klemme* (Ill.) *supra*, it was held that where a husband and wife are living in the same house and eating at the same table, although they have not for several years occupied the same room, they are not living apart within the meaning of the statute, and the wife may not, therefore, recover in an action for separate maintenance under the statute.

So in *Rathmann v. Rathmann* (Ill.) *supra*, it is said in the abstract of the opinion that in order for a wife to recover in a suit for separate maintenance, it must appear that the parties are actually living separate and apart at the time the bill was filed, and that a finding that the parties were living apart was not sustained by evidence that the wife was compelled to cease her relation with the defendant as his wife, although continuing to live under the same roof, each occupying a separate room, there being no evidence as to whether or not during this period the parties ate at the same table or met in the family living room, or that in any way the relationship was changed, save the fact that they did not occupy the same room.

3. Rule in Canada.

In Canada, on somewhat different facts, the decisions in two cases are conflicting.

In *Price v. Price* (1910) 21 Ont. L. Rep. 454, 16 Ont. Week. Rep. 260, it was held that where a wife was living under her husband's roof, and, though not occupying the same bed, was supplied with food, and did not desire the resumption of marital intercourse, but did want more than just her living, she was not entitled to succeed in an action for alimony, but must enforce the marital obligation to supply her with necessities by pledging her husband's credit.

However, in *Moffatt v. Huberdeau* (1914) 20 R. L. (N. S.) 354, 20 R. de J. 210, cited in Canadian Case Law Dig. 1914-15, col. 207, it was held that a wife living in the same house with her husband who pays her household expenses, but who only comes to the house for meals, he sleeping in separate apartments, is entitled to an alimentary allowance, as this is a separation in fact for which he is responsible.

VIII. Condonation.

a. Condonation as bar.

Condonation is a defense to a wife's action for separate maintenance. *Wade v. Wade* (1892) 3 Cal. Unrep. 576, 31 Pac. 258; *Deenis v. Deenis* (1872) 65 Ill. 167; *Meeker v. Meeker* (1898) — N. J. Eq. —, 27 Atl. 78; *Doe v. Doe* (1916) 48 Utah, 200, 158 Pac. 781; *Cherrington v. Cherrington* (1916) 9 Alberta L. R. 181, 9 West. Week. Rep. 146; *Henderson v. Henderson* (1872) 19 Grant, Ch. (U. C.) 464; *Payne v. Payne* (1905) 10 Ont. L. Rep. 742, 6 Ont. Week. Rep. 428; *Ruttle v. Ruttle* (1912) 23 Ont. Week. Rep. 575, 4 Ont. Week. N. 457. And see the cases cited in the two following subdivisions.

Thus in *Deenis v. Deenis* (1872) 65 Ill. 167, a wife's suit for separate maintenance brought under a statute authorizing such suits in cases where married women, without their fault, are living separate and apart from their husbands, it was held that condonation by the wife is an absolute bar to her action, and that the act of the wife in living with her husband as man and wife for four years after she knew of the offense alleged by her

was condonation, the court saying: "It may be conceded that the husband had acted improperly; and that his conduct had been such as to shock the sensibilities of the wife, and in opposition to the first principles of morality. But after full knowledge of the existence of the offense she continued cohabitation with him, gave birth to a child, and continued to live with him for four years, during which time there was no attempt on his part to seduce his daughter or disturb the family peace. In his answer the defendant set up that for years after the pretended offenses the complainant voluntarily lived and cohabited with him as his wife without any complaint, and that, if the offenses charged were committed, the complainant had forgiven them. The proof sustains the answer. Even in an application for a divorce, where good ground once existed for a decree, condonation is an absolute bar to any remedy for the particular injury which has been forgiven. This principle applies as well to the case before us. The separation, on the part of the wife, must be 'without her fault.' If he has committed an offense which is forgiven, the offense no longer exists, and there can be no cause for the separation. Condonation is an act of the mind, either expressed or implied. It may be indicated by the acts of the party. The complainant testified that she knew of the alleged offenses; and yet after this knowledge there was continued matrimonial intercourse. For such facts the law presumes forgiveness. She was cognizant of all his acts upon which the alleged offenses were based. For four years they lived together as man and wife, and there was uninterrupted harmony so far as the old offenses were concerned. There was no attempt to revive them, and no conduct to justify a separation. Under the circumstances we must presume a reconciliation. The continuous cohabitation with knowledge of the alleged guilt, and the acquiescence for years, must be regarded as a remission of the past offenses."

In *Ruttle v. Ruttle* (Ont.) *supra*, an action for alimony was dismissed

where the wife continued to live with her husband for some two months after the action was begun, and cohabited with him.

In *Wade v. Wade* (Cal.) *supra*, it was held that a husband was entitled to an order discontinuing separate maintenance, on the ground that the wife had returned to him, and that the parties have lived together, occupying the same house and cohabiting together as husband and wife, even though the wife consented to matrimonial intercourse to prevent her husband having a good ground for divorce, it appearing that she had a horror of divorce and feared that he would have a cause of action against her to obtain one unless she consented.

b. Revival of acts condoned.

But condonation is accompanied with the express or implied condition that the wife will be treated with conjugal kindness, and upon breach of this condition by any matrimonial offense, the wife's right to a remedy for former injuries is revived. *Harrison v. Harrison* (1852) 20 Ala. 629, 56 Am. Dec. 227; *Williams v. Williams* (1898) 77 Ill. App. 229; *Shors v. Shors* (1906) 133 Iowa, 22, 110 N. W. 16; *Levin v. Levin* (1903) 68 S. C. 123, 46 S. E. 945; *Threewits v. Threewits* (1815) 4 S. C. Eq. (4 Desauss.) 560; *Aldrich v. Aldrich* (1891) 21 Ont. Rep. 447; *Rodman v. Rodman* (1873) 20 Grant, Ch. (U. C.) 428; *Bavin v. Bavin* (1896) 27 Ont. Rep. 571.

Thus, in *Harrison v. Harrison* (Ala.) *supra*, an action of debt by a wife against the personal representatives of her deceased husband, it was held that condonation is accompanied with an implied condition that the injury shall not be repeated, and that the repetition of the injury takes away the condonation and operates a revival of former acts, and the wife thereupon becomes remitted to her original right to separate maintenance.

Although a decree for alimony cannot be based on wrongs which have been condoned, all misconduct having ceased after such condonation, to hold that cruelties of a husband which have been forgiven are not to be considered when others have followed until the

wrong becomes unbearable would not be to give encouragement and support to a wife's patient endurance, but to mock at it, and in such a case the court will connect the whole of the husband's conduct in order to form a correct judgment in the wife's action for alimony. *Levin v. Levin* (1903) 68 S. C. 123, 46 S. E. 945, wherein the court said: "The case of *Wise v. Wise* (1901) 60 S. C. 447, 38 S. E. 794, is not in conflict with this view, because the conditions under which the condonation was there held a bar are essentially different from those existing here."

In *Shors v. Shors* (1906) 133 Iowa, 22, 110 N. W. 16, a suit for separate maintenance and custody of minor children, it was held that condonation was not a defense where unjust accusations were made up to the very moment of final separation, and even if there had been a mutual understanding that previous charges were to be forgiven, it was based on condition of future good conduct, and a repetition of the acts revived the condoned offenses.

Condonation by a wife of her husband's cruel treatment is a forgiveness with an implied condition that the injury shall not be repeated, and a breach of this condition revives the wife's right to a remedy for the former injury, such as separate maintenance. *Bavin v. Bavin* (Ont.) *supra*.

If a wife forgives ill usage and returns to her husband on promises of good usage, she may not thereafter obtain the assistance of the court to secure separate maintenance if those promises have been faithfully kept and she again leaves her husband from caprice, but if there are clear indications of a breach of those promises, and some actual ill usage, she is not bound to wait for extremities, as in the first instance, but may depart as soon as she finds the promises violated and her husband returning to his old bad habits, since she has the right to judge the future by the past, and the court will connect the whole of the husband's conduct in order to form a correct judgment. *Threewits v. Three-*

wits (1915) 4 S. C. Eq. (4 Desauss.) 560.

In *Williams v. Williams* (1898) 77 Ill. App. 229, a wife's suit for separate maintenance, in which it appeared that the defendant was afflicted with an incurable, contagious, and loathsome disease constituting a continuing offense against the plaintiff and a constant menace to her health in case of cohabitation, and it was the contention of the defendant that the plaintiff had condoned prior offenses by living with him after filing a prior bill alleging the same grounds, it was held that if the plaintiff lived with her husband either because of his temporary cure, or under the restraint of fear or force of circumstances, or before she fully realized her situation, a finding that the plaintiff had not condoned the defendant's offense was warranted, the court saying in part: "In 1 *Nelson on Divorce & Separation*, § 451, the author says: 'According to a familiar principle of law, a party is not bound by any involuntary act induced by force or fraud. A condonation will not be implied from the conduct of a plaintiff while acting under the restraint of fear or the force of circumstances. The fear of violence may induce the wife to return to her husband, or to remain with him after he has been guilty of a cause for divorce, but no condonation will be implied from such circumstances.' The same author says (§ 456): 'It is the policy of the law to encourage reconciliation and reunion where the parties are separated on account of the misconduct of one of them. The purpose is evidently to reform the offender. . . . If no reformation is effected by the reunion, and the cruelty is repeated, or the offender commits some other cause for divorce, the injured party loses no rights by the condonation. The former offense is revived.' And in § 461: 'The doctrine of condonation is that the offender will reform and will commit no matrimonial offense. If any offense is committed the injured party is entitled to all the relief she could have obtained if she had not condoned the offense; otherwise, she will suffer for her

rightful conduct in condoning the offense.' The statements of this text are reasonable and are supported by respectable authority. The nature of appellant's offense is such as to be continuing—a constant menace to his wife's health in case of cohabitation. In her first bill she alleged that she had been informed that her husband could not be permanently cured, and, for aught that appears from these pleadings, she may have lived with him subsequently to the filing of that bill, as his wife, because he had been temporarily cured, or she may have done it under the restraint of fear or force of circumstances, for either of which reasons she would be relieved from any implied condonation by reason of the matters appearing in the pleadings. Moreover, by the present bill it appears that she was fully advised by a reputable physician of the terrible nature of appellant's disease, and that it was incurable, thereby making it plain that then for the first time she fully realized his condition and her situation."

Violence and acts of cruelty by a husband which did not cause the wife to leave home, and which were not repeated before she finally did leave, must be regarded as condoned, but the effect of subsequent adulterous intercourse by the husband is to revive the condoned acts of cruelty, since condonation is always on the condition that there shall be no repetition of any matrimonial offense in the future, and this doctrine extends not merely to an offense of the same nature, but to any other matrimonial offense which falls within the cognizance of the court. *Aldrich v. Aldrich* (1891) 21 Ont. Rep. 447.

Where a wife left her husband several times and subsequently returned until the last occasion, subsequent alleged acts of cruelty were held not sufficient to revive the former serious acts, which were condoned by the wife by returning to live with her husband. *Cherrington v. Cherrington* (1916) 9 Alberta L. R. 181, 9 West. Week. Rep. 146.

c. Acts constituting condonation.

In a suit for alimony, it was held

that where the husband kept his wife in hotels because of the objection of his children by a prior marriage to his receiving her in his home, and occasionally visited the wife and had with her the intercourse which the marital relations justify, her submission in this respect cannot be treated as a condonation of the husband's wrong in not taking her to his home, so as to bar her action for separate maintenance. *Weir v. Weir* (1864) 10 Grant, Ch. (U. C.) 565.

In *Lovell v. Lovell* (1905) 11 Ont. L. Rep. 547, affirmed in (1906) 13 Ont. L. Rep. 569, an action for alimony in which it was urged that condonation was established by the fact that the parties had shared the same bed on a certain date, it was said that condonation in a case of persistent cruel treatment (or moral tort) is a very different thing from condonation in a distinct case of matrimonial transgression, such as adultery, so that condonation is not lightly to be presumed from a continuance of cohabitation after one or even several acts of cruelty, as the wife might be afraid to cross her husband or make him angry by any resistance, and might therefore continue the ordinary marital intercourse in hopes of a change for the better.

LX. Wife's separate property or income.

Few cases have been found on the question whether the possession of separate property or income by the wife is a defense to her action for separate maintenance, and these cases are not entirely in accord.

However, most of the cases found support the broad rule that while a wife may not be required to exhaust her resources before bringing a suit for separate maintenance, and thus the possession of income or separate property is not an absolute defense to the action, the amount of her income or property will affect, at least, the amount which she will recover, and the possession of sufficient means for her proper support will probably defeat her recovery of separate maintenance. *Austin v. Austin* (1908) 42 Colo. 130, 94 Pac. 309; *Decker v. Decker* (1917) 279 Ill. 300, 116 N. E. 688;

Mayer v. Mayer (1877) 5 Ohio Dec. Reprint, 444; **Converse v. Converse** (1876) 30 S. C. Eq. (9 Rich.) 585.

Thus in **Austin v. Austin** (Colo.) *supra*, it was held that the fact that a wife had \$520 is not a defense to her suit for separate maintenance, it not being necessary that a wife be wholly without means before she is qualified to bring a suit against her husband, but the court said that it must presume that the trial court had found that the amount the wife was possessed of was not sufficient to meet her necessary demands, and that the amount awarded, together with what she possessed, would supply her needs, thus intimating that the possession of independent means by the wife would be a defense to her suit for separate maintenance.

So, **Decker v. Decker** (1917) 279 Ill. 300, 116 N. E. 688, a suit for separate maintenance in which the husband in his answer said that he was not an able-bodied man and was not able to earn a support for himself and wife, and that he had no sufficient income to support himself comfortably, and that the wife was receiving an income from a considerable amount of property paid for with money belonging to him, would seem to support the view that, if the income of the wife be sufficient to suitably support her, she may not recover an allowance for that purpose, the court saying in part: "Appellee having abandoned his wife without just cause and without her fault, the question of their property rights must be settled on that theory, and upon the further idea that the separation is to continue, inasmuch as he has refused to return to her on request. The amount, if any, to be allowed a wife for separate maintenance depends not only upon the question of the misconduct of the husband, but also upon the matter of their property and income, as well as their ages, health, past and present habits, social conditions and circumstances, and upon the further question whether or not there are children dependent upon one or both of them for support, and the amounts required therefor by each party. The amount of alimony to be

allowed in a separate maintenance suit is to be determined in the same manner as in a case for divorce. **Harding v. Harding** (1899) 180 Ill. 481, 54 N. E. 587. If the wife's income be insufficient to maintain her and to carry on the litigation, the husband's income should be required to contribute to her income as alimony and to bear the expense of the suit. If the income of the wife be sufficient to suitably support her there will ordinarily exist no reason for making an allowance for that purpose. The amount allowed a wife for separate maintenance or alimony varies from a sum sufficient to meet the actual wants and necessities of the wife, to a third and even a half of the income of the husband. Where they both have an income, the method of computation of a proper allowance for her support and maintenance is to add the wife's annual income to her husband's, consider what, under all the circumstances, should be allowed her out of the aggregate, then from the sum so determined deduct her separate income, and the remainder will be her proper annual allowance. **Harding v. Harding** (1892) 144 Ill. 588, 21 L.R.A. 310, 32 N. E. 206. It is also a rule of equity in such cases that the wife shall not be put in a worse condition by reason of her marriage, the dissolution of which has been caused by her husband's wilful misconduct. 'Equity and good conscience require that the husband shall not profit by his own wrong, and that restitution shall be made to the wife of the property which she brought to the husband, or a suitable sum in lieu thereof be allowed out of his estate, so far as may be done consistently with the preservation of the rights of each, and also that a fair division shall be made, taking into consideration the relative wants, circumstances, and necessities of each, of the property accumulated by their joint efforts and savings.' **Cole v. Cole** (1892) 142 Ill. 19, 19 L.R.A. 311, 34 Am. St. Rep. 56, 31 N. E. 109. If the wife has no claim for separate maintenance or alimony except the existence of the marriage relation and the husband's fault, an allowance should be

paid in money at stated intervals. If either or both have equitable rights in a piece of real estate or chattel, other than through the marriage relation, by reason of their having purchased or contributed to the purchase or accumulation thereof, the court may decree equities to both in such property, or award it to the one who purchased it outright, or award other property in lieu thereof. *Champion v. Myers* (1904) 207 Ill. 308, 69 N. E. 815; *Robbins v. Robbins* (1881) 101 Ill. 416; *Wilson v. Wilson* (1882) 102 Ill. 297. The sum and substance of the various holdings is that the wife shall not merely have what necessity demands, but what complete justice requires, and that both the husband and the wife are first entitled to have their equities settled in the property held by both, jointly and separately. If all the property, or any part thereof, came to them by the sole efforts of the one or the other, then such party is entitled to have that property by the decree of the court, or some property the equivalent thereof, or money of the value thereof. After the equities of the parties in the property are adjusted, then the husband should be caused to pay or not to pay a further sum for support and maintenance in money payments at stated intervals, according to whether or not the wife is equitably entitled to further payment after a consideration of all the facts that enter into a proper solution of that question. . . . The court properly decreed that appellant was not equitably entitled to a further specific money allowance for her maintenance and support. The evidence clearly discloses that her income from the property and money specifically decreed to her, and the other property held by her in her own right, will amount to \$220 per month or more, and that appellee's income from his property, including the Star Theater building, will be very little, if any, more than \$110 per month, and he will have to pay her, by the provisions of the decree, \$5,049.12. He is at an age when his earning capacity is much limited. No children are dependent upon either of them for support. The

income of appellant is amply sufficient to suitably support her. Under such circumstances no reason exists for making further allowance to her as alimony."

In *Converse v. Converse* (S. C.) *supra*, although the bill seeking an adjustment of property rights was not framed for alimony, the court said that alimony means an allowance from the husband's estate for the maintenance of the wife during separation, and is never given where she has sufficient means of subsistence in comfort.

In *Mayer v. Mayer* (1877) 5 Ohio Dec. Reprint, 444, it was held that where a wife committed adultery after securing a decree for alimony, and it appeared that she had property of her own sufficient for her support, the decree for alimony would be modified, the court saying: "A husband may not be entitled to a dissolution of marriage where he has been guilty of misconduct, and yet at the same time may not be obliged to render support out of his estate to a wife who, independent of that, has means of her own. The alimony under the decree which was previously pronounced at the suit of the defendant was possession by the wife of the house No. 1450 Front street, belonging to the husband. This possession was subject to the payment to the husband of \$80 per year, and was subject to the further orders of the court. The husband, on the other hand, was decreed to pay to the wife \$280.43, and the wife was to bear the taxes upon the property. The wife has property of her own, some 10 acres in the county, which is sufficient for her support. Her husband should not be bound, out of his estate, to give her a support which the court has decreed for his misconduct, when she by her subsequent misconduct, as appears in this case, has forfeited that right. The petition prays not simply a divorce from the wife, but a modification of the alimony decree; and, proceeding to make such modification as seems proper, the order will be that the possession of the premises shall be surrendered by the wife to the husband, and the decree for alimony in that re-

spect so far modified; provided, however, that before the wife shall be compelled to surrender, a settlement be made between the parties by the payment on the part of the husband of the \$280.43 which he was required to pay under the decree, and by the payment by the wife of the \$80 to which the property was subject in favor of the husband, together with the taxes for one year."

This rule finds some support in the practice adopted in some jurisdictions of determining the amount to be allowed a wife for separate maintenance from the total income of the parties, especially in cases where the husband's income is small, or, in other words, the amount of allowance in such cases is that necessary for her support in comfort according to the station in life of the parties, determined from their joint income, minus the amount of the wife's separate income.

However, in Minnesota the court held the contrary view, in *Stephen v. Stephen* (1907) 102 Minn. 301, 113 N. W. 913, wherein it was said that the duty which the law imposes upon a husband to support his wife is absolute and not dependent upon her ability to support herself by her own labor or out of her own property so that, by wrongfully deserting his wife, a husband does not escape the duty of supporting her.

X. Poverty of husband.

a. In general.

The absence of an estate or fixed income on the part of the husband is not a defense to an action for separate maintenance, and does not absolve him from his personal duty to exert himself to support his wife.

Illinois.—See *Foote v. Foote* (1859) 22 Ill. 425.

Kentucky.—*McCrocklin v. McCrocklin* (1842) 2 B. Mon. 372; *Canine v. Canine* (1891) 13 Ky. L. Rep. 124, 16 S. W. 367.

Missouri.—*McGrady v. McGrady* (1892) 48 Mo. App. 668.

New Jersey.—*Furth v. Furth* (1898) — N. J. Eq. —, 39 Atl. 123.

North Carolina.—*Muse v. Muse* (1881) 84 N. C. 35.

South Carolina.—*Prince v. Prince* (1844) 18 S. C. Eq. (1 Rich.) 282; *Messervy v. Messervy* (1908) 30 S. C. 277, 61 S. E. 442, subsequent appeals in (1910) 85 S. C. 189, 30 L.R.A.(N.S.) 1001, 137 Am. St. Rep. 873, 67 S. E. 130, and (1910) 86 S. C. 90, 67 S. E. 129.

Rhode Island.—*Batley v. Batley* (1845) 1 R. I. 212.

Virginia.—*Bailey v. Bailey* (1871) 21 Gratt. 43.

Thus in *McCrocklin v. McCrocklin* (Ky.) *supra*, it was said that the fact that a husband may own little or no property will not alone absolve him from his duty to contribute, even by his labor, something towards the maintenance of his wife and an infant child in her possession, and, with his consent, under her care.

In *Prince v. Prince* (S. C.) *supra*, it was held that the fact that a husband has no property or certain income will not defeat the wife's right to alimony.

So in *Furth v. Furth* (N. J.) *supra*, an action for nonsupport, the court said in an oral opinion that the husband's statement that he is presently unable to earn a sufficient sum to support his wife was not a reason for dismissing the bill without relief to the wife, but that the husband should fully understand that the obligations of his marriage contract and the consequent duty that he owes to the woman whom he contracted to support, and to the public to carry the burden of his wife's maintenance, still rest upon him, and that he may justly be expected fully to perform them, and the mere fact that the husband presently has no money does not discharge him of the duty to support his wife, though it may be some excuse for a present failure, but that his duty to support his wife is continuous, and is not dependent upon his prosperity, although in ordering the decree the court directed an amount consistent with the defendant's then low earning capacity, until further order of the court, it appearing that the defendant was in good health, strong, and had a

trade by means of which he had in the past earned a large weekly stipend.

So in *McGrady v. McGrady* (Mo.) supra, it was held that poverty will not excuse a husband from the obligation to maintain his wife, although such a condition should receive consideration in determining the sum which he must pay.

In *Messervy v. Messervy* (1908) 80 S. C. 277, 61 S. E. 442, although the question before the court was the allowance of temporary alimony, which was resisted on the ground that the defendant had no estate or business or certain income, the court said that the absence of an estate or fixed income cannot absolve the husband from his personal duty to exert himself to support his wife.

In *Messervy v. Messervy* (1910) 85 S. C. 189, 67 S. E. 130, an appeal from an order committing the appellant husband to jail for contempt, for failure to pay to the plaintiff alimony and suit money according to a previous order, it appearing that the appellant depended upon his father for support and could not earn more than enough to support himself, it was said that a judgment may be given against a husband for alimony when he has neither property nor income, but is able by the use of his faculties to provide maintenance for his wife, and that in such a case the wife is entitled to the judgment even though it may be impossible for the court to enforce its payment, but the court did not think that it could compel a husband who had no trade or profession or employment, to learn a trade, acquire a profession, or find employment, and by the exercise thereof derive an income for the support of his wife. The opinion reads in part: "The testimony shows that appellant is a young man of limited education, who has no trade, profession, or employment, and no property or income. It does not appear that he has or ever had any steady employment, or that he has ever engaged in any business. On the contrary, it does appear that he has always been supported by his father, who is a man of means. . . . There is no doubt of the obligation, legal and moral, of the

appellant to support his wife. This court has held that a judgment may be given against a husband for alimony when he has neither property nor income, but is able by the use of his faculties to provide maintenance for her. In such a case, the wife is entitled to the judgment, even though it may be impossible for the court to enforce its payment. The court cannot deny a party the right to a judgment to which he is entitled on the ground that the judgment debtor is insolvent or unable to pay the amount adjudged to be due, for the debtor may thereafter acquire property which could be subjected to the payment of the judgment. There is, therefore, no inconsistency in the court decreeing alimony in a case like this, even though it may find itself unable to enforce payment thereof. If a husband has property or an income, or if, by the exercise of his faculties, he does derive an income, the court may in its discretion, to be exercised according to the facts of the case and the circumstances of the parties, order a part of such property or income in excess of what is necessary for the support of the husband devoted to the support of the wife, and obedience to such order may be enforced by attachment for contempt. The remedy, however, is a harsh one and it should be applied with caution. But where it appears that the husband is able to comply with the order of the court and wilfully refuses to do so, or has, in fraud of the rights of his wife and in violation of the order of the court, brought upon himself the inability to do so, he may be punished as for a contempt. But we do not think the court can compel a husband who has no trade or profession or employment, to learn a trade, acquire a profession, or find employment, and by the exercise thereof derive an income for the support of his wife. If it could do so to enforce payment of a judgment for alimony, why could it not do so to enforce payment of any other judgment? The moral obligation to pay a judgment for alimony may be greater than the obligation to pay any other, but there is no difference in the legal obligation. The court does not

undertake to enforce purely moral obligations, nor can it undertake to make the thriftless thrifty."

In *Messervy v. Messervy* (1910) 86 S. C. 90, 67 S. E. 129, a suit for separate maintenance, it was held that permanent alimony may be granted when the defendant is without estate or certain income, but is able by the use of his faculties to provide reasonable maintenance for his wife, since the absence of an estate or income cannot absolve the husband from his personal duty to exert himself to support his wife.

b. Rule in Canada.

In Canada, it has been said that, as alimony is payable out of income alone, a wife is not entitled to alimony where it appears that, although the husband is possessed of property of some value, the property is wholly unproductive of income, and that the husband has no income from any other source. *Gilbert v. Gilbert* (1914) 29 West. L. R. (Can.) 714.

So in *Dupuis v. St. Mars* (1901) 5 Quebec Pr. Rep. 404, an action "*en séparation de corps*," it was held that a husband who is unable to earn his living, and, as his sole income, takes under the will of his brother only an amount sufficient for his strict necessities, could not be required to pay "*aliments*" to his wife.

XI. Agreements and settlements.

a. Agreement as bar.

Generally a separation agreement between husband and wife which is not inequitable is a defense to the wife's action or suit for separate maintenance. *Clisby v. Clisby* (1909) 160 Ala. 572, 135 Am. St. Rep. 110, 49 So. 445; *Tallmon v. Tallmon* (1914) 166 Iowa, 370, 147 N. W. 746; *Com. v. Henderschedt* (1882) 1 Kulp (Pa.) 42; *Kelley v. Bausman* (1917) 98 Wash. 686, 168 Pac. 181. Thus in *Clisby v. Clisby* (Ala.) *supra*, a wife's suit for alimony, in which it appeared that the husband had agreed to pay or allow the wife a stated monthly amount after the separation, and before the bill was filed, the court said that if the husband had performed his agreement and paid the amount stip-

ulated, which was a proper monthly allowance for the wife pending the separation, the bill, if filed, would not have shown the wife entitled to relief and would have been dismissed. So where a wife authorized her attorneys to settle her claim against her husband for separate maintenance at the time when she was living apart from her husband, although the wife had a disagreement with her attorneys and refused to accept the money received by them from the husband, the settlement was a defense and bar to her subsequent suit for separate maintenance (based on desertion). *Tallmon v. Tallmon* (1914) 166 Iowa, 370, 147 N. W. 746.

It has been held that, by signing a deed of separation and accepting the benefits conferred by it, a wife estopped herself from the right to relief by her own action for separate maintenance under the Statute of April 13, 1867. *Com. v. Henderschedt* (1882) 1 Kulp (Pa.) 42.

In *Kelley v. Bausman* (1917) 98 Wash. 686, 168 Pac. 181, a wife's action for separate maintenance against her husband and certain of his debtors or persons holding property belonging to him, the court held that it was error to strike an affirmative defense setting up a former settlement between the plaintiff and the defendant husband in which the principal parties had made a division of the said defendant's property.

In Illinois, there is some conflict. In *Longhi v. Longhi* (1915) 133 Ill. App. 21, a suit for separate maintenance, it was held that a separation agreement between husband and wife which makes sufficient provision for the wife in view of her station in life is a bar to a suit by the wife for separate maintenance. In *Middleton v. Middleton* (1886) 18 Ill. App. 472, the court said that if articles of separation between husband and wife were fairly obtained and fully performed there would be a grave question whether a bill for separate maintenance only would lie. But in *Patterson v. Patterson* (1903) 111 Ill. App. 342, an action by a wife against her husband to recover an amount alleged to be

due under a written contract for separation, it was held that such an agreement is not a bar to the wife's application for alimony, and that, even if the defendant wife had expressly agreed as a consideration for the payments to be made to her for her support not to bring a suit for separate maintenance, she would not be bound thereby, and was therefore at liberty to institute such suit at any time without waiving her right to the instalments then due under the contract.

In Massachusetts, the opinions do not agree. Thus in *Bailey v. Dillon* (1905) 186 Mass. 244, 66 L.R.A. 427, 71 N. E. 538, a bill brought by the plaintiff on behalf of and for the benefit of the husband of the defendant to enforce a separation agreement entered into between the defendant and her husband through the intervention of the plaintiff as trustee, the court could see no reason why such agreement, if free from fraud or coercion, and reasonable, and the parties were still living separately, should not operate as a bar to proceedings for separate maintenance if instituted by her in the probate court, saying: "What the effect of a bona fide offer to return on her part would be is not before us, and it is not necessary now to consider." But in *Silverman v. Silverman* (1886) 140 Mass. 560, 5 N. E. 639, a wife's petition to the probate court seeking, among other things, an order for the support of herself, it was held that an instrument executed for a valuable consideration by the wife, releasing the husband from all claims against him and indemnifying him against all loss resulting from claims by her for maintenance, etc., was invalid, because the parties were incompetent to contract with each other, and hence, as the wife was not bound by the release, she is not debarred thereby from the rights which she is seeking under her petition.

In New York, it has been held that an agreement as to separation between husband and wife, providing for the support of the wife and the support and education of their son, and for the disposition of certain property, although a valid and subsisting agree-

ment so far as its pecuniary features are concerned, is not a bar to the maintenance of an action by the wife for separation on the ground of cruelty. *Landes v. Landes* (1916) 94 Misc. 486, 159 N. Y. Supp. 586, affirmed in (1916) 172 App. Div. 758, 159 N. Y. Supp. 230.

In Canada, it has been held that an agreement between husband and wife which contains no covenant not to apply for alimony if legal grounds therefor arise is not a defense to the wife's subsequent action for alimony. *Miller v. Miller* (1914) 19 B. C. 563, 16 D. L. R. 557, 6 West. Week. Rep. 168, 27 West L. R. 607. See also *Tuxford v. Tuxford* (1913) — Sask. —, 12 D. L. R. 380, 24 West. L. R. 611. But in *Drewry v. Drewry* (1916) 9 Alberta L. R. 363, 27 D. L. R. 716, 34 West. L. R. 103, 33 West. L. R. 73, 423, reversed in [1916] 2 A. C. 631, 30 D. L. R. 581, 35 West. L. R. 266, 11 West. Week. Rep. 266, a widow's action against her husband's estate, the court indicates in the opinion that a prior separation agreement might be a defense to a wife's action against her husband for alimony.

b. Breach of separation agreement.

An agreement of separation between husband and wife which has been broken or repudiated by the husband will not defeat the wife's action for separate maintenance.

Illinois.—*Hill v. Hill* (1914) 190 Ill. App. 541.

Maryland. — *Walker v. Walker* (1915) 125 Md. 649, 94 Atl. 846, Ann. Cas. 1916B, 934.

Michigan.—*Meyerl v. Meyerl* (1901) 125 Mich. 607, 84 N. W. 1109.

New York. — *Landes v. Landes* (1916) 172 App. Div. 758, 159 N. Y. Supp. 230; *Scheinkman v. Scheinkman* (1909) 64 Misc. 443, 118 N. Y. Supp. 775.

North Carolina.—*Cram v. Cram* (1895) 116 N. C. 288, 21 S. E. 197.

Canada.—*Riddell v. Riddell* (1913) 7 Alberta L. R. 4.

Thus in *Meyerl v. Meyerl* (1901) 125 Mich. 607, 84 N. W. 1109, a wife's suit for separate maintenance, it was held that the husband could not successful-

ly set up as a bar to his wife's claims under the statute for separate maintenance, a separation agreement which he himself refuses to keep and perform, in that he has failed to pay the weekly sums provided for and absolutely refuses to pay more of them, and has disposed of his property with intent to evade payment.

In *Walker v. Walker* (1915) 125 Md. 649, 94 Atl. 346, Ann. Cas. 1916B, 934, it was held that the fact that a husband had entered into an agreement with his wife to pay her a certain sum per month, which he afterwards repudiated, cannot deprive her of her right to separate maintenance.

Under a Code provision authorizing a special proceeding by a wife to have reasonable subsistence secured to her where her husband has separated himself from her and failed to provide for her according to his means and condition in life, it was held that if it be conceded that the plaintiff had the right to demand the enforcement of a separation agreement, had she chosen to sue upon it, the husband will not be allowed, after repudiating the agreement by ceasing to pay or offer to pay according to its provisions, to set it up as a bar to her recovery in an action under the statute, even though she may have demanded by letter a sum larger than that which she had stipulated in the agreement to take as a sufficient allowance, since it is not the contract to pay a certain sum in lieu which quits the husband of his duty to furnish a support for the wife when he is discharged, but the actual payment, or attempt or offer to pay in fulfilment of his agreement, and having ceased to perform his agreement to pay a monthly allowance, the agreement will not avail him as a defense to the proceeding for maintenance on the part of his wife, whom he has deserted. *Cram v. Cram* (N. C.) *supra*.

In *Hill v. Hill* (1914) 190 Ill. App. 541, it was held that the fact that husband and wife had entered into a separation agreement would not defeat the wife's suit for separate maintenance, where it appeared that the contract was inequitable to the wife,

who made it under a misunderstanding and while she was in a nervous condition of mind due to the cruel treatment of the husband, and it was also shown that the husband had broken the contract by refusing to make payments for the wife's support.

In *Riddell v. Riddell* (Alberta) *supra*, although the question was the allowance of interim alimony, the court said that inasmuch as the foundation of an action for alimony is separation without any sufficient reason, an agreement for separation is *prima facie* a bar as furnishing a sufficient reason, but if there are breaches of the agreement on the defendant's part, such as failure to make payments to an extent amounting to a virtual repudiation of the obligation to pay, the court will not recognize the agreement as being a defense to the action.

In *Scheinkman v. Scheinkman* (1909) 64 Misc. 443, 118 N. Y. Supp. 775, it was held that, where a husband is in default in the performance of his obligation under a separation agreement, he is not protected by such agreement against the wife's motion for alimony and counsel fee, although if he were not in default he would doubtless be protected against an attempt by the wife to secure a further allowance; but he cannot evade the obligation of the matrimonial relations and not perform the obligation which he assumed by his contract. And see *Landes v. Landes* (1916) 172 App. Div. 758, 159 N. Y. Supp. 230, wherein it was held that an agreement of separation between husband and wife, which has been broken by the husband, will not defeat the wife's action for separation brought in derogation of such agreement.

In *Com. v. Hollinger* (1867) 18 Lanc. L. Rev. (Pa.) 110, a proceeding for desertion and nonsupport brought under a statute, it was held that an agreement and bond by the husband to contribute a certain weekly sum for the wife's support so long as they should live separate and apart, which the husband had not kept, was not a bar to a proceeding commenced by the wife under the act to compel him to

contribute to her support and maintenance.

But in another case it appears from the digest, the report not being available, that a wife's action for separate support will be defeated by an agreement of separation, even where the husband commits a breach of the agreement. *Com. v. Blackburn* (1899) 15 Montg. Co. L. Rep. (Pa.) 175.

c. Release of claim or stipulation not to sue.

In Canada, in *Atwood v. Atwood* (1893) 15 Ont. Pr. Rep. 425, affirmed by divided opinion in (1894) 16 Ont. Pr. Rep. 50, an action for alimony, it was said that husband and wife may validly agree inter se to live apart, and the wife's engagement not to sue for alimony or to claim the restoration of marital intercourse, if founded on a valid consideration given by the husband, will be enforceable against her and may be set up as a bar of her action for that purpose.

A deed of separation between husband and wife which provided that they should live apart and that each should not and would not disturb the other in any way, or claim any property, has been held to be a complete answer to the wife's subsequent action for alimony. *Ditch v. Ditch* (1911) 21 Manitoba L. R. 507, 19 West. L. R. 497. See also *Gaines v. Poor* (1861) 3 Met. (Ky.) 503, 79 Am. Dec. 559, wherein it was held that a contract between a husband and certain sureties reciting the separation of husband and wife, whereby certain property was to be conveyed by the husband in trust for the wife, and providing that the wife should make no claim on the husband or his estate for maintenance or alimony, did not bar the wife's right of suit against the husband and his representatives for alimony, it appearing that the wife was not a party to the contract and did not sign it, it being evident from the contract itself that the parties thereto did not contemplate that the wife should sign it.

However, in Illinois, in *Patterson v. Patterson* (1908) 111 Ill. App. 342, it was held that even if a wife had expressly agreed in a separation con-

tract, as a consideration for the payments to be made to her for her support, not to bring a suit for separate maintenance, she would not be bound thereby and was at liberty to institute suit at any time. However, two other cases hold that in Illinois a separation agreement is a bar to the wife's action for maintenance. See, ante, the subdivision XI. a, "Agreement as bar."

d. Inadequate provision for support.

Articles of separation which do not make adequate provision for the support of the wife, the annual payment provided for therein being the nominal sum of \$1, and the property given her not being sufficient to support her, are not a bar to the wife's claim upon her husband for alimony, it not appearing from the testimony that she had separate property. *Miller v. Miller* (1831) 1 N. J. Eq. 386.

However, in *Tuxford v. Tuxford* (1913) — Sask. —, 12 D. L. R. 380, 24 West. L. R. 611, an action to set aside a separation deed and for restoration of conjugal rights, etc., and in the alternative for an alimentary allowance of a stipulated sum greater than that allowed in the deed, it was held that, although the amount for maintenance which a wife received under a separation agreement was inadequate, she was not entitled to an increased allowance where it appeared that she deserted her husband in the first place, that since the execution of the agreement she has been paid, and has acted under it for years, and that she has broken the covenant of the deed not to molest the husband or bring an action for restitution of conjugal rights, since the cases in which a fixed amount has been decreed are cases where circumstances have arisen since the entering into of the agreement, which were not contemplated at the time of the arrangement, such as adultery.

e. No provision for support.

A separation agreement which contains no provision for the support of the wife is not a bar to the wife's subsequent suit for separate maintenance. *Schriner v. Schriner* (1910) 155 Ill. App. 191; *Kelly v. Kelly* (1908) 61

Misc. 480, 115 N. Y. Supp. 587; Com. v. King (1910) 37 Pa. Co. Ct. 635; Morgan v. Morgan (1912) 22 Ont. Week. Rep. 25, 3 Ont. Week. N. 1220, 3 D. L. R. 802; Frémont v. Frémont (1912) 26 Ont. L. Rep. 6.

A husband is liable to support his wife even though he has agreed to a separation, and, unless the agreement of separation contains a reasonable provision for her support and is carried into effect in good faith by the husband, it is not a bar to her obtaining an order for support in a proceeding under the Statute of 1867, authorizing such proceeding. Com. v. King (1910) 37 Pa. Co. Ct. 635.

An agreement between husband and wife adjusting property rights, executed at a time when they were living apart, which did not include the right to support among the differences settled although it purported to settle all claims and recited, among the premises, a payment of a certain sum a week to the wife for her support, was held not to be a defense to an action by the wife against the husband for a separation and separate maintenance, in Kelly v. Kelly (1908) 61 Misc. 480, 115 N. Y. Supp. 587.

A contract between husband and wife disposing of their personal effects and property, which was silent upon any agreement or intention to separate other than could be inferred by the division of the property, did not in any way bar the wife from asserting her rights by an action for separate maintenance. Schriener v. Schriener (1910) 155 Ill. 191.

An agreement in settlement of a prior action for alimony, by the terms of which the plaintiff withdrew her action and went back to live with the defendant as his wife, and he made an express covenant to support and maintain her as his wife and to treat her in fit and proper manner as a wife should be treated, and conveyed land and chattel interests to the wife, but which contained no provision for support and maintenance beyond that contained in his promise already implied by law, and no covenant not to sue for alimony, was not a bar to an action for alimony predicated on subsequent

misconduct. Morgan v. Morgan (1912) 22 Ont. Week. Rep. 25, 3 Ont. Week. N. 1220, 3 D. L. R. 802.

A separation deed by the terms of which, in consideration of certain payments by the husband, the parties agreed to live apart, and each agrees not to take any proceedings against the other for restitution of conjugal rights, or to annoy or interfere with the other in any manner, and the wife agrees to pay her own debts save three named accounts, and to support their two children, but which contained no provision relating to the maintenance of the wife, did not relieve the husband from his obligation to support and maintain his wife, or defeat her action for alimony, it appearing that the wife was justified in leaving her husband by reason of his cruelty and misconduct. Frémont v. Frémont (1912) 26 Ont. L. Rep. 6.

f. Fraud or coercion.

A separation agreement procured by fraud or coercion is not a defense to a wife's suit for separate support. Lister v. Lister (1916) 86 N. J. Eq. 30, 97 Atl. 170; Bueter v. Bueter (1890) 1 S. D. 94, 8 L.R.A. 562, 45 N. W. 208. See also Hill v. Hill (1914) 190 Ill. App. 541 (reviewed in subdivision XI. b, "Breach of separation agreement," supra).

Thus in Lister v. Lister (1916) 86 N. J. Eq. 30, 97 Atl. 170, a wife's suit against her husband for maintenance under a section of the Divorce Act, it was held that a contract between the plaintiff and defendant by the terms of which she agreed to release all claims in consideration of \$400, but which made no provision for future support, was not a defense to the action, it appearing that the wife when she signed the contract was under great stress of pecuniary embarrassment and greatly discouraged in her effort to get justice from her husband. The court said with regard to this defense: "At the very start it must be borne in mind that all contracts between man and wife are void in law, and in equity are only contracts sub modo and are entirely within the control of courts of equity, and are enforceable, especially against the wife,

only to the extent to which they may be found equitable and fair. 3 Pom. Eq. Jur. § 1121; *Demarest v. Terhune* (1901) 62 N. J. Eq. 663, 667, 50 Atl. 664. It would perhaps clear up this subject of the status of so-called contracts between man and wife if such transactions were not regarded as contracts even *sub modo*. A contract between a man and wife, void at law, may be deemed in equity as mere conduct,—a mere transaction out of which arise equitable rights and equitable duties. Without, however, indulging in any metaphysical discussion, it is enough to recognize in this case that this paper produced by this husband cannot be enforced in a court of equity so as to accomplish what is unfair, unjust, or oppressive. There can be no doubt in my judgment that to permit this man, who has so greatly wronged his innocent wife, to escape from this present litigation and discharge himself from all costs and expenses of this suit, and to secure the dismissal of this bill, would be to permit him to practise extortion and oppression upon the woman whom he has wronged. It will be observed that no provision is made in this paper for the future support of this impoverished and deserted wife. The testimony of the wife shows that she was under great stress of pecuniary embarrassment and greatly discouraged in her effort to get justice from her derelict husband, and was tempted by the opportunity for temporary relief which was held out before her when she executed this paper. Under these circumstances she drew, partly at the dictation of her son, the so-called release, signed the same, and delivered it to the son. The son delivered the paper to the father and brought back to the complainant the sum of \$400 which had tempted her to attempt to perform an unwifely and improvident act. In my judgment the defendant's answer—his supplemental answer setting up this release—exhibits a contract which a court of equity will not enforce, and that therefore the wife is entitled to a decree for maintenance upon her bill. The \$400 paid by the husband will be credited upon any

amount of past or future alimony or suit money which the court may order the husband to pay to the wife."

Articles of separation procured by the husband by threats of bodily injury, and accomplished by menace, justifying the court in annulling them, are not a defense to the wife's action for separate maintenance and support. *Bueter v. Bueter* (1890) 1 S. D. 94, 8 L.R.A. 562, 45 N. W. 208.

In *Reischfield v. Reischfield* (1917) 100 Misc. 561, 166 N. Y. Supp. 898, it was held that a void separation agreement constitutes in itself no defense to a wife's action for separation.

g. Subsequent misconduct of husband.

The subsequent or unsuspected adultery of a husband will preclude the husband from setting up a prior written agreement between the parties as a bar to the wife's action for alimony. *Miller v. Miller* (1914) 19 B. C. 563, 27 West. L. R. 607, 16 D. L. R. 557, 6 West. Week. Rep. 168.

The provisions of a separation agreement whereby a husband and wife mutually covenanted not to take proceedings against each other for restitution of conjugal rights, or to obtain a divorce or judicial separation in respect of anything that had theretofore taken place, and which provided for the payment of a weekly sum to the wife, have been held not to constitute a bar to the wife's action for alimony based on new grounds,—subsequent adultery of the husband,—there being no agreement that the wife will not sue for increased alimony should the circumstances warrant her in so doing. *Tuxford v. Tuxford* (1916) 9 Sask. L. R. 251, 28 D. L. R. 239, 34 West. L. R. 419.

h. Antenuptial agreement.

In *Logan v. Logan* (1841) 2 B. Mon. (Ky.) 142, a wife's suit for alimony, it was said that an antenuptial contract, whereby each party renounced all right to the property of the other which might otherwise have resulted by operation of law from their marriage, did not absolve the husband from his legal obligation to maintain his wife during cohabitation, nor can it exonerate him from contributing to

her maintenance after deserting her (unless her own estate be amply sufficient), and that agreement, therefore, may present no insuperable barrier to decreeing alimony.

In *Clopton v. Clopton* (1912) 162 Cal. 27, 121 Pac. 720, an action by a wife for maintenance, it was held that an antenuptial contract providing, among other things, that in the event there was no issue of the marriage the wife should have one fourth of the property owned by the husband at the time of his death, and that the husband should have the absolute and exclusive management and control, with power of disposition of all his property during his lifetime, but which contained nothing purporting to relieve the husband from the obligation of supporting and maintaining his wife during the continuance of the proposed marriage relation, did not in any way affect the duty of the husband to provide his wife with support.

1. *Contract contemplating divorce.*

In *Birch v. Anthony* (1899) 109 Ga. 349, 77 Am. St. Rep. 379, 34 S. E. 561, it was held that a widow's right to a year's support and dower from her husband's estate was not barred by a contract between herself and husband, by which the wife, in consideration of the sum of \$400, relinquished all claims of any kind as a wife, which contract was rendered illegal by a condition added, providing in effect that it should be legal if a divorce should be granted to the husband on or before a fixed date, since a contract intended to promote a dissolution of marriage is contrary to the policy of the law, illegal, and void.

XII. *Wife's right to criminal action.*

A wife's right to resort to a criminal action under a Nonsupport Statute is not a defense to her civil suit for separate maintenance. *Dye v. Dye* (1897) 9 Colo. App. 320, 48 Pac. 313; *Austin v. Austin* (1908) 42 Colo. 130, 94 Pac. 309; *Baier v. Baier* (1903) 91 Minn. 165, 97 N. W. 671.

Thus in *Austin v. Austin* (1908) 42 Colo. 130, 94 Pac. 309, a suit for separate maintenance, it was held that the action would not be defeated by the
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contention that the wife is afforded an adequate remedy through the medium of the statute which makes it a misdemeanor for a husband to wilfully neglect, fail, or refuse to provide reasonable support and maintenance for his wife and minor children, since the wife is not compelled to resort to the criminal law to enforce support from her husband, but may maintain an action for separate maintenance independently of an action for divorce or of a criminal proceeding.

In *Dye v. Dye* (Colo.) *supra*, an action by a wife against her husband to obtain relief in the way of separate maintenance, it was held that a statute which makes it a misdemeanor for any person living in Colorado to wilfully neglect, etc., to provide support for his wife, would not defeat the general powers of courts of equity to entertain suits to compel a husband to pay alimony which is consistent with his condition in life and reasonable for the maintenance of his wife.

So in Minnesota it has been held that the jurisdiction of equity to entertain a separate action for support, if it ever existed, is not taken away by a law providing for the punishment of husbands who abandon their wives and refuse to provide for them. *Baier v. Baier* (1903) 91 Minn. 165, 97 N. W. 671.

XIII. *Laches or estoppel.*

a. *Laches.*

A mere lapse of time does not constitute laches which will bar a wife's action for separate maintenance, since the cause of action is a continuing one and not affected by lapse of time. *Olsen v. Olsen* (1909) 3 Alaska, 616; *Carr v. Carr* (1892) 6 Ind. App. 377, 33 N. E. 805; *Delaware County v. Mercer* (1844) 2 Clark (Pa.) 75; *Kimble v. Kimble* (1897) 17 Wash. 75, 49 Pac. 216.

Thus in *Olsen v. Olsen* (Alaska) *supra*, it was held that the fact that a wife has for a long time supported herself and child, after desertion by the husband, would not make her claim any the less meritorious.

In *Kimble v. Kimble* (Wash.) *supra*, a wife's action for maintenance, it was

held that the husband cannot seize upon the fact that the wife has not asked him for maintenance for a quarter of a century, during which time she has, unaided by him, supported herself and children, as a pretext for avoiding his responsibilities in the future, since so far as the question of maintenance is concerned the action is based on the responsibility of the husband growing out of a marriage relation, and there is no principle of estoppel which can be applied, but the marriage relation, once established, continues until it is dissolved either by death or decree of a competent judicial tribunal.

In *Carr v. Carr* (1892) 6 Ind. App. 377, 33 N. E. 805, a wife's action for support authorized by a statute, it was held that the Statute of Limitations could not be successfully pleaded as a bar to the suit, the court saying: "Appellant's counsel further contend that the evidence shows that the action is barred by the Statute of Limitations, and that the finding should have been for the defendant under their answer pleading the bar. It is sufficient to say to this that the obligation of a husband to support his wife and infant children is a continuing one, and lasts so long as the relation exists. The purpose of this action is not to recover for past support, but for present and future maintenance. If the plaintiff has by some means eked out an existence in the past, she cannot compel the defendant to compensate her for the cost. The statute, §§ 3134 and 3135, Rev. Stat. 1891, in speaking of the judgment for support and maintenance, calls it alimony. The word alimony is here used in its primary sense of nourishment, sustenance, means of living. The effort here is to obtain nourishment and means of sustenance for the present and future. The Statute of Limitations has no application to the case made by the evidence."

The omission of a deserted wife to call on her husband for aid for twenty years after the separation, while her health and strength permitted personal exertion for her own support, will not release the husband from his duty

to support his wife, or defeat an action by the directors of the poor to indemnify the county for the support of the wife, left a charge on the funds of the public, and for an order appropriating such portion of the husband's property as is necessary to provide for the wife. *Delaware County v. Mercer* (1844) 2 Clark (Pa.) 75.

However, in Michigan the decisions are somewhat in conflict. Thus in *Parkinson v. Parkinson* (1913) 177 Mich. 336, 143 N. W. 4, an action under statute to compel a husband to support his wife, it was held that the wife's claim was not barred because she had refrained for about five years from compelling the defendant to adequately provide for her, since the mere lapse of time does not necessarily constitute laches, but it must result in changing the position of the other party.

But in *Reed v. Reed* (1893) 52 Mich. 117, 50 Am. Rep. 247, 17 N. W. 720, a wife's suit in equity to compel her alleged husband to furnish support, it was held that a delay of eighteen years in bringing the bill, and thirteen years after fraudulent divorce proceedings by the husband, was gross laches, which warranted the court in refusing the relief sought and ordering the bill dismissed. The opinion reads in part: "A more difficult objection for the complainant to overcome is that which arises upon the long delay to make claim to support. The Indiana divorce, it is seen, was obtained in 1868; this suit was instituted in 1881. Here are delay and apparent acquiescence in the fraudulent proceedings for thirteen years, and the bill assigns no reason for this whatever. But even this does not fully present the laches with which complainant is chargeable. It appeared from the charges and countercharges that she withdrew from her husband in 1863, eighteen years before this bill was filed, and that her remaining apart from him after that time was against his will and in disregard of his repeated requests that she would return to him. A suit for support under such circumstances necessarily brings in question the justification for

the original separation, and would require an investigation into the facts attending it. It could not be expected that an investigation after such a lapse of time could be anything else than imperfect, uncertain, and unsatisfactory, and the laches has been so gross that the court may well refuse to enter upon it." See also *Judson v. Judson* (1912) 171 Mich. 185, 187 N. W. 103, an action seeking to open a divorce decree to review the question of alimony, wherein it was held that a wife's delay for eighteen years after a divorce from her husband secured by her in another state before taking legal steps to secure support and maintenance was laches precluding her from any recovery, although her excuse for the laches, imputable to so long delay before taking action, was that her attorneys in Minnesota advised her that some provision for the maintenance of herself and child would be made by the court which granted her divorce, upon which she alleges she relied, and that the defendant who resided in Michigan told her that he was under no legal obligation to support herself and their child, and would not do so unless again married, which statement she alleges she believed, since neither the promises or advice of her own counsel nor belief in assertions of immunity by a prospective defendant are excuses for laches.

b. Estoppel.

In *Dillon v. Dillon* (1878) 60 Ga. 204, a suit by a wife against her husband for permanent alimony, it was held that the husband was estopped to deny that the plaintiff was his wife because she was a person of African descent, having more than one eighth of African blood in her veins, where he had openly lived with the plaintiff as his wife for many years, and raised children, and had also been instrumental in procuring a legislative act which declared that the plaintiff and her children were entitled to all the rights and privileges of a citizen of Georgia. The court said: "The points made and argued by counsel are many, but there is one broad principle that holds in its grasp the whole body of

the case; that principle is estoppel. The jury found in effect that there was a marriage in fact; and that finding was justified by the array of circumstances tending to establish such a marriage, which the record exhibits. Granting that some of the testimony was of doubtful admissibility, or even clearly inadmissible, enough remains to which no objection can be urged to warrant the finding. For years and years Mr. Dillon lived with Mrs. Dillon as his wife, recognizing and treating her as such. Of her he begat children; and the parents and children were grouped as a family, and as such lived openly in the city of Savannah, the largest city of Georgia, and one of the most respectable cities of the world. If the marriage tie had been wanting, would this have occurred? Could it have occurred, in the midst of a moral and refined community, and under the eye of the police? The jury belonged to the vicinage and could and did interpret the testimony in the light thrown upon it by the local gloss. They understood what such a mode of living in Savannah meant; whether it meant concubinage or matrimony. We believe its ordinary meaning throughout Christendom to be matrimony; and we are aware of no reason why it would or should be differently construed in Savannah. Of conduct, as of language, the ordinary meaning is to be accepted as the true meaning until a different sense, in the given instance, is established. When persons for a long period act habitually as married people generally act, there is a strong presumption that they have at some time, and in some way, entered the marriage state—that they have acquired the rights and assumed the obligations of the marriage relation. How else can their everyday habitual actions be accounted for, without imputing criminality to the parties concerned? To reason from long-continued cohabitation to marriage is to class them with the many; while to reason from it to fornication or adultery is to class them with the few. The jury found that Mr. Dillon and Mrs. Dillon were married. That find-

ing being correct, can Mr. Dillon shun his civil obligations to his family and to society, in the matter of furnishing support to his wife and minor children, on the ground that the marriage *de facto* was void? Can he be heard to say that Mrs. Dillon is not a free white person, but a person of color; and that therefore she was under a legal disability to contract the marriage into which he and she entered, he being a white man? As is to be fairly deduced from the evidence, Mrs. Dillon is not black, but of a complexion approximating that of many white persons of pure blood. Her true classification in respect to race cannot be accomplished readily by mere inspection. Examination and the employment of scientific skill would seem from the evidence to be requisite, in order to settle her extraction, in the absence of family history; and, perhaps even with the aid of such history, so far as the same is now attainable. It is thus not an open, bald case of the intermarriage of an African with a Caucasian. While the husband's lineage is certain, that of the wife is doubtful. Under these circumstances, can the husband (after marrying her, living with her as his wife for many, many years, rearing by her a family of children, some of them to the age of manhood and womanhood) institute a narrow search into her pedigree that he may deny to her the full measure of support in her declining years, to which, if she is truly and legally his wife, the law entitles her? Possibly for some purposes he might raise the question of blood even now, but can he for this purpose? That is the practical inquiry with which we are at present concerned. We think he cannot evade her claim for support, or the claim of his minor children for support, by such means. In respect to alimony, he is estopped to deny that she is his lawful wife. It militates against no interest of society that we can think of, so to treat him. Such an application of the doctrine of estoppel is not obstructive of public policy, but promotive of it. Society and each member of society, the mass and the individual, are benefited by closing

the mouth of any man against repudiating his family when they come to him for needed support. If he may cast them off, they will in many instances fall a weighty burden on the public. To allow a husband to indulge in scruples about the pedigree of his old wife, when her youth, beauty, and strength have all waned, and thus escape responding to her claim for reasonable alimony, would be unwise in policy, unsound in principle. Though there was room for differences of opinion on what we have said thus far touching estoppel, there can scarcely be a doubt that as Mr. Dillon procured the act of the general assembly to be passed, the provisions of which are set forth in the headnote, he is estopped by the foregoing facts, with that act superadded. He had the very question which he now attempts to raise settled by that act. He caused the legislature to be informed by satisfactory evidence that Mrs. Dillon was entitled to all and singular the rights and privileges of a citizen of Georgia; and the legislature solemnly declared by means of the act that she was. He must (in all civil rights and duties, at least) abide by this declaration, having himself been instrumental in procuring it to be made. Indeed, it seems to have been made wholly at his instance. If, in 1857 (the date of the act) she was entitled to all the rights and privileges of a citizen, she was entitled to be his wife, whether he married her before the act was passed or afterwards. The act declares her status, and to do so was within the competency of the legislature. That she was a free white person, though not affirmed expressly, is implied in the declaration of citizenship; for, at that period, to be a citizen of this state was to be white, white persons only being then members of our body politic. The act does not make her white, but is conclusive evidence against Mr. Dillon in this proceeding that she is white. He is estopped to controvert it."

XIV. *Prior suit as bar.*

A decree in a suit for separate support and maintenance is not a bar

to subsequent suit based on subsequent conduct of the parties.

Arkansas.—*Kientz v. Kientz* (1912) 104 Ark. 381, 149 S. W. 86.

California.—*Hardy v. Hardy* (1893) 97 Cal. 125, 31 Pac. 906.

Illinois.—*Schraeder v. Schraeder* (1888) 26 Ill. App. 524.

Kentucky.—*Griffin v. Griffin* (1847) 8 B. Mon. 120.

Missouri.—*Creasey v. Creasey* (1912) 168 Mo. App. 98, 151 S. W. 215.

Ohio.—*Schradin v. Schradin* (1902) 24 Ohio C. C. 647.

Canada.—*Tuxford v. Tuxford* (1916) 9 Sask. L. R. 251, 28 D. L. R. 239, 34 West. L. R. 419; *Henderson v. Henderson* (1872) 19 Grant, Ch. (U. C.) 464. See also *Payne v. Payne* (1905) 10 Ont. L. Rep. 742, 6 Ont. Week. Rep. 423, reviewed in *V. supra*.

Thus in *Creasey v. Creasey* (1912) 168 Mo. App. 98, 151 S. W. 215, a wife's suit for maintenance, it was held that a decree refusing maintenance would not be a bar to a subsequent suit if she should thereafter become justified in living apart from her husband. In *Griffin v. Griffin* (1847) 8 B. Mon. (Ky.) 120, a wife's suit to obtain a decree for alimony, it was said that a decree in the case refusing the relief sought would not be a bar to any claim growing out of the subsequent conduct of the parties. So in *Schradin v. Schradin* (Ohio) *supra*, it was held that a prior action for alimony was not a bar to an action instituted after a reconciliation and second separation, since the policy of the law is not to have a wife become reconciled to her husband at her peril.

A decree refusing a wife separate maintenance will not bar her remedy against her husband if she shall subsequently have sufficient grounds for another suit. *Schraeder v. Schraeder* (1888) 26 Ill. App. 524.

A decree in a wife's suit for alimony, giving effect to a compromise between the parties, although operating as a condonation of alleged previous matrimonial offenses, did not operate as a bar or answer to a subsequent suit for alimony based on adultery committed subsequent to such compromise and

decree. *Henderson v. Henderson* (1872) 19 Grant, Ch. (U. C.) 464.

The judgment in a prior action to set aside a separation agreement does not bar the wife's action for alimony based on subsequent adultery of the husband. *Tuxford v. Tuxford* (1916) 9 Sask. L. R. 251, 28 D. L. R. 239, 34 West. L. R. 419.

In *Kientz v. Kientz* (1912) 104 Ark. 381, 149 S. W. 86, a wife's suit for divorce, in which it was urged that although the court refused to grant to plaintiff a decree of divorce, it should have made some provision for her maintenance, the court held that the decree refusing the divorce did not conclude the wife's right at any time in the future to prosecute an action for alimony, if she should become entitled to it.

However, in *Hardy v. Hardy* (1893) 97 Cal. 125, 31 Pac. 906, it was held that a wife's action for permanent support and maintenance is barred by the judgment in a former action, where the second action does not allege any different facts than those upon which the prior action was based.

In *Com. ex rel. Tinkler v. Tinkler* (1902) 27 Pa. Co. Ct. 202, it was held that a pending order in another court for alimony pendente lite in the husband's suit for divorce will be a bar to the wife's right to an order for support under a statute which provides that if a husband separates himself from his wife without reasonable cause, or shall neglect to maintain his wife, he shall be liable to arrest, and the court of quarter sessions may order the person against whom complaint has been made, being of sufficient ability, "to pay such sum as said court shall think reasonable and proper for the comfortable support and maintenance of the wife . . . not exceeding \$100 per month," until the termination of the divorce proceedings.

XV. Miscellaneous.

In *Parker v. Parker* (1910) 134 Ga. 816, 67 S. E. 812, it is stated in the official syllabus that a wife is not barred of her right to alimony by the fact that the acts of her husband

which caused her to leave him were not unlawful.

In *Pendleton v. Pendleton* (1908) — Ky. —, 112 S. W. 674, a wife's suit against her husband to compel him to contribute to the support of herself and child, it was held that the defendant's infancy was not a defense, since he was old enough to contract marriage and is liable for the support of his wife and child even though he be an infant.

In *Smith v. Smith* (1891) 154 Mass. 262, 23 N. E. 263, a petition for support brought under a statute authorizing the probate court to make an order for the support of a wife who is actually living apart from her husband for justifiable cause, it was held that the statute permits the commencement of a suit immediately after a wife has begun actually to live apart from her husband for justifiable cause, even though he has not knowledge of it, without first giving him notice, express or implied, that she is so living apart.

In *Prichard v. Prichard* (1915) 189 Mo. App. 470, 176 S. W. 1124, it was held that it was not intended by the statute that a judgment for the support of a wife should be without limitation as to time or change as to amount, but the very nature of the husband's offense is such that if abandonment ceases the penalty should cease to be exacted, and it was not the intent of the statute that an inflexible and perpetual judgment should block the way to reconciliation, nor was it the intention of the legislature to authorize a judgment which could not be altered, where the situation had been so changed as to make the statute necessarily inapplicable; hence where the husband's marital obligation was dissolved for the wife's fault by a proper judgment of divorce in which she appeared, it put an end to the husband's duty to maintain her.

In proceedings against a husband for an order for support, the defendant was entitled to show that the plaintiff was married before she was married to the defendant, and that her husband is still living and is not

divorced from her. *Com. v. White* (1908) 22 Pa. Super. Ct. 67.

In *Kelley v. Bausman* (1917) 98 Wash. 686, 168 Pac. 181, a wife's action for separate maintenance against her husband and certain of his debtors, it was held that any defense which was available to the defendant husband was available to the codefendants.

An offer by a husband to support his wife separately is not a defense to a suit for alimony. *Weir v. Weir* (1868) 1 Ch. Chamb. Rep. (U. C.) 194.

In *Bowman v. Worthington* (1866) 24 Ark. 529, it was held that a woman who has been divorced and has married again is not, after the death of her second husband, entitled to have maintenance and support decreed to her from her first husband, her right being barred by the second marriage.

In *Shrader v. Shrader* (1895) 36 Fla. 502, 18 So. 672, it was held that a void decree of divorce between the parties was not a bar to the wife's suit to require the husband to contribute to her support.

In a wife's action for separation and to attack a voluntary separation agreement, made with the intervention of a third person as trustee, where the only acts alleged in the complaint upon which judgment could be asked on the ground of cruel and inhuman treatment occurred before the execution of the agreement, and are alleged not so much as a ground of separation as constituting a species of duress under which the wife was induced to execute the agreement of separation, and the only abandonment alleged is the voluntary one which has taken place between the parties under the agreement, sufficient ground is not presented for granting a motion for alimony and counsel fees. *Curtis v. Curtis* (1899) 29 Misc. 257, 61 N. Y. Supp. 59.

In *Jones v. Jones* (1911) 174 Ala. 461, 57 So. 376, a suit in equity by a wife against her husband, seeking alimony in the nature of maintenance without praying for divorce, in which a contract between the husband and wife to live separate and apart, with provisions for support, etc., is made a part of the bill for the information of

the court in determining the rights of the parties to alimony or maintenance, without seeking specific enforcement, it was held that the fact that the wife had not joined with her husband in the execution of conveyances, as stipulated in the contract, was not a defense to the action when she had not been requested to do so by the husband.

In *Freund v. Freund* (1906) 71 N. J. Eq. 524, 63 Atl. 756, it was held that it was not a defense to a wife's suit in New Jersey for support and maintenance that a New York judgment had decreed a separation from the wife, which the husband was from that time obliged to continue, and that he did not, therefore, "without any justifiable cause, abandon his wife or separate himself from her and refuse or neglect to maintain and provide for her" within the meaning of the New Jersey statutes, since "abandonment," under the statute, meant "forsaking entirely" of, or "removing entirely" from, the wife, and such "abandonment" occurred when the husband failed to perform the duties of a husband still incumbent on him under the judgment, viz., to support her and to be true to her.

In *Brandt v. Brandt* (1913) — Cal., 174 Pac. 55, an action seeking to recover separate maintenance for a wife and child, it was held that the circumstance that the child appears to have been of age when the complaint was filed cannot affect the right of the wife to obtain support for herself.

In *Sharpe v. Sharpe* (1908) 134 Mo. App. 278, 114 S. W. 584, the court said that it would be a perversion of the statute authorizing a wife to procure an allowance to be paid her for her support, if the husband could plead as a defense to his wife's action for maintenance that she was indebted to him, and to sue her by cross bill for divorce would take the case out of the purview of the statute providing for the suit, by converting it into an action for divorce.

In *Kuster v. Kuster* (1902) 87 Misc. 136, 74 N. Y. Supp. 853, alleged cruelty of the husband in confining the wife in an asylum was held to be justified by

the fact that she was afflicted by an incurable form of insanity known as "paranoia," the husband having under the circumstances conducted himself with commendable devotion as a faithful husband, and the wife, therefore, was not entitled to a separation on the ground of her husband's cruelty, or because it would be unsafe to place herself under his care.

The fact that a wife had previously filed a bill for divorce and alimony in the equity side of the county court would operate to bar her suit in the chancery court for separate maintenance. *Dunnock v. Dunnock* (1852) 3 Md. Ch. 140.

A wife may be found to be justifiably living apart from her husband on account of extreme cruelty notwithstanding her adultery, which he was willing to forgive. *Watts v. Watts* (1894) 160 Mass. 464, 23 L.R.A. 187, 39 Am. St. Rep. 509, 36 N. E. 479, in which the court said: "Living apart from a husband under such circumstances as to constitute utter desertion, for which a divorce may be granted, is a marital wrong, and cannot be legally justifiable. But facts may be supposed upon which the decision of the probate court might have been made in the present case, even if it were known that the wife was guilty of adultery of which the husband had knowledge. If he had for a long time been guilty of extreme cruelty towards her, and had inflicted serious bodily injury upon her when he ejected her from his house, and then had asked her to return to his home and had offered to forgive the adultery if she would come back, she would have been justified in refusing to return on the ground that she had reason to fear great injury from his cruelty if she continued to live with him. If such facts appeared the court might well decide that she was justifiably living apart from him on account of his cruelty, notwithstanding her adultery, which he was willing to forgive. It is obvious, therefore, that the decision in her favor on the question whether she was living apart from him for a justifiable cause is not necessarily a finding that she was not guilty of adultery,

and upon the record before us it cannot be said that her guilt or innocence was necessarily involved in the issue then tried."

In *Pyott v. Pyott* (1900) 90 Ill. App. 210, affirmed in (1901) 191 Ill. 280, 61

N. E. 88, a suit for separate maintenance, it was held that a cross bill will lie to annul the marriage on the ground of insanity of the husband and fraud in procuring the marriage.

R. H. H.

J. T. ABRAHAM, Appt.,
v.
DOC HATCHETT, JR., et al.

Arkansas Supreme Court — March 5, 1917.

(128 Ark. 15, 193 S. W. 72.)

Public lands — right to compensation for improvements.

1. Where, by statute, one receiving a certificate of entry under the Federal Homestead Law may maintain ejectment for possession against one having no better title or right of possession, one entering under such certificate is entitled to compensation for improvements from one ousting him by superior title.

[See note on this question beginning on page 95.]

Improvements — right to compensation — color of title.

2. Color of title, as well as good faith, is necessary to entitle an occupant of real estate to compensation for improvements put upon the property.

Definition — color of title.

3. The words, "color of title," mean that which is appearance of title, but which in reality is not title.

Improvements — allowance for — amount.

4. One making improvements under a certificate of entry on government land is not entitled to recover their cost from one having a superior title to the land, but merely the amount by which he has enhanced the value of the land.

APPEAL by plaintiff from a judgment of the Circuit Court for Pulaski County (Hendricks, J.) in his favor, in part only, in an action brought to recover possession of certain lands. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. O. D. Longstreth and E. R. Parham for appellant.

Messrs. Bratton & Bratton for appellees.

Hart, J., delivered the opinion of the court:

This is an action of ejectment instituted in the circuit court by J. T. Abraham against Doc Hatchett, Jr., and Doc Hatchett, Sr., to recover 200 acres of land.

The defendants admitted that the plaintiff had title to the land, but they claimed to be in possession of it under "color of title" by virtue of a homestead certificate, and claimed

judgment for improvements to the amount of \$479.50. On the trial of the case, it was shown that the defendants filed their homestead application in United States Land Office at Little Rock, Arkansas, on February 1, 1911, and paid the fees therefor. A certificate of homestead entry by the United States government was issued to them. Afterward, it was ascertained that the lands had been previously granted to the state of Arkansas, for the benefit of the Little Rock & Fort Smith Railroad Company, and the United States Land Department,

having discovered this fact, held that the lands were not within its jurisdiction at the time of the homestead entry of the defendant, and the same was canceled.

The defendants made certain improvements on the lands during the time they were in possession of them, and testified to the value of these improvements.

Judgment was rendered in favor of the plaintiff for the possession of the land, but it was further adjudged that no writ of possession be issued in his favor until he should pay to the defendants the sum of \$300, the value of the improvements in excess of the rental value of the land as found by the jury. It was further provided that the defendants should have a lien on the land for said amount. The plaintiff has appealed.

It is first contended that the certificate of homestead entry was not sufficient to constitute "color of title" in the defendants. "Color of

Improvements
—right to
compensation—
color of title.

title," as well as good faith, is made necessary to entitle

an occupant of lands to compensation for improvements made by him. *Beasley v. Equitable Securities Co.* 72 Ark. 601, 84 S. W. 224; *Bloom v. Strauss*, 70 Ark. 483, 69 S. W. 549; *White v. Stokes*, 67 Ark. 184, 53 S. W. 1060; *Beard v. Dansby*, 48 Ark. 183, 2 S. W. 701; *Nunn v. Lynch*, 89 Ark. 41, 115 S. W. 926, 16 Ann. Cas. 852. It is also apparent from those authorities that the words, "color of title," had received a judicial interpretation at

Definition—
color of title.

the time our Betterment Act was passed. They have

been generally defined as "that which in appearance is title, but which in reality is not title."

In *Whitcomb v. Provost*, 102 Wis. 278, 78 N. W. 432, the supreme court of Wisconsin decided that a holding under an invalid certificate of homestead entry is not "color of title," so as to entitle the defendant in ejectment to recover for improvements. We do not think that case,

and others of similar character, are authority for so holding in this state. Under our statute, a plaintiff claiming possession of land under an entry made with the register and receiver of the proper land office of the United States may maintain an action for the recovery of the lands. *Kirby's Dig.* § 2738.

The certificate issued by the agents of the proper land office to an applicant for a homestead entry entitles the holder of the certificate to take possession of the land and make improvements upon it. It is true the certificate of entry only gives him an inchoate equitable title, subject to be defeated by non-compliance with the provisions of the act of Congress, or to be canceled for cause, but under the liberal provisions of our statutes, the person holding the certificate may maintain ejectment for possession of the land against one having no better title or right of possession. *Gaither v. Lawson*, 31 Ark. 279.

While our Betterment Act was passed many years after our Ejectment Statute, yet the former was passed with a knowledge of the existence of the latter statute, and with reference to its provisions. While the certificate of homestead entry did not invest the holder with the legal title, it was sufficient, under our statute, to enable him to maintain or resist ejectment. The receiver's receipt and the certificate of entry give to the holder the immediate right to the possession of the land, with the power to oust any intruder by an action of ejectment. When the applicant has paid his money and taken the receipt, he has done all in his power, and the land from that time is reserved from entry. It is true the certificate is liable to be canceled by the government in case the sale was improperly made, but such would be the case if a patent had been issued. Either a certificate or patent may be recalled or canceled in case the government has previously sold the land. But we think that, when our Ejectment and Betterment Statutes

are construed together, it was the evident intention of the legislature to make a certificate of homestead entry "color of title," and the circuit court properly so held. As bearing on the question, see *Cawley v. Johnson*, 21 Fed. 492, and *Hannibal & St. J. R. Co. v. Clark*, 68 Mo. 371.

The court, however, erred in allowing the defendants the cost of the improvements placed by them on the land. In considering the question of how the value of improvements are determined, in *McDonald v. Rankin*, 92 Ark. 173, 122 S. W. 88, the court said: "The value thereof is based upon the enhanced value which these improvements at the time of the recovery impart to the land. But such enhanced value of the land should arise solely by reason of the improvements themselves, and should be determined only by the ordinary considerations that would apply to lands that are similarly situated. The condition of the improvements at the time of the recovery should be taken into considera-

tion. The difference between the value of the land without the improvements, and the value of the land with the improvements in their then condition, would be a just sum to allow therefor. In any event, no value that the land might impart to the improvements should be considered in estimating the value of such improvements. The reasonable cost in making the improvements, their deterioration, if any, or the reasonable cost of making them at the time of the recovery in their then condition, may well be taken into consideration in arriving at the value of such improvements."

For the error in determining the measure of the value of the improvements, the judgment will be reversed and the cause remanded for a new trial.

NOTE.

The question involved in the reported case (*ABRAHAM v. HATCHETT*, ante, 88), as to the right as between adverse claimants, to improvements placed on public lands, is the subject of the annotation following *PATTERSON v. CHANEY*, post, 95.

CLYDE A. PATTERSON

v.

C. G. CHANEY, Appt.

New Mexico Supreme Court—May 28, 1918.

(24 N. M. 156, 173 Pac. 859.)

Public lands — Improvements — right of purchaser.

1. The purchaser from the government of public lands is entitled to the improvements on the premises when he acquires possession, as being a part of the real estate.

[See note on this question beginning on page 95.]

Fixtures — tests.

2. There are three general tests applied by the courts in determining the question whether an article used in connection with realty is to be considered a fixture: First, annexation to the realty, either actual or constructive;

second, adaptation or application to the use or purpose to which that part of the realty to which it is connected is appropriated; and, third, intention to make the article a permanent accession to the freehold.

[See 11 R. C. L. 1059.]

Headnotes by ROBERTS, J.

Public lands — removal of improvements.

3. Section 4634, Code 1915, does not attempt to give the owner of improvements upon public lands the right to remove the same, after such lands have passed into the possession of a bona

fide entryman or purchaser from the government.

[See 22 R. C. L. 264, 265.]

Homestead — applicability of statute.

4. The Act of Congress June 1, 1874, has no application to homestead entries.

APPEAL by defendant from a judgment of the District Court for Chaves County (Richardson, J.) overruling a motion for direction of a verdict in his favor in an action brought to recover possession of certain improvements on land held by defendant under a homestead claim. *Reversed.*

The facts are stated in the opinion of the court.

Mr. H. R. Parsons, for appellant:

Defendant on entering the Walton tract was immediately vested with all rights of ownership of the land upon which the improvements in question were located, which improvements are all annexed in a permanent way to the Walton tract. Hence, they are real property and cannot properly be the subject-matter of an action in replevin.

Wisconsin C. R. Co. v. Price County, 133 U. S. 496, 33 L. ed. 687, 10 Sup. Ct. Rep. 341; Knapp v. Alexander-Edgar Lumber Co. 237 U. S. 162, 59 L. ed. 894, 35 Sup. Ct. Rep. 515; Moore v. Linn, 19 Okla. 279, 91 Pac. 911; Floyd v. Ricks, 14 Ark. 286, 58 Am. Dec. 774; Rason v. Qualls, 4 Blackf. 286, 30 Am. Dec. 658; Boyer v. Williams, 5 Mo. 335, 32 Am. Dec. 324; Reservation State Bank v. Holst, 17 S. D. 240, 70 L.R.A. 799, 95 N. W. 981; Hiatt v. Brooks, 17 Neb. 83, 22 N. W. 73; Welborn v. Spears, 32 Miss. 138; Hill v. Pitt, 2 Neb. (Unof.) 151, 96 N. W. 339; 32 Cyc. 826; Collins v. Bartlett, 44 Cal. 371; Seymour v. Watson, 5 Blackf. 555, 36 Am. Dec. 556; Burlington v. Teeple, 2 G. Greene, 542; Attridge v. Billings, 57 Ill. 499; Blair v. Worley, 2 Ill. 179; Chavez v. Chavez de Sanchez, 7 N. M. 58, 32 Pac. 137.

Mr. K. K. Scott for appellee.

Roberts, J., delivered the opinion of the court:

This is an action in replevin of certain property consisting of a three-room dwelling house, windmill, garage, chicken house, and fencing located on land held by appellant under a homestead claim at the time of the institution of the suit. There was no dispute as to the material facts in the case. On May 16, 1913, Chester E. Walton made a homestead entry at the Fort Sumner land office for the

north half of section 1, township 2 south, range 22 east. After making the entry he constructed the improvements in question and lived on the claim for some eight months. The house was set on a stone foundation. The windmill was for the operation of a pump, and was bolted to a foundation, set in the earth. The garage was likewise set upon a foundation, and the fence consisted of posts and wire, the posts being embedded in the earth. Walton, in February, 1914, sold the improvements to appellee's brother for \$100 cash and four notes of \$100 each. Walton, at the same time, signed a relinquishment and delivered it to Patterson. Later Walter Patterson sold the improvements to appellee herein, and delivered to him the relinquishment. The Pattersons lived on the claim for some time, but never filed thereon. On January 3, 1916, appellee entered into an agreement with one Midgett, by which he agreed to transfer to him the improvements and to deliver the relinquishment. Midgett applied at the land office at Fort Sumner, and was told that there was no contest pending, whereupon he delivered the relinquishment and made application to enter the land. The application was received, but later Midgett was notified by the officers of the Land Department that C. G. Chaney, appellant herein, had filed a contest on December 13, 1915. Chaney's application to enter the land was allowed, and the application made by Midgett was rejected. In March, Chaney took possession of the land

and the improvements, and this action was instituted by appellee to recover the improvements.

Appellant, at the conclusion of appellee's evidence in chief, moved the court for an instructed verdict, which was overruled. Later, the motion was renewed at the close of all the evidence, and was again overruled. The action of the court in overruling this motion is decisive of the case. Other questions are presented, but they are disposed of by a consideration of the single question.

Appellant contends that when he entered the land he was immediately vested with the right of possession of the tract of land upon which the improvements in question were located, and to everything annexed to it in a permanent way; that the improvements in question were permanently annexed to the land, and the right to their possession passed to him; that, being fixtures, they could not be replevied. In *Wisconsin C. R. Co. v. Price County*, 133 U. S. 496, 33 L. ed. 687, 10 Sup. Ct. Rep. 341, the court said: "In *Witherspoon v. Duncan*, 4 Wall. 210, 218, 18 L. ed. 339, 342, a similar question arose and was in like manner answered. Said the court: 'In no just sense can lands be said to be public lands after they have been entered at the Land Office and a certificate of entry obtained. If public lands before the entry, after it they are private property. If subject to sale, the government has no power to revoke the entry and withhold the patent. A second sale, if the first was authorized by law, confers no right on the buyer, and is a void act. And again: 'The contract of purchase is complete when the certificate of entry is executed and delivered, and thereafter the land ceases to be a part of the public domain. The government agrees to make proper conveyance as soon as it can, and in the meantime holds the naked legal fee in trust for the purchaser, who has the equitable title.'"

Hence, if the improvements on the land in question were fixtures and passed with the real estate, appellant, having the right of possession of the real estate, would likewise be entitled to the possession of all permanent improvements and fixtures upon the same.

Public lands—
improvements—
right of
purchaser.

There are three general tests applied by the courts in determining the question whether an article used in connection with realty is to be considered a fixture.

Fixtures—
tests.

First, annexation to the realty, either actual or constructive; second, adaptation or application to the use or purpose to which that part of the realty to which it is connected is appropriated; and, third, intention to make the article a permanent accession to the freehold. 11 R. C. L. 1059; *Reeves*, Real Prop. § 11; *Ewell*, Fixtures, 27.

The improvements made upon the entry by Walton under these tests must be held to be fixtures. Under his entry of the land he was required by the statutes of the United States to take up his residence upon it and improve it, and, upon complying with the law, he would eventually have received a patent from the government, conveying to him the legal title to the land. He took up his residence upon the land and made the improvements, presumably with the intention of fully complying with the law and becoming invested with such title. The nature of the property, the manner of its construction, and its intended use all go to show that it was the intention of the party who made the improvements that they should be permanent additions to the land. There is no evidence tending to show a contrary intent. Under such circumstances the articles, so attached, are presumed to have become a part of the realty, and, being such when appellant filed a homestead entry on the land in question, he acquired the right to the possession of the land and to

the fixtures thereon. It is well settled, as stated by the editor of the note to the case of *Reservation State Bank v. Holst*, 70 L.R.A. 799, that "the purchaser from the government is entitled to the improvements on the premises when he acquires possession, as being part of the real estate."

Many cases are cited in support of the text.

In the case of *Collins v. Bartlett*, 44 Cal. 371, the court held that all improvements on the public lands of the United States which become a part of the realty pass to the purchaser of the land from the United States. The court considered the effect of an act of the legislature allowing those who had put improvements on lands of the United States to remove the same within six months after the land shall have become private property of any person, and held that, in so far as this statute related to improvements which are a part of the realty, it was void because of its interference with the primary disposition of the soil by the government of the United States. This case was followed by the court in *Pennybecker v. McDougal*, 48 Cal. 160, and *McKiernan v. Hesse*, 51 Cal. 594. The same rule is announced by the supreme court of Arkansas in the case of *Graham v. Roark*, 23 Ark. 19. Other Arkansas cases will be found cited in this opinion.

The supreme court of Illinois, in the case of *Hutson v. Overturf*, 2 Ill. 170, holds that a promise made by a vendee of public lands, after the purchase of the same from the United States, to pay for improvements made upon the same previous to the purchase, was without consideration and void. This upon the theory that the improvements passed with the land; hence that there was no consideration for the agreement to pay for the same. To the same effect see *Carson v. Clark*, 2 Ill. 113, 25 Am. Dec. 79, and the later case of *French v. Carr*, 7 Ill. 664, and the case of *Burlerson v. Teeple*, 2 G. Greene, 542, which held

that a fence built upon public lands, even by mistake, passes with the freehold from the government to the purchaser. The same rule was announced by the supreme court of Indiana in the case of *Seymour v. Watson*, 5 Blackf. 555, 36 Am. Dec. 556. See also *Welborn v. Spears*, 32 Miss. 138; *Hiatt v. Brooks*, 17 Neb. 33, 22 N. W. 73. In 32 Cyc. 826, it is held that a purchaser of lands from the United States is entitled to growing crops and improvements forming part of the realty which are on the land at the time of the purchase.

Appellee argues, however, that the statute of New Mexico, Code 1915, § 4634, has enlarged the rights of the bona fide possessor of government land with respect to improvements. This section provides: "The owner of what is known as a valid claim or improvement under the laws of this state, on public lands of the United States, shall be deemed in possession of a transferable interest therein, and any sale of such improvement shall be considered a sufficient consideration to support a promise," etc.

This statute, however, does not have the effect which appellee ascribed to it. It has application only so long as the title and right to possession of the land is in the United States. So long as the claimant is in possession of the land, legal title to the same being in the United States, the claimant, under this statute, would have the right to sell or dispose of any improvements he might make upon the land. He could likewise dispose of growing crops. He can remove the improvements and do what he chooses with the crop, because the government does not object or interfere with such action on his part. When, however, he loses his right of possession to the land and such right passes to another by virtue of a valid entry, the second entryman becomes entitled to possession of the land and of all fixtures thereon.

Public lands—
removal of
improvements.

With the rights of such parties the

legislature has not attempted to interfere.

Again, appellee argues that by virtue of the provisions of Act June 1, 1874, chap. 200, 18 Stat. at L. 50, Comp. Stat. § 1541, 8 Fed. Stat. Anno. 2d ed. p. 865, which provides "that when an occupant of land, having color of title, in good faith has made valuable improvements thereon, and is, in the proper action, found not to be the rightful owner thereof, such occupant shall be entitled in the Federal courts to all the rights and remedies, and, upon instituting the proper proceedings, such relief as may be given or secured to him by the statutes of the state or territory where the land lies, although the title of the plaintiff in the action may have been granted by the United States after said improvements were so made." Congress has recognized the right of private property in improvements made on the public lands of the United States, even when the title to the land has passed to another. This statute, however, has

**Homestead—
applicability of
statute.**

no application to homestead entries, as held by the supreme court of Oklahoma in the case of *Woodruff v. Wallace*, 3 Okla. 355, 41 Pac. 357. Appellee cites the cases of *Crocker v. Donovan*, 1 Okla. 165, 30 Pac. 374, and *Winans v. Beidler*, 6 Okla. 603, 52 Pac. 405, the latter case holding that the homestead settler who makes improvements upon a tract of government land can remove the same after the land has been awarded to an adverse settler. The first case cited involves solely the question of the right to tax improvements upon the government lands, the territorial law so authorizing. The same rule is announced by a majority of the courts, which presents a quite different question from that here involved.

In a later Oklahoma case (*Moore v. Linn*, 19 Okla. 281, 91 Pac. 911) the court held that the second entry-

man was entitled to growing crops on the land entered, and said: "And it has been held that where the government sells land to one, or permits one to file a homestead entry on a piece of government land, the purchaser or entryman not only acquires the absolute right of possession, but also title to all improvements and growing crops thereon."

The only two states we have found where the courts hold in accordance with the contention of appellees are Idaho and Colorado. In the case of *Bingham County Agri. Asso. v. Rogers*, 7 Idaho, 63, 59 Pac. 931, the court held that where a person has entered on public land, in good faith and under what he believes to be a valid entry, and has made valuable improvements thereon, he is entitled, upon his entry being defeated, to remove such improvements upon reasonable notice after the title to the land has been finally determined. No authorities are cited or reason advanced for the holding. In a later Idaho case (*Richardson v. Bohny*, 19 Idaho, 369, 114 Pac. 42) the earlier case is followed. In Colorado, in the case of *Wallbrecht v. Blush*, 43 Colo. 329, 95 Pac. 927, the court said: "If a person erects a building on the public domain by mistake, it does not necessarily become the property of the government, or of a subsequent homesteader, but the owner of the building will have a reasonable time in which to remove it."

The courts in these two states are not in harmony with the weight of authority, and the cases are not supported by reason and logic.

For the foregoing reasons we are constrained to hold that the District Court should have sustained appellant's motion for a directed verdict. The cause will therefore be reversed, with directions to enter judgment for appellant; and it is so ordered.

Hanna, Ch. J., and Parker, J., concur.

ANNOTATION.

Rights as between adverse claimants to improvements placed on public lands.**I. Scope, 95.****II. Ownership:****a. In general, 95.****b. Promise by purchaser to pay for improvements, 97.****c. Right to remove improvements:****1. Generally, 98.****2. As affected by character of improvements, 98.****d. Minority view, 99.****III. Right to compensation for improvements:****a. Generally, 100.****I. Scope.**

This note embraces only questions as to the rights of the adverse claimants in the improvements themselves. It does not embrace questions as to their rights in the land by reason of making the improvements, such as questions as to the right of pre-emption by one making improvements on public lands or questions as to the sufficiency of improvements by a homestead entryman.

II. Ownership.**a. In general.**

By the weight of authority, the purchaser from the government is entitled to the improvements on the premises when he acquires the land, as being part of the real estate, and a person making improvements on public lands has no right thereto as against the grantee of the government.

Alabama.—Shaw v. Boyd (1831) 1 Stew. & P. 83; Rhea v. Hughes (1840) 1 Ala. 219, 34 Am. Dec. 772; Duncan v. Hall (1846) 9 Ala. 128.

Arkansas.—McFarland v. Mathis (1850) 10 Ark. 560; Floyd v. Ricks (1853) 14 Ark. 286, 58 Am. Dec. 874; Wynn v. Morris (1855) 16 Ark. 414, appeal dismissed in (1859) 20 How. (U. S.) 3, 15 L. ed. 800; Graham v. Reark (1861) 23 Ark. 19; Martin v. Roesch (1893) 37 Ark. 474, 21 S. W. 831.

California.—Collins v. Bartlett

III.—continued.**b. Under Occupying Claimants' Acts:****1. In general, 100.****2. "Good faith" of occupant, 101.****3. Title, color of title, or apparent title, 103.****4. Adverse holding, 105.****5. Miscellaneous decisions, 105.****c. Under statutes expressly relating to state lands:****1. Tennessee, 107.****2. Washington, 107.****3. Wisconsin, 108.**

(1872) 44 Cal. 371; Pennybecker v. McDougal (1874) 48 Cal. 160; McKiernan v. Hesse (1877) 51 Cal. 594.

Illinois.—Carson v. Clark (1833) 2 Ill. 113, 25 Am. Dec. 79; Hutson v. Overturf (1834) 2 Ill. 170; Blair v. Worley (1835) 2 Ill. 178; Roberts v. Garen (1837) 2 Ill. 396; Townsend v. Briggs (1838) 2 Ill. 472; French v. Carr (1845) 7 Ill. 664; Taylor v. Davis (1849) 11 Ill. 10; Attridge v. Billings (1870) 57 Ill. 489.

Indiana.—Boston v. Dodge (1820) 1 Blackf. 19, 12 Am. Dec. 205; Seymour v. Watson (1841) 5 Blackf. 555, 36 Am. Dec. 556.

Iowa.—Burlerson v. Teeple (1850) 2 G. Greene, 542.

Louisiana.—Gibson v. Hutchins (1857) 12 La. Ann. 545, 68 Am. Dec. 772.

Mississippi.—Welborn v. Spears (1856) 32 Miss. 133.

Missouri.—Burns v. Hayden (1857) 24 Mo. 215; Welch v. Bryan (1859) 23 Mo. 30.

Nebraska.—Hiatt v. Brooks (1885) 17 Neb. 33, 22 N. W. 73; Hill v. Pitt (1901) 2 Neb. (Unof.) 151, 96 N. W. 339.

New Mexico.—PATTERSON v. CHANEY (reported herewith) ante, 90.

Oklahoma.—Moore v. Linn (1907) 19 Okla. 279, 91 Pac. 911.

Texas.—McCullers v. Johnson (1907) — Tex. Civ. App. —, 104 S. W. 502.

The rule applies in favor either of a purchaser or of a homestead entry-

man. *Moore v. Linn* (Okla.) *supra*. It has been applied against one who never held any interest in the land on which he made the improvements (*Shaw v. Boyd* (Ala.) *supra*); a "mere settler upon public lands" (*Duncan v. Hall* (Ala.) *supra*); a purchaser of improvements on public lands who had arranged to secure title to the land through its selection by the state under an internal improvement grant, but who was prevented from securing title by the former owner of the improvement exercising her right of pre-emption (*Wynn v. Morris* (1855) 16 Ark. 414, appeal dismissed in (1859) 20 How. (U. S.) 3, 15 L. ed. 800); persons who made improvements on land which had been forfeited to the state for nonpayment of taxes, in good faith, without knowledge of the claim of the state, and under color of title, believing that they were the owners (*Martin v. Roesch* (1893) 57 Ark. 474, 21 S. W. 881); a person claiming under a location of school warrants, which was void because made prior to a survey of the land (*Collins v. Bartlett* (1872) 44 Cal. 371); a mere possessor who had hope of acquiring title by pre-emption (*Gibson v. Hutchins* (1857) 12 La. Ann. 545, 68 Am. Dec. 772); a pre-emptor who had abandoned his pre-emption at the time another filed thereon (*Hiatt v. Brooks* (1885) 17 Neb. 33, 22 N. W. 73; *Hill v. Pitt* (1901) 2 Neb. (Unof.) 151, 96 N. W. 339); and owners of adjoining land placing fences on the land of government by mistake (*Seymour v. Watson* (1841) 5 Blackf. (Ind.) 555, 36 Am. Dec. 556; *Burlerson v. Teeple* (1850) 2 G. Greene (Iowa) 542).

In the case last cited, the court said: "Although in a new country like Iowa, where claims are made and fences built in many instances, before the land is surveyed, the principle of law that, where a man enters land he enters all the improvements upon it, may and often will operate oppressively; still a doctrine so well settled in the books cannot be made to yield to particular emergencies. . . . From the general and well-established principle of law that a fence attaches to and becomes a part

of the freehold when erected, and follows the tenure of the soil (and, although built upon the land of another by mistake, the rule remains the same), it follows as a necessary result that the plaintiff in this case, when he purchased the land upon which the fence was situated, became the owner thereof and the defendants were trespassers in removing it." It was further held that the wrongful detachment of the fence from the realty did not divest the purchaser of his title and entitle the person erecting the fence to carry away the rails. In *Seymour v. Watson* (1841) 5 Blackf. (Ind.) 555, 36 Am. Dec. 556, the court said that all permanent buildings followed the tenure of the soil on which they were erected, that the fence which inclosed a field was within this doctrine, that the fact that the fence in question was erected by mistake did not alter the matter or make it any less a part of the freehold, and that, being the property of the United States, in consequence of its annexation to the soil it passed to the purchaser by virtue of his purchase of the land.

In *Hiatt v. Brooks* (1885) 17 Neb. 33, 22 N. W. 73, the court said: "It may be considerations of natural justice would lead to the conclusion that a person who puts permanent valuable improvements on a tract of government land, in an unsuccessful effort to hold it by virtue of the Pre-emption or Homestead Laws, should be allowed to take such improvements away at the end of unsuccessful litigation. But such a rule would be difficult of execution, of doubtful general utility, and never has been applied to cases of this kind." It was accordingly held that where plaintiff filed on land which had been abandoned by persons making improvements thereon, and sold a house standing on the land to defendant, such conveyance constituted a sufficient consideration for defendant's note, though one of the former owners claimed the land and apparently also sold the house to defendant.

In *Reese v. Crockett* (1835) 8 Yerg. (Tenn.) 129, it was held that one

abandoning an improvement on vacant land before he had acquired any right to the land under a statute giving a right of occupancy to any person who should have occupancy on a certain date had no interest subject to sale, and that the agreement of a person thereupon taking possession to acquire title and divide the land with him was without consideration.

And after land on which there was an improvement had been entered by a land warrant, and possession of the improvements taken, a sale of the improvements by the party making it, to a third party, was void for want of consideration. *Burns v. Hayden* (1857) 24 Mo. 215.

Where a city erected a sewer across the lands of the United States government without its consent or permission, such structure immediately belonged to the owner of the soil, and, when the government conveyed such lands, the whole of the premises passed to the grantee. *Harrington v. Port Huron*. (1891) 86 Mich. 46, 13 L.R.A. 664, 48 N. W. 641. The court, however, held that ejectment against the city was not a proper remedy, and, in a subsequent part of its opinion, says that the government only conveyed the right, title, and interest of the United States without any covenant of warranty, and that the question whether the government intended to recognize the city's rights on the premises was not passed on.

But settlers making valuable improvements upon public lands which, at the time, are not reserved for the exclusive use of the government, are not regarded as trespassers, and their improvements will be protected as against all persons who have neither a legal nor equitable title to the land, and hence, where none of the claimants to public lands had clear title thereto, but one of them whose entry had subsequently been canceled had obtained a judgment in ejectment against the other, the possessory right and title of each to the improvements made by him would be protected, and for that purpose enforcement of the judgment in ejectment would be enjoined. *Gaines v.*

6 A.L.R.—7.

Hale (1870) 26 Ark. 168, affirmed in (1876) 93 U. S. 3, 23 L. ed. 782.

And where, after defendant made a homestead entry, but before he received his patent, a part of the land was appropriated by a railroad company under a statute granting rights of way across public lands, though the company thereby acquired title to the land appropriated, any improvements made by defendant on such land were his own, and if they were appropriated he was entitled to be paid therefor. *Flint & P. M. R. Co. v. Gordon* (1879) 41 Mich. 420, 2 N. W. 648.

Where a school district purchased a piece of land from a person in possession having a squatter's title, with knowledge by it of the issuance of a United States patent therefor to another, on the advice of counsel and with the belief that the squatter's title was the better title, and erected a schoolhouse thereon, it was held, in subsequent proceedings to condemn the land as against the holder of the patent, who was the true owner, that the school district was only required to pay such owner the value of the land without the schoolhouse, though the district was notified before the erection of the schoolhouse that it would erect it at its peril. *Searl v. School Dist.* (1890) 133 U. S. 553, 33 L. ed. 740, 10 Sup. Ct. Rep. 374. The court said that the only legitimate inference from the facts was that the district acted throughout in good faith, as the opposite of fraud and bad faith, and that, although it may have been wholly mistaken, the intention guided the entry and fixed its character, and it could not be held to have been such a trespass as to justify the claim that the school building erected in similar good faith became part and parcel of the land, so as to entitle the owner to recover its value.

b. Promise by purchaser to pay for improvements.

So a promise by the purchaser to pay for the improvements, though valid in some states if made before the purchase, is void if made after the purchase, for want of consideration, it being merely a promise to pay for what is already his own. *Shaw v.*

Boyd (1831) 1 Stew. & P. (Ala.) 83; Duncan v. Hall (1846) 9 Ala. 128; McFarland v. Mathis (1860) 10 Ark. 560; Carson v. Clark (1833) 2 Ill. 113, 25 Am. Dec. 79; Hutson v. Overturf (1834) 2 Ill. 170; Roberts v. Garen (1837) 2 Ill. 396; Townsend v. Briggs (1838) 2 Ill. 472; Boston v. Dodge (1820) 1 Blackf. (Ind.) 19, 12 Am. Dec. 205; Welch v. Bryan (1859) 23 Mo. 30.

A promise by the purchaser to pay for the improvement cannot be upheld on the theory that the consideration was the surrender of the possession, as the purchaser was entitled to the possession. Boston v. Dodge (1820) 1 Blackf. (Ind.) 19, 12 Am. Dec. 205.

And under a statute expressly validating promises by the purchaser to pay for the improvements, though made after the purchase, there must be an express agreement to pay, and such an agreement cannot be implied. And hence, where the purchaser offered to let the party making the improvement, and his son, each have 20 acres of the land, but the offer was rejected, whereupon the purchaser said that he would do what was right, there was no binding promise within the statute. Blankenship v. Cuttrell (1854) 16 Ill. 62.

But, under such statute, a promise to pay for the improvement, made after the purchase, is enforceable, though the party making the improvement does not assent thereto, since the promise is a mere gratuity which the statute authorizes to be enforced, and the promisee is bound to lose his improvements, or accept what the purchaser offers, and an acceptance will therefore be presumed. Taylor v. Davis (1849) 11 Ill. 10.

c. Right to remove improvements.

1. Generally.

In California, it has been held that the state cannot prevent such improvements as are a part of the freehold from vesting absolutely in the purchaser by virtue of the patent, without interfering with the primary disposal of the public lands of the United States, and hence an act authorizing anyone making improvements on the lands of the United

States, or of the state, or having a right of possession of such improvements, to remove them within six months after the land becomes private property, was void as applied to lands of the United States. Collins v. Bartlett (1872) 44 Cal. 371; Pennybecker v. McDougal (1874) 48 Cal. 160.

And a statute authorizing persons to remove fences made by mistake on the lands of others was held in Blair v. Worley (1835) 2 Ill. 178, to apply only as between natural persons, and not to authorize the removal of fences from school lands of the state, after the sale of the land.

And in Duncan v. Hall (1846) 9 Ala. 128, it was held that a mere settler making improvements upon public lands which were subsequently purchased by another was not permitted to dilapidate or remove buildings, or otherwise lessen the value of the land, but must give it up in condition in which it was when appropriated by the individual purchaser.

And in Welborn v. Spears (1856) 32 Miss. 138, a judgment in favor of a person entering public land, for improvements placed upon the land by another and removed therefrom after plaintiff's entry, was affirmed.

So, where defendant built a fence and house on land of the United States, and after the purchase of the land by plaintiff, and while defendant was still in possession, defendant removed the improvement, plaintiff recovered in trespass and the recovery was affirmed. Cook v. Foster (1845) 7 Ill. 62. His right to the improvement does not seem to have been disputed, the only question being whether he could recover for the trespass committed while defendant had possession.

2. As affected by character of improvements.

Improvements not attached to the soil and forming no part of the realty may be removed by the party making them, as the United States had no interest in them to convey, and they did not pass to its patentee. Thus, a cabin set upon blocks resting on the surface, not attached to the soil, and removable without disturbing the land in

any way, might be removed. And evidence that a fence was constructed of posts and boards did not necessarily show that it was so annexed to the soil as to be irremovable, as it might have been a portable fence. *Pennybecker v. McDougal* (1874) 48 Cal. 160.

So, machinery which had been detached from a sawmill erected on public lands, and which, together with tools, had been stored in another building, was personal property to which the purchaser acquired no title under the grant from the United States. But an engine resting on a long timber to which it was attached by bolts, which timber was notched into the upper surface of sills embedded in the ground, and boilers which were placed in position and secured by trestlework, and in and around which was masonwork of stone and mortar resting on the earth, pass to the purchaser. *McKiernan v. Hesse* (1877) 51 Cal. 594.

Houses, fences, orchards, and vineyards, if real estate, are as much a part of the freehold as the soil itself, and, being a part of the freehold, a patent issued in the usual form by the United States will convey them to the purchaser of the land. *Collins v. Bartlett* (1872) 44 Cal. 371.

One making a homestead entry on land on which there are a house, stable, and well, constructed by a former entryman may recover against a person who takes lumber from the house, window casings from the windows, poles from the stable, and curbing from the well, though the defendant had purchased the improvements from the former entryman and removed them before plaintiff acquired actual possession, none of the materials taken being loose lumber unconnected with the land. *Hill v. Pitt* (1901) 2 Neb. (Unof.) 151, 96 N. W. 339.

Where improvements were placed on land by one who had the land surveyed and expected to acquire it under the state Pre-emption Laws, and who made the improvements in good faith, and afterwards plaintiff applied for a survey of the land and subsequently applied to purchase it and obtained

a patent, and defendant, claiming under the party making the improvements, removed certain of them after plaintiff's survey, but before his application to purchase, the court approved instructions which told the jury that the removal of such of the improvements as were not fixtures was authorized, but that such of the improvements as constituted fixtures became part of the realty and could not be removed. The court said that improvements which were personalty, and not fixtures, did not belong to plaintiff. *McCullers v. Johnson* (1907) — Tex. Civ. App. —, 104 S. W. 502.

d. Minority view.

As stated in *PATTERSON v. CHANEY* (reported herewith) ante, 90, a different rule seems to be recognized in Colorado, Idaho, and also in one Oklahoma case. *Wallbrecht v. Blush* (1908) 43 Colo. 329, 95 Pac. 927; *Bingham County Agri. Asso. v. Rogers* (1900) 7 Idaho, 63, 59 Pac. 931; *Richardson v. Bohny* (1911) 119 Idaho, 369, 114 Pac. 42; *Winans v. Beidler* (1898) 6 Okla. 603, 52 Pac. 405. And see also *Scott v. Buchanan* (1918) — Colo. —, 174 Pac. 1123, where the court says that it may be that the improvements would be removable within a reasonable time by the person placing them on the land, though, as the question arose on demurrer to the complaint, which did not show that the persons removing the improvements made any claim to them, this was not decided.

In *Wallbrecht v. Blush* (1908) 43 Colo. 329, 95 Pac. 927, supra, the action was one of unlawful detainer by a landlord against a tenant, defended on the ground that the buildings sought to be recovered were on government land, on which the tenant had made a homestead filing. The court said that the fact that by mistake or otherwise a person erected a building upon the public domain would not necessarily make it the property of the government, or of a subsequent homesteader, but that the owner of the building would have a reasonable time to remove it. This statement was made without discussion, and the court's decision appar-

ently rests principally on the ground that the tenant was estopped to deny the landlord's title.

In *Bingham County Agri. Asso. v. Rogers* (1900) 7 Idaho, 63, 59 Pac. 931, the court said that where a person has in good faith entered upon public land and made, or caused to be made, valuable improvements thereon, although his right to make entry of such land under the Land Laws of the United States may be defeated, he is not, by reason thereof, deprived of his property in such improvements, but is entitled to remove them upon reasonable notice after the question of title has been finally settled. The court accordingly held that fences placed on public lands might be removed, they not being fixtures, since the relations of the party must be considered in determining whether a thing is a fixture. The court applies the same rule in *Richardson v. Bohnay* (1911) 19 Idaho, 369, 114 Pac. 42, but it would seem that the question was not argued by counsel in either case.

In *Winans v. Beidler* (1898) 6 Okla. 603, 52 Pac. 405, it was held that a homestead settler who made improvements upon a tract of government land, and whose entry was afterwards canceled, might remove buildings and fences which could be removed without injury to the soil, after the land had been awarded to an adverse settler, but while he was still in possession. Also that a statute providing that, when a person affixed his property to the land of another without an agreement permitting him to remove it, the thing affixed belonged to the owner of the land unless he chose to require the former to remove it, did not apply. The improvements were being removed, in that case, while the party making them was still in possession, but whether this influenced the court is not clear.

III. Right to compensation for improvements.

a. Generally.

The United States may sell public lands with whatever improvements are on it, and put the purchaser in possession, without obtaining the con-

sent of the person making the improvements or making him any remuneration for his improvements. *Boston v. Dodge* (1820) 1 Blackf. (Ind.) 19, 12 Am. Dec. 205.

And, aside from statute, there is no moral or legal obligation on the purchaser to pay for the improvement. *Duncan v. Hall* (1846) 9 Ala. 128; *Carson v. Clark* (1833) 2 Ill. 113, 25 Am. Dec. 79.

b. Under Occupying Claimants' Acts.

1. In general.

There is some conflict in the authorities as to whether persons making improvements on public lands which are subsequently acquired by another are entitled to compensation for the improvements, under Occupying Claimants' Acts, which usually provide that the defeated party in ejectment may recover the value of his improvements which were made by him in good faith under "color of title," or "a plain and connected title," or "an apparent title." The weight of authority apparently supports the view that such statutes do not apply to improvements made on land which, at the time they were made, was property of the government or of the state.

United States.—*Deffebach v. Hawke* (1885) 115 U. S. 392, 29 L. ed. 423, 6 Sup. Ct. Rep. 95; *Sparks v. Pierce* (1885) 115 U. S. 408, 29 L. ed. 428, 6 Sup. Ct. Rep. 102 (see also *Rose's Notes* to these cases); *Vilas v. Prince* (1898) 88 Fed. 682.

Arkansas.—*Martin v. Roesch* (1898) 57 Ark. 474, 21 S. W. 881.

Kansas.—*Central Branch Union P. R. Co. v. Hardenbrook* (1879) 21 Kan. 440.

Louisiana.—*Herriott v. Broussard* (1826) 4 Mart. N. S. 260; *Jenkins v. Gibson* (1848) 3 La. Ann. 203; *Wood v. Lyle* (1849) 4 La. Ann. 145; *Hollon v. Sapp* (1849) 4 La. Ann. 519; *Jones v. Wheelis* (1849) 4 La. Ann. 541; *Doles v. Cockrell* (1855) 10 La. Ann. 540; *Gibson v. Hutchins* (1857) 12 La. Ann. 545, 68 Am. Dec. 772; *Lawrence v. Grout* (1857) 12 La. Ann. 835; *Mower v. Kemp* (1890) 42 La. Ann. 1007, 8 So. 830.

New Mexico.—*Chavez v. Chavez de*

Sanchez (1898) 7 N. M. 58, 32 Pac. 187.

Oklahoma.—Woodruff v. Wallace (1895) 3 Okla. 355, 41 Pac. 357; Calhoun v. McCornack (1898) 7 Okla. 347, 54 Pac. 493; Cook v. McCord (1904) 13 Okla. 506, 75 Pac. 294.

Texas.—Swetman v. Sanders (1892) 85 Tex. 294, 20 S. W. 124; Finks v. Cox (1895) — Tex. Civ. App. —, 30 S. W. 512; Hamman v. Presswood (1908) — Tex. Civ. App. —, 120 S. W. 1052.

Utah.—Helstrom v. Rodes (1906) 30 Utah, 122, 83 Pac. 730.

Washington. — Smith v. Arthur (1893) 7 Wash. 60, 34 Pac. 433.

Wisconsin.—Whitcomb v. Provost (1899) 102 Wis. 278, 78 N. W. 432.

Canada.—Queen Victoria Niagara Falls Park v. Colt (1895) 22 Ont. App. Rep. 1.

And see also Boley v. Wynn (1914) 68 Fla. 341, 67 So. 117, in which, however, though the improvements were made under a homestead entry, the land was not, in fact, public land, having previously been patented to another, and Maxwell Land Grant Co. v. Santistevan (1893) 7 N. M. 1, 32 Pac. 44, in which it does not appear whether the land was public land or not when the improvements were made.

But the person making the improvement was held entitled to compensation in the following cases:

United States.—Chinn v. Darnell (1848) 4 McLean, 440, Fed. Cas. No. 2,684; Wells v. Riley (1872) 2 Dill. 566, Fed. Cas. No. 17,404; Litchfield v. Johnson (1877) 4 Dill. 551, Fed. Cas. No. 3,387.

Arkansas.—ABRAHAM v. HATCHETT (reported herewith) ante, 88.

Maine.—Fisk v. Briggs (1835) 12 Me. 373; Kinsman v. Greene (1839) 16 Me. 60.

Michigan.—Sherman v. A. P. Cook Co. (1893) 98 Mich. 61, 57 N. W. 23.

Missouri. — Russell v. DeFrance (1867) 39 Mo. 506.

Ohio.—Shaler v. Magin (1826) 2 Ohio, 235.

Texas.—Miller v. Moss (1885) 65 Tex. 179.

And see also the following cases, in which the land apparently was not

public land, though believed by the settler making the improvements to be so: Sellman v. Lee (1881) 55 Tex. 319; Thompson v. Comstock (1883) 59 Tex. 818; Gaither v. Hanrick (1887) 69 Tex. 92, 6 S. W. 619.

In New Mexico and Oklahoma, it has been held that an Occupying Claimants' Act does not apply to improvements made on land of the United States government, because so to apply it would interfere with the disposition of the public land by Congress. Chavez v. Chavez de Sanchez (1893) 7 N. M. 58, 32 Pac. 137; Woodruff v. Wallace (1895) 3 Okla. 355, 41 Pac. 357; Cook v. McCord (1904) 13 Okla. 506, 75 Pac. 294. But such an objection to the recovery of compensation was rejected in Russell v. DeFrance (Me.) supra.

Where the state conveyed only its right, title, and interest in a lot, the court said in Kinsman v. Greene (Me.) supra, that, considering the state's usual regard for settlers, it might be understood as intending to allow any settler to set up his claim in the same manner as he might have done if the title had been in the hands of a private person, and that the grantee of the state could not under such a title interpose the rights of the state against a claim for improvements, where the state had not chosen to do so.

2. "Good faith" of occupant.

There can be no good faith in an adverse holding, within the meaning of an Occupying Claimants' Act, where the party knows he has no title, and that under the law, which he is presumed to know, he can acquire none by his occupation. And hence one claiming land under the Town Site Laws is not entitled to compensation for improvements made by him, when subsequently ousted in an action of ejectment, where he knew when the improvements were made that title was in the United States, that the lands were mineral lands and were claimed as such by plaintiff, and that title could be acquired only under the laws relating to mineral lands. Deffenback v. Hawke (1885) 115 U. S. 392, 29 L. ed. 423, 6 Sup. Ct. Rep. 95.

And a person who makes improvements upon public land, knowing that he has no title and that the land is open to exploration and sale for its minerals, and makes no effort to secure the title to it, as such, under the laws of Congress, or a right of possession under the local customs and rules of miners, has no claim for compensation for his improvements as an adverse holder in good faith, when such sale is made to another and the title is passed to him by a patent from the United States. *Sparks v. Pierce* (1885) 115 U. S. 408, 29 L. ed. 428, 6 Sup. Ct. Rep. 102; *Helstrom v. Rodes* (1906) 30 Utah, 122, 83 Pac. 730.

And one making a homestead entry on land within a railroad land grant which the Secretary of the Interior had held to be excepted therefrom did not hold in good faith where he knew that the title was in litigation and that the question was then pending in the United States Supreme Court, and the state had given a patent to the railroad company which had conveyed the land to plaintiff's predecessor. *Vilas v. Prince* (1898) 88 Fed. 682.

A mere possessor of public lands, even with a hope of a future entry by pre-emption, is not a possessor in good faith so as to be entitled to recover the value of ameliorations from a subsequent patentee, until he actually makes his entry. To be a possessor in good faith he must believe himself to be the owner, and a mere settler, even with a hope of pre-emption, knows that he has no title. A mere hope of getting title is not a title. *Gibson v. Hutchins* (1857) 12 La. Ann. 545, 68 Am. Dec. 772, overruling, so far as they recognize the right to reimbursement of one who settled on public lands with hope of securing pre-emption, *Pearce v. Frantum* (1840) 16 La. 414, affirmed on rehearing in (1840) 16 La. 422, *Kellam v. Rippey* (1842) 8 Rob. (La.) 138 and *Williams v. Booker* (1845) 12 Rob. (La.) 253. The court said: "The right of a possessor to recover of the true owner for ameliorations inseparable in their nature from the soil cannot, it appears to us, be recognized in any case, unless the possessor was at least a pos-

essor in good faith, believing himself to be the owner. The mere possessor is presumed to have made such changes for his own amelioration, and to have received a sufficient reward in the immediate benefit which he reaped from the enhanced production of the soil. . . . A mere settler, even with the hope of pre-emption, until he actually makes his entry, knows that he has no title. He has an expectancy and nothing more. He is a tenant by sufferance. He makes improvements for his own benefit and at his own risk. The government does not warrant him a title, nor agree to indemnify him for his labor in case he gets none. Whilst he is permitted to settle there by the government, he may reap the fruits and live rent free. But when the government parts with the title to a third person, that title carries with it such inseparable ameliorations as the land may have received from the settler."

And one who is not in a situation to avail himself of the Pre-emption Laws, and has no hope, intention, or expectation of acquiring title by virtue of his possession, cannot recover the value of improvements made by him. *Jenkins v. Gibson* (1848) 3 La. Ann. 203; *Hollon v. Sapp* (1849) 4 La. Ann. 519; *Jones v. Wheelis* (1849) 4 La. Ann. 541; *Doles v. Cockrell* (1855) 10 La. Ann. 540.

And one settling upon land which has been withdrawn from sale and entry and certified to the state, to which Congress has donated it, to aid in the construction of a railroad, is not a good-faith possessor and is not entitled to reimbursement for improvements when subsequently ejected by the railroad company. *Mower v. Kemp* (1890) 42 La. Ann. 1007, 8 So. 830. It was, however, held that he should be relieved from any claim for rents and damage, the one demand being regarded as the equivalent of the other.

Improvements made by a homestead entryman whose entry is canceled are not made in good faith, where the cancellation is on the ground that he entered and occupied the land prior to the time fixed by the proclamation of

the President, and, under the express provisions of the statute opening such land to settlement, was denied the right to enter the land, or acquire any right thereto. *Woodruff v. Wallace* (1895) 3 Okla. 355, 41 Pac. 357; *Calhoun v. McCornack* (1898) 7 Okla. 347, 54 Pac. 493.

A homestead entryman is not entitled to recover for improvements where before any of them were made he was notified by the local land office that the entry had been allowed by inadvertence, and would be returned to the General Land Office for cancellation, especially where he could not have made many of the improvements until after he received knowledge that the General Land Office had decided against him. *Smith v. Arthur* (1893) 7 Wash. 60, 34 Pac. 433.

Even if the Ontario statute, providing that a person making lasting improvements on land under the belief that the land is his own shall be entitled to a lien for the enhanced value, applies to improvements made on Crown land, persons making improvements on land which they had agreed to purchase from the Dominion government were not entitled to compensation therefor where at the time the improvements were made they knew that the title was not in the Dominion government, but in the province. *Queen Victoria Niagara Falls Park v. Colt* (1895) 22 Ont. App. Rep. 1.

Where one to whom land was conveyed which was found to be public land, not owned by the grantor, did not accept that intended to be conveyed, either expressly or tacitly, by paying the stipulated price, and the grantor's heirs subsequently acquired title by pre-emption, the grantee was not entitled to remuneration on account of ameliorations or improvements, as he knew that he held without title. *Herriott v. Broussard* (1826) 4 Mart N. S. (La.) 260.

And where a Spanish land grant covering land on which plaintiff subsequently made a homestead entry, and for which he obtained a patent, was never confirmed under the acts of Congress relating to such grants, it was held that the lands must be re-

garded as part of the public domain at the time the homestead entry was made, and that the parties in possession under the Spanish grant could not recover compensation for improvements, since they could have no rightful possession and the statute was not available in the case of a wrongful possession. *Chavez v. Chavez de Sanchez* (1893) 7 N. M. 58, 32 Pac. 137.

But where defendant entered land under the Pre-emption Laws, proved up, and obtained a patent which was subsequently held void because the land had been withdrawn from entry because of a doubt as to the extent of a grant in aid of a river improvement, and the land had been subsequently confirmed by Congress to the state's grantee, it was nevertheless held that the improvements were made in good faith, within the statute. *Wells v. Riley* (1872) 2 Dill. 566, Fed. Cas. No. 17,404.

And where land on which defendants settled under the belief that it was property of the United States open to pre-emption, with the intent to pre-empt it or enter it under the Homestead Act, was within a river improvement grant, but conflicting decisions as to the extent of such grant were not settled until after the defendants took possession, and defendants were foreigners, unacquainted with the English language, it was held in *Litchfield v. Johnson* (1877) 4 Dill. 551, Fed. Cas. No. 8,387, that it was not impossible or improbable that they had made their improvements in good faith.

3. Title, color of title, or apparent title.

An occupant cannot have color of title within the meaning of an Occupying Claimants' Act where he does not hold under any instrument, proceeding, or law purporting to give him the title or right of possession. *Deffenback v. Hawke* (1885) 115 U. S. 392, 29 L. ed. 423, 6 Sup. Ct. Rep. 95.

A mere hope of getting title is not a title, and hence a mere possessor of public land, expecting to acquire title by pre-emption, is not a bona fide possessor under a statute defining a bona fide possessor as one possessing as owner by virtue of an act sufficient in

terms to transfer property, the effect of which he was ignorant of. *Gibson v. Hutchins* (1857) 12 La. Ann. 545, -68 Am. Dec. 772. The court said: "The defendant does not show that he never possessed under a title translativ of property. He produces no title whatever. He says he had a hope of getting a title—a pre-emptor's claim. It seems to us a contradiction in terms to call such an expectation a title translativ of property."

But in *Shaler v. Magin* (1826) 2 Ohio, 236, compensation was allowed to one making improvements under an "entry" on public lands as against one having a better title, under a statute applying to any occupying claimant who could show a plain and connected title in law or equity. There does not, however, seem to have been any claim that the fact that the improvements were on public lands was of any importance, the claim being that there could be no recovery because the improvements were made under an entry which was withdrawn, and before the entry under which the claimant claimed.

In *Brygger v. Schweitzer* (1893) 5 Wash. 564, 32 Pac. 462, 33 Pac. 388, a person claiming under a homestead entry on land finally decreed to another under a university selection, by the agents of the territory, was allowed the value of his improvements less the value of the use and occupation. On motion for rehearing he contended that he was a bona fide occupant under color of title, and asked that a different rule be applied respecting the improvements, though it is nowhere stated what rule he wanted applied. The court, however, held that as he knew of the university selection, and the adverse claim was at all times asserted, and it was only on the assumption that for some technical reason the university selection was ineffectual that he expected to maintain the homestead entry, he was not an occupant in good faith. The court added that, by a strict construction of his rights, it was doubtful whether he was en-

titled to any relief on account of his improvements.

A receiver's receipt issued to one making a homestead entry is not a written instrument purporting to convey title, within the meaning of an Occupying Claimants' Statute. *Vilas v. Prince* (1898) 88 Fed. 682.

And a statute providing that the receipt of a receiver of the United States Land Office shall be prima facie evidence that the title has passed from the United States to the person named in the receipt does not apply to the receipt given for the registration fee required at the original entry, but to the receipt or certificate given at the final entry. And so one making improvements under a homestead entry had no title, legal or equitable, within the statute giving a right to recover where the improvements are made by one holding under an apparently good legal or equitable title. *Boley v. Wynn* (1914) 68 Fla. 341, 67 So. 117.

And one entering land which had theretofore been withdrawn from sale, pre-emption, or homestead entry for the benefit of a railroad company to which it was subsequently patented was not within the statute giving a right to compensation to any person who could show a plain and connected title in law or equity, derived from the records of some public office, as nothing less than an apparent title is sufficient, and the apparent title must be manifest from a consideration of the whole of the records of the public office to which the occupying claimant refers, and the records of the Land Office clearly showed that such settler had no right or interest. *Central Branch Union P. R. Co. v. Hardenbrook* (1879) 21 Kan. 440.

A homestead filing does not rise to the dignity of color of title within such a statute. *Woodruff v. Wallace* (1895) 3 Okla. 355, 41 Pac. 357; *Whitcomb v. Provost* (1899) 102 Wis. 278, 78 N. W. 432. In the case last cited, the supreme court of Wisconsin said: "'Color of title' has been generally defined as 'that which in appearance is title, but which in reality is no title' [citing cases]. Now unless a holding under a valid certificate of home-

stead entry is in fact a holding under title, a holding under an invalid certificate of homestead entry cannot be a holding under 'color of title.' If a valid certificate is not title, an invalid certificate cannot be appearance of title. The Supreme Court of the United States has recently held, after full consideration, that land entered as a homestead continues to be the property of the United States for five years following the entry, and until a patent is issued. . . . This principle seems to determine conclusively the question here. A man who makes a valid homestead entry has not the title to the land, and hence the man who makes an invalid homestead entry has not even the appearance of title. . . . There is no analogy between a certificate of homestead entry and a receiver's certificate of purchase of public lands. This last is made evidence of title by our statute (Rev. Stat. 1878, § 4165), and is held to convey all the substantial interest of the government in the land. *Cawley v. Johnson* (1884) 21 Fed. 492. The consideration has been fully paid and nothing remains to be done except to execute the patent. In a case of homestead entry, however, nothing has been paid for the land, and the homesteader simply has acquired a right to earn or buy it in the future."

But the supreme court of Arkansas holds that a certificate of homestead entry is color of title, within the Betterment Statute of that state, in *ABRAHAM v. HATCHETT* (reported herewith) ante, 88.

In *Wells v. Riley* (1872) 2 Dill. 566, Fed. Cas. No. 17,404, improvements made by one who entered the land under the Pre-emption Laws, and obtained a patent which was subsequently held void, were held to have been made under color of title.

If the color of title exists before and at the time the suit of the rightful owner is brought against the occupant, the occupant may be compensated for any valuable improvement made thereon, though made before color of title was acquired. Thus, where the only color of title was that arising from possession for five years,

which a statute declared should give color of title, the occupant was entitled to compensation for improvements made during the five years. *Litchfield v. Johnson* (1877) 4 Dill. 551, Fed. Cas. No. 8,387.

4. *Adverse holding.*

In *Whitcomb v. Provost* (1899) 102 Wis. 278, 78 N. W. 432, it was held that a person making a homestead entry on lands not subject to such entry because included within the place limits of a railroad grant did not hold adversely to the railroad company within the Betterment Act of that state, since one holding under an executory contract of purchase does not hold adversely to his vendor, or his vendor's grantee, until after full performance of the conditions of the contract.

5. *Miscellaneous decisions.*

In other cases, compensation has been denied where land was forfeited to the state for the nonpayment of taxes and subsequently sold by the state, but before the sale improvements were placed thereon by persons acting in good faith, without knowledge of the claim of the state, and under color of title, believing that they were the owners (*Martin v. Roesch* (1893) 57 Ark. 474, 21 S. W. 881); where the improvements were made by a trespasser on the public land (*Wood v. Lyle* (1849) 4 La. Ann. 145); where improvements were made by one showing no title, on land acquired by the state as swamp land, and patented by the state to plaintiff (*Lawrence v. Grout* (1857) 12 La. Ann. 835); where a homestead entryman was adjudged not to have any title under his patent because the land was included in a railroad land grant, the denial of compensation, however, being apparently placed on the sole ground that, having taken a contract from the railroad company to purchase the land, with which he had not complied, he was not evicted by a title adverse to him, within the meaning of the statute (*Vance v. Burlington & N. River R. Co.* (1882) 12 Neb. 285, 11 N. W. 384); where a person entered upon and improved a county's school lands, believ-

ing that he thereby acquired a right of pre-emption, and expecting to buy the land from the county, but did not actually settle upon the land so as to have any such right of pre-emption, the court saying that the statute allowing compensation for improvements to those having had adverse possession in good faith of premises for one year prior to suit did not permit persons who were not actual settlers to encumber the school lands with claims for improvements, when their sole excuse for making them was their ignorance of the law (*Baker v. Millman* (1890) 77 Tex. 46, 13 S. W. 618).

Where neither plaintiff nor those whose improvements on public lands were purchased by him ever made any valid survey so as to sever the land from the public domain, and after plaintiff had left the land, defendant made proof of plaintiff's abandonment, and filed on the land, it was held that plaintiff was not entitled to compensation for improvements; that, the land being vacant and the property of the state when the improvements were made, the state could not be required to make compensation for improvements, in the absence of a statute authorizing such relief; that, therefore, when defendant filed on the land and caused it to be surveyed, the land was not charged with the claim for improvements, and no claim for compensation could be asserted against him for the improvements, because none could have been asserted against the state through which he derived his right. *Swetman v. Sanders* (1892) 85 Tex. 294, 20 S. W. 124, followed in *Finks v. Cox* (1895) — Tex. Civ. App. —, 30 S. W. 512, holding that a party making improvements could not recover therefor, if at the time he settled on the land and made the improvements it was vacant public domain. And see also *Hamman v. Presswood* (1908) — Tex. Civ. App. —, 120 S. W. 1052.

Compensation has been allowed to one who made an entry on land and obtained a patent which was subsequently held void because, at the time the entry was made, the land was

within Indian territory, in which settlements were expressly prohibited by act of Congress (*Chinn v. Darnell* (1848) 4 McLean, 440, Fed. Cas. No. 2,684); to one who settled on and made improvements on land in the state of Maine to which the state of Massachusetts had retained title at the time of the separation of the two states, and which it subsequently granted to another party (*Fisk v. Briggs* (1835) 12 Me. 373); to one claiming land granted to the state as swamp land, under a subsequent grant from the Federal government, to the extent that the buildings and improvements increased the present value of the premises (*Sherman v. A. P. Cook Co.* (1893) 98 Mich. 61, 57 N. W. 23); to persons obtaining from the receiver a certificate of entry, and paying for public land, where another subsequently entered the land and obtained a patent therefor (*Russell v. Defrance* (1867) 39 Mo. 506).

In *Doles v. Cockrell* (1855) 10 La. Ann. 540, the court, though holding that a person making improvements upon public land was not entitled to compensation, also held that, where improvements were made after the entry of the land under an internal improvement warrant, the person claiming under the warrant could either keep the improvements upon reimbursing the one making them, or compel the party making them to remove or demolish them at his own expense.

Where, after the death of the locatee of Crown land, his widow remarried and her second husband made improvements on the land, and after the wife's death a child of the locatee applied for a patent, the second husband was allowed to recover the value of his improvements less the rents and profits. *Highland v. Sherry* (1900) 82 Ont. Rep. 371. The court, however, expresses a doubt as to his right to recover, but the commissioner of Crown lands had desired a determination of his right to compensation, and the judgment allowing compensation had been entered by consent, the only dispute being over the amount.

In *Marchand v. Fournier* (1916) Rap. Jud. Quebec 49 C. S. 298, it was held that one whose permit of occupation of public land under the Quebec statutes was revoked might recover, against a subsequent grantee of the land, the value of improvements and outlays by him.

a. Under statutes expressly relating to state lands.

1. Tennessee.

Harvey v. Jones (1842) 3 Humph. 157, involved a statute providing that persons in the actual possession of vacant and unappropriated land should have priority for 160 acres, including their dwelling and improvements; that any person settling upon vacant land and making valuable improvements, and not entering or transferring the same, need not surrender possession until the value of the improvements was paid, the improvements being entered by any third person; and that, when any valuable improvements might be entered which did not give a preference of entry to the owner, the person entering the improvements should pay the value to the person owning the improvements. It was held that a person securing 160 acres as an occupant enterer, and who had also made improvements on adjoining land, was entitled to remuneration for the improvements from the person entering such adjoining land.

2. Washington.

The Washington statute relative to the appraisal and sale of the state's school lands requires the appraisers to appraise all improvements found on the land, and to deduct therefrom all damages and waste, and provides that if the purchaser be not the owner of the improvements he shall pay to the owner the appraised value thereof. *Pearson v. Ashley* (1892) 5 Wash. 169, 31 Pac. 410. A later statute apparently limits the right to compensation for improvements to persons who were not holding or claiming the land adversely to the state. *Sullivan v. Callvert* (1902) 27 Wash. 600, 63 Pac. 363. Thereunder it has been held that a person making improvements on

school lands is entitled to be reimbursed therefor, though the improvements had not been appraised pursuant to the statute (*Wilkes v. Hunt* (1892) 4 Wash. 100, 29 Pac. 830; but see *Wilkes v. Davies* (1894) 8 Wash. 112, 23 L.R.A. 103, 35 Pac. 611, where the court, though holding that the question was *res judicata* between the parties to that action, said that it would not consider itself bound by the decision in *Wilkes v. Hunt*, *supra*, when the question arose in an independent action); that the purchaser cannot recover possession until such payment is made, and that, even though there are more than one person claiming to be the owners, he must, in some manner, determine to whom payment should be made before he can maintain an action for possession (*Pearson v. Ashley*, *supra*; *Brummett v. Campbell* (1903) 82 Wash. 358, 73 Pac. 403); that the improvements are to be appraised at the time the land is appraised, and the owner of the improvements cannot demand a new appraisal at the time of the sale, but can only recover their value as previously appraised (*Holm v. Prater* (1893) 7 Wash. 207, 34 Pac. 919); but that an appraisement at the time of the sale was valid, though the land had been previously appraised, where there had been no appraisement of the improvements (*J. F. Hart Lumber Co. v. Rucker* (1896) 15 Wash. 456, 46 Pac. 728); that the owner of the improvements is not required to yield up possession before bringing an action against the purchaser of the land for their value (*Wilkes v. Davies*, *supra*); and that, an appraisement having stated that the improvements were upon the lot sold, the purchaser must be presumed to have bought with the expectation of paying therefor, and cannot take advantage of the fact that some portion of the improvements was upon tideland in front of the upland purchased (*J. F. Hart Lumber Co. v. Rucker*, *supra*).

Improvements on tideland must be appraised before any sale thereof, and the value of the improvements paid by the purchaser into the state treasury for the use of the owner of the im-

provements (Sullivan v. Callvert (1902) 27 Wash. 600, 68 Pac. 363); but if the improvements were made after January 1, 1891, their appraised value is not to be paid to the person making them, but into the state treasury for the use of the school fund (Samish Boom Co. v. Callvert (1902) 27 Wash. 611, 68 Pac. 367).

3. Wisconsin.

In State ex rel. Merrill v. School Land Comrs. (1859) 9 Wis. 200, the court apparently recognized the duty of the purchaser of state school lands to pay the owner of improvements thereon their value. It would seem from the syllabus that a statute required such payment. A. McT.

W. B. CURRY, Acting Chief of Police, Plff. in Err.,
v.
C. E. OSBORNE.

Florida Supreme Court — June 25, 1918.

(— Fla. —, 79 So. 293.)

Municipal corporation — regulation of jitney busses — validity.

Under its general welfare powers the city adopted an ordinance containing the following: "It shall be unlawful for any jitney bus operator or owner to take on or discharge passengers upon or along, or within 700 feet of any street, avenue, or highway in the city of Miami, which is now or may hereafter be traversed by street car tracks over which street car service is maintained. Provided, however, that passengers taken on at points more than 700 feet distance from street car tracks may be discharged at any point, and provided further that passengers boarding any jitney bus within less than 700 feet of any street car tracks shall not be discharged at any point nearer than 700 feet of any street car tracks." Held, that the quoted provision of the ordinance forbids the use of jitneys by the public in certain streets or sections of the city, without any basis therefor in matters affecting public safety, health, morals, or welfare; and that it is therefore arbitrary and unreasonable, and consequently invalid.

[See note on this question beginning on page 110.]

Headnote by WHITFIELD, J.

ERROR to the Circuit Court for Dade County (Branning, J.) to review a judgment in favor of petitioner in a habeas corpus proceeding to secure his discharge from custody to which he had been committed for alleged violation of an ordinance regulating jitneys. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. John C. Gramling and William P. Smith for plaintiff in error.

Messrs. Atkinson & Burdine and Bart A. Riley for defendant in error.

Whitfield, J., delivered the opinion of the court:

Osborne presented to the circuit judge a petition, alleging that he was unlawfully imprisoned by vir-

tue of a warrant issued from the municipal court of the city of Miami, alleging that the petitioner, an operator of a jitney bus, on October 24, 1917, violated § 6 of Ordinance 236 of said city, by "then and there taking on a passenger upon and along Twelfth street, said street now being traversed by street car

tracks over which street car service is maintained, and within 700 feet of said street car tracks, and did thereafter discharge the said passenger upon and along Twelfth street, said street now being traversed by street car tracks over which street car service is maintained, and within 700 feet of said street car tracks, contrary to and against the ordinance;" that the imprisonment is illegal because, among other reasons, the ordinance is unjust, arbitrary, and unreasonable. A writ of habeas corpus was issued.

By return the officer sets up that the petitioner is held "by virtue of a warrant and affidavit of complaint issued out of the municipal court of the city of Miami, a true copy whereof is attached to the petition for writ of habeas corpus."

The court discharged the petitioner and allowed a writ of error which was taken by the officer under the statute. Gen. Stat. 1906, Comp. Laws 1914, § 2257; *Pounds v. Darling*, 75 Fla. —, L.R.A.1918E, 949, 77 So. 666; *Hardee v. Brown*, 56 Fla. 377, 47 So. 834.

Section 6 of the ordinance referred to is as follows: "It shall be unlawful for any jitney bus operator or owner to take on or discharge passengers upon or along, or within 700 feet of any street, avenue, or highway in the city of Miami, which is now or may hereafter be traversed by street car tracks over which street car service is maintained. Provided, however, that passengers taken on at points more than 700 feet distance from street car tracks may be discharged at any point, and provided further that passengers boarding any jitney bus within less than 700 feet of any street car tracks shall not be discharged at any point nearer than 700 feet of any street car tracks."

There appears to be no statute or provision of the city charter expressly authorizing the regulations contained in the quoted § 6 of Ordinance 236 of the city of Miami, but the city is given power "to pass

all ordinances necessary to the health, convenience, comfort, and safety of the citizens," and also is given "power to do and perform all things necessary for the government of the city not inconsistent with the Constitution and laws of the United States, the Constitution of the state of Florida, and the terms and provisions of this act." Acts 1913, § 27, chap. 6724.

"A municipal ordinance of a regulatory nature, in contravention of the natural rights of individuals, enacted under general charter powers, is not only required to be constitutional, but it must be reasonable as well; that is, the court before which it is brought must be able to see that it will tend to promote the public health, morals, safety, or welfare; that the means adopted are adapted to that end, and that it is impartial in operation, and not unduly oppressive upon individuals." 19 R. C. L. p. 805, and authorities there cited."

In this case the quoted provision of the ordinance adopted under general welfare powers of the city is obviously not designed to exclude jitney service from certain streets for safety, sanitary, or other reasons involving the public welfare, but its manifest purpose and effect are to curtail the use of jittneys where they will compete with street cars; and in accomplishing this object the public are unreasonably deprived of the use of jittneys in streets from which they are thus arbitrarily excluded. Even if the quoted section of the ordinance is not invalid as tending to produce and promote a monopoly for the street cars, it forbids the use of jittneys by the public in certain streets or sections of the city, without any basis therefor in matters affecting public safety, health, morals, or welfare; it is therefore arbitrary and unreasonable, and consequently invalid.

Municipal corporation—regulation of jitney buses—validity.

Judgment affirmed.

Browne, Ch. J., and Taylor, Ellis, and West, JJ., concur.

ANNOTATION.

Validity of restrictions as to points at which jitney bus passengers may be taken on and discharged.

That jitney busses and their use of public streets and highways are subject to reasonable regulations seems to be well settled. Questions may arise, however, as to the constitutionality or reasonableness of particular regulations, or, in the case of municipal ordinances, as to whether they are within the powers delegated to the municipality. In most of the cases hereinafter cited, the particular restrictions which come within the subject of this note are merely incidental provisions of ordinances intended to cover the whole matter of the regulation of jitney busses. Questions which relate to the validity of such an ordinance as a whole, rather than to the validity of the particular provisions with which this note is immediately concerned, such, for example, as the question of whether such ordinances are unconstitutionally discriminatory because of applying to jitney busses, and not to other common carriers, are not discussed herein.

The ordinance considered in the reported case (*CURRY v. OSBORNE*, ante, 108) was enacted under the general welfare powers of the city, and provided in substance that it should be unlawful to take on or discharge passengers within 700 feet of any street over which street car service was maintained. The court says: "It forbids the use of jitneys by the public in certain streets or sections of the city, without any basis therefor in matters affecting public safety, health, morals, or welfare; it is therefore arbitrary and unreasonable, and consequently invalid."

An ordinance which, while not directly restricting the places where jitneys might receive passengers, required the owners, before being permitted to solicit or receive passengers on the paved portions of certain designated streets, to pay a license fee, in addition to that required of all jitneys, so large in amount as to be prac-

tically prohibitive, was held in *Dresser v. Wichita* (1915) 96 Kan. 820, L.R.A.1916D, 246, 153 Pac. 1194, to be within the general powers conferred by the legislature upon the city, among which was included the power to levy and collect a license tax upon, and regulate, wagons and other vehicles transporting passengers for pay. It was also held that it was not rendered invalid by reason of the fact that its enforcement would necessarily benefit the street railway company. The court recognized the rule that such regulations must be reasonable, but on the ground that those who pass ordinances for a city are primarily the judges of what requirements are reasonable, and that it is not for the courts to interfere unless and until it appears beyond question that the thing done was not a use, but a misuse, of power, refused to enjoin the enforcement of the ordinance.

In *Allen v. Bellingham* (1917) 95 Wash. 12, 163 Pac. 18, it was urged against a provision in a jitney ordinance, making it unlawful "to stop while in the fire limits of the city of Bellingham for the purpose of accepting or discharging passengers, except such stop be made within not less than 10 feet or more than 50 feet of the near side of an intersecting alley, or within not less than 10 feet nor more than 50 feet of the center of such blocks as contain no intersecting alley;" or to "stop when outside of the fire limits of the city of Bellingham, on the intersection of any street or within 25 feet thereof, for the purpose of accepting or discharging passengers," that it was unreasonable and unnecessary and not required for the benefit of the public, but intended to make the operation of jitneys unprofitable, and thus to benefit other public carriers, particularly street cars; but the court held that the regulation was within the power of the city, and justifiable as intended to mitigate congestion of traffic.

West v. Asbury Park (1916) 89 N. J. L. 402, 99 Atl. 190, involved an ordinance providing, among other things, that it should be unlawful for auto busses "to receive or discharge passengers except at the curb, or the regularly provided stands, and except at the nearest side of street intersections and on the right-hand side of the street." The city charter authorized the council to regulate, clean, and keep in repair the streets and highways; to regulate the speed and running of motor or other cars through the city; to license and regulate all carriages and vehicles used for the transportation of passengers and goods and chattels of any kind, and the owners and drivers thereof; and to make and establish such other ordinances as they may deem necessary to carry into effect the powers and duties conferred on them, and as they may deem proper for the good government, order, protection of persons and property, preservation of the public health, and prosperity of the city. The court, after reciting various provisions of the ordinance, including the one above quoted, says: "We think all the provisions we have recited are well within the express powers given to the council, or within the powers necessarily inferred from the general clause."

In **Thielke v. Albee** (1915) 79 Or. 48, 153 Pac 793, an ordinance regulating

the operation of motor busses was attacked on the ground, among others, "that it is void for the reason that it requires motor busses, when approaching intersecting streets, to stop at the near crossing thereof to take on or discharge passengers." The opinion, beyond reciting this ground of attack, makes no reference to the point raised, but, after discussing other questions, sustains the ordinance.

Ordinances containing restrictions of the kind considered in this note have been sustained in other cases, but apparently without consideration of these provisions. *Ex parte Sullivan* (1915) 77 Tex. Crim. Rep. 72, P.U.R. 1915E, 441, 178 S. W. 537 (forbidding stops except at right-hand curb); *Hazleton v. Atlanta* (1916) 144 Ga. 775, 87 S. E. 1043, subsequent appeal in (1917) 147 Ga. 207, 93 S. E. 202 (forbidding stops at intersection of cross streets, except at curb on rear side and right-hand side of street, in such position as not to interfere with pedestrians crossing street or passengers boarding or alighting from street cars); *Com. v. Slocum* (1918) 230 Mass. 180, 119 N. E. 687 (forbidding taking on or discharging passengers except at curb, or standing to wait for passengers except at places to be designated by the police commission).

M. A. L.

ALLEN ALEXANDER MCKINNON, by Next Friend, Appt.,

v.

FIRST NATIONAL BANK OF PENSACOLA.

Florida Supreme Court — May 30, 1919.

(— Fla. —, 82 So. 748.)

Guardian and ward — right of natural guardian.

1. A natural guardianship, as such, confers no right to intermeddle with the property of the infant, but is a mere personal right in the father or other ancestor to the custody of the person of his heir apparent or presumptive until attaining twenty-one years of age.

[See note on this question beginning on page 115.]

Headnotes by BROWNE, Ch. J.

Gift — deposit to credit of another.

2. In order that the deposit of money in a bank to the credit of another person shall operate as a valid gift *inter vivos*, it must appear not only that the depositor intended a gift, but also that he executed his intention, and there must be an acceptance of the gift by the donee. But where a gift made to

an infant is beneficial, and not burdensome, the law will presume acceptance. [See 12 R. C. L. 948.]

Guardian and ward — custody of ward.

3. A guardian by nature is entitled to the charge only of the person, and not of the personal estate, of the ward. [See 12 R. C. L. 1108.]

APPEAL by complainant from a decree of the Circuit Court for Escambia County (Campbell, J.) in favor of defendant in an action brought for an accounting and payment of complainant's claim against the defendant bank. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. John C. Avery and Watson & Pasco, for appellant:

If a gift was made by Alex. McKinnon to his children, the mere fact that he was their father would give him no right to check out or use the money, even though he assumed to act for them. He was a mere natural guardian, and a guardian by nature has absolutely no control over the property of the ward.

15 Am. & Eng. Enc. Law, 2d ed. 26; 21 Am. & Eng. Enc. Law, 2d ed. 1043; Linton v. Walker, 8 Fla. 144, 71 Am. Dec. 105; 2 Kent, Com. 217.

The deposits by McKinnon, and the entries to the credit of his children on the books of the bank, were a gift duly delivered, though the bank books were retained by him.

Minor v. Rogers, 40 Conn. 512, 16 Am. Rep. 69; Gardner v. Merritt, 32 Md. 78, 3 Am. Rep. 115; Grangiac v. Arden, 10 Johns. 293; Smith v. Ossipee Valley Ten Cents Sav. Bank, 64 N. H. 228, 10 Am. St. Rep. 400, 9 Atl. 792; Kerrigan v. Rautigan, 43 Conn. 17; Goelz v. People's Sav. Bank, 31 Ind. App. 67, 67 N. E. 232; Howard v. Windham County Sav. Bank, 40 Vt. 597; Davis v. Garrett, 91 Tenn. 147, 18 S. W. 113; Eversole v. First Nat. Bank, 21 Ky. L. Rep. 244, 51 S. W. 169; Alger v. North End Sav. Bank, 146 Mass. 418, 4 Am. St. Rep. 331, 15 N. E. 916; Scott v. Berkshire County Sav. Bank, 140 Mass. 157, 2 N. E. 925.

The gifts were clearly for the benefit of the minor children, and there is a conclusive presumption of acceptance by them, the property not being of the character which can by any possibility become burdensome.

Goelz v. People's Sav. Bank, 31 Ind. App. 67, 67 N. E. 235; Richards v. Reeves, 149 Ind. 427, 49 N. E. 349;

Copeland v. Summers, 138 Ind. 219, 35 N. E. 514, 37 N. E. 971; DeLevillain v. Evans, 39 Cal. 120; Davis v. Garrett, 91 Tenn. 147, 18 S. W. 113.

Mr. E. C. Maxwell for appellee.

Browne, Ch. J., delivered the opinion of the court:

This is an action brought by a minor, by his next friend, against the First National Bank of Pensacola for an accounting and payment of complainant's claim against the bank. There are four cases pending before this court with identical pleadings and testimony.

Alex. McKinnon, the father of the appellant, deposited at divers times for several years in the savings department of the First National Bank of Pensacola various sums of money to the credit of each of his four minor children. The pass books show that on some occasions he would make deposits to the credit of two of the children on the same day, and at other times to only one of them. Individual pass books were issued in the names of the four minor children, and signature cards left with the bank indicating how checks against the accounts should be signed. The cards of Ethel B. McKinnon and Martel C. McKinnon contain their names by Beulah F. McKinnon, while those of Eleanor W. McKinnon and Allen Alex. McKinnon contain their names only. Ethel and Martel McKinnon's cards seem to have been signed by the same person, and are in a different handwriting from those of

Allen Alex. McKinnon and Eleanor McKinnon.

The deposits to the credit of the children with interest amounted to something over \$11,000, was drawn by the father, and loaned to the president of the bank, taking his individual notes payable to each of the children from whose account the money was taken. These notes were never paid. None of the children had a legal guardian. None of the checks on which he drew out the money was signed by any of the children or in the manner indicated on the identification cards.

The father, Alex. McKinnon, carried an account in his own name. He also from time to time deposited money to the credit of his wife's account.

Two of the children, aged respectively fifteen and seventeen years, testified to having had the pass books in their possession; that they had been shown to them by their father, who said they belonged to them, and told them that he put the money in the bank for them. The books were at one time kept in a drawer, and later in a vault in their home, to which all the family had access at all times and opened the vault whenever they wished to; that they never signed any checks or drew out any money from the bank except on one occasion when they each asked their father to get \$20 or \$25 for them from their money in the bank. Both are quite positive and clear in their testimony that their father from time to time handed them the deposit books containing entries of deposits made by him in their names, and they frequently heard him say that the money which he had deposited to the credit of their accounts and to their brothers was theirs as gifts from him.

Mrs. Beulah McKinnon, wife of Alex. McKinnon, the mother of the minor children, testified that her husband, when he made deposits of money to the account of the children, gave it to them; that she saw the pass books showing these

deposits from time to time, and that several times he gave them to her and she would put them away in the vault; that he deposited money in her name in the bank to the credit of her account; and that sometimes she let him draw some of it. She was quite positive that her husband said that he gave the money so deposited to her and the children, and frequently when he made a deposit to the credit of the children he would tell them that he had deposited the money for them.

In order that the deposit of money in a bank to the credit of another person shall operate as a valid gift *inter vivos*, it must appear not only that the depositor intended a gift, but also that he executed his intention, and there must be an acceptance of the gift by the donee. But where a gift made to an infant is beneficial, and not burdensome, the law will presume acceptance. *Davis v. Garrett*, 91 Tenn. 147, 18 S. W. 113. Or, as some courts say, "the law accepts it for him." *Copeland v. Summers*, 188 Ind. 219, 35 N. E. 514, 87 N. E. 971; *DeLevillain v. Evans*, 39 Cal. 120.

Gift—deposit to credit of another.

In the course of their examination the two children, Martel and Ethel McKinnon, said the money was to be theirs at the age of eighteen years, and upon these replies the appellee predicates most of his argument that in making the deposits the father did not intend the money to be theirs until each attained the age of eighteen years.

In view of all the other testimony and the circumstances surrounding the transactions tending to show that the father, when he made these deposits, intended them to be free gifts to his children, we do not think that what these two very young persons said in this connection is conclusive of the question.

To accept that view we would be presented with this condition: Mr. McKinnon told his wife and children that he gave them the money when he deposited it to their credit, and

then said, "But I am not going to give it to you until you are eighteen years of age," or, more tersely put, "I give you this money, but am not going to give it to you now." This is almost a *reductio ad absurdum*.

A more reasonable and natural conclusion to be drawn from the evidence, and one that seems quite clear to us, is that the father intended when he deposited the money in the bank that it should be an absolute gift to the children, but did not intend for them to acquire extravagant habits by permitting them to use the money as they pleased before they were eighteen years old. This, as their natural guardian, he had the right to do, and if the gifts had been made by a third person he could have controlled his children in its expenditure until they reached an age when he considered it was advisable for them to use it as they saw fit. What was said about the children having the money when they were eighteen years of age, in the light of all the circumstances, relates to the control he intended to exercise over their expenditure of money already theirs, and not the time when he intended it to become theirs.

This case hinges upon the question whether the father, at the time he made the deposits to the credit of his children, intended them as free gifts as of the dates of the deposits. If so, the funds became the property of the infants, and he lost dominion over it and it passed completely out of his control as their natural guardian.

Guardian and ward—right of natural guardian.

"This guardianship confers no right to intermeddle with the property of the infant, but is a mere personal right in the father or other ancestor to the custody of the person of his heir apparent or presumptive until attaining twenty-one years of age." 1 Lewis's Blackstone, 435, n. 4; *Dagley v. Tolferry*, 1 P. Wms. 285, 24 Eng. Reprint, 391, 1 Eq. Cas. Abr. 300, 21 Eng. Reprint, 1060, Gilb. Eq. Rep. 103, 25 Eng. Reprint, 72; *Genet v. Tall-*

madge, 1 Johns. Ch. 8; *Jackson v. Combs*, 7 Cow. 36; *Hyde v. Stone*, 7 Wend. 354, 22 Am. Dec. 582; *May v. Calder*, 2 Mass. 55; *Miles v. Boyden*, 3 Pick. 213.

The case of *Linton v. Walker*, 8 Fla. 144, 71 Am. Dec. 105, while not decisive, the views of the chief justice on this question not being concurred in by the other justices, lays down the law as we find it to be, and is in accord with the weight of the authorities, that "a guardian by nature is entitled to the charge only of ^{—custody of} the person, and not ^{ward.} of the personal estate, of the ward." *Hyde v. Stone*, and other cases cited *supra*.

A number of cases are cited on both sides which are not necessary for us to discuss. Most of those referred to by the appellee relate to gifts to adults, and show facts and circumstances from which the courts held that they did not establish an absolute and irrevocable gift. These cases are interesting, but not determinative, as the facts and circumstances before us are different from those in the cases cited. One wherein the facts more nearly fit the case that we are considering is that of *Gardner v. Merritt*, 32 Md. 78, 3 Am. Rep. 115, cited by appellant. In that case as in this, the donor had an individual account in her own name in addition to those which were carried in the name of the donees to whose credit she made deposits. There the court said: "During the same period, when she was making these deposits in the names of her grandchildren, she was also making similar deposits in the same bank in her own name; that is, she was depositing to separate accounts in the name of each of the grandchildren, and at the same time to a separate account in her own name, which had been opened long before, in 1856, and was continued until her death. If she intended that all the moneys were her own, and deposited to her own credit, it is hard to conceive her purpose in requiring five accounts to be kept, one

in the name of each of the infants, and a sixth in her own name. It is argued that her purpose was to indicate thereby an intent to make future gifts of the moneys to the children, but there is no proof upon which the argument can rest."

In the case we are considering, we not only have the uncontradicted testimony of the two young girls and the mother that Alex. McKinnon repeatedly declared that in making these deposits in the names of his children that he was making them a free gift of the money, but the circumstances surrounding the transactions carry conviction that such was his purpose. One of the strong circumstances is that, when he drew out the money to lend to the president of the bank, he caused the notes to be made payable to each minor child from whose account the money was taken.

Another circumstance that is called to the attention of the court by the appellant is that the donor, the father, was present at the taking of the testimony and heard his children and his wife testify that

when he deposited money in the bank in the names of his children he would show or hand them the deposit books and tell them he had done it as a free gift to them, and did not take the stand and deny any of their testimony. From all the facts and circumstances surrounding this case, we are satisfied that McKinnon, at the time he made the deposits in the bank to the credit of his children, intended the money so deposited to be a free gift to them; and there is nothing in the testimony to show that there was any understanding or agreement between him and the bank that he was to keep control of the funds, and dispose of them as he saw fit. The money passed absolutely and irrevocably from his custody and control, and the bank had no authority to pay it out on his order.

The judgment is reversed.

Taylor, Whitfield, Ellis, and West, JJ., concur.

Petition for rehearing denied July 29, 1919.

ANNOTATION.

Right of natural guardian to custody or control of infant's property.

This note does not include statutory rights of a natural guardian, nor his right to the infant's earnings, nor does it include the question whether a parent may control or settle his child's litigation.

A natural guardian has no right to the custody or management of the infant's estate.

Alabama.—Capal v. M'Millan (1838) 8 Port. 197 (as stating the rule); Alston v. Alston (1859) 34 Ala. 15; Nelson v. Goree (1859) 34 Ala. 565.

Arkansas.—Rhea v. Bagley (1897) 63 Ark. 374, 36 L.R.A. 86, 38 S. W. 1039 (stating the rule).

California.—Kendall v. Miller (1858) 9 Cal. 591.

Connecticut.—Kline v. Beebe (1827) 6 Conn. 494 (as stating the rule); Porter v. Tudor (1833) 9 Conn. 411;

Williams v. Cleaveland (1904) 76 Conn. 426, 56 Atl. 850.

Delaware.—Spruance v. Darlington (1894) 7 Del. Ch. 111, 30 Atl. 663.

Florida.—Linton v. Walker (1858) 8 Fla. 144, 71 Am. Dec. 105; (McKINNON v. FIRST NAT. BANK (reported herewith) ante, 111, McKinnon v. First Nat. Bank (1919) — Fla. —, 82 So. 751.

Georgia.—Perkins v. Dyer (1849) 6 Ga. 401 (as stating the rule).

Illinois.—Perry v. Carmichael (1880) 95 Ill. 519; Bedford v. Bedford (1891) 136 Ill. 354, 26 N. E. 662 (as stating the rule); Paskewie v. East St. Louis & Suburban R. Co. (1917) 281 Ill. 385, L.R.A.1918C, 52, 117 N. E. 1035.

Indian Territory.—Indian Land & T. Co. v. Shoenfelt (1904) 5 Ind. Terr. 41, 79 S. W. 34 (as stating the rule) (reversed on another ground in (1905) 68 C. C. A. 196, 135 Fed. 484).

Iowa.—*Ringstad v. Hanson* (1911) 150 Iowa, 324, 130 N. W. 145 (as stating the rule).

Michigan.—*Power v. Harlow* (1885) 57 Mich. 107, 23 N. W. 606.

Missouri.—*McCarty v. Rountree* (1854) 19 Mo. 345 (as stating the rule).

New Hampshire.—*French v. Hoyt* (1833) 6 N. H. 370, 25 Am. Dec. 464.

New Jersey.—*Graham v. Houghtalin* (1863) 30 N. J. L. 552.

New York.—*Williams v. Storrs* (1822) 6 Johns. Ch. 353, 10 Am. Dec. 340; *Fonda v. Van Horne* (1836) 15 Wend. 631, 30 Am. Dec. 77; *Hyde v. Stone* (1831) 7 Wend. 354, 22 Am. Dec. 582; *Houghton v. Watson* (1882) 1 Dem. 299.

South Carolina.—*Clark v. Smith* (1880) 13 S. C. 585.

Tennessee.—*Miles v. Kaigler* (1836) 10 Yerg. 10, 30 Am. Dec. 425; *Barbee v. Williams* (1871) 4 Heisk. 522.

Texas.—*Vineyard v. Heard* (1914) — Tex. Civ. App. —, 167 S. W. 72.

Vermont.—*Ferguson v. Phoenix Mut. L. Ins. Co.* (1911) 84 Vt. 350, 35 L.R.A. (N.S.) 844, 79 Atl. 997.

West Virginia.—*McDodrill v. Pardee & C. Lumber Co.* (1895) 40 W. Va. 564, 21 S. E. 878.

England.—*Dagley v. Tolferry* (1715) 1 P. Wms. 285, 24 Eng. Reprint, 391, 1 Eq. Cas. Abr. 300, 21 Eng. Reprint, 1060, Gilb. Eq. Rep. 103, 25 Eng. Reprint, 72.

"At the common law where there was no guardian in socage, the father was guardian by nature to his heir apparent until the age of twenty-one. This was a guardianship of his person only, and gave the father no right of control over his property, real or personal." *Combs v. Jackson* (1828) 2 Wend. (N. Y.) 153, 19 Am. Dec. 568.

A guardian by nature at the common law has no authority over the lands of the infant. *Cranch, Ch. J., in Mauro v. Ritchie* (1827) 3 Cranch, C. C. 147, Fed. Cas. No. 9,312.

A natural guardian cannot convey the infant's real property (*McNeil v. First Cong. Soc.* (1884) 66 Cal. 105, 4 Pac. 1096), even though ordered to do so by the county court (*Shanks v. Seamonds* (1867) 24 Iowa, 181, 92 Am. Dec. 465; his bond for title is void

(*Judson v. Sierra* (1858) 22 Tex. 365); he cannot assign a land certificate (*Pyle v. Cravens* (1823) 4 Litt. (Ky.) 17); nor may he grant an easement (*Farmer v. McDonald* (1877) 59 Ga. 509).

A natural guardian may not lease the infant's lands. *Pilgrim v. McIntosh* (1907) 7 Ind. Terr. 623, 104 S. W. 858; *May v. Calder* (1806) 2 Mass. 55; *Anderson v. Darby* (1818) 10 S. C. L. (1 Nott & M'C.) 369.

At common law a father as a guardian by nature could not have the rents of his infant's land not inherited on the part of the mother. *Jackson v. Combs* (1827) 7 Cow (N. Y.) 36, affirmed in (1828) 2 Wend. 153, 19 Am. Dec. 568, where the court said: "At the common law, if lands held in socage came to an infant by descent, his nearest relative, who could not by any possibility inherit the lands, was his guardian in socage until the age of fourteen, and until the infant selected a guardian for himself. Such guardian might lawfully receive the rents and profits of the land during the continuance of the guardianship. If the lands descended from the father or other paternal relatives, the mother or next of kin on the part of the mother was the guardian; and if the lands descended on the part of the mother, the father or next of kin on the paternal side was entitled to the guardianship."

In *Curle v. Curle* (1848) 9 B. Mon. (Ky.) 309, the court said that the father as natural guardian was entitled to the control of the minor's real estate; but there the real estate came to the ward from her half brother of another name, and the court may have been thinking of a guardian in socage.

The mother of minor heirs cannot appoint an agent to act for them in matters concerning their real estate. *Harmer v. Morris* (1829) 1 McLean, 44, Fed. Cas. No. 6,076.

But it was held in *McKee v. Hann* (1840) 9 Dana (Ky.) 526, that the father might as natural guardian present a petition for the sale of the real estate of his minor children, the statute requiring a bond for the infants' protection.

The mother of infant heirs cannot, as administratrix of her husband, apply for leave to sell his real estate without notice to her minor children. *French v. Hoyt* (1833) 6 N. H. 370, 25 Am. Dec. 464.

Contrary to all the authorities seems the case of *Re Salisbury* (1876) L. R. 2 Ch. Div. (Eng.) 29, 45 L. J. Ch. N. S. 250, 34 L. T. N. S. 5, 23 Week. Rep. 824, where the majority of the court, citing no cases, held that a father, a tenant for life, being the natural guardian of his minor son, the remainderman could, as such, consent on his behalf to a gift of an acre of land as a site for a church, the statute providing that the gift should not be valid unless, if the remainderman be a minor, the guardian concur.

A natural guardian cannot sell personal property (*Porter v. Tudor* (1833) 9 Conn. 411; *Keeler v. Fassett* (1849) 21 Vt. 539, 52 Am. Dec. 71); nor may he sell the child's slave (*Wilson v. Wright* (1832) Dudl. (Ga.) 102); nor the use of his child's slave during the child's minority (*Forsythe v. Kreakbaum* (1828) 7 T. B. Mon. (Ky.) 97); nor release the infant's mortgage (*Perkins v. Dyer* (1849) 6 Ga. 401).

A natural guardian has no authority to receive or receipt for the infant's legacy (*Lang v. Pettus* (1847) 11 Ala. 37; *Linton v. Walker* (1858) 8 Fla. 144, 71 Am. Dec. 105; *Genet v. Tallmadge* (1814) 1 Johns. Ch. (N. Y.) 3,561; *Morrell v. Dickey* (1814) 1 Johns. Ch. (N. Y.) 153; *Van Epps v. Van Deusen* (1833) 4 Paige (N. Y.) 64, 25 Am. Dec. 516 (as stating the rule); *Johnson v. Johnson* (1835) 11 S. C. Eq. (2 Hill) 277; *Haynie v. Hall* (1844) 5 Humph. (Tenn.) 290, 42 Am. Dec. 427; *Sparhawk v. Buell* (1837) 9 Vt. 41; *Dagley v. Tolferry* (1715) 1 P. Wms. 285, 24 Eng. Reprint, 391, 1 Eq. Cas. Abr. 300, 21 Eng. Reprint, 1060, Gilb. Eq. Rep. 103, 25 Eng. Reprint, 72).

Lang v. Pettus (1847) 11 Ala. 37, supra, overrules the decision to the contrary in *Wood v. Wood* (1842) 8 Ala. 756.

In *Holloway v. Collins* (1675) 1 Ch. Cas. 245, 22 Eng. Reprint, 782, the court at first refused to hold that a

payment of a legacy of £ 125 to an infant's father was bad, stating that the payment was good unless the legacy was large enough to pay the costs of suit, but it appearing that the executor had taken a bond, the court held the payment bad.

But in *Dagley v. Tolferry* (1715) 1 P. Wms. 285, 24 Eng. Reprint, 391, 1 Eq. Cas. Abr. 300, 21 Eng. Reprint, 1060, Gilb. Eq. Rep. 103, 25 Eng. Reprint, 72, supra, it was held that payment of a legacy of £100 to a father was bad, though the testator on his deathbed by parol had directed it.

There has been some grumbling at the rule. Thus in *Philips v. Paget* (1740) 2 Atk. 80, 26 Eng. Reprint, 449, the report, in giving the judgment of Hardwicke, L. Ch., states: "The case of *Dagley v. Tolferry* (Eng.) supra, he said, must have some other circumstances, for the rule is laid down too strictly, that (in all cases where executors pay infants' legacies to fathers), in order to deter executors from such payments, they shall be paid over again; Lord Cowper confirmed the master of the rolls' decree; but he seemed, even by this report of the case, to have had a remorse of judgment at the time, for, on looking into the register's office, it appears, his lordship ordered the deposit to be divided between the parties."

In *Curle v. Curle* (1848) 9 B. Mon. (Ky.) 309, supra, the court, after stating that the father, as natural guardian, was entitled to the control of the minor's real estate, said: "And although the receipt by him, in that character, of the estate also of such child, in slaves and personalty, may not have the effect to exonerate the executor or administrator from liability, yet having so received it, we think it should be considered and treated as being in his hands in that character, and that the claim of the child in this case, founded upon such receipt, as well as upon the profits of the real estate, is entitled to priority over the claims of the general creditors."

There is an extraordinary decision in *Miles v. Boyden* (1825) 3 Pick.

(Mass.) 213, holding that while a father as natural guardian has no authority to receive a legacy, if the executor resists on the ground that the legacy has lapsed, and the father is admitted by the court to prosecute for the infant as *prochein ami*, "he may discharge this judgment, and it will bar any future action for the legacy."

A widow cannot make an agreement binding her minor daughter in estate. *Jones v. Jones* (1877) 46 Iowa, 466.

It may be noted that it has been held that if a father gives a negro to his infant son, the father's subsequent possession of the negro will be the

son's possession. *Williams v. Walton* (1835) 8 Yerg. (Tenn.) 387, 29 Am. Dec. 122.

It was held in *Henkel v. United States* (1915) 237 U. S. 43, 59 L. ed. 831, 35 Sup. Ct. Rep. 536, that minor Indians must be deemed to be bound by the action of their mother in their behalf in relinquishing to the United States for reclamation purposes all their right, title, and interest in land occupied by them with their parents in the Blackfeet Indian Reservation, in view of the practice of the Interior Department to require the interest of minors to be represented by their natural guardians. B. B. B.

COMMONWEALTH OF KENTUCKY, Appt.,

v.

SOUTH COVINGTON & CINCINNATI STREET RAILWAY COMPANY.

Kentucky Court of Appeals — October 1, 1918.

(181 Ky. 459, 205 S. W. 581.)

Nuisance — permitting street car to be overcrowded.

1. Failure of a street car company to provide sufficient cars to accommodate the public, and permitting the cars employed to be overcrowded so as to affect the safety and comfort of the passengers, does not constitute a public nuisance subject to indictment.

[See note on this question beginning on page 124.]

Definition — nuisance.

2. A public nuisance is the doing of or failure to do something that injuriously affects the safety, health, or morals of the public, or works some substantial annoyance, inconvenience, or injury to the public.

[See 20 R. C. L. 384.]

Nuisance — indecent use of street car.

3. A street railway company may be guilty of nuisance if it permits its cars to be used for indecent or pernicious purposes, injurious to the morals of the public desiring to or becoming passengers on them, or permits them to become so unsanitary as to endanger health, or permits disorderly persons to frequent them.

— acts of public.

4. When members of the public voluntarily create conditions on the premises of another injurious only to their

own safety or health, or from which they alone suffer annoyance, the owner of the premises cannot be charged with committing a public nuisance.

[See 20 R. C. L. 391, 392.]

Carrier — right to prescribe rules as to number of passengers carried.

5. A street car company may, in the absence of statute or ordinance, prescribe reasonable regulations as to the number of passengers that should ride at one time in any of its cars.

[See 4 R. C. L. 1055 et seq.]

— exclusion of passengers.

6. A street car company may refuse to admit more passengers to its cars at one time than the number prescribed by reasonable rules promulgated by it.

[See 4 R. C. L. 1061.]

— liability in damages.

7. The remedy of one injured by a street car company permitting the car

(181 Ky. 459, 205 N. W. 581.)

upon which he is a passenger to become overcrowded is a civil action for damages.

[See 4 R. C. L. 1213, 1214.]

—public regulation of number of passengers.

8. The state or a city, pursuant to

statutory regulations, may prescribe reasonable regulations as to the number of passengers to be carried on the cars of street railway companies doing business wholly within the limits of the state.

[See 4 R. C. L. 562.]

APPEAL by the Commonwealth from a judgment of the Criminal, Common Law, and Equity Division of the Circuit Court for Kenton County, sustaining a demurrer to an indictment charging defendant with maintaining a common and public nuisance. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Stephens L. Blakeley and Charles H. Morris, Attorney General, for the Commonwealth:

A nuisance existing in a public place is a public nuisance, punishable as a common-law offense. The term "public place" means any place, common or private, where the public has a right to go and to be.

Jones v. Chanute, 63 Kan. 243, 65 Pac. 243; Joyce, Nuisances, § 5; State v. Ohio Oil Co. 150 Ind. 31, 47 L.R.A. 627, 49 N. E. 809; Wood, Nuisances, §§ 18, 29, 43, 47; People v. Doris, 14 App. Div. 117, 43 N. Y. Supp. 571; Reaves v. Territory, 13 Okla. 396, 74 Pac. 9.1; Winchester & L. Turnp. Road Co. v. Croxton, 98 Ky. 739, 33 L.R.A. 177, 34 S. W. 518; Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198; People v. Transit Development Co. 131 App. Div. 174, 115 N. Y. Supp. 297; State v. Welch, 88 Ind. 308; Goldstein v. State, — Tex. Crim. Rep. —, 35 S. W. 289; Territory v. Lannon, 9 Mont. 1, 22 Pac. 495; Stewart v. Pennsylvania Co. 2 Ind. App. 142, 50 Am. St. Rep. 231, 28 N. E. 211; Dickey v. State, 68 Ala. 508, 4 Am. Crim. Rep. 249; Flake v. State, 19 Ala. 551; Neal v. Com. 22 Gratt. 917; Parker v. State, 26 Tex. 204; Reg. v. Holmes, 20 Eng. L. & Eq. Rep. 597; Coleman v. State, 13 Ala. 602.

It is not necessary that a nuisance affect the entire community, or a majority of the community, in order to be a public and common nuisance. "The public," or "the general public," or "all the citizens of the commonwealth," in this sense, means that part of the public which is affected by the nuisance.

Keefer v. State, 174 Ind. 588, 92 N. E. 656; Burlington v. Stockwell, 5 Kan. App. 569, 47 Pac. 988.

Passengers on a street car are there

because they have a right to go and to be upon the car, and not because they and the street car company have made contracts for transportation for hire.

Sun Printing & Pub. Asso. v. New York, 152 N. Y. 257, 37 L.R.A. 788, 46 N. E. 499; Wyman, Pub. Serv. Corp. §§ 337, 339, 341.

A street railway is a public highway, and a street car is a public place. A nuisance upon a street car is in a public place, affects such of the public as are there, and is, therefore, a public nuisance, and indictable as such.

Wyman, Pub. Serv. Corp. p. 149; Nellis, Street Railways, §§ 1-6; Cherokee Nation v. Southern Kansas R. Co. 185 U. S. 641, 34 L. ed. 295, 10 Sup. Ct. Rep. 965; Com. v. Fitchburg R. Co. 12 Gray, 180; People v. Kerr, 27 N. Y. 188; Sharpless v. Philadelphia, 21 Pa. 147, 59 Am. Dec. 759; Toledo, P. & W. R. Co. v. Pence, 68 Ill. 524; Davidson v. Ramsey County, 18 Minn. 482, Gil. 482; Gibson v. Mason, 5 Nev. 307; Heilbron v. St. Louis Southwestern R. Co. 52 Tex. Civ. App. 575, 113 S. W. 610, 979; Whalen v. Baltimore & O. R. Co. 108 Md. 11, 17 L.R.A. (N.S.) 130, 129 Am. St. Rep. 423, 69 Atl. 390; Rothschild v. Chicago, 227 Ill. 205, 81 N. E. 407; Olcott v. Fond du Lac County, 16 Wall. 678, 21 L. ed. 382; 3 McQuillin, Mun. Corp. § 1279; Sun Printing & Pub. Asso. v. New York, and Coleman v. State, supra; Dickey v. State, 68 Ala. 508, 4 Am. Crim. Rep. 249; State v. Heidenhain, 42 La. Ann. 483, 21 Am. St. Rep. 388, 7 So. 621; Williams v. East India Co. 3 East, 192, 102 Eng. Reprint, 571, 6 Revised Rep. 589; State v. Waymire, 52 Or. 281, 21 L.R.A. (N.S.) 56, 132 Am. St. Rep. 699, 97 Pac. 46; Reg. v. Holmes, 20 Eng. L. & Eq. Rep. 597.

Messrs. J. C. W. Beckham and Ernst, Cassatt, & Cottle for appellee.

Carroll, J., delivered the opinion of the court:

The South Covington & Cincinnati Street Railway Company, a Kentucky corporation owning and operating a line of street railway in the city of Covington, Kenton county, Kentucky, was indicted by the grand jury of Kenton county; the charge in the indictment being that the company "did on said day and ever since, up to and immediately preceding the finding of this indictment, unlawfully, continuously, unreasonably, and for a long and unnecessary period of time, invite, suffer, and permit a large and unreasonable number of men and women to congregate, assemble, and gather upon its street cars operating upon what is known as the Rosedale line, and unlawfully, unreasonably, wilfully, continuously, and knowingly failed and refused to furnish cars sufficient in number and size to accommodate the general public and citizens of the commonwealth then and therein being upon its cars, and did unlawfully, knowingly, continuously, and unreasonably allow, suffer, and permit its said street cars on said line of railway on said day, and on each day since, and up to and immediately preceding the day of the finding of this indictment, to become unreasonably and dangerously overcrowded with men, women, and children, permitting and causing the same to block and crowd the aisles, and stand upon the front and rear platforms on said cars, rendering the cars in which said persons were permitted to be crowded, gathered, and congregated, unsanitary, unhealthy, and uncomfortable to persons gathered therein and riding thereon, and greatly and unnecessarily, and unreasonably endangering the safety, health, and comfort of said passengers, said condition being unsafe, unsanitary, and dangerous and in violation of its legal duty as a common carrier, and to the common annoyance and nuisance of all citizens of the commonwealth then and there being, riding

upon said cars, and having the right then and there to be and travel, against the peace and dignity of the commonwealth."

To this indictment the trial court sustained a general demurrer, and on this appeal by the commonwealth the only question before us is: Did the indictment charge a public offense?

There is no statute regulating the subject-matter of the indictment, which was found under the common-law principles relating to the prosecution of persons guilty of committing a punishable nuisance. It may, however, be said at this point that the city of Covington did by ordinance, with appropriate penalties, undertake to regulate the conduct of this company in the operation of its cars and the number of passengers that it should carry in each car, and the validity of this ordinance was before this court in the case of *South Covington & C. Street R. Co. v. Covington*, 146 Ky. 592, 143 S. W. 28. In that case the railway company brought suit against the city to enjoin the enforcement of the ordinance, § 1 of which provides "that it shall be unlawful for any person, corporation, or company owning or operating street cars for the carriage of passengers for hire in or through or over the public streets of the city of Covington, to permit more than one third greater in number of passengers to ride or to be transported within such cars over and above the number for which seats are provided in the same, provided that this section shall not apply to or be enforced on the days celebrated as the Fourth of July, Decoration day or Labor day."

And § 6 that "it is hereby made the duty of every company, person, or corporation, operating street cars and the street car lines within the corporate limits of the city of Covington, to run and operate cars in sufficient numbers at all times to reasonably accommodate the public within the limits of this ordinance as to the number of passengers per-

mitted to be carried, and the general council of the city of Covington may by resolution at any time direct that the number of cars operated upon any line or route be increased to a sufficient number to so accommodate the public, if there is a failure in that respect. Any such person, company, or corporation failing or refusing to run or operate sufficient cars as by this section provided shall be subject to the penalties provided by § 2 hereof."

Other sections of the ordinance, the enforcement of which was sought to be enjoined, undertook to regulate in other respects, not pertinent here, the operation and equipment of the cars. This court in its opinion upheld the validity of the ordinance, and further held that the company was not engaged in interstate commerce. From the opinion of this court the railway company prosecuted an appeal to the Supreme Court of the United States, and that court, in an opinion reported in 235 U. S. 537, 59 L. ed. 350, L.R.A.1915F, 792, P.U.R.1915A, 231, 35 Sup. Ct. Rep. 158, reversed so much of the opinion of this court as ruled that it was permissible for the city by ordinance to regulate the number of passengers that might be carried in each car, or the number of cars that should be run, and further held that the railway company was engaged in interstate commerce.

The decision of the Supreme Court may not be very pertinent to the case we have, as the indictment does not disclose the fact that this railway company, at the time and before the indictment was found, was engaged in interstate commerce, although we may reasonably assume that it was engaged in such commerce and under the same conditions existing when the injunction suit was filed. We may further take it for granted that these opinions were not referred to or mentioned in the brief of counsel, because the indictment shows on its face that the railway company was engaged only in intrastate business. So that,

looking to the indictment as it stands, the precise question for our consideration is: Can a street car company doing business wholly in this state, in the absence of an ordinance or statute on the subject, be prosecuted under an indictment for nuisance for failing to furnish a sufficient number of cars to enable persons desiring passage to ride without being overcrowded, or for permitting such a number of passengers to board any car as may create a crowded condition detrimental to the safety, health, and comfort of the passengers?

The argument in behalf of the commonwealth is that a street car is a public place, to which the public are invited and permitted to go, and therefore, when the owner of the public place voluntarily permits it to become so overcrowded as to endanger the safety, health, and comfort of the public that it has invited and permitted to ride on its cars, it is guilty of an indictable common-law nuisance, as we have no statute defining what constitutes a nuisance. What is a nuisance has been defined many times, and the definitions

Definition—
nuisance.

differ in some minor respects; but upon the whole a common or public nuisance is the doing of, or the failure to do, something that injuriously affects the safety, health, or morals of the public, or works some substantial annoyance, inconvenience, or injury to the public, although it is not, of course, essential that the injury, annoyance, or inconvenience should affect the whole body of the public. It will be sufficient if it operates upon such members of the public as are brought into contact with the conditions that constitute the nuisance. Joyce, Nuisances, § 5.

But this general definition is hardly applicable to the case we have, and to make it so the law of nuisance would have to be enlarged to meet conditions to which, so far as our investigation goes, it has never

Nuisance—per-
mitting street
car to be over-
crowded.

been extended. We agree with counsel for the commonwealth that a street car is a public place, in which the public are invited and permitted to come and remain, and we have no doubt that, if a railway company permitted its cars to be used for indecent or pernicious purposes, injurious to

—indecent use of street car.

morals of the public desiring to or becoming passengers on its cars, or permitted its cars to become so filthy or unsanitary as to endanger the health of passengers, or allowed drunken or disorderly persons to habitually frequent its cars, to the annoyance and discomfort or inconvenience of the traveling public, as, for example, if it permitted gambling devices to be set up in its cars, or disorderly persons or lewd women to congregate therein, or allowed them to become so unsafe as to continually endanger the safety of passengers, that it would be guilty of a common-law nuisance, because passenger cars used by common carriers in the performance of their public duty are places set apart for public use, where the public are invited and expected to go, although they may be owned by and under the control of a private corporation. *Coleman v. State*, 13 Ala. 602; *Burlington v. Stockwell*, 5 Kan. App. 569, 47 Pac. 988; *Com. v. Cincinnati*, N. O. & T. P. R. Co. 139 Ky. 429, 18 L.R.A. (N.S.) 699, 112 S. W. 613, Ann. Cas. 1912B, 427.

But there is no charge in the indictment that this public place was itself unhealthy or unsafe or unsanitary, or, on account of anything the company directly did, injurious to good morals or detrimental to the comfort or convenience of the public, or that the railway company contributed in any manner or way to the unsafe, unhealthy, and discomforting conditions charged in the indictment, except by permitting members of the public who desired passage on the cars to board already overcrowded cars. It would thus appear that the injurious consequences growing out of the de-

scribed conditions were brought about by the members of the public themselves, who sought passage on the cars and there crowded them, by their voluntary action, to such an extent as to cause to exist the conditions alleged to be offensive.

Generally speaking, the law of nuisance is invoked to protect the public affected from conditions they had no part in creating and from the consequences of injury to health, safety, or morals that were produced without their consent or acquiescence by some other person, or by the owner of the premises or property sought to be declared a nuisance; but here we have a public place, free from any offensive elements, and that is not, and could not be under the charge in the indictment, injurious to either the health, comfort, or safety of any person, unless made so by the voluntary congregation of persons who are themselves the only members of the public that could reasonably be injured by conditions which they themselves created. It may be admitted that the street car company, by inviting and permitting the public to overcrowd its cars, participated in the creation of the conditions that constitute the nuisance complained of; but this circumstance does not impair the force of the argument that the only members of the public affected by the conditions were those who themselves brought them about, and we think that, when members of the public voluntarily, although by invitation and permission, create conditions on the premises of another injurious only to their safety or health, or from which they alone suffer annoyance, inconvenience, or discomfort, it cannot be said that the owner of the premises is guilty of committing a public nuisance. Thus, it is said in *Joyce on Nuisances*, § 476: "The injurious consequences or nuisance complained of should be the natural, direct, and proximate cause of defendant's acts to render him liable for maintaining a public

nuisance, for it is a good defense that the tortious act was committed by others or third parties; and if the injurious results flow from acts done by others operating on the alleged nuisancer's acts, so as to produce such results, then he is not liable."

We also think that a street car company may, in the absence of any ordinance or statute, prescribe reasonable regulations as to the

Carrier—right to prescribe rules as to number of passengers carried.

number of passengers that should ride at one time on any of its cars, and further adopt and

enforce rules providing that, when its cars contain the prescribed reasonable number, others

—exclusion of passengers.

desiring passage may be refused admittance. 10 C. J. p. 650. But if it does permit its cars to become overcrowded, and thereby the passengers in these overcrowded cars are injuriously affected, the railway company cannot, as we think, be made answerable in a criminal prosecution for producing a nuisance. The remedy of those

—liability in damages.

who may be injured by the overcrowding is to be found

in an action for damages against the carrier. *South Covington & C. Street R. Co. v. Harris*, 152 Ky. 750, 154 S. W. 35; *Basey v. Louisiana R. & Nav. Co.* 137 La. 451, L.R.A.1915E, 964, 68 So. 824; *Shields v. Minneapolis, St. P. R. & D. Electric Traction Co.* 124 Minn. 327, 50 L.R.A. (N.S.) 49, 144 N. W. 1092; *La Barge v. Union Electric Co.* 138 Iowa, 691, 19 L.R.A. (N.S.) 213, 116 N. W. 816.

Nor have we any doubt that a city, pursuant to statutory author-

—public regulation of number of passengers.

ity, or the state, has authority to enact laws reasonably

regulating this subject, applicable to companies engaged in doing business wholly within the state, or that Congress has the right to make similar regulations affecting carriers doing an interstate business,

because the reasonable control and regulation of the manner in which common carriers may conduct their business for the convenience and safety of the public is, we think, plainly within the power of the jurisdiction having authority to adopt and enforce such regulations. 1 *Nellis, Street Railways*, § 143; *Chicago v. Chicago City R. Co.* 222 Ill. 560, 78 N. E. 890; *New York v. Dry Dock, E. B. & B. R. Co.* 133 N. Y. 104, 28 Am. St. Rep. 609, 30 N. E. 563.

Counsel for the commonwealth in a well-prepared brief have not referred us to any authority supporting the proposition that a street car company may be found guilty of a common nuisance by committing the acts charged in the indictment; nor have we, after a somewhat extended investigation, found any authority that would support the charge, although, of course, the mere absence of authority on the subject is not of itself conclusive of the question that the indictment is not good. But, as a case of first impression, we are of the opinion that an indictment for nuisance is not the proper remedy in cases like this, unless the arm of the criminal law is invoked to enforce the provisions of some reasonable ordinance or statute, regulating the number of passengers that may ride in the car or the number of cars that shall be run for the reasonable accommodation of the public.

We also think it may fairly be said that this indictment is an attempt by criminal prosecution, to compel the railway company to run on the line in question a greater number of cars than it now runs, and to furnish such a number as may be reasonably necessary to accommodate the public, because it is obvious that the alleged overcrowding of the cars is due to the failure to furnish a sufficient number of cars, and, this being so, it is equally obvious that whether it furnished a sufficient number of cars would be left to the determination of every jury trying the case, if criminal

prosecution without statutory regulation was the proper remedy to compel the company to furnish the requisite number of cars. The matter of guilt or innocence being thus left to depend on the view that different juries might take of the matter, there would be no reasonable standard by which the company could determine in advance whether it was violating or observing the law. That civil relief of the character here sought to be secured cannot be obtained by criminal prosecution has, we think, been definitely determined by this court as well as others. In *Louisville & N. R. Co. v. Com.* 99 Ky. 132, 33 L.R.A. 209, 59 Am. St. Rep. 457, 35 S. W. 129, the railroad company was indicted for a violation of § 816 of the Kentucky Statutes, reading: "If any railroad corporation shall charge, collect or receive more than a just and reasonable rate of toll or compensation for the transportation of passengers or freight in this state, or for the use of any railroad car upon its track, or upon any track it has control of or the right to use in this state, it shall be guilty of extortion."

In holding that the statute was too uncertain and indefinite to furnish the basis of a criminal prosecution the court said: "Under this statute it is still a crime, though it cannot be known to be such until after an investigation by a jury, and then only in that particular case, as another jury may take a different view, and, holding the rate

reasonable, find the same act not to constitute an offense. There is no standard whatever fixed by the statute, or attempted to be fixed, by which the carrier may regulate its conduct; and it seems clear to us to be utterly repugnant to our system of laws to punish a person for an act, the criminality of which depends not on any standard erected by the law which may be known in advance, but on one erected by a jury. And especially so as that standard must be as variable and uncertain as the views of different juries may suggest, and as to which nothing can be known until after the commission of the crime."

In *Tozer v. United States* (C. C.) 52 Fed. 917, it was also said: "But in order to constitute a crime the act must be one which the party is able to know in advance whether it is criminal or not. The criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable. There must be some definiteness and certainty."

Other illustrative cases on the subject are *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86, 53 L. ed. 417, 29 Sup. Ct. Rep. 220; *Nash v. United States*, 229 U. S. 373, 57 L. ed. 1232, 33 Sup. Ct. Rep. 780; *International Harvester Co. v. Kentucky*, 234 U. S. 579, 58 L. ed. 1479, 34 Sup. Ct. Rep. 944.

Upon the whole case, we agree with the lower court that the indictment did not charge a public offense, and therefore the judgment is affirmed.

ANNOTATION.

Means of preventing overcrowding of street cars.

I. Introductory, 124.

II. Regulation by statute or ordinance:

a. Power to regulate, 125.

b. Scope and effect of regulation, 129.

III. Regulation by Public Service Commission, 132.

IV. Prosecution as for nuisance, 134.

I. Introductory.

This note discusses the regulation of the number of passengers to be carried by street cars, by municipalities and public service commissions. It also discusses criminal prosecution as a means of preventing overcrowding. It does not discuss the question of

overcrowding of street cars as a cause of injuries to passengers.

II. Regulation by statute or ordinance.

a. Power to regulate.

A municipality, in the exercise of its police power, may regulate reasonably the number of passengers to be carried on street cars or the frequency with which cars are to be run so as to prevent them from being overcrowded. *Minneapolis Street R. Co. v. Minneapolis* (1911) 189 Fed. 445; *Chicago v. Chicago City R. Co.* (1906) 222 Ill. 560, 78 N. E. 890; *North Jersey Street R. Co. v. Jersey City* (1907) 75 N. J. L. 349, 67 Atl. 1072; *Tacoma v. Boutelle* (1911) 61 Wash. 434, 112 Pac. 661; *Smith v. Butler* (1885) L. R. 16 Q. B. Div. (Eng.) 349, 50 J. P. 260, 34 Week. Rep. 416. And see the reported case (*COM. v. SOUTH COVINGTON & C. STREET R. Co. ante*, 118).

Thus, in *Minneapolis Street R. Co. v. Minneapolis* (Fed.) *supra*, an action to restrain the enforcement of an ordinance, the court held an ordinance regulating the number of passengers to be carried in a street car to be valid, saying: "Under that statement of what the law is, I come now to consider whether a simple ordinance limiting the number of people that the company can carry in its cars can be valid. Would an ordinance which only said that seventy-five people, and no more, should be carried in a car, be valid? Upon that point I can entertain no doubt. It seems to me that it is clearly within the power of the city council, in the exercise of those functions which the state has committed to its care, to make such a provision. It is not necessary to discuss from a practical standpoint the evils which come or result from overcrowded street cars. An ordinance of that kind, saying no more than that the company should not receive more than seventy-five persons in one of its cars, would be valid, and an ordinance which imposed a penalty for receiving more than that number would be also valid. I say seventy-five persons, and I say that because seventy-five is about the number which the company can carry under this ordinance. There has been no claim from counsel that

if the ordinance is valid the number seventy-five is an unreasonable number, and I assume that it is not unreasonable. The city council has determined that it is a reasonable number, and there has been no contention to the contrary. Such an ordinance as that being valid, the question is, Is the ordinance here sought to be enforced valid? I will take up the sections as they appear in the ordinance. No serious complaint is made as to § 1, which simply requires that the company post in its cars the number of people to be reasonably carried in each car. If such an ordinance is valid, I see no objection to that section."

In *Chicago v. Chicago City R. Co.* (1906) 222 Ill. 560, 78 N. E. 890, it appeared that the city of Chicago had enacted an ordinance providing, among other things, that traction companies should provide a sufficient number of cars on each line to carry passengers comfortably, and without overcrowding. The ordinance also provided a penalty for each violation. Two of the traction companies filed a bill to enjoin the city from enforcing the ordinance. The court held that the city was within its powers in enacting such an ordinance, since the ordinance was designed to promote the public comfort, safety, and health. The court said: "The ordinance in this case is within the powers conferred upon the defendant, and it has for its object the laudable purpose of protecting the traveling public against discomfort, annoyance, and danger. It is designed to promote the public comfort, safety, and health by preventing the overcrowding of cars, and it should be sustained if it is legally possible to do so."

In *North Jersey Street R. Co. v. Jersey City* (1907) 75 N. J. L. 349, 67 Atl. 1072, there was involved an ordinance requiring traction companies operating trolley cars between certain points to run a sufficient number of cars during the rush hours to provide a seat for every passenger from whom a fare was demanded. In dismissing writs of certiorari by two traction companies, the court held that it was

within the police power of the city to regulate reasonably the number of passengers to be carried. It was said: "It is admitted by counsel for the prosecutor that whatever power is possessed by the city to pass an ordinance of this character is properly to be exercised by the board of street and water commissioners. Nor is it disputed that the subject-matter of the ordinance—the regulation of street railway companies in their use and operation of their public vehicles of conveyance, with due regard to the comfort, safety, and health of the passengers transported, and to the convenience of passengers desiring transportation—is fairly within the police power of the city. The sole contention is that the ordinance is unreasonable because it is impossible to comply with it. It being conceded that its subject-matter is within the police power of the municipality, and that the board of street and water commissioners is the proper legislative body to exercise that power, the presumption is (until the contrary be shown) that the ordinance is reasonable. The question of reasonableness is a question of fact, and the burden of proof is upon those who attack the ordinance to show its unreasonableness. The court will not interfere unless it is clearly shown that the ordinance, either upon the face of its provisions, or by reason of its operation in the circumstances under which it is to take effect, is unreasonable or oppressive."

In *Tacoma v. Boutelle* (1911) 61 Wash. 434, 112 Pac. 661, the superintendent of a street car system of the city of Tacoma was convicted of a violation of an ordinance requiring the cars on certain streets to run at certain intervals during certain hours. It was contended, among other things on behalf of the superintendent, that the ordinance was invalid. The court held that the common council, having in mind the general welfare of the traveling public, and the health and safety of the citizen, endangered by crowded cars, had ample authority to regulate by ordinance the frequency with which cars should be run. It was said: "All courts concede the im-

possibility of adopting fixed rules by which to test the validity of laws passed under the police power. It covers a wide range of subjects, but is especially occupied with whatever affects the peace, security, health, morals, and general welfare of a community. While originally it was used, as a rule, to indicate the protective functions of the government, its development of late years has been in the direction of the state that cares for the general welfare. . . . That it, when generally reserved, vests ample power in the common council of a city, having in mind the general welfare of the traveling public, and the health and safety of the citizen, endangered by crowded and heavily loaded cars, to determine by ordinance the frequency with which cars should be run upon the public streets, is to our mind demonstrated both upon principle and by authority. . . . The police power being ample, then, to sustain Ordinance No. 3883, and the exercise of this power having been conferred upon the city, and the city having exercised it as conferred, appellant's second objection that the ordinance is not justified and cannot be vindicated as a valid exercise of the police power must also fail."

In *Smith v. Butler* (1885) L. R. 16 Q. B. Div. (Eng.) 349, the court sustained a borough by-law regulating the number of passengers to be carried on tram cars. On the trial of a conductor of one of the cars for permitting a greater number of people to remain on the car than could be provided with seats, the court held the by-law to be authorized by the Tramway Act of 1870, which provided as follows: "The local authority shall have the like power of making and enforcing rules and regulations and of granting licenses with respect to all carriages using the tramways, and to all drivers, conductors, and other persons having charge of or using the same, and to the standings for the same, as they are for the time being entitled to make, enforce, and grant with respect to hackney carriages and the drivers and other persons having the charge thereof,

and to the standings for the same in the streets and district, of or under the control of the local authorities: Provided always, that in any district in which any of the powers aforesaid in relation to hackney carriages and the matters aforesaid in connection therewith are vested in any authority other than the local authority of such district, such authority shall have and may exercise the powers by this section conferred upon the local authority." The court said: "The question reserved for us in this case is whether it was competent to the local authority, the corporation of Bolton, to make a by-law for the regulation of the number of passengers to be conveyed, and the accommodation to be afforded to them. I am of the opinion that it was. The 48th section of the Tramways Act 1870 gives the local authority the power of making and enforcing rules and regulations, and of granting licenses with respect to tramway carriages and the drivers and conductors, as they may make, enforce, and grant with respect to hackney carriages; and there is nothing in the proviso to qualify that power. Acting under that section, the local authorities have made a by-law (No. 8) for regulating the number of passengers to be carried by tram cars, and the extent of the accommodation to be afforded them, and also a by-law (No. 3) requiring every proprietor of a tram carriage to cause a statement of the number of passengers authorized to be carried at any one time in and upon such carriage, to be painted conspicuously on the inside and outside of such carriage."

In *United States v. Capital Traction Co.* (1910) 34 App. D. C. 592, 19 Ann. Cas. 68, there was involved an act of Congress requiring street railway companies in the District of Columbia to furnish a sufficient number of cars so that all persons who desired to ride could do so "without crowding." A violation of the statute was made a criminal offense. In affirming a judgment quashing an information charging a street car company with violation of this statute, the court held that the statute was invalid and unenforce-

able because it did not definitely state the elements constituting the offense, such as what would constitute a crowded car. It was said: "In a criminal statute, the elements constituting the offense must be so clearly stated and defined as to reasonably admit of but one construction. Otherwise, there would be lack of uniformity in its enforcement. The dividing line between what is lawful and unlawful cannot be left to conjecture. The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. A criminal statute cannot rest upon an uncertain foundation. The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements, and the courts upon another. As was said in *United States v. Reese* (1876) 92 U. S. 214, 23 L. ed. 563: 'If the legislature undertakes to define by statute a new offense, and provide for its punishment, it should express its will in language that need not deceive the common mind. Every man should be able to know with certainty when he is committing a crime. . . . It would be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government.' Penalties cannot be inflicted at the discretion of a jury. Before the citizen can be deprived of his liberty, or a corporation of its property by the imposition of fines, the crime must be clearly defined by the lawmaking power. If the Congress has power to declare it a crime for the street railway companies in the District of Columbia to operate cars in a

crowded condition, it must, in order to impart validity to the law, declare with certainty what constitutes, under the statute, a crowded car. This it has totally failed to do." In another part of the opinion the court said: "The statute makes it a criminal offense for the street railway companies in the District of Columbia to run an insufficient number of cars to accommodate persons desiring passage thereon, without crowding the same. What shall be the guide to the court or jury in ascertaining what constitutes a crowded car? What may be regarded as a crowded car by one jury may not be so considered by another. What shall constitute a sufficient number of cars in the opinion of one judge may be regarded as insufficient by another. What may be regarded as grounds for acquittal by one court may be held sufficient to sustain a conviction in another. The principle of uniformity, one of the fundamental elements in determining the validity of criminal statutes, is wholly lacking. There is a total absence of any definition of what shall constitute a crowded car. This important element cannot be left to conjecture, or be supplied by either the court or the jury. It is of the very essence of the law itself, and without it the statute is too indefinite and uncertain to support an information or indictment."

A municipal ordinance regulating the number of passengers street cars engaged in interstate commerce may carry is void. The number of persons to be carried by such cars can be regulated only by appropriate legislation of Congress. *South Covington & C. Street R. Co. v. Covington* (1915) 235 U. S. 537, 59 L. ed. 350, L.R.A.1915F, 792, P.U.R.1915A, 231, 35 Sup. Ct. Rep. 158, reversing (1912) 146 Ky. 592, 143 S. W. 28. In that case there was a bill to enjoin the enforcement of an ordinance which provided, among other things, that it should be unlawful for the railway company to permit more than one third greater in number of passengers to ride or be transported within its cars, than the number for which seats were provided therein. After holding that

the company was engaged in interstate commerce, the court held that while a state might enact reasonable measures in the interest of health, safety, and welfare of the people regardless of whether the measures affected interstate commerce, still an ordinance of a city regulating the number of passenger cars of a company engaged in interstate commerce might carry was void. It was said: "In the light of these cases, and upon principle, the conclusion is reached that it is competent for the state to provide for local improvements or facilities, or to adopt reasonable measures in the interest of the health, safety, and welfare of the people, notwithstanding such regulations might incidentally and indirectly involve interstate commerce. . . . We think the necessary effect of these regulations is not only to determine the manner of carrying passengers to Covington and the number of cars that are to be run in connection with the business there, but necessarily directs the number of cars to be run in Cincinnati, and the manner of loading them when there, where the traffic is much impeded and other lines of street railway and many hindrances have to be taken into consideration in regulating the traffic. If Covington can regulate these matters, certainly Cincinnati can, and interstate business might be impeded by conflicting and varying regulations in this respect, with which it might be impossible to comply. On one side of the river one set of regulations might be enforced, and on the other side quite a different set, and both seeking to control a practically continuous movement of cars. As was said in *Hall v. De Cuir* (1878) 95 U. S. 485, 489, 24 L. ed. 547, 548, 'commerce cannot flourish in the midst of such embarrassments.' We need not stop to consider whether Congress has undertaken to regulate such interstate transportation as this, for it is clearly within its power to do so, and absence of Federal regulation does not give the power to the state to make rules which so necessarily

control the conduct of interstate commerce as do these just considered."

b. Scope and effect of regulation.

An ordinance which provides a penalty for each and every person carried on a street car in excess of the number permitted by the ordinance practically abolishes the common-law obligation of a street railway company to stop at crossings and take on passengers. *Minneapolis Street R. Co. v. Minneapolis* (1911) 189 Fed. 445, wherein it was said: "Now I come to § 3 of the ordinance which says 'that whenever any passenger shall be admitted into any of said cars in excess of the carrying capacity thereof as in said ordinance defined, said Minneapolis Street Railway Company shall forfeit and pay to the city of Minneapolis the sum of \$50 for each and every passenger so admitted.' I omit for the present the proviso in that section. What does that section provide so far? It provides no more than if the company receives persons in excess of seventy-five into a car it shall pay \$50 for each person in excess of that number. There is nowhere found in that section any provision requiring or authorizing the company to receive more than seventy-five persons. It expressly forbids the taking into the car of more than seventy-five persons; and expressly forbidding that, of course it altogether abolishes and entirely puts to one side any obligation on the part of the street railway company to stop to take on passengers when there are more than seventy-five persons in a car. The street railway company with seventy-five persons in one of its cars has the right to refuse to carry any more passengers in that car. Counsel speaks of the common-law obligation of the company to stop at crossings and take on passengers; but here the common-law obligation to do that has been modified and necessarily restrained, and practically abolished by this ordinance. The city council has the right to regulate the running of street cars in that respect. If it says in the exercise of its power, as it may say, that after seventy-five people are in a car no more shall be

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taken on, that would undoubtedly relieve the company of its obligation to stop and take on passengers. The company would have a perfect right to run a car from one end of the line to the other, if there are seventy-five people in it, without stopping anywhere except to allow passengers to alight. This ordinance does not require the company to stop a car after seventy-five people are in it, and imposes no penalty if it refuses to do so."

When an ordinance regulates the number of people to be carried in street cars, a car engaged in interurban traffic is not required to stop at the city line and eject all those passengers in excess of the number allowed. Such cars are only required to take on no more than the number allowed while in the city limits. *Minneapolis Street R. Co. v. Minneapolis* (Fed.) *supra*. In that case it appeared that an ordinance limited the number of passengers to be carried. In an action to restrain the enforcement of the ordinance it was contended, among other things, that such an ordinance would require interurban cars to stop at the city lines and eject all the passengers in excess of the limit. The court said: "It has been argued that the ordinance is invalid, because, so far as interurban passengers are concerned, it would require the stoppage at the city line of a car having more than seventy-five persons in it coming from St. Paul, and the ejection of some of the passengers. There is nothing whatever in the ordinance which would justify any such construction. It relates to the city of Minneapolis, and the only prohibition is that the company shall not, in the city, take on any passengers after the prescribed number has been reached. It does not prohibit them from bringing into the city of Minneapolis a car with eighty to one hundred people on it."

A proviso in an ordinance that no penalty shall be exacted if another car on the same line, going in the same direction and on the same track, containing fewer passengers than the limit, shall at the time of the al-

leged offense be within 300 feet of the point where the excess passenger is admitted, does not require the company to run its cars 300 feet apart. It merely relieves the company from the obligation of the ordinance, under certain circumstances. *Minneapolis Street R. Co. v. Minneapolis (Fed.) supra*. In that case it was said: "That, to my mind, is the weakest part of the ordinance, and shows that the city council expressly allowed the public to do what they refused to allow the street car company to do. They refused to allow the company to overcrowd its cars, but did allow the public to do so. I can see no reason whatever for any such proviso in the ordinance. If it is an evil to crowd 150 people into a car, it is just as much of an evil when there is another car within 300 feet as it is when there is another car following within 600 feet. I see no defense whatever for that proviso. But the fact that I see no reason for putting that proviso into the ordinance is no ground for saying that the whole ordinance is unreasonable, or that the company has been deprived of its property without due process of law, or that the ordinance impairs the obligation of the contract between the street car company and the city. What does this proviso in fact require? It has been said that it requires the company to run its cars 300 feet apart during the hours named in the ordinance. I find no provision of that kind whatever in the ordinance. There is nothing in the ordinance, in this § 3, or in the proviso, from which any such requirement as that can be spelled out. The ordinance in § 2 says that the company shall furnish cars sufficient in number for the convenience of the public; but it nowhere says that they shall be run 300 feet apart. The fact is that, so far from the proviso imposing an obligation upon the company, or depriving it of its property without due process of law, it relieves the company from the obligation imposed upon it in another part of the ordinance. In other words, the city did not go as far as it might

have gone. It might have prohibited the company from receiving more than seventy-five persons in a car at any particular time, whether there was a car following it or not; but by this proviso it relieved the company from such obligation, and said that it might receive, under certain circumstances, more persons in a car than seventy-five. While I think the proviso is entirely unjustifiable from the standpoint of public policy, yet I see nothing in it which would justify the court in declaring that it infringes the Constitution of the United States. It is not for the court to make regulations; that duty is intrusted to the legislative power. All the power which this court has in a case of this kind is simply to determine whether the legislature has violated any constitutional provisions."

The possibility of extraordinary circumstances arising in the operation of street railways in accordance with the municipal regulations does not thereby render the ordinance void because of unreasonableness. Where the operation of a street railway in accordance with municipal regulations is prevented because of some extraordinary circumstances, the company, in an action against it to recover the penalty, may set up the extraordinary circumstances by way of a defense. *Minneapolis Street R. Co. v. Minneapolis (Fed.) supra*; *North Jersey Street R. Co. v. Jersey City (1907) 75 N. J. L. 349, 67 Atl. 1072*.

In *North Jersey Street R. Co. v. Jersey City (N. J.) supra*, it was contended on behalf of the traction companies that if the ordinance was enforced the cars would be subjected to innumerable or extraordinary blockades. The court held that exceptional circumstances that might render performance impossible in particular instances might be availed of by way of defense, if an action was brought to recover the penalty prescribed by the ordinance. It was said: "No doubt, under any schedule or system of running cars, interruptions may occasionally be caused by extraordinary blockades in the street, or by other circumstances over which, the

traction company has no control. The ordinance, however, should be given a reasonable interpretation, and it is not to be supposed that the company would be held liable for the results that might occasionally be produced by causes beyond its control. Upon the whole, we cannot say that the requirements of the ordinance with respect to the despatch of cars from the Pennsylvania terminal are either impossible of performance or so difficult of performance as to render the ordinance oppressive. The operation of the ordinance is therefore not wholly unreasonable. Exceptional circumstances that may render its performance impossible in particular instances may be availed of by way of defense, if action is brought for recovery of the penalty that the ordinance prescribes. If an ordinance may operate reasonably in some instances or circumstances, and unreasonably in others, it is not wholly void, and should not be set aside *in toto*."

In the case first cited it was said: "It has been suggested that this ordinance is defective in not providing for extraordinary occasions, such as football games, baseball games, grand opera, and entertainments of that nature, when there are a very large number of people to be carried. But the ordinance does not in any manner change the law in respect to those matters from what it is now. The law does not compel the company to take on these people if the car is crowded (and in contemplation of the law more than seventy-five passengers would crowd a car) under a penalty for not doing so; neither did the old law before this ordinance was passed make any such requirement. It was suggested in the argument that on the occasion of a grand opera entertainment in St. Paul, people from Minneapolis on one day all returned on the Selby-Lake line, which was swamped thereby, and that on the next day they all returned on the Como-Harriet line, and the consequence was that those cars were overcrowded. It was urged that it would be a great hardship if the street railway

company was liable in that case for not furnishing cars sufficient to meet the demands of the traffic. Under the law as it stood at the time of this occurrence, the company was subject to a suit by the state for its failure to comply with § 12 of the Ordinance of 1875. But in such a case it would have been undoubtedly a complete defense to show that the occasion was an extraordinary one. So, under the new ordinance, if there should be at an unusual hour or occasion an extraordinary demand for cars, and the company should not be able to furnish them, it would be liable to a suit by the state. But, it would be a complete defense to say that the demand was extraordinary. In any event, however, this ordinance nowhere imposes any penalty upon the company for a failure to furnish sufficient cars either for this or for any other occasion."

If an ordinance provides that a street car conductor shall be criminally responsible for permitting an excess number of passengers to board his car, he may be criminally prosecuted. *State v. Overby* (1911) 116 Minn. 304, 133 N. W. 792; *Phesse v. Fisher* [1915] 1 K. B. (Eng.) 572, [1914] W. N. 438, 84 L. J. K. B. N. S. 277, 112 L. T. N. S. 462, 79 J. P. 174, 13 L. G. R. 269, 31 Times L. R. 65; *Smith v. Butler* (1885) L. R. 16 Q. B. Div. (Eng.) 349, 50 J. P. 200, 34 Week. Rep. 416.

In *State v. Overby* (Minn.) *supra*, the ordinance under consideration made it an offense for a conductor to admit an excess of passengers into a street car. Two policemen testified that they boarded the car with the purpose of counting the passengers. On a count by them there was an excess of passengers besides themselves. The conductor testified that the police themselves constituted the overload. There was no question raised as to the validity of the ordinance. The court held that the evidence was sufficient to sustain the conviction.

In *Phesse v. Fisher* [1915] 1 K. B. (Eng.) 572, [1914] W. N. 438, 84 L. J. K. B. N. S. 277, 112 L. T. N. S. 462, 79

J. P. 174, 13 L. G. R. 269, 31 Times L. R. 65, a conductor was convicted of permitting an excess of passengers over the number permitted by statute on his car.

In *Badcock v. Sankey* (1890) 54 J. P. (Eng.) 564, it appeared that a tramway company forbade more than a certain number of passengers to be carried on a car, and provided that a conductor would be liable to a penalty for an infringement of any by-laws. It was held that a passenger discomforted by an excessive number of passengers was entitled to prosecute a conductor for breach of the by-law.

In *Tacoma v. Boutelle* (1911) 61 Wash. 434, 112 Pac. 661, the court sustained a conviction of the superintendent of a street railway company for violation of an ordinance requiring cars to be run at certain intervals.

III. Regulation by Public Service Commission.

In some jurisdictions power is given to a Public Service Commission to regulate, among other things, the number of passengers to be carried on street cars. See generally, as to the power of a Public Service Commission to regulate the operation of a street railway, the note to *Puget Sound Traction Light & P. Co. v. Public Service Commission*, 5 A.L.R. 36.

An order of a Public Service Commission which required a street railway company which had discontinued through service on some of its lines, to provide a sufficient number of cars on the discontinued routes, which partly ran through territory where but few passengers were taken on, so as to provide seats for substantially all passengers, has been held to be unreasonable and void.

Puget Sound Traction Light & P. Co. v. Reynolds (1915) 223 Fed. 371, affirmed in (1916) 244 U. S. 574, 61 L. ed. 1325, 5 A.L.R. 13, P.U.R.1917F, 57, 37 Sup. Ct. Rep. 705. In that case it appeared that the petitioner, a street railway company, operated two lines partly through territory where but few passengers were taken on. A short time prior to the promulgation of an order of the Public Service Commission requiring that the com-

pany should furnish sufficient cars on these two lines to provide seats for substantially all passengers, except during an emergency, the company had discontinued through service on two other lines. For a couple of hours every morning and evening, and on Sunday and summer afternoons, 30 to 40 per cent of the passengers stood most of the distance. In an action to restrain the enforcement of the order of the Public Service Commission, the court held that while the Commission had ample authority to regulate the number of passengers to be carried, the order under consideration was unreasonable and void. It was said: "Ample authority for the order of the Commission is found, and the franchise ordinances of the city of Seattle do not stand in the way of its exercise. . . . We feel constrained to hold, however, that so much of the order as requires the furnishing of seats for all passengers on the Alki Point and Fauntleroy Park lines is unreasonable and void, in view of the severe penalties imposed by law for failure to comply therewith. The order requires the company to furnish seats for 'substantially all persons using the Alki Point and Fauntleroy Park lines,' and provides that 'a substantial compliance' with the order shall be deemed a sufficient compliance; that the company shall furnish seats at all times for 'the usual patronage of said lines,' and excepts only 'emergency crowds' and 'extraordinary and unusual occasions.' Webster defines 'emergency' as 'an unforeseen occurrence or combination of circumstances which calls for immediate action or remedy; pressing necessity; exigency.' The same authority defines 'extraordinary' as 'beyond or out of the common order or method; not usual; uncommon; rare.' The crowds which pass over these two lines mornings and evenings, and the thousands that flock to the parks and beaches on Sundays and summer afternoons, are neither emergency crowds, nor are the occasions extraordinary or unusual, and to require the company to furnish cars and seats for all who

present themselves for transportation over these single-track railways, 8 miles in length, is to require the impossible. We do not underestimate the difficulties which confront the Commission in its efforts to compel the company to furnish adequate facilities, nor do we overstate the difficulties which confront the company in its efforts to furnish these facilities. The furnishing of seats for passengers on street railways is an unsolved problem, and perhaps will remain so as long as a considerable part of the population is habitually attracted in the same direction at the same time in pursuit of business or pleasure. The matter is not wholly beyond regulation and control, however. If, as appears in this case, one third of the passengers are without seats during certain hours of the day, an increase in facilities to that extent during these hours will, in a large measure, relieve the congestion. Such an order or regulation can be made definite and specific, and the company can reasonably comply therewith; but to compel it to furnish cars and seats at all times and on all ordinary occasions for all who may present themselves for transportation, as already stated, is an unreasonable requirement, and one to which no transportation company can conform. This conclusion finds ample support in the record, and is supported by facts and conditions within the common knowledge of all, of which a court may well take judicial notice."

A mere extension of the time set for the operation of a street railway in accordance with an order of a Public Service Commission, and a modification of the order in regard to the cars to be provided in the interim, in no way affects the Commission's right to enforce the order by writ of mandamus after the time set.

Public Service Commission v. Brooklyn Heights R. Co. (1918) 105 Misc. 254, P.U.R.1919B, 258, 172 N. Y. Supp. 790. In that case it appeared that the Public Service Commission of the first district of New York ordered the defendant companies to pro-

vide a certain number of cars to relieve the crowded condition of cars during the rush hour. Later the order was modified by agreement, whereby the rehearing on the order was postponed for several months, and the companies agreed to purchase 100 steel rapid transit cars and convert some of their other cars into two-car trains. This adjournment and agreement were made with the express understanding that neither the companies nor the Commission's rights nor the Commission's power were to be deemed prejudiced thereby. The commissioners later sought to enforce their order by writ of mandamus. The court held that the original order of the Commission was not reached by the subsequent agreement, but merely modified as to the time in which the company might comply, and in no wise affected the Commission's right to a writ of mandamus. It was said: "They claim that the things to be done under the agreement were intended to be, and understood by them to be, a substitute for the things required to be done by the order, and that, although they have not done any of these things (except to equip a very few cars for operation in two-car trains), their failure has been due not to any fault of their own, but to conditions resulting from the state of war, which prevented the manufacturers from getting steel with which to build the cars and make the appliances necessary to comply with the agreement, and they set forth in great detail their efforts to forward the work. They further urged that the completion and operation of certain rapid transit lines, and the imminent completion and operation of others, will release many surface cars, so as to render the 250 cars required by the order of February 8, 1917, unnecessary and useless, and they further urge that the cost of the new cars, if they be required to order them at this time, would be abnormally high, inasmuch as the steel market is in a worse condition now than it was last February. All of these facts, they urge, show that it would be grossly inequitable to en-

force against them the order of February 8, 1917. The companies' claim that the order should not be enforced can be sustained, if at all, only on equitable grounds; for the order of February 8, 1917, still stands unrevoked and unmodified, except as the time for compliance therewith has been extended by the order of February 20, 1918, made in pursuance of the agreement aforesaid. So far as the agreement of February 15, 1918, is concerned, it did not modify the order of February 8, 1917, for it was expressly stated that the adjournment should be 'with the understanding . . . that neither the rights of the companies nor the rights and powers of the Commission under the present order [the order of February 8, 1917], or under existing provisions of law, are to be deemed in any way prejudiced by the adjournment or by the action taken by the companies,' and there were other statements of a similar nature. The position of the Commission is, therefore, unassailable in law, and can be attacked only on equitable grounds."

IV. Prosecution as for nuisance.

The overcrowding of street cars does not constitute a public nuisance for which the company is criminally responsible. *Toronto R. Co. v. Rex* [1917] A. C. (Eng.) 630, 86 L. J. P. C. N. S. 195, 117 L. T. N. S. 579, 34 Times L. R. 1, Ann. Cas. 1918A, 991, reversing (1915) 34 Ont. L. Rep. 589, 9 Ont. Week. N. 152, which affirms (1911) 23 Ont. L. Rep. 183, 18 Ont. Week. Rep. 104, 18 Can. Crim. Cas. 417. And see the reported case (*COM. v. SOUTH COVINGTON & C. STREET R. Co. ante*, 118).

The reason for the rule was given in the reported case (*COM. v. SOUTH COVINGTON & C. STREET R. Co.*) to be that if a criminal prosecution against the railroad company was permitted, the matter of guilt or innocence would thereby be left to the jury, and different juries would thereby arrive at different views. The companies would therefore be at a loss as to

whether they were violating or observing the law.

In *Toronto R. Co. v. Rex* (Eng.) *supra*, a street railway company was indicted for committing a common nuisance, in that it overcrowded its cars, thereby endangering the lives, health, safety, comfort, and property of the public. It also appeared that in the articles of agreement, which were later confirmed by statute, the company agreed that the cars were not to be overcrowded. What constituted an overcrowded car was to be determined by the city engineer, and his decision approved by the city council. A demurrer to the indictment was overruled. The jury found the company guilty of endangering the comfort and property of the public, but disagreed on their endangering the lives, health, and safety of the public. In reversing the conviction the court held that the demurrer should have been allowed, as the obligation of the company was a contractual obligation with the city. The cars were not public places and the overcrowding of the cars did not affect the public generally, but only those who used the cars. The court said: "The obligation of the appellants was a contractual obligation to the corporation. There was no duty to the public generally. That the electric cars ran on rails along the streets made no difference in this respect. For these cars were on the street in derogation of the public right, which the legislature of Ontario and the corporation of Toronto had thought it advantageous to interfere with. The cars were not the less thereby the property of the appellants, which the public could only enter by invitation. Whatever conditions in the grant of the appellants' title the corporation had contracted for obtained merely between them and the appellants. The overcrowding was not a matter that affected the public as such, but only those members of the public who had obtained from the appellants licenses to enter the cars." R. C. L.

R. YOUNG et al.
v.
CUMBERLAND COUNTY EDUCATIONAL SOCIETY.

Kentucky Court of Appeals — March 18, 1919.

(183 Ky. 625, 210 S. W. 494.)

Damages — wilful substitution of inferior material.

1. If one contracting to construct a building wilfully substitutes for the material called for other material wholly unsuited to the purpose, the measure of damages is the cost of reconstructing the building according to contract.

[See note on this question beginning on page 187.]

Appeal — rulings against appellee — absence of cross appeal.

2. Rulings against appellee which are not brought up by cross appeal cannot be reviewed.

[See 2 R. C. L. 182.]

Damages — failure to construct building according to contract.

3. The damages in case inferior material is substituted for that called for by a building contract are the difference in value of the building as constructed and as it would have been had the contract been followed.

[See 6 R. C. L. 868.]

— allowance for worthless building.

4. Damages for substituting worthless material for that called for by the contract in constructing a building cannot be based on the theory that the building is worthless if it is possible to remedy the defective conditions at a reasonable expense.

Appeal — final judgment — when refused.

5. Final judgment will not be directed on appeal if the ends of justice require further evidence upon the principal issue in the case.

[See 2 R. C. L. 282.]

APPEAL by defendants, cross petitioners, from a judgment of the Circuit Court for Cumberland County in favor of the defendant society on its counterclaim, in an action brought to recover a balance alleged to be due on a contract for the construction of a school building. *Reversed.*

The facts are stated in the opinion of the Commissioner.

Mr. Prescott Sandidge for appellants.

Messrs. W. E. Miller, Charles Grayer, C. R. Hicks, and J. O. Ewing for appellee.

Clay, C., filed the following opinion:

The Cumberland County Educational Society, a corporation, was organized for the purpose of purchasing a site and erecting buildings thereon to be leased and used as an educational institution. To that end, it purchased 8 acres of land in the town of Burkesville and entered into contracts with Charles Grayer to construct a school building for the sum of \$7,500, and with R. Young to build two frame dormitory buildings for the sum of \$5,940.

After the execution of these contracts R. Young and C. R. Payne entered into a partnership for the erection of the two dormitory buildings, and later on, Young, Payne, and Grayer entered into a partnership for the construction of all the buildings. The grounds and buildings were leased to Payne. Upon the completion of the buildings, Payne moved to and proceeded to conduct the school for two or three years.

Grayer brought this suit against the Cumberland County Educational Society, R. Young, and C. R. Payne, and sought a mechanics' lien for the sum of \$4,949, the balance due under the contract, and for the further sum of \$922.02, the amount due for

extras. He charged that Young and Payne were in collusion with the Cumberland County Educational Society to prevent him from recovering what was due him, and that they would not unite as plaintiffs. Young and Payne filed a joint answer, counterclaim, and cross petition, denying collusion and asserting their claim and lien for certain balances due. The Cumberland County Educational Society filed an answer and counterclaim, denying the right of Grayer, Young, and Payne to recover, and pleading that it was damaged in a large sum because the brick building was practically worthless. Later on it filed an amended answer charging a conspiracy between Young, Payne, and Grayer to cheat and defraud it out of its money, and asked damages on this account in the sum of \$10,125.18. During the progress of the action Grayer abandoned his original suit and asserted a claim against Young and Payne for 217 days' service at \$2 per day. On final hearing the chancellor held that the brick school building was worthless, that there was due Grayer, Young, and Payne, under the contracts, the sum of \$2,276.07, and also the sum of \$702.92 for extras, and rendered judgment on the Educational Society's counterclaim against Grayer, Young, and Payne for the sum of \$7,500, less the sum of \$2,978.99. The Society's claim for damages of \$10,125.18 on the ground of fraud was rejected, as was also Grayer's claim against Young and Payne. Young and Payne appeal.

No cross appeal has been prosecuted either by the Educational Society or Grayer; hence that part of the judgment rejecting the Society's claim for fraud and Grayer's labor claim against Young and Payne cannot be reviewed.

Besides other defects which could have been easily remedied, it was shown that a large number of the facing brick were soft instead of hard, and when exposed to the

weather disintegrated and ran over the outside wall. Three or four of the directors of the Educational Society testified that, in their opinion, the brick building was worthless. None of them, however, had ever had any experience as contractors or builders, and were unable to state whether or not the defective brick could have been removed and good brick substituted. Charles Grayer also stated that the building was in such condition that no one would want to take it. On the other hand, an experienced contractor, in answer to the hypothetical question whether the defective brick could have been removed and hard brick substituted, replied that this could be done at an expense of about \$30 per thousand for hard brick.

The brick building was accepted and used for the purpose for which it was constructed. Ordinarily, in a case like this, the measure of damages is the difference between the value of the building as constructed and what its value

Damages—
failure to construct building according to contract.

would have been if it had been constructed according to the contract. *Hartford Mill Co. v. Hartford Tobacco Warehouse Co.* — Ky. —, 121 S. W. 477; *Culbertson v. Ashland Cement & Constr. Co.* 144 Ky. 614, 139 S. W. 792; *Cunningham v. Fischer*, 20 Ky. L. Rep. 1167, 48 S. W. 993; *Short v. Moore*, 19 Ky. L. Rep. 1225, 43 S. W. 211. However, where the contractor wilfully varies from the contract by using materials not only different from those contracted for, but wholly unsuitable for the purpose, the true measure of damages is the actual cost of reconstructing the building according to the contract (*Morgan v. Gamble*, 230 Pa. 165, 79 Atl. 410); and it seems to us that this is the measure of damages applicable to the peculiar facts of this case, since it appears that soft and unsuitable brick were used in the outside walls in-

—wilful substitution of inferior material.

Appeal—ruling against appellee—absence of cross appeal.

stead of hard brick, as required by the contract. The judgment below was based on the finding that the building was worthless. Manifestly, if the defective conditions could have been remedied, the building was not worthless. None of the witnesses for the Society were able to say this could not be done. On the other hand, an experienced builder gave it as his opinion that the defective brick could have been removed and hard brick put in their stead at a reasonable expense. In our opinion,

—allowance for worthless building.

the evidence was not sufficient to sustain the chancellor's finding that the building was utterly worthless.

In view, however, of the fact that the case was not fully developed with respect to the cost of remedying the defective conditions, the ends of justice require that the parties be given an opportunity to introduce further evidence on the question, and no final judgment will be directed.

Appeal—final judgment—when refused.

Judgment reversed, and cause remanded for proceedings consistent with this opinion.

ANNOTATION.

Wilful or intentional variation by contractor from terms of contract in regard to material or work as affecting measure of damages.

- I. Introductory, 137.
- II. Majority rule, 137.
- III. Minority rule, 143.

I. Introductory.

It is not the purpose of this note to discuss the proper measure of damages for the breach of a building contract, but only to consider how far that measure is affected by a wilful or intentional departure in materials or workmanship from the terms of the contract. It is generally conceded that the common-law rule requiring a strict or literal performance of a contract has been greatly relaxed in actions on building contracts, so that a builder need only substantially perform his agreement in good faith in order to support a recovery. 6 R. O. L. 967. In such case the builder is entitled to recover the contract price, less a deduction for the damage caused by the omissions or defects. 6 R. C. L. 968. By a "wilful" or an "intentional" departure, as the phrase is used in this note, is meant a departure in bad faith.

II. Majority rule.

By the weight of authority a building contractor who wishes to take advantage of the doctrine of substantial performance must not be guilty of a wilful or an intentional departure from the terms of his contract. If he

wilfully or intentionally departs from the terms of the contract, either in materials or work, he is barred from recovering anything.

California.—Perry v. Quackenbush (1894) 105 Cal. 299, 38 Pac. 740.

District of Columbia.—Beha v. Ottenberg (1888) 6 Mackey, 348.

Massachusetts.—Bowen v. Kimbell (1909) 203 Mass. 364, 133 Am. St. Rep. 302, 89 N. E. 542.

Minnesota.—Elliott v. Caldwell (1890) 43 Minn. 357, 9 L.R.A. 52, 45 N. W. 845.

Montana.—Franklin v. Schultz (1899) 23 Mont. 165, 57 Pac. 1037.

New York.—Fox v. Davidson (1899) 36 App. Div. 159, 55 N. Y. Supp. 524; D'Amato v. Gentile (1910) 54 App. Div. 625, 66 N. Y. Supp. 833, affirmed in (1903) 173 N. Y. 596, 65 N. E. 1116; D'Andre v. Zimmerman (1896) 17 Misc. 357, 39 N. Y. Supp. 1086; May v. Menton (1896) 18 Misc. 737, 41 N. Y. Supp. 650; Kohl v. Fleming (1897) 21 Misc. 690, 47 N. Y. Supp. 1092; Smith v. Gugerty (1848) 4 Barb. 614; Hopper v. Cutting (1891) 37 N. Y. S. R. 504, 13 N. Y. Supp. 820.

North Dakota.—Braseth v. State Bank (1904) 12 N. D. 486, 98 N. W. 79.

Pennsylvania.—Gillespie Tool Co. v. Wilson (1888) 123 Pa. 19, 16 Atl. 36; Wade v. Haycock (1855) 25 Pa. 382.

In *Perry v. Quackenbush* (Cal.) *supra*, it appeared that a contractor agreed to erect a building of the best material, according to certain plans and specifications. The owner of the land, as a part of the contract, executed and delivered to the contractor a promissory note for the contract price and a mortgage to secure the same. In an action to have the note and mortgage canceled, it appeared that the material used in the construction of the house was second-hand and inferior to that contracted for, and the foundation was smaller than that contracted for. The trial court canceled the mortgage only to the extent of the difference between the value of the building as contracted for and its value as built. The appellate court held that the deviations from the terms of the contract were intentional departures, amounting to a fraud, and that the rule in regard to recovery in cases of substantial performance did not apply where the departures from the terms of the contract were made in bad faith, and held accordingly that the owner of the land was entitled to have the whole mortgage canceled. It was said: "It is found, for instance, that defendant did not furnish the quantity or quality of materials called for, and did not construct the building in a good and workmanlike manner. That the foundation was not as large as contracted for, and instead of good hard brick he used old, secondhand brick of poor quality. The piers were only one-fourth part as large as called for, and of inferior old brick, and only half as many of them. There was no first-class lumber in the framework, and some of it was old refuse lumber from other buildings. The paint used was inferior to that called for in the agreement. . . . If there were no other findings save the specific findings, I think it a case where the ultimate fact that the contract has not been substantially performed would be necessarily inferred. The findings may be, in fact, unjust to defendant, but we cannot go behind them; if true, they show an intentional departure from the contract,—in fact, an at-

tempted fraud. Under such circumstances the court would not have been justified in finding that there had been a substantial performance. Nor does the finding that the difference between the value of the house as actually constructed and as it should have been was only \$350 tend to show that the contract had been substantially performed. That might have been true, though the structure were totally unlike the house contracted for. The owner has a right to have built the structure he contracted for, and not another. Even his caprices, as expressed in the contract, must be complied with, even though they would not have added to the value of the structure, or may have lessened its value. It is only when this plan has been substantially embodied in the work that the court can have an occasion to estimate the deficiencies. The authorities are very clear upon this point. There are a variety of cases to which the so-called modern equitable rule had been applied. . . . Good faith, however, on the part of the contractor, is not enough. The owner has a right to a structure in all essential particulars such as he has contracted for; and to authorize a court or jury to find that there has been a substantial performance, it must be found that he has such a structure. The court cannot say that anything is immaterial which the parties have made material by their contract. One has the right to determine for himself what he deems a good foundation, or what materials he desires to be used, and if he contracts for them, neither the contractor nor the court has the right to compel him to accept something else which may be shown by the witnesses to be just as good or even better. No precise rule can or ought to be laid down upon this subject, but whenever such a case arises, courts and juries should see to it that the design of the owner shall not be defeated in any important respect. I think the judgment should be modified by giving plaintiffs a decree in accordance with the prayer of the complaint."

In *Beha v. Ottenberg* (D. C.) *su-*

pra, an action to enforce a mechanics' lien, it appeared that a contractor performed work and labor and furnished materials on the premises of defendant, under a written contract. The work was to be done in a workmanlike manner and the materials were to be of the best. On the hearing it was admitted that the work was not done strictly in accordance with the terms of the contract and the materials were not of the required quality. Complainant contended that the contract was substantially performed, and that an expenditure of a comparatively small amount of money would put the work in the condition provided for in the contract. The defendant contended, on the other hand, that the plaintiff had wilfully and fraudulently varied from the terms of the contract, and that the materials were so inferior and the work so defective as greatly to depreciate the value of the building. The court said: "Of course, if there has been a fraudulent disregard of the contract, nothing whatever could be recovered in any court."

In *Bowen v. Kimbell* (1909) 203 Mass. 364, 133 Am. St. Rep. 302, 89 N. E. 542, an action to recover the balance due under a building contract, the referee found that the builder intentionally departed from the terms of the contract in the quality of the plaster. The court held that the intentional departure was conclusive against the builder's right to recover. It was said: "We think that the referee's finding of fact that the plaintiff was guilty of an intentional departure from the contract, in a substantial matter, is conclusive against his right to recover, as well under the rule in Massachusetts as it would be under that in other states. It shows a lack of good faith on the part of the plaintiff in his dealings with the defendants under the contract."

In *Phillip v. Gallant* (1875) 62 N. Y. 258, an action to recover the contract price of a building, the referee found that there had been a substantial performance, and that the work was defective in but slight par-

ticulars. The court held that in order to support a recovery for the contract price of a building contract, there must be no wilful or intentional departure. It was said: "When a builder has in good faith intended to and has substantially complied with the contract, although there may be slight defects caused by inadvertence or unintentional omissions, he may recover the contract price, less the damage on account of such defects. . . . There must be no wilful or intentional departure."

In *Kohl v. Fleming* (1897) 21 Misc. 690, 47 N. Y. Supp. 1092, it was held that since any intention to perform substantially a building contract was negatived by the contractor's refusal to complete the work when called on, he was not entitled to recover the contract price, nor was he entitled to be credited with that amount, less a proper amount as a necessary expense to which the defendants were put in the completion of the work. It was said: "Upon the issue of performance the evidence was in direct conflict; but from the testimony adduced for the defense, the trial court was well authorized to find that the plaintiff had not substantially fulfilled the agreed requirements, and had refused to supply the omissions when his attention was called to them. This being found as a fact, the plaintiff was not entitled to a recovery of the contract price, nor could he demand that he be credited with that amount, less deductions for the necessary expense to which the defendants were put when completing the work (*Woodward v. Fuller* (1880) 80 N. Y. 312), since any intention to substantially perform was negatived by his refusal to complete when called upon."

In *Elliott v. Caldwell* (1890) 43 Minn. 357, 9 L.R.A. 52, 45 N. W. 845, it appeared that a contractor agreed to construct a dwelling house for a gross sum. In an action on the contract to recover the contract price, it was found that the contractor fraudulently and intentionally varied from the terms of the agreement in many material respects. The supervisor of

the work had been discharged because he conspired with the contractor to vary from the terms of the contract. The court held that a contractor who intentionally and fraudulently varied from the terms of the contract, and who sued thereon, could not claim the benefit of the doctrine of substantial performance, and could recover nothing. It was said: "Upon such a state of facts, the plaintiffs cannot recover on the express contract, because they have not performed it on their part, and performance is a condition precedent to payment. They have not at all brought themselves within the liberal rule of 'substantial performance' laid down in *Leeds v. Little* (1890) 42 Minn. 414, 44 N. W. 309, for the omissions and deviations were not slight and easily remedied, but substantial, and remediless except by tearing down and rebuilding the structure. Neither were they the result of mistake or oversight, but intentional and even fraudulent. And we may remark here, in passing, that the very nature of the deviations, as in using inferior and defective material all through the building, is intrinsic evidence strongly supporting the finding that plaintiffs acted fraudulently. No case, we think, can be found where the doctrine of 'substantial performance' was applied to such a state of facts. To justify a recovery upon the contract as substantially performed, the omissions or deviations must be the result of mistake or inadvertence, and not intentional, much less fraudulent; and they must be slight or susceptible of remedy, so that an allowance out of the contract price will give the other party substantially what he contracted for. They must not be substantial and running through the whole work, so as to be remediless, and defeat the object of having the work done in a particular manner. And these are questions of fact for the jury or trial court. *Olmstead v. Beale* (1887) 19 Pick. (Mass.) 528; *Woodward v. Fuller* (N. Y.) *supra*. It may seem a harsh doctrine to hold that a man who has built a house shall have no pay for it, but the other party can well say: 'I never made

any such agreement. I agreed to pay you if you would build my house in a certain manner, which you have not done.' The fault is with the one who voluntarily violates his contract."

In *Franklin v. Schultz* (1899) 23 Mont. 165, 57 Pac. 1037, it appeared that a builder agreed to erect a two-story and basement brick house in accordance with certain plans and specifications. One of the rooms in the basement was never plastered, and a flue was never built in that room. It was held that inasmuch as the builder failed to prove that the omission was unintentional or the result of an oversight, he could not recover. The court said: "This is not an action to recover what the services and materials were reasonably worth. It is to recover the agreed price fixed by an express contract in writing. The evidence does not tend to prove a substantial performance by the plaintiff of the contract; nor, under the circumstances, can it successfully be maintained that the failure to plaster, or the omission to build the flue, was unintentional or a mere oversight. The plaintiff may lawfully insist upon payment only when the conditions on which payment is due have been performed. 'While slight and insignificant imperfections or deviations may be overlooked, on the principle of "*De minimis non curat lex*," the contract in other respects must be performed according to its terms. When the refusal to proceed is wilful, the difference between substantial and literal performance is bounded by the line of *de minimis*. . . . Substantial performance is not sufficient, except when it is understood as excluding only such unsubstantial differences as the parties are presumed not to have had in contemplation when they made the contract.' *Van Clief v. Van Vechten* (1892) 130 N. Y. 571, 29 N. E. 1017."

In *D'Amato v. Gentile* (1910) 54 App. Div. 625, 66 N. Y. Supp. 833, affirmed in (1903) 173 N. Y. 596, 65 N. E. 1116, it appeared that a contractor wilfully and deliberately varied from the terms of the contract

in workmanship and materials, using inferior material and making omissions and changes. In an action by the contractor for the balance of the contract price, the court held that a contractor who wilfully and deliberately deviated from the terms of the contract could not take advantage of the rule that a contractor who has in good faith substantially performed a contract might recover the contract price, less a suitable amount for defendant's damage. In such a case the contractor can recover nothing, while the owner of the building can recover his damage. It was said: "The character and extent of the defects, omissions, and departures from the plain meaning of the contract are so great in the case at bar that it cannot be fairly said that the plaintiff has substantially performed upon his part, especially as he has in the main purposely made the changes complained of by the defendant. While the wisdom of the rule which permits a recovery on a building contract in cases where there have been slight and inadvertent departures from the terms of the contract cannot be doubted, yet it must be borne in mind that it will not do to so far relax the rule that contractors can wilfully disregard and ignore the plain meaning and intent of a building contract, and then ask the court to adjust supposed equities based not upon a substantial performance, but upon a clear nonperformance of the contract. The plaintiff claims that the changes and omissions were made with the consent of the defendant. This is denied by the defendant. From the character of the omissions, defects, and changes, and from the appearance of the parties upon the witness stand, I am inclined to believe the defendant did not consent to any material change, but, on the contrary, endeavored to obtain full performance. The plaintiff evidently attempted to take advantage of the defendant by substituting in many respects an inferior class of work by making omissions and changes, thereby effecting a large saving to himself and consequent damage to the defendant, and also depriving the de-

fendant of the benefit of his contract. The defendant was entitled to have a building constructed substantially according to the contract. This was not done. In lieu thereof there is forced upon him, through no fault of his, a building much changed from the plans and specifications, inferior in many respects, and with many defects of workmanship and material. It is quite reasonable to believe that the defendant never would have made a contract for the construction of such a building as he actually received. The equities of this case do not require the court to award the plaintiff the unpaid balance of the contract price after deducting a suitable amount for the defendant's damages, but rather to deny to the plaintiff the right to recover anything upon his contract, for the very good reason that he has failed to perform on his part, and at the same time has attempted to injure the defendant. The damages to the defendant, proven upon the trial, by reason of the defects, changes, and omissions, amounted to nearly 20 per cent of the contract price, the amount being based largely upon the difference in cost at the time the work was done. . . . These defects were so general that they permeated nearly the entire structure. The evidence convinces me that the plaintiff deliberately attempted at nearly every opportunity to substitute inferior workmanship and material in the place of those required by the terms of the contract. As before stated, the defendant did not consent to the changes, nor has he waived, either expressly or impliedly by his acts and conduct, the nonperformance by plaintiff."

In *Fox v. Davidson* (1899) 36 App. Div. 159, 55 N. Y. Supp. 524, a contractor admitted that he left undone over one twentieth of the work contracted for, in the erection of an extension and completion of alterations to a building. The action being to foreclose a mechanics' lien against the property, the court held that the contractor, having intentionally deviated from the terms of the contract, could not recover. It was said:

"Whatever may be the rule where the contractor is endeavoring to perform in good faith, and has omitted some slight things by inadvertence, it is well settled that any substantial deviation or omission, made intentionally, will bar a recovery."

In *May v. Menton* (1896) 18 Misc. 737, 41 N. Y. Supp. 650, it was held that if a contractor uses a tin inferior to that called for by the contract, he cannot recover, the court saying: "If the plaintiff performed his contract as alleged in his complaint and proved by his evidence on the trial, he is entitled to the contract price of \$775, and no \$105 should be deducted therefrom; and if the plaintiff has not used the 'Merry's Old Method' tin, then the plaintiff has failed to perform his contract, and cannot recover at all."

In *D'Andre v. Zimmerman* (1896) 17 Misc. 357, 39 N. Y. Supp. 1086, it appeared that a contractor failed to do some brick work. In an action to foreclose a mechanics' lien, the court held that where there has been a substantial performance of the contract, and some items of work have been overlooked, a recovery may be had for the contract price less the expense of completing the work left undone, but that the rule did not apply where there is a wilful and intentional departure from the terms of the contract, and the defects pervade the whole work. The court said: "The rule is that where there has been a substantial performance of a contract, and some item of work has been accidentally overlooked, a recovery may be had for the contract price less the expense of completing the portion undone. . . . It is where the contractor abandons his work, . . . or there has been a wilful or intentional departure from the contract, and the defects pervade the whole work, . . . that the rule stated is inapplicable. There is nothing to justify the inference that the trifling amount of brick work left unfinished was other than an accidental omission, fully compensated for by the allowance made at the trial."

In *Hopper v. Cutting* (1891) 37 N. Y. S. R. 504, 13 N. Y. Supp. 820,

in an action to recover the balance on a building contract, the court held that if there was a wilful omission on the part of the contractor, he ought not to recover.

In *Braseth v. State Bank* (1904) 12 N. D. 486, 98 N. W. 79, it appeared that a building contractor rebuilt a bank building which had been destroyed by fire in a manner so materially different from the terms of the contract as to show an intentional deviation therefrom. The court thereupon held that the contractor was not entitled to recover.

In *Gillespie Tool Co. v. Wilson* (1888) 123 Pa. 19, 16 Atl. 36, it appeared that plaintiff agreed to bore a gas or oil well according to the terms of a contract. The contract was not complied with. In an action for the work done the court impliedly held that a person who had wilfully omitted or departed from the terms of the contract could not recover, saying: "The equitable doctrine of substantial performance is intended for the protection and relief of those who have faithfully and honestly endeavored to perform their contracts in all material and substantial particulars, so that their right to compensation may not be forfeited by reason of mere technical, inadvertent, or unimportant omissions or defects. It is incumbent on him who invokes its protection to present a case in which there has been no wilful omission or departure from the terms of his contract. If he fails to do so, the question of substantial performance should not be submitted to the jury."

In *Wade v. Haycock* (1855) 25 Pa. 382, an action on a note under seal, it appeared that the plaintiff had been engaged to perform the millwright work on a mill which was being erected. For that work the note was given. The court held that if the work was made defective *mala fides* there could be no recovery on the part of the millwright, saying: "If the employee knowingly and purposely makes the work defective, it is such *mala fides* on his part that he can recover nothing for any of the work done under the contract."

But in *Morgan v. Gamble* (1911) 230 Pa. 165, 79 Atl. 410, it appeared that a building contractor put in iron pipe instead of lead, as provided in the contract. The court held that the contractor must pay the cost of laying a lead pipe, as provided in the contract. In that case it was said: "The contract provides that the plaintiff shall lay an extra strong lead water pipe, and the contractor substituted an iron pipe. Unless we hold that the contractor had the right to thus change the specific stipulation in the agreement and use his own judgment instead of that of the defendants as to the pipe to be laid, we must require him to pay to the defendants, not the difference between the iron and lead pipes, but the cost of laying a lead pipe as provided in the agreement. This is the proper measure of damages."

III. *Minority rule.*

In a few jurisdictions a contractor who wilfully varies from the terms of the contract in material or work may recover the contract price, less the cost of reconstructing the building in accordance with the terms of the contract. *Kiel v. Kline* (1893) 15 Ky. L. Rep. 158; *Sarrazin v. Adams* (1902) 110 La. 124, 34 So. 301; *Hayler v. Owen* (1875) 61 Mo. 270. And see the reported case (*YOUNG v. CUMBERLAND COUNTY EDUCATIONAL SOC.* ante, 135).

In *Kiel v. Kline* (Ky.) *supra*, it appeared that a contractor substituted other material than that specified in the contract, and also altered the plan of the house. The court held that the contractor had no right to make such substitutions or changes, and that, in arriving at the difference in the value of the building as contracted for and as built, the cost of taking out all the work and material, which was not done in accordance with the contract, and having the work done over again so as to conform to the contract, should be taken into consideration.

In *Sarrazin v. Adams* (1902) 110 La. 124, 34 So. 301, it appeared that a contractor agreed to build a house according to certain plans and speci-

fications. The house when finished was materially different from that contracted for. The foundation was not laid properly. The floors were unevenly laid and badly warped. The stairway was so built that a person of ordinary height could not go up or down without stooping. The plastering blistered and fell off in pieces. The windows and doors were out of plumb. The windows could not, except by great exertion, be opened without the aid of tools. There were also other defects. In an action for damages caused by the defendant's failure to comply with the contract the defendant set up a counterclaim for the balance of the contract price. The court held that as the departure from the terms of the contract was not passive, but active, the defendant was permitted to use the balance due the contractors for necessary repairs to place the building in the condition that was contracted for, but could not claim any other sum, as she took possession of the building without pointing out any defects until after a considerable time. It was said: "We take up for decision the first legal principle urged by defendants, whose first contention is that they have never been placed in mora. Unquestionably, damages cannot be recovered without a placing in default, if the violation was passive, and, if active, default is not necessary. We think the violation was active, and default unnecessary, for the reason that, in our view, there was an active disregard by defendants of the plans and specifications. The general condition of the house, made evident by preponderance of the testimony, is such as to render it impossible reasonably to conclude that the violation is passive. There are too many defects to characterize them as passive. There are deficiencies in the roof, in the foundation, and in the body of the building. The testimony shows that they are not slight and immaterial, but that, on the contrary, they impair the usefulness of the entire house. Such absolute want of performance in a contract in which one binds himself to

do' certain work, and in regard to which the failure 'to do' shows great disregard for the terms of the contract, cannot well be considered in any other light than an absolute violation. The failure to deliver a house (under the circumstances here) manifestly not according to contract constitutes an open and active violation. We pass to the proposition urged by plaintiff, that she had the right to use the money she owed to the defendants (that is, the balance due by her) to remedy the defects. To that extent it occurs to us that plaintiff's claim is sustained by the testimony. Defendants had drawn the plans and specifications. They knew that plaintiff wished to have a tenantable house constructed. She trustingly paid them a large portion of the contract price a day or two after defendants had commenced to work in constructing the building. They owed it to her to use only good, merchantable materials, and to do the whole work in a workmanlike manner. In this there was failure. Instead of the material and the work for which the specifications called, the material, in some respects, must have been of an inferior quality, for on no other theory can the unsatisfactory appearance of the building be accounted for. The work was not satisfactory, as many places were not level and did not fit. There was, instead, a misfit. Roof leaking, not a door nor window that closed properly, plaster breaking and falling loudly, suggestive of a gunshot we are told by the testimony, the floor slanting, and the foundation sinking. While it may be the testimony has united in somewhat over-drawing the whole situation, we, none the less, are of the view that defendants should not recover any further amount of the plaintiff. Unquestionably 'the laborer is worthy of his hire.' He must, however, in order to receive it, show that performance has at least been about equal to his promise, accepted in good faith, and by which plaintiff seems to have been greatly influenced. This brings us to a consideration of the extent of the damages suffered by plaintiff, and as

to whether they should exceed the \$1,170.50 claimed by defendants, \$1,000 of which plaintiff admits would have been due by her if the work had been completed according to contract. We do not think she should recover any further amount than these amounts. These are our reasons: She voluntarily took possession of the house in its unfinished state, occupied it, and was occupying it when the suit was tried. There is, in consequence, no ground for allowing so-called 'demurrage.' She not only went into possession, but urged no objection at the time. She was not estopped from claiming damages, but she must be held to be estopped from claiming demurrage. We have considered the other defects. We are not impressed by the testimony referred to to sustain the claim for the additional \$500 to be awarded as damages for the following reasons: There was some dilatoriness on part of plaintiff in pointing out the defects. Many of them surely were apparent. There was unwillingness to permit defendants to attempt to make repairs. In all probabilities the repairs they offered to make would not have amounted to much, yet they had some right to make the attempt. Plaintiff's agent refused to permit defendants to make the least attempt in that direction. Again, on that subject there is no deficiency of material. Not only the body of the house is standing, but the house itself, though sadly in need of repairs, it is true, is occupied, and has been occupied since it was delivered. The materialmen have testified to the value of materials. Taking into account the probability of exaggerated estimate, we think that the amount should be restricted to the balance due by plaintiff. All agree that the house can be repaired. It strikes us that some \$1,100, the sum allowed by the judgment, is enough to repair a house which was originally to cost \$2,800."

In *Haysler v. Owen* (1875) 61 Mo. 270, it appeared that plaintiffs entered into an agreement with defendant to construct a sheet and galvanized iron roof on a livery stable. The

defendant contended that the roof was constructed in a negligent, unskilful, and unworkmanlike manner, and of inferior materials. The court held that the measure of the deduction from the contract price where a builder openly violated the agreement was what it would cost to make the building conform to what the contractor agreed it should be, saying: "When the building has been completed, but differs in plan of construction or in materials employed from that which the builder contracted to erect, and this is the only element of damage, and there has been no waiver, the true rule for estimating the damages sustained by the owner, whether the action be for the contract price or for the value of the labor and materials, is to ascertain what it will cost to make the building conform to what the builder contracted it should be. And cases might arise where the deviation from the terms of the contract would be so gross and reprehensible that the builder should not be permitted to recover anything for his work. Courts have no right to make contracts for the parties, and they cannot compel a man to pay for a building for which he did not contract, and which he does not want, and which he would rather have removed from his premises, unless there has been some waiver on his part of strict performance. Builders cannot substitute their own taste or judgment or fancy for the stipulations of their contracts, and compel parties to pay for work done by them in open violation of their contracts, on the ground that it is equally as valuable as that which they have contracted to perform."

In *Pence v. Dennie* (1919) — Cal. App. —, 182 Pac. 980, where the contract called for a stone front to the building, and the contractor, without

the knowledge or consent of the owner, substituted brick construction for defective stone work, it was held that the measure of damages under a counterclaim by the owner was the cost of replacing the work with the material called for by the contract. The court said that that measure of damages, though lawful, placed a harsh penalty on the contractor in view of the fact that the value of the completed building was probably not greatly reduced by the substitution of brick for artificial stone, and that if the owner had known of the change when it was in process and had stood by without objection, a different measure of damages might have been allowed. In this case the unpaid balance of the contract price was less than the amount of the counterclaim, and the defendant did not rely upon the departure from the contract as a defense to recovery of the unpaid balance of the contract price.

In *Springer v. Jones* (1919) — Ind. App. —, 123 N. E. 816, where the action was by the owner against the contractor for breach of contract, it being averred that the roof leaked, that the cement floor of the basement was of such poor quality that it had no strength and was easily broken, that the steps were crooked, and that the mantel was not level, it was held that the proper measure of damages was the reasonable cost of altering the defective parts of the house so as to make them conform to the plans and specifications, and not, as the defendant contended, the difference between the value of the house as it was and what its value would have been if constructed according to the plans and specifications. Here, again, it will be observed that no question was involved as to the effect of the departure from the contract to prevent a recovery by the contractor. R. C. L.

G. W. CAIN'S ADMINISTRATOR, Appt.,

v.

R. S. HUBBLE et al.

Kentucky Court of Appeals — April 25, 1919.

(184 Ky. 38, 211 S. W. 413.)

Partnership — claim on interest of partner — priority.

1. An interest in real estate purchased with partnership funds as partnership property is subject to the respective liens of the partners in the settlement of the partnership accounts, in priority to claims of strangers against the individual partners.

[See note on this question beginning on page 160.]

Joint tenants — contribution to repairs.

2. One joint tenant cannot require another to reimburse him for improvements made upon the joint property, nor to contribute to repairs already made, and has no lien to secure advances made for improvements.

[See 7 R. C. L. 843, 902.]

Joint adventure — purchase of lot and erection of building.

3. An undertaking by several persons to purchase a lot and erect a building thereon, to be rented for profit, is a joint adventure.

— contribution to repairs.

4. Where several persons join in an undertaking to purchase a lot and erect a building which is to be rented for profit, it will be assumed that each is to contribute equally towards the repairs.

[See 15 R. C. L. 505.]

— priority of right to repayment of advances.

5. One party to a joint adventure to purchase a lot and erect a building to be rented for profit has a right to repayment of his advances for repairs and carrying charges out of the property, superior to claims of individual creditors of other members of the enterprise.

[See 15 R. C. L. 506.]

Appeal — absence of evidence — assumption as to correctness of judgment.

6. The court, on appeal from an order adjusting the accounts of a partnership, must, when a large portion of the evidence is not in the record, assume that the evidence was sufficient to sustain the judgment as to the state of accounts.

[See 2 R. C. L. 219.]

Partnership — real estate — character of property.

7. Real estate purchased for partnership purposes with partnership funds, and held and used as partnership property, will be treated as personalty for the purposes of the partnership, and partnership property.

[See 20 R. C. L. 864.]

— membership in larger concern — effect on right.

8. The partnership interest, as between the members of a firm which invested funds, with others, in the purchase of real estate for improvement for profit, cannot affect the rights of the members of the real estate concern, in an adjustment of the accounts between the members of that enterprise.

— priority of individual creditors.

9. A creditor or mortgagee of a member of a partnership is not entitled to a lien superior to creditors of the partnership.

[See 20 R. C. L. 1050.]

— lien without notice of partnership.

10. A mortgage of his interest by a member of a partnership which, as a firm, has invested funds, with others, in the purchase of real estate for improvement, to one who has no notice that the funds were those of a partnership, has priority over the rights of his copartner growing out of the settlement of the accounts of the investing partnership.

— mortgagee with notice — rights.

11. One taking a mortgage upon the interest of one member of a partnership which has invested funds, with others, in the purchase of real estate for improvement, with notice that the funds of the investing firm were part-

nership property, takes subject to the rights arising out of the adjustment of the accounts of the investing firm.

Notice — party to suit.

12. One made a party to a suit to

settle partnership accounts, and served with summons, is charged with notice of the lien asserted in that suit by one partner upon the interest of his co-partners.

APPEAL by plaintiff from a judgment of the Circuit Court for Pulaski County in favor of defendant Smith on his counterclaim, in an action brought to secure the settlement of a partnership. *Reversed in part.*

The facts are stated in the opinion of the court.

Messrs. Denton, Kennedy, & Hays, R. A. Jackson, and T. B. McGregor for appellant.

Messrs. O. H. Waddle & Son for appellees.

Hurt, J., delivered the opinion of the court:

G. W. Cain died on December 24, 1907. For ten or twelve years previous to his death, he and the appellee, R. S. Hubble, had been partners, and as such had engaged in conducting saloons, "pop joints," and a livery stable. A saloon owned by them in North Somerset was conducted under the name of Cain & Hubble, while at the same time a saloon owned by them in South Somerset was conducted under the name of Hubble & Cain. While they were still doing business as partners under the firm names of Cain & Hubble and Hubble & Cain, the appellee Beecher Smith and Cain and Hubble entered into an arrangement under which the three jointly purchased a lot in the city of Somerset, upon which there stood at that time a small house. They agreed to purchase the lot, to remove or pull down the house then upon the lot, and to build thereon a three-story brick structure, to be thereafter let for rental for business purposes. The agreement was, further, that each should pay one third of the cost of the lot and the erection of the building thereon, and each was to be an owner of one third of the property, and, as necessary incidents to the ownership, to receive one third of the profits of the enterprise and to bear one third of the expenses incident to the ownership. They described their status as owners and conductors of the business

of the purchase, ownership, and management of the property, as R. S. Hubble & Company, or Hubble, Cain, & Smith, or Cain, Hubble, & Smith. The deed under which they held the property contained the following description of them, and the interests to be held by each: "R. S. Hubble & Company, composed of R. S. Hubble, Beecher Smith, and G. W. Cain, one third to R. S. Hubble, one third to Beecher Smith, one third to G. W. Cain. . . ."

They chiefly conducted their business affairs in the name of Cain, Hubble, & Smith, or Hubble, Cain, & Smith, or Beecher Smith, treasurer for Cain, Hubble, & Smith, or Hubble, Cain, & Smith. The names, Cain, Hubble, & Smith, and Hubble, Cain, & Smith, were used interchangeably, as it seems, by inadvertence, and occasionally accounts were rendered against them in the name of R. S. Hubble & Company. The purchase of the lot by R. S. Hubble & Company was effected on December 19, 1904, and the property was conveyed to it on the 6th day of July, 1905, and thereafter the new building was erected upon the lot.

On January 16, 1909, this suit was instituted by the administrators of G. W. Cain against R. S. Hubble and Beecher Smith. The purpose of the suit, as expressed in the petition, was to secure a settlement of the partnership of Cain & Hubble, or Hubble & Cain. These names seem to describe the same partnership, and we will hereafter denominate it the partnership of Cain & Hubble. Beecher Smith, as a party to this suit, was served with a summons to answer and defend it

on January 18, 1909. The petition alleged that Hubble, as a partner of Cain, was indebted to the partnership in the sum of \$5,000, arising out of having received of the partnership assets that sum in excess of the amounts which had been received by Cain, and that the two-thirds interest owned by Cain & Hubble in the house and grounds owned by R. S. Hubble & Company was an asset of the partnership of Cain & Hubble, and was acquired by an investment of the partnership money of Cain & Hubble, and that it, in fact, was the only property owned by the partnership of Cain & Hubble, except a few worthless accounts. Beecher Smith was alleged to be the owner of the remaining one-third interest in the property of R. S. Hubble & Company, and held a mortgage lien thereon, and for such reason was made a party. A judgment was prayed for a settlement of the partnership, and a judgment in favor of the administrators of Cain for such sum as a settlement of the accounts of Cain & Hubble would show Hubble indebted, and for a sale of the house and lot and other orders and relief necessary to effect a settlement of the partnership and a recovery by the administrators of Cain of such part of the assets of the partnership of Cain & Hubble as they were entitled to receive. Hubble answered, but failed to deny that the interests owned by him and Cain in the building, grounds, and assets of R. S. Hubble & Company were assets of the partnership of Cain & Hubble. Upon a reference to a commissioner to report a settlement of the accounts of Cain & Hubble, it was reported that Hubble was indebted to the partnership in the sum of \$5,188.36, and was, therefore, indebted to the administrators of Cain in the sum of \$2,594.18.

Previous to the death of Cain, on December 1, 1905, Cain, Hubble, and Smith executed to Walter Smith a joint note for \$3,000, which they secured by a mortgage, in which their wives joined, upon the build-

ing and lot of R. S. Hubble & Company, and the proceeds went to assist in the erection of the building.

On July 26, 1907, Hubble and Cain executed a joint note to the First National Bank of Somerset, for the sum of \$3,000, with L. P. Hunter as their surety, and to secure Hunter against loss they, together with their wives, executed to him a mortgage upon their interests in the property of R. S. Hubble & Company, and, to give Hunter a superior lien upon such interests, Walter Smith and Beecher Smith joined in the mortgage, wherein it was expressly provided that Hunter's lien upon Cain & Hubble's interests should be superior to the lien of Walter Smith, and it also had the effect of making the lien superior to any that could be claimed by Beecher Smith. On June 29, 1909, W. D. Gover became the surety of Hubble in a note to the First National Bank of Somerset, in the sum of \$300, and to secure him from loss Hubble and his wife executed a mortgage to Gover upon the undivided interest of Hubble in the building and grounds owned by R. S. Hubble & Company. This note Gover was compelled to pay, which, with its interest, amounted to \$385.50.

On January 6, 1910, Beecher Smith became the surety of Hubble in a note to First National Bank of Somerset, in the sum of \$1,200, and to secure Smith from loss as such surety Hubble and wife executed to him a mortgage upon Hubble's one-third interest in the building and lot of R. S. Hubble & Company. Smith was compelled to pay this debt.

On November 1, 1911, Hubble executed to Beecher Smith a note for the sum of \$1,500, and to secure its payment, together with his wife, executed a mortgage to Smith upon his one-third interest in the building and lot of R. S. Hubble & Company.

Beecher Smith also claimed that R. S. Hubble & Company was indebted to him in the sum of \$2,699.43 for materials furnished by him to it, and which went into the construction of its building and

equipments, and for moneys paid for it in premiums for insurance upon its property, and other items of indebtedness, which were advances by him to R. S. Hubble & Company.

Beecher Smith by his answer, counterclaim, and cross petition averred that R. S. Hubble & Company was a partnership, and prayed that a settlement of the partnership be had, the property sold, and a distribution of the proceeds as the rights of the parties demanded.

Hubble obtained a discharge in bankruptcy as of the 27th day of March, 1913. Under judgment of the court the property of R. S. Hubble & Company was sold. All of the above-named persons being parties to the suit, the court rendered personal judgments in favor of certain of the parties against the others, with the exception of Hubble, according to their respective rights—at least, there is no complaint made of any personal judgment, except that of Beecher Smith against the administrators of Cain.

In adjusting the accounts of R. S. Hubble & Company for the purpose of rendering the partners equal in disbursements and receipts, including the rents received from the property of the firm by Smith, it was adjudged that Cain's administrator was indebted to Smith in the sum of \$683.81, and Hubble in the sum of \$48.41, and that Smith had a lien upon their respective interests in the proceeds of the sale of the property to satisfy these sums, respectively. The proceeds of the sale of the property were then adjudged to be distributed to the parties, and in the order as follows:

(1) To payment of the costs of the action.

(2) To Walter Smith, in payment of the debt held by him.

(3) To Beecher Smith, as assignee of the First National Bank and L. P. Hunter, the amount of the note executed by Cain & Hubble, with Hunter as surety, to the bank. This sum to be paid out of the por-

tions of the proceeds due Cain & Hubble equally.

(4) To Beecher Smith, the sum of \$683.81, out of the interest of Cain.

(5) To Beecher Smith, the sum of \$48.81, out of the interest of Hubble.

(6) To W. D. Gover, the amount of his claim, out of the interest of Hubble.

(7) To Beecher Smith, the debts of \$1,200 and \$1,500, with their interests, out of the portion of Hubble.

(8) To Cain's administrator, out of the interest of Hubble, the sum of \$2,270.33, which Hubble was adjudged to owe Cain, and which arose out of the affairs of Hubble & Cain.

(9) To Beecher Smith and Cain's administrator, each one third of all the proceeds of the sale of the property, less the sums ordered to be paid out of their interests, respectively, and that any portion of the interest of Hubble, less the sums ordered to be paid from it, be held by the commissioner for the further adjudication by the court.

From this judgment only Cain's administrator appeals. No complaint is made of the action of the court in adjudging that Walter Smith had a lien superior to all others upon all the assets of R. S. Hubble & Company to satisfy his debt, nor that Beecher Smith, as the assignee of First National Bank, has a superior lien upon the interests of Cain & Hubble to satisfy the note executed by them to the bank, with Hunter as surety, and of these matters it does not appear that any just criticism could be made by the appellant. It is, however, contended by the appellant that R. S. Hubble & Company was not a partnership, but a mere joint ownership, and that Beecher Smith for that reason had no lien upon the interest of Hubble or Cain, nor upon the property of R. S. Hubble & Company, to secure the payment of any debt arising from expenditures made by him in the improvement of the joint property, or for materials fur-

nished by him for that purpose, nor for moneys expended in the care of the property, and, further, that R. S. Hubble & Company did not owe Beecher Smith any sum. It is further contended that the two-thirds interest in the property of R. S. Hubble & Company which was owned by Cain and Hubble was a part of the partnership property of Cain & Hubble, and that, as such, the administrator of Cain had a lien upon Hubble's interest therein superior to any mortgage lien created upon his interest by Hubble to secure an individual debt, to satisfy the demand due Cain from Hubble arising from the partnership transactions of Cain & Hubble, and hence the court was in error in adjudging Gover and Beecher Smith to have liens upon Hubble's interest to satisfy debts which Hubble individually owed them, and had secured by the mortgages executed by him to them, respectively, upon his interest, superior to the equitable lien of the appellant, as administrator of Cain. These contentions will be considered in their order as stated.

(a) It is not clear that Cain, Hubble, and Smith in their ownership and control of the property, which we have designated that of R. S. Hubble & Company, were partners in the strict and technical sense of a partnership. While the name of R. S. Hubble & Company strongly indicates the purpose of the three to become and act as partners, rather than as joint tenants, the deed, after describing them as R. S. Hubble & Company, actually conveys the property to them jointly and by their individual names. They never made use of the name of R. S. Hubble & Company in their business affairs relating to the building and lot, but used the names Cain, Hubble, & Smith, which might equally apply to a partnership or to a joint tenancy. Beecher Smith when testifying, although given the opportunity to do so, failed to state that the relationship between himself, Cain, and Hubble was that of a partnership. At the common law

one joint tenant could not require another to reimburse him in any part, for improvements made upon the joint property, nor to contribute to repairs already made, unless the cotenants agreed to do so, and had no lien to secure the advancements made for improvements, but might compel his cotenants to contribute to the making of necessary repairs to the buildings already upon the property.

**Joint tenants—
contribution to
repairs.**

This court, in *Alexander v. Ellison*, 79 Ky. 148, held that a joint tenant was entitled to contribution from a cotenant for necessary repairs made, where the cotenant refused to assist or was under disabilities, and the one making the repairs had a lien upon the cotenant's share to secure the latter's proportion of the costs of the repairs. In *Crenshaw v. Crenshaw*, 22 Ky. L. Rep. 1782, 61 S. W. 366, it was held that a joint tenant had a lien upon his cotenant's share in land, jointly purchased by them, to secure what he might pay that was in excess of his proportional part of the purchase money. Neither has a joint tenant or tenant in common a lien upon his cotenant's interest in land to secure the payment to him of his share of the rents collected by the cotenant, although he may require the cotenant to pay to him his share. *Burch v. Burch*, 82 Ky. 622. Where a joint tenant or tenant in common buys in an outstanding conflicting title, the purchase of which redounds to the benefit of all, the tenant who has made the expenditure may require contribution of the other cotenants, and has a lien to secure its payment to him upon the shares of the cotenants, respectively. *Cornett v. Burchfield*, 142 Ky. 357, 134 S. W. 466; *Venable v. Beauchamp*, 3 Dana, 321, 28 Am. Dec. 74. While the general rule is as stated above with reference to the right of a joint tenant to a lien upon his cotenant's interest to secure reimbursement for improvements or repairs upon the joint property, it does not have application to the facts presented in this case.

In this case, the relations of the parties were more than joint tenants or tenants in common. The purchase of the lot and the erection of the building thereon was a joint

Joint adventure
—purchase of lot
and erection of
building.

adventure, or limited partnership, by Smith, Cain, and

Hubble as partners, or else by Smith as one partner and Cain & Hubble as a partnership, and was made under a contract between them to purchase the land and to erect the building, and for which each of the parties was to pay an equal part; and, while not expressed in the contract, it must be assumed that each of them was to share equally in the rents thereafter to be collected, and to bear an equal

—contribution to
repairs.

part of the taxes, insurance, and repairs. Whether such

a transaction is or is not a complete and full partnership it is not necessary to decide, as the rights and liabilities of the members of such an arrangement are such as govern and apply to a partnership, as was held in *Crenshaw v. Crenshaw*, supra, and in many other cases in this court, where the association of the parties consisted of only one transaction, with such elements of a partnership as existed in this case. 28 Cyc. 457, 458; 15 R. C. L. 500. Beecher Smith's claim, allowed against R. S. Hubble & Company, was for materials advanced for the erection of the building, and for money paid for insurance thereon, and other things necessary for the erection of the building and its preservation. The same rule applying in an adventure of this kind as applies to a partnership generally, the joint property is bound for advances, and the joint adventurer who makes such advances, has an equitable right to have his own claims upon the firm for advancements, and the balance due upon a settlement of the partnership accounts and the firm debts, discharged before a

—priority of
right to repay-
ment of ad-
vances.

creditor of a party to the transaction can come in. *Divine v. Mitch-*

um, 4 B. Mon. 488, 41 Am. Dec. 241; *Wilson v. Soper*, 13 B. Mon. 411, 56 Am. Dec. 573; *Pearson v. Keedy*, 6 B. Mon. 129, 43 Am. Dec. 160; *Hodges v. Holeman*, 1 Dana, 55; *White v. Woodward*, 8 B. Mon. 485; *Payne v. Burks*, 4 B. Mon. 492. A mortgagee of the interest of a member of a partnership will only have a lien upon the portion left to the mortgagor after the debts owing by the partnership to others have been discharged and the balance due to other partners upon adjustment of the partnership accounts has been paid, and the same rule applies to the transactions growing out of such an arrangement as *R. S. Hubble & Company*.

(b) It is insisted that the evidence is not sufficient to have justified the court in allowing the claim of \$2,669.50 for advancements which Beecher Smith claimed to have made to R. S. Hubble & Company. It cannot be determined that such claim was allowed, as the court only adjudged him entitled to recover \$732.62, and of this sum that Cain owed \$682.21 and Hubble owed \$48.41. What items of the claim of Smith were allowed or disallowed, or on account of what receipts or advances the court arrived at the conclusions as to the amounts that Cain and Hubble, respectively, owed the firm, or upon what evidences the decision was made that the firm owed Smith the sum of \$732.62, cannot be determined here, as there was no report of a commissioner as to the accounts of the members of R. S. Hubble & Company, and the books of that firm, although in the evidence before the trial court, are not with the record brought to us; and in the absence of such a large part of the evidence we can only assume that the evidence was sufficient to sustain the judgment of the chancellor as to the state

Appeal—absence
of evidence—
assumption as to
correctness of
judgment.

of the accounts of the members of R. S. Hubble & Company. First *State Bank v. Richardson*, 167 Ky. 771, 181 S. W. 611; *Terrell v. Row-*

land, 86 Ky. 67, 4 S. W. 825; *Courier Journal Job Printing Co. v. Cardozo*, 21 Ky. L. Rep. 1259, 54 S. W. 966; *Sanson v. Connolly*, 141 Ky. 120, 132 S. W. 159.

(c) It is contended by appellees that the interests of Cain and Hubble in the property of R. S. Hubble & Company were not held by them as a partnership property of Cain & Hubble, but as individual holdings, and for that reason the claim of the representatives of Cain to a lien upon the interests to satisfy the claim of Cain which grew out of the settlement of the accounts of Cain & Hubble is not meritorious. It is well settled that real estate purchased for partnership purposes,

Partnership—
real estate—
character of
property.

paid for with partnership funds, and held and used as partnership property, will be treated as personalty for the purposes of the partnership and partnership property, regardless of the manner or by what agency it is bought, or in whose name the title is held. The holder of the legal title will be considered a trustee for the partnership. *Dvine v. Mitchum*, 4 B. Mon. 488, 41 Am. Dec. 241; *Spalding v. Wilson*, 80 Ky. 589; *Buck v. Winn*, 11 B. Mon. 320; *Lowe v. Lowe*, 13 Bush, 688; *Cornwall v. Cornwall*, 6 Bush, 369; *Galbraith v. Gedge*, 16 B. Mon. 631; *Bank of Louisville v. Hall*, 8 Bush, 676.

The evidence seems to support the judgment of the chancellor that the interests of Cain and Hubble were partnership property of the firm of Cain & Hubble, and as such Cain's representatives had a lien upon it, or a right to have any indebtedness

—claim on
interest of
partner—
priority.

of the partnership to Cain satisfied out of it, before it could be appropriated to paying the individual debts of Hubble, at least as against the claim of one who had notice of the fact of the partnership character of the interests. Such lien or right could not, however, affect the right of a

member or creditor of R. S. Hubble & Company in a distribution of the assets of the latter firm. The partner-

—membership
in larger com-
cern—effect on
right.

ship of Cain & Hubble was a contract between the members of it, and to which Smith was not a party, and of which he says that he had no knowledge, or so far as it had relationship to R. S. Hubble & Company. Hence the interests of Cain and Hubble in R. S. Hubble & Company must be held to be their holdings as individuals, so far as it is necessary to adjust the rights and liabilities of the members of R. S. Hubble & Company, and when such an adjustment is made, whatever remains of the interest of Cain and Hubble is the partnership property of Cain & Hubble. Gover, as a creditor of Hubble, could not take precedence over the right of a creditor of R. S. Hubble & Company to have his debt out of the assets of the firm in preference to an individual creditor, when the name under which the property, as real estate, was held, gave him notice of its first obligation to the creditors of the firm, and to its members for advances made to it and balances due them upon settlement; and neither could Gover, as the creditor of Hubble, have a superior lien by reason of his mortgage upon the interest of Hubble, to a creditor of the firm of Cain & Hubble, if at the time he

—priority of
individual
creditors.

had notice of the partnership character of the property upon which his mortgage was given. The name in which the property was held, however, did not give Gover any notice that the partnership of Cain & Hubble had any interest in it. There is no pretense in the record, either by averment or evidence, that Gover had any notice at the time he became the surety of Hubble, and accepted the mortgage, that the partnership of Cain & Hubble had any interest in the property embraced in the mortgage. The property was not in the possession of Cain & Hubble, but of

R. S. Hubble & Company. Gover was not a party to this suit at that time and although this suit was then pending in which it was averred that Hubble's interest in R. S. Hubble & Company was partnership property of Cain & Hubble, and a lien asserted, the *lis pendens* notice provided for by § 2358a, Ky. Stat., was not filed in the office of the clerk of the county court, and, although partnership property, it was real estate; and hence, being an encumbrancer without notice, the lien of the representatives of Cain could not prevail over the lien created by the mortgage of Hubble to Gover. Before the enactment of the statute, *supra*, it was held that the purchaser of partnership real property, where the name in which it was held gave no notice of its partnership quality, and the purchaser had no actual notice of its character, could hold the land as against any equity in favor of a partner. *Buck v. Winn*, 11 B. Mon. 323; *Divine v. Mitchum*, 4 B. Mon. 488, 41 Am. Dec. 241.

(d) For the reasons stated above, the liens created by the mortgages of Hubble to Beecher Smith, dated January 6, 1910, and November 1, 1911, respectively, are inferior to the lien of the administrator of Cain upon the interest of Hubble in the property of R. S. Hubble & Company. These mortgages were given to secure the individual debts of Hubble to Smith, and were not debts owing by R. S. Hubble & Company. No lien existed in favor of Smith to secure the payment of these debts, except the liens created by the mortgages, and long prior to the time they were executed Smith had actual notice of the fact that the interest of Hubble in the property of R. S. Hubble & Company was partnership property of Cain & Hubble, and that such portion of it as remained after the settlement of the affairs of R. S. Hubble & Company must first be appropriated to the payment of the

debts of Cain & Hubble and to the lien of his partner for any balance due him upon a settlement of the affairs of the latter partnership. Smith, being a party to this suit, wherein the representatives of Cain asserted the partnership character of the interests of Cain and Hubble and a lien upon the interests of Hubble and Cain therein to pay the large balance due Cain from the partnership, and having been duly served with a summons, must be held to have had actual notice of the lien asserted therein at the time the mortgages were executed to him by Hubble. For the error in adjudging that Beecher Smith's liens, by reason of the mortgages executed to him by Hubble on January 6, 1910, and November 1, 1911, respectively, had priority over the lien of Cain's representative upon Hubble's interest for the balance adjudged him against Hubble's interest upon the settlement of the partnership of Cain & Hubble, the judgment is reversed, but in all other respects it is affirmed, and the cause remanded for proceedings consistent with this opinion.

NOTE.

The reported case (CAIN v. HUBBLE, ante, 146) clearly illustrates that class of cases which hold that real estate owned by a partnership, and held and used as partnership property, will be treated as personalty for partnership purposes so as to entitle a partner to a preference therein over individual creditors of a copartner, in accordance with the general rule that a claim of a partner against the partnership assets takes precedence over the individual creditors of other members of the firm.

The general question of the right of one partner to a preference over creditors of his copartner is treated in the annotation following MARTIN v. CARLISLE, post, 160, and the authorities upon the more specific question of such right with respect to real estate will be found collated in subd. II. b, thereof.

W. A. MARTIN, Appt.,
v.
CHARLES D. CARLISLE et al.

Oklahoma Supreme Court — May 4, 1915.

(46 Okla. 268, 148 Pac. 833.)

Partnership — lien of partner.

1. One partner has a lien on partnership realty for a balance due him by his copartner in the conduct of the partnership business, and such lien takes precedence over a conveyance of said copartner's interest to a third person.

[See note on this question beginning on page 160.]

— application of assets — rights.

2. One partner has a statutory right to have the partnership assets applied to the payment of the partnership debts, including the payment of the general balance due to him by said firm.

— real estate — purchase from partner — title.

3. Where realty constitutes partnership assets, but the deed is taken in the individual names of the partners, and does not show on its face that it is partnership property, one purchasing an undivided interest of a partner takes a good title, unless he had notice that the realty was partnership property.

Evidence — burden of proof — knowledge of purchaser.

4. The burden of proof is upon the party attacking such a deed to prove by evidence that is clear and convincing that the purchaser took with notice that it was partnership property.

— sufficiency.

5. Evidence examined and held sufficient to show that the realty constituted

partnership property, and that a purchaser of a partner's interest was not an innocent purchaser.

Partnership — real estate — when partnership property.

6. To constitute real estate bought by a partnership partnership property, an express agreement that it shall be so held is not necessary, nor is it necessary that the property shall have been purchased by the common fund of the partnership.

Evidence — presumption as to ownership of property deeded to partnership.

7. There is a strong presumption in law that when land is deeded to the several members of the partnership individually, without any showing in the deed that the property is held for the firm, the ownership is in the individual members of the firm.

Appeal — finding of court sitting without jury.

8. The finding of the court in a case tried without a jury has the same standing as the verdict of a jury.

Headnotes 1-5 by MATHEWS, C.

APPEAL by plaintiff from a judgment of the District Court for Ottawa County (Davis, J.) in defendants' favor in an action brought to enjoin the defendant sheriff from selling under execution a certain tract of land levied on by him. *Modified and affirmed.*

Statement by Mathews, C.:

This action was begun in the court below by plaintiff in error filing his petition praying for an injunction to prevent the sheriff of Ottawa county from selling under execution a certain tract of land levied upon by him.

It appears from the record that

on June 1, 1901, one George Girtten and Charles D. Carlisle, one of the defendants herein, entered into a written contract in substance that Girtten was to secure ground by lease at the station of Narcissa, in Ottawa county, upon which they agreed to erect a barn for the purpose of storing hay; the cost of the erection of

said barn to be borne equally by them. Three days later they executed another written agreement, in effect a copartnership agreement, for the purpose of buying, storing, and selling hay; Girten to attend to the buying and storing of the hay, and Carlisle, doing business as the Carlisle Commission Company, to manage the selling thereof, each of said parties to bear one half of the expense of the business and to share equally in the profits.

On the 30th day of August, 1901, the said Girten and Carlisle executed an instrument wherein they stated that the barn had been completed, and that each of them had borne one half of the expense in erecting the same, and declaring that the said hay barn and the tract of land upon which it stood were owned by them in equal interest.

The said Girten, having leased the ground for the erection of the barn, conveyed a one-half interest in said lease to Carlisle, and on the 16th day of December, 1905, the owner of said leased premises conveyed the same by warranty deed to George Girten and Carlisle Commission Company. On June 30, 1908, Girten conveyed by warranty deed an undivided one-half interest in said property to appellant, Martin.

Carlisle and Girten continued to conduct the partnership business at Narcissa until July, 1908, when Carlisle instituted suit against Girten for \$1,281.27 for losses sustained by said partnership, and on May 11, 1911, he recovered a judgment against said Girten for the sum sued for, and a lien was declared upon the undivided one-half interest of the said Girten in the barn and premises at Narcissa. Appellant was not made a party to the action.

From this judgment an execution was issued and levied upon the property in controversy by the sheriff of Ottawa county, when the appellant, Martin, instituted this action and obtained a temporary injunction to prevent the sale of said barn and lot; the appellant alleging that he had, for a valuable consideration, be-

come the owner in fee simple of the undivided one-half interest of Girten therein. Issues were joined by defendant setting up that defendant and Girten had owned the property in controversy as a partnership, and that he had obtained a judgment against the said Girten for a balance due him on said partnership business, and that he was entitled to have the interest of Girten applied to the payment of said indebtedness, as evidenced by said judgment.

The evidence shows that, at the time the business was commenced in 1901, appellant entered into the employ of Carlisle and Girten and worked for them almost continuously up to 1908, when the partnership ceased operation. He had charge of the barn and hay business of the said Carlisle and Girten at the town of Narcissa, and during these seven years bought and sold hay for them, carried the keys to the barn, looked after the shipping of the hay and the repairs of the building, and frequently corresponded with appellee Carlisle about said business, and admitted he knew Carlisle and Girten were partners in the hay business, but denied that he knew they were partners in the barn, and states that, when he bought the undivided one-half interest of Girten, he did not know who owned the other one-half interest in said barn and did not make any inquiry thereto. The evidence further shows that the cost of the erection of the barn was paid for by Carlisle and Girten, each paying one half of the same, and each was to pay one half of the expenses incurred in the conduct of said hay business. The evidence further shows that the barn was used exclusively for the carrying on of the partnership business, and the repairs of said barn and insurance thereon were paid for out of the partnership funds.

Messrs. Vern E. Thompson and O. F. Mason, for appellant:

If the property was firm property, neither one of the parties owned an undivided one-half interest.

Lellman v. Mills, 15 Wyo. 149, 87 Pac. 985; *Mechem, Partn.* § 108.

An imperfect acknowledgment of the execution of a mortgage does not affect its validity as between the parties.

Hess v. Trigg, 8 Okla. 286, 57 Pac. 159.

There can be no question of plaintiff's right to relief under the proof made and offered by him unless the proof shows either that the property so purchased by him belonged at the time to Carlisle, or was impressed with a lien in favor of Carlisle. There is absolutely no proof of fraud, collusion, or want of consideration.

17 Enc. Pl. & Pr. 314; *Giltinan v. Lemert*, 13 Kan. 476.

The conveyance of the land was made to Girten and Carlisle as individuals, and the barn built upon the land became appurtenant thereto and a fixture, and its ownership merged in the ownership of the land and was the property of individuals, and hence either individual owner had a full and complete right to sell his interest, and if it was sold to a bona fide purchaser prior to the institution of a subsequent suit between the grantor and his creditor, a judgment subsequently obtained against the grantor would not reach the land of the grantee.

Ware v. Owens, 42 Ala. 212, 94 Am. Dec. 642; *Pecot v. Armelin Bros.* 21 La. Ann. 667; 30 Cyc. 430, 433; *Wheatley v. Calhoun*, 12 Leigh, 264, 37 Am. Dec. 654; *Lamport v. Miller*, 153 Ill. 244, 27 L.R.A. 449, 38 N. E. 1078; *Alexander v. Kimbro*, 49 Miss. 529; *Dodson v. Dodson*, 26 Or. 349, 37 Pac. 542; *Clark v. Lyster*, 84 C. C. A. 27, 155 Fed. 513; *Taber-Prang Art. Co. v. Durant*, 189 Mass. 173, 75 N. E. 221.

Messrs. A. Scott Thompson, Omar E. Robinson, and F. D. Adams, for appellees.

Mathews, C., filed the following opinion:

1. Partners purchasing land and taking the deed as tenants in common, without showing in the deed that it was partnership assets or intended to be treated as such, but afterwards used as partnership property, has been a most fruitful source of litigation in the other states of the Union, and a wide diversity of opinions makes the matter difficult of solution, especially as it comes before us as an original

question; it appearing that it is now before the court for the first time.

2. One partner has an equitable and statutory right to have the partnership assets applied, first, to the payment of the debts incurred by the partnership, and next to be himself reimbursed for

Partnership—
application of
assets—rights.

such sums as he may have paid out upon the partnership indebtedness above his proportionate part of said indebtedness, and the right extends to the real estate owned by the partnership, even though the deed to the same upon its face shows that it is held by the partners as tenants in common, unless the rights of a bona fide purchaser should intervene.

—Lien of partner.

The Revised Laws of Oklahoma 1910 provide:

"4431. . . . Partnership is the association of two or more persons for the purpose of carrying on business together, and dividing its profits between them."

"4433. . . . The property of a partnership consists of all that is contributed to the common stock at the formation of the partnership, and of all that is consequently acquired thereby."

"4437. . . . Each member of a partnership may require its property to be applied to the discharge of its debts, and has a lien upon the share of the other partners for this purpose and for the payment of the general balance, if any, due to him."

"4441. . . . Each member of a partnership must account to it for everything that he receives on account thereof, and is entitled to reimbursement therefrom for everything that he properly expends for the benefit thereof, and to be indemnified thereby for all losses and risks which he necessarily incurs on its behalf."

3. There was no error in overruling the demurrer of plaintiff to the answer of defendants.

Plaintiff contends that defendant, in his answer, is guilty of committing inconsistent defenses when he impliedly admits that Girten owned

an undivided one-half interest in the property in controversy, and then alleges that the property in question was partnership property, his different defenses not being separately numbered and stated, and for this reason insists that his demurrer should have been sustained. We do not find that the answer of defendant in error merits the criticism aimed at it. In the answer he alleges the property in controversy to be the assets of a copartnership, but prays that, should the court find the plaintiff in error to be the owner of an undivided one-half interest in said property, he have judgment against the plaintiff in error for his proportionate part for the use and occupation of the barn by Martin and for one half of the taxes and insurance paid by him on said property. While it would have been better to have set out the same in different counts, yet the two pleas are not inconsistent, and it is not objectionable to have set the two pleas out in the same paragraph, especially when it is not challenged, except by a demurrer.

Bliss on Code Pleading, § 342: "Although a defendant cannot, by his answer, set up, in opposition to the plaintiff's title, inconsistent defenses in the alternative, he will not be precluded from denying the plaintiff's title, and also insisting that, in case the plaintiff establishes his title, he is precluded from recovering by some other circumstances which would equally serve to preclude him or any other person in whom the title might be actually vested."

4. Upon the consideration of the merits of the case, the first point for our decision is: Was the property in controversy, as between the partners, partnership assets? The question will be answered in the affirmative.

The intention of the partners at the time the property was acquired, as shown by the facts and circumstances surrounding the transaction of purchase, considered with the conduct of the parties towards the

property after the purchase, must govern. It is not necessary that there should have been an express agreement that the property should be held as partnership property, but such an intent and purpose may be implied if the facts <sup>—real estate—
when partnership property.</sup> warrant it; nor is it necessary that the property should have actually been purchased from the common fund of the partnership. *Divine v. Mitchum*, 4 B. Mon. 488, 41 Am. Dec. 241.

5. Although the evidence shows that the barn on the premises in controversy was paid for by Girten and Carlisle, not out of a common funds, but from their individual assets, yet it appears from the evidence that at the time they entered into the contract to acquire the land and erect the barn, which was on June 1, 1901, they then had in contemplation the partnership for buying and storing hay, as we find them executing a separate contract for such a purpose three days later, which was followed up by the erection of the barn and the using of the same as the place of business for storing of hay, and the said barn was always treated by said partners as constituting partnership assets, used by them for partnership purposes; the expense of repairs, insurance, etc., of the barn, being charged to and paid out of the partnership account. This barn was erected at the very inception of this partnership, and it was necessary that the barn be completed before the business of storing hay could be commenced; and, as there had to be a beginning, it is immaterial that the barn was not paid for out of a joint fund, so long as it appears that it was paid as partnership money for a partnership purpose.

We think the evidence was sufficient to warrant the trial judge in arriving at the conclusion that the property in controversy was purchased with an intention to constitute it partnership property of the firm, and that it was so

Evidence—
sufficiency.

considered, treated, and held, and that the plaintiff in error was not a bona fide purchaser of Girten's interest in said property. *Bopp v. Fox*, 63 Ill. 544; *Loubat v. Nourse*, 5 Fla. 350; *Roberts v. McCarty*, 9 Ind. 16, 68 Am. Dec. 604; *Dyer v. Clark*, 5 Met. 562, 39 Am. Dec. 697; *Lucas v. Cooper*, 15 Ky. L. Rep. 642, 23 S. W. 959; *Patterson v. Silliman*, 28 Pa. 304, 11 Mor. Min. Rep. 327; 30 Cyc. 424.

6. We are not unmindful of the fact that in cases like the one at hand, where the record title does not indicate a partnership holding, but appears to be a title held as tenants in common by the individual members, the record must be the guide on which parties dealing with one of the partners individually may with safety rely, and they ought not to be charged with notice of equities existing between the partners which do not show of record, or which have not been brought to the knowledge of the purchaser of such partnership interest, and the purchaser from a partner of his undivided interest in real estate held by partners in their individual names cannot lightly be divested thereof,

Partnership—
real estate—
purchase from
partner—title.

and titles thus obtained should be held good, until it is shown by evidence that is clear and convincing that it was not acquired in good faith, but that the purchaser had notice that it was partnership property. *Reynolds v. Ruckman*, 35 Mich. 80; *Ware v. Owens*, 42 Ala. 212, 94 Am. Dec. 672; *M'Dermot v. Laurence*, 7 Serg. & R. 438, 10 Am. Dec. 468; *Buchan v. Sumner*, 2 Barb. Ch. 165, 47 Am. Dec. 305; *Taber-Prang Art Co. v. Durant*, 189 Mass. 173, 75 N. E. 221; *Robinson Bank v. Miller*, 153 Ill. 244, 27 L.R.A. 449, 46 Am. St. Rep. 883, 38 N. E. 1078.

7. The burden of proof is upon the party attacking such a deed to prove the same by satisfactory evidence, for there is a strong presumption of law that when land is deeded

Evidence—
burden of proof
—knowledge of
purchaser.

to the several members of a partnership individually, without any showing in the deed that the property is held for the firm, the ownership is in the individual members of said firm; and the fact that the property was used as the place for conducting the business of the partnership does not of itself disclose an intent to make it partnership property, and is not sufficient proof that it was partnership property, when the evidence shows, as in this case, that it was the only place said partners had for carrying on their business. The proof must not only show that it was purchased with partnership funds and used for the partnership purposes, constituting a part of the partnership assets, but there must be further proof that the purchaser knew these facts, or had knowledge of such facts that would put a reasonably prudent man upon inquiry which, followed up, would give him the information that the property was of the assets of the firm.

—presumption as
to ownership of
property deeded
to partnership.

In the case at bar the deed from Walker and wife was made to Girten and the Carlisle Commission Company. It was deeded to them as tenants in common, and so appeared of record, and there was nothing indicating that the title was held by them as partners, or that it was intended to be held as partnership property. *Phillips v. Thorp*, 12 Okla. 617, 73 Pac. 268.

8. So the plaintiff in error must prevail, unless it should clearly appear from the evidence that he was not a purchaser in good faith. The trial court found that he was not an innocent purchaser, and this court could let the matter rest with the finding of the trial court, as there is substantial evidence to sustain the same, and the findings of the trial court in cases tried before the court without a jury have the same standing as the verdict of a jury, which this court will not disturb.

Appeal—
finding of court
sitting without
jury.

where the evidence reasonably tends to support the same, but we will briefly review the evidence in the case, so far as the same applies to the conduct of the plaintiff in error.

The evidence shows that the business of the firm was located in the town of Narcissa, a small town in Ottawa county, composed of about one hundred people, and plaintiff was in the employ of the firm from the beginning of the business in 1901 until 1908; at the time the partnership business was disrupted by a misunderstanding between the said partners over a settlement of their business affairs, and in less than thirty days thereafter he became a purchaser of Girten's interest in the property in controversy. For about seven years he was in the employ of said firm, and seems to have had the management of the same for the greater portion of the time, during which time he bought, stored, shipped, and sold hay and carried on a general correspondence about the business with defendant in error Carlisle. He admits he knew that Carlisle and Girten were partners in the hay business and were using the property in controversy for storing the hay bought by the firm. He carried the key to the barn, looked after its repairs, and had general control over the barn as the agent and employee of the said firm. As far as the record shows, no one had informed him, after he purchased Girten's interest, that Carlisle owned the other half of said barn, and he denied that he had ever been informed or even knew that Carlisle owned a half interest in said barn upon the premises in controversy; yet, in a very short while after he purchased Girten's interest, we find him writing Carlisle two letters of inquiry in reference to Carlisle's interest in the premises in controversy. *The evidence leads us to but one conclusion, and that is that the plaintiff in error, at the time of the purchase of Girten's interest, knew that Carlisle owned an interest in the barn, and the property in con-

troversy was partnership property. We cannot conceive that a person could be so ignorant of or unconcerned about the affairs of his employers as to have had the management of their business for seven years and not to have become aware of a fact that was so easily ascertainable by the use of a little curiosity or the exertion of a slight degree of intelligence, especially to one living in a small village like Narcissa, where common knowledge readily comes to all of its inhabitants, as the fact of the partnership seemed from the evidence to have been generally known by other residents there. And when the plaintiff in error, in testifying in his own behalf, goes so far as to state that he purchased Girten's interest in the barn without making any inquiry as to who owned the other interest therein, and even without caring or desiring to know, and stating that it was an immaterial matter with him as to who the owner of the other interest was, he stretches the credulity of the trial court too far when he asks him to believe such a statement. No sane man would purchase a half interest in a hay barn without knowing or making inquiry as to whom he would have to be associated with in the use of the same.

9. We find no error in the admission of testimony complained of over the objection of appellant. Appellant urges that, as the evidence of certain witnesses for appellee only tended to prove a partnership in the hay business existing between Carlisle and Girten for the purpose of buying and selling hay, and did not refer to the property in question, the same was inadmissible and incompetent. For the reason that the conduct of the partnership in buying, storing, and selling hay was so closely blended with the use and management of the barn, the admission of the evidence objected to was entirely proper.

10. The testimony shows that appellant was in possession of one half

of the barn in 1909 and 1910, and of the entire barn in 1911, and that the storage capacity of the barn was 568 tons, and the rental value of the barn was 40 cents per ton. Thus it appears that the judgment should have been for \$454.40, less a credit of \$29.50, which the trial court

found plaintiff to be entitled to, leaving a balance of \$424.90.

The money judgment will be reduced to \$424.90, and, with this modification, the entire judgment of the trial court will be affirmed.

Per Curiam:

Adopted in whole.

ANNOTATION.

Right of partner to preference over creditors of copartner.

I. Scope, 160.

II. Rights in general:

a. Personal property, 160.

b. Real property, 162.

III. Nature of rights, 163.

IV. Application of rule, 164.

I. Scope.

The present annotation is confined to a treatment of the general question of the right of one or more members of a partnership to a preference over the individual creditors of another or other members of the firm. In other words, the question is, As between the claims of a partner and the claims of individual creditors of a copartner, who is entitled to priority of payment out of firm assets?

II. Rights in general.

a. Personal property.

The general rule is to the effect that the rights of a partner in personal assets of the firm are subordinate to those of firm creditors, but have a preference over the claims of individual creditors of a copartner. In other words, the individual claim of one partner against partnership assets takes precedence over the claims of individual creditors of other members of the firm. The following cases support this rule:

United States.—Hobbs v. McLean (1885) 117 U. S. 567, 29 L. ed. 940, 6 Sup. Ct. Rep. 870; Henderson v. Ries (1901) 47 C. C. A. 625, 108 Fed. 709.

Alabama.—Warren v. Taylor (1877) 60 Ala. 218; Lacey v. Cowan (1909) 162 Ala. 546, 50 So. 281.

Arkansas.—Nichol v. Stewart (1880) 36 Ark. 612; Parker v. Wells (1907) 84 Ark. 172, 105 S. W. 75.

Connecticut.—Church v. Knox (1818) 2 Conn. 523; Brewster v. Hammet (1823) 4 Conn. 540; Witter v. Richards (1833) 10 Conn. 37; Beecher v. Stevens (1876) 43 Conn. 587.

Georgia.—Haines v. Millers (1878) 61 Ga. 344.

Illinois.—Rainey v. Nance (1870) 54 Ill. 29; Mack v. Woodruff (1877) 87 Ill. 570; Taylor v. Farmer (1886) — Ill. —, 4 N. E. 370; Alkire v. Kahle (1888) 123 Ill. 496, 5 Am. St. Rep. 540, 17 N. E. 693.

Indiana.—Roberts v. McCarty (1857) 9 Ind. 16, 68 Am. Dec. 604; Meridian Nat. Bank v. Brandt (1875) 51 Ind. 56; Lewis v. Harrison (1881) 81 Ind. 278; Deeter v. Sellers (1885) 102 Ind. 458, 1 N. E. 854; Johnson v. Shirley (1898) 152 Ind. 453, 53 N. E. 459.

Iowa.—Pierce v. Wilson (1855) 2 Iowa, 20; Evans v. Hawley (1872) 35 Iowa, 83; Cox v. Russell (1876) 44 Iowa, 556.

Kansas.—Boston & S. Glass Co. v. Ludlum (1871) 8 Kan. 40.

Kentucky.—Hodges v. Holeman (1833) 1 Dana, 50; Divine v. Mitchum (1844) 4 B. Mon. 488, 41 Am. Dec. 241; Pearson v. Keedy (1845) 6 B. Mon. 128, 43 Am. Dec. 160; Simrall v. O'Bannon (1847) 7 B. Mon. 608; White v. Woodward (1848) 8 B. Mon. 484; Bank of Kentucky v. Herndon (1866) 1 Bush, 359, 89 Am. Dec. 630; Robinson v. Winn (1882) 4 Ky. L. Rep. 54; Graves v. McKinney (1884) 6 Ky. L. Rep. 220; Holmes v. Stix (1898) 104 Ky. 351, 47 S. W. 243; Walter v. Herman (1901) 110 Ky. 800, 62 S. W. 857; Harlan v. Bennett (1907) 127 Ky. 572, 128 Am. St. Rep. 360, 106 S. W. 287; CAIN v. HUBBLE (reported herewith) ante, 146.

Louisiana.—Purdy v. Hood (1827) 5 Mart. N. S. 626; Reilly v. Creditors (1893) 45 La. Ann. 470, 12 So. 519.

Maine.—Crooker v. Crooker (1863) 52 Me. 267, 83 Am. Dec. 509.

Maryland.—Ridgely v. Carey (1798) 4 Harr. & McH. 167; Pierce v. Tiernan (1838) 10 Gill & J. 253; Conkling v. Washington University (1849) 2 Md. Ch. 497.

Michigan.—Kunze v. Cox (1897) 113 Mich. 546, 67 Am. St. Rep. 480, 71 N. W. 864.

Mississippi.—Atwood v. Meredith (1859) 37 Miss. 635.

Missouri.—Dieckmann v. St. Louis (1880) 9 Mo. App. 9; Wright v. Radcliffe (1895) 61 Mo. App. 257; Freedman v. Holberg (1901) 89 Mo. App. 340; Hemm v. Juede (1910) 153 Mo. App. 259, 133 S. W. 620.

Nevada.—Whitmore v. Shiverick (1867) 3 Nev. 288.

New Hampshire.—Tappan v. Blaisdell (1830) 5 N. H. 190.

New Jersey.—Hill v. Beach (1858) 12 N. J. Eq. 31; Uhler v. Semple (1869) 20 N. J. Eq. 288; Standish v. Babcock (1894) 52 N. J. Eq. 628, 29 Atl. 327; Longley v. Sperry (1907) 72 N. J. Eq. 537, 66 Atl. 1062.

New York.—Wilson v. Conine (1807) 2 Johns. 280; Mumford v. Nicoll (1822) 20 Johns. 611; Ketchum v. Durkee (1840) Hoffm. Ch. 538; Buchan v. Sumner (1847) 2 Barb. Ch. 165, 47 Am. Dec. 305; Menagh v. Whitwell (1873) 52 N. Y. 146, 11 Am. Rep. 683; Wade v. Rusher (1859) 4 Bosw. 537; Ryder v. Carpenter (1878) 8 N. Y. Week. Dig. 25; Drexel v. Pease (1891) 37 N. Y. S. R. 166, 13 N. Y. Supp. 774; Lovins v. Laub (1914) 85 Misc. 336, 147 N. Y. Supp. 304.

North Carolina.—Mendenhall v. Benbow (1881) 84 N. C. 646; Evans v. Bryan (1886) 95 N. C. 174, 59 Am. Rep. 233.

Oklahoma.—MARTIN v. CARLISLE (reported herewith) ante, 154.

Oregon.—Caldwell Bkg. & T. Co. v. Porter (1908) 52 Or. 318, 95 Pac. 1, 97 Pac. 541.

Pennsylvania.—Zell's Appeal (1886) 111 Pa. 532, 6 Atl. 107.

South Carolina.—Boyce v. Coster (1850) 23 S. C. Eq. (4 Strobbh.) 25; 6 A.L.R.—11.

Moffatt v. Thomson (1852) 26 S. C. Eq. (5 Rich.) 155, 57 Am. Dec. 737.

Tennessee.—Williams v. Love (1858) 2 Head, 80, 73 Am. Dec. 191; Reecker v. Forest (1877) King's Dig. (Tenn.) 1615, as set out in 22 Am. & Eng. Enc. Law, 182; Lane v. Jones (1882) 9 Lea, 627.

Texas.—Moore v. Steele (1887) 67 Tex. 435, 3 S. W. 448; McCutcheon v. Davis (1888) — Tex. —, 8 S. W. 123; Sherk v. First Nat. Bank (1918) — Tex. —, 206 S. W. 507; Holder v. Shelby (1909) — Tex. Civ. App. —, 118 S. W. 590.

Virginia.—Christian v. Ellis (1845) 1 Gratt. 396; Maddock v. Skinner (1896) 93 Va. 479, 25 S. E. 535.

Wisconsin.—Miller v. Price (1865) 20 Wis. 117.

England.—Croft v. Pyke (1733) 3 P. Wms. 180, 24 Eng. Reprint, 1020; Skipp v. Harwood (1747) 2 Swanst. 586, 36 Eng. Reprint, 739; West v. Skip (1749) 1 Ves. Sr. 239, 27 Eng. Reprint, 1006; Ryall v. Rowles (1750) 1 Ves. Sr. 348, 27 Eng. Reprint, 1074; Taylor v. Fields (1799) 4 Ves. Jr. 396, 31 Eng. Reprint, 201; Ex parte King (1810) 17 Ves. Jr. 115, 34 Eng. Reprint, 45, 1 Rose, 212, 11 Revised Rep. 34; Dutton v. Morrison (1810) 17 Ves. Jr. 193, 34 Eng. Reprint, 75, 1 Rose, 213, 11 Revised Rep. 56, 4 Eng. Rul. Cas. 112; Holderness v. Shackels (1828) 8 Barn. & C. 612, 108 Eng. Reprint, 1170, 3 Mann. & R. 25, 6 L. J. K. B. 80, 24 Eng. Rul. Cas. 216; Cavander v. Bulteel (1871) L. R. 9 Ch. 79, 43 L. J. Ch. N. S. 370, 29 L. T. N. S. 710, 22 Week. Rep. 177.

In *Maddock v. Skinner* (Va.) supra, in answering the contention that individual creditors of one partner, by obtaining judgments and suing out executions, thereby acquire liens superior to the rights of other partners, the court said: "Partners are joint tenants of the property of the partnership. Neither partner has an exclusive right to any part of the property until all of the debts of the partnership are paid, including the debts which may be due from the partnership to either of the partners. The interest of each partner in the property of the partnership is his share

of the surplus after all the firm debts are paid and a balance of accounts is struck between the partners. It is thus that his interest is ascertained. And it is only this interest, so ascertained, that is subject to the lien of the execution or attachment of an individual creditor. The law does not permit the separate creditor to obtain more than the partner, who is his debtor, is entitled to." And in *Warren v. Taylor* (1877) 60 Ala. 218, the court said: "In settling partnership accounts, each partner is clothed with the right to insist that the partnership effects shall be first applied to the payment of the partnership debts; and this right will prevail over the claims of an alienee or creditor of the copartner. So clearly defined is this right—so necessary to persons engaging in joint adventures of this kind—that it has been long and firmly settled that each partner has a lien on the effects, that they shall be applied primarily to the extinguishment of the partnership liabilities. This results, naturally and necessarily, from the nature of the enterprise and of the title by which the property is held. The title is in the company, or association of individuals, and no one of the number has a separate ownership or right to any part or piece of the property or effects of the partnership. And the lien goes further than this. After the debts are all paid, each partner has a lien on the remaining partnership effects, for any balance due him upon a proper accounting together." And in *Rainey v. Nance* (1870) 54 Ill. 29, it was said that one partner, to the extent of his "interest in the firm property, must be considered as a creditor of the firm, whose debt is deferred to all of the other firm creditors, but preferred to the separate creditors" of the other partners.

And in the following cases it was held generally that the interest of a creditor of an individual partner in personal property of the firm is subject both to the payment of firm debts and to the equities of the copartners: *Gilmore v. North American Land Co.* (1817) Pet. C. C. 460, Fed. Cas. No. 5,448; *Johnson v. Rogers* (1876) 15

Nat. Bankr. Reg. 1, Fed. Cas. No. 7,408; *Atkins v. Saxton* (1879) 77 N. Y. 195; *Read v. McLanahan* (1881) 15 Jones & S. (N.Y.) 275; *Tredwell v. Rascoe* (1831) 14 N. C. (3 Dev. L.) 50; *Price v. Hunt* (1850) 33 N. C. (11 Ired. L.) 42; *Ross v. Henderson* (1877) 77 N. C. 170; *Deal v. Bogue* (1853) 20 Pa. 228, 57 Am. Dec. 702; *Thompson v. Tinnin* (1860) 25 Tex. Supp. 56.

However, it has been held that individual creditors of one who subsequently entered into a partnership and furnished a moiety of the capital are entitled to priority of payment out of the property put into the firm by him over a debt owed by the partnership to another member of the firm. *Killefer v. McLain* (1888) 70 Mich. 508, 38 N. W. 455.

b. Real property.

Upon the general question whether or not real estate owned or used by a partnership stands upon the same footing as personal property, there has been some diversity of opinion, but it seems to be fairly well settled, at least so far as applicable to the particular question under consideration, that in equity real estate owned by a partnership and used for its purposes constitutes firm assets so as to give a partner a preference therein over the individual creditors of his copartners. Thus it has been held that real estate purchased by or brought into a partnership with an intent to make it partnership property, and which is used as such, will be treated in equity as personalty, so that it constitutes a fund upon which a partner has a claim which is superior to the claims of individual creditors of another partner.

Illinois.—*Alkire v. Kahle* (1888) 123 Ill. 496, 5 Am. St. Rep. 540, 17 N. E. 693. And see *Rainey v. Nance* (1870) 54 Ill. 29, and *Taylor v. Farmer* (1886) — Ill. —, 4 N. E. 370.

Indiana. — *Roberts v. McCarty* (1857) 9 Ind. 16, 68 Am. Dec. 604.

Iowa.—*Evans v. Hawley* (1872) 35 Iowa, 83.

Kentucky. — *Divine v. Mitchum* (1844) 4 B. Mon. 488, 41 Am. Dec. 241; *Holmes v. Stix* (1898) 104 Ky.

351, 47 S. W. 243; *Cain v. Hubble* (reported herewith) ante, 146.

Nevada.—*Whitmore v. Shiverick* (1867) 3 Nev. 288.

New Jersey.—*Hill v. Beach* (1858) 12 N. J. Eq. 31; *Standish v. Babcock* (1894) 52 N. J. Eq. 628, 29 Atl. 327.

New York.—*Buchan v. Sumner* (1847) 2 Barb. Ch. 165, 47 Am. Dec. 305; *Wade v. Rusher* (1859) 4 Bosw. 537.

North Carolina.—*Ross v. Henderson* (1877) 77 N. C. 170; *Mendenhall v. Benbow* (1881) 84 N. C. 646.

Oklahoma.—*MARTIN v. CARLISLE* (reported herewith) ante, 154.

South Carolina.—*Boyce v. Coster* (1850) 23 S. C. Eq. (4 Strobb.) 25.

Tennessee. — *Williams v. Love* (1858) 2 Head, 80, 73 Am. Dec. 191; *Lane v. Jones* (1882) 9 Lea, 627.

Texas.—*Sherk v. First Nat. Bank* (1918) — Tex. —, 206 S. W. 507.

In *Divine v. Mitchum* (1844) 4 B. Mon. (Ky.) 488, 41 Am. Dec. 241, in rejecting the minority rule that real estate owned by copartners does not constitute firm assets, it was said that the only plausible reason which the court had anywhere seen advanced for the distinction taken between real and personal estate of partners is that, as to real estate, attention is directed to the record, which is presumed to furnish correct information as to title, whereas the title and right to personal estate are presumed to be with the possession, and that such objection did not apply in the case of real property in the possession of and used as partnership property to the knowledge of the interested parties.

In *Goodwin v. Richardson* (1814) 11 Mass. 469, where partners took a mortgage to secure a firm obligation and later took over the property, it was held, in an action at law after the foreclosure of the mortgage, that the partners were tenants in common of the land, so that the claims of individual creditors of one partner were superior to the rights of the other partner or of those claiming through the partnership. It was said that the taking over of the property paid for with partnership assets was in effect

a division pro tanto of so much of the partnership property, so that the land became the property of the individual members as tenants in common, and not joint stock of the partnership. It will be noted, however, that this was an action at law.

III. Nature of rights.

The great majority of the cases lay down the rule that a partner who has a claim against the partnership property has a lien, sometimes characterized as specific and sometimes as implied or equitable, as against his copartners and the individual creditors of each.

Alabama.—*Warren v. Taylor* (1877) 60 Ala. 218; *Lacy v. Cowan* (1909) 162 Ala. 546, 50 So. 281.

Arkansas. — *Nichol v. Stewart* (1880) 36 Ark. 612.

Illinois.—*Taylor v. Farmer* (1886) — Ill. —, 4 N. E. 370.

Indiana — *Roberts v. McCarty* (1857) 9 Ind. 16, 68 Am. Dec. 604; *Meridian Nat. Bank v. Brandt* (1875) 51 Ind. 56.

Iowa.—*Pierce v. Wilson* (1855) 2 Iowa, 20; *Evans v. Hawley* (1872) 35 Iowa, 83; *Cox v. Russell* (1876) 44 Iowa, 556.

Kentucky. — *Hodges v. Holeman* (1833) 1 Dana, 50; *Pearson v. Keedy* (1845) 6 B. Mon. 128, 43 Am. Dec. 160; *White v. Woodward* (1848) 8 B. Mon. 484; *Bank of Kentucky v. Herndon* (1866) 1 Bush, 359, 89 Am. Dec. 630; *Holmes v. Stix* (1898) 104 Ky. 351, 47 S. W. 243; *Harlan v. Bennett* (1907) 127 Ky. 572, 128 Am. St. Rep. 360, 106 S. W. 287; *Cain v. Hubble* (reported herewith) ante, 146.

Maryland.—*Ridgely v. Carey* (1798) 4 Harr. & McH. 167.

Missouri.—*Dieckmann v. St. Louis* (1880) 9 Mo. App. 9; *Wright v. Radcliffe* (1895) 61 Mo. App. 257; *Freedman v. Holberg* (1901) 89 Mo. App. 340.

New Hampshire.—*Tappan v. Blaisdell* (1830) 5 N. H. 190.

New Jersey.—*Hill v. Beach* (1858) 12 N. J. Eq. 31; *Uhlen v. Semple* (1869) 20 N. J. Eq. 288; *Standish v. Babcock* (1894) 52 N. J. Eq. 628, 29 Atl. 327.

New York.—Ketchum v. Durkee (1840) Hoffm. Ch. 538; Buchan v. Sumner (1847) 2 Barb. Ch. 165, 47 Am. Dec. 305; Wade v. Rusher (1859) 4 Bosw. 537.

North Carolina.—Evans v. Bryan (1886) 95 N. C. 174, 59 Am. Rep. 233.

Oklahoma.—MARTIN v. CARLISLE (reported herewith) ante, 154.

Oregon.—Caldwell Bkg. & T. Co. v. Porter (1908) 52 Or. 318, 95 Pac. 1, 97 Pac. 541.

South Carolina.—Moffatt v. Thomson (1852) 26 S. C. Eq. (5 Rich.) 155, 57 Am. Dec. 737.

Tennessee.—Williams v. Love (1858) 2 Head, 80, 73 Am. Dec. 191; Reecker v. Forest (1877) King's Dig. (Tenn.) 1615, as set out in 22 Am. & Eng. Enc. Law, 132; Lane v. Jones (1882) 9 Lea, 627.

Wisconsin.—Miller v. Price (1865) 20 Wis. 117.

England.—West v. Skip (1749) 1 Ves. Sr. 239, 27 Eng. Reprint, 1006; Ex parte King (1810) 17 Ves. Jr. 115, 34 Eng. Reprint, 45, 1 Rose, 212, 11 Revised Rep. 34; Holderness v. Shackels (1828) 8 Barn. & C. 612, 108 Eng. Reprint, 1170, 3 Mann. & R. 25, 6 L. J. K. B. 80, 24 Eng. Rul. Cas. 216.

At least, the partner has an equity in firm assets which is superior as against the separate creditors of the other partners. Rainey v. Nance (1870) 54 Ill. 29; Alkire v. Kahle (1888) 123 Ill. 496, 5 Am. St. Rep. 540, 17 N. E. 693.

And it has been held that a partner, to the extent of his interest in the firm, must be considered as a creditor of the firm whose debt is deferred to all of the other firm creditors, but preferred to the separate creditors of the other partners. Rainey v. Nance (Ill.) supra; Purdy v. Hood (1827) 5 Mart. N. S. (La.) 626.

IV. Application of rule.

A partner who has contributed capital to a partnership is entitled to be repaid his advances out of the partnership assets before payment to the individual creditors of another partner, who contributed neither capital nor work to the partnership. Hobbs v. McLean (1885) 117 U. S. 567, 29 L.

ed. 940, 6 Sup. Ct. Rep. 870; Pierce v. Wilson (1855) 2 Iowa, 20; Cox v. Russell (1876) 44 Iowa, 556. And see Evans v. Bryan (1886) 95 N. C. 174, 59 Am. Rep. 233.

So it has been held that the lien of the partner over the individual creditors of another member of the firm extends to inequality of capital invested. Lane v. Jones (1882) 9 Lea (Tenn.) 627.

And a partner who has loaned money to the firm or made advances for which he is entitled to be repaid is entitled to a preference over individual creditors of another member of the firm.

United States.—Henderson v. Ries (1901) 47 C. C. A. 625, 108 Fed. 709.

Illinois.—Rainey v. Nance (1870) 54 Ill. 29; Taylor v. Farmer (1886) — Ill. —, 4 N. E. 370; Alkire v. Kahle (1888) 123 Ill. 496, 5 Am. St. Rep. 540, 17 N. E. 693.

Indiana.—Lewis v. Harrison (1881) 81 Ind. 278; Deeter v. Sellers (1885) 102 Ind. 458, 1 N. E. 854.

Iowa.—Pierce v. Wilson (1855) 2 Iowa, 20; Evans v. Hawley (1872) 35 Iowa, 83; Cox v. Russell (1876) 44 Iowa, 556.

Kentucky.—Hodges v. Holeman (1833) 1 Dana, 50; Divine v. Ketchum (1844) 4 B. Mon. 488, 41 Am. Dec. 241; CAIN v. HUBBLE (reported herewith) ante, 146.

Louisiana.—Purdy v. Hood (1827) 5 Mart. N. S. 626.

Maine.—Crooker v. Crooker (1863) 52 Me. 267, 83 Am. Dec. 509.

Maryland.—Pierce v. Tiernan (1838) 10 Gill & J. 253; Conkling v. Washington University (1849) 2 Md. Ch. 497.

Missouri.—Dieckmann v. St. Louis (1880) 9 Mo. App. 9.

New Hampshire.—Tappan v. Blaisdell (1830) 5 N. H. 190.

New Jersey.—Hill v. Beach (1858) 12 N. J. Eq. 31; Uhler v. Semple (1869) 20 N. J. Eq. 288.

New York.—Mumford v. Nicoll (1822) 20 Johns. 611; Ketchum v. Durkee (1840) Hoffm. Ch. 538; Buchan v. Sumner (1847) 2 Barb. Ch. 165, 47 Am. Dec. 305.

North Carolina.—Mendenhall v.

Benbow (1881) 84 N. C. 646; Evans v. Bryan (1886) 95 N. C. 174, 59 Am. Rep. 233.

Oklahoma.—MARTIN v. CARLISLE (reported herewith) ante, 154.

Pennsylvania.—Zell's Appeal (1886) 111 Pa. 532, 6 Atl. 107.

South Carolina.—Moffatt v. Thomson (1852) 26 S. C. Eq. (5 Rich.) 155, 57 Am. Dec. 737.

Tennessee. — Williams v. Love (1858) 2 Head, 80, 73 Am. Dec. 191.

Texas.—Moore v. Steele (1887) 67 Tex. 435, 3 S. W. 448; Sherk v. First Nat. Bank (1918) — Tex. —, 206 S. W. 507.

Virginia.—Christian v. Ellis (1845) 1 Gratt. 396.

Wisconsin.—Miller v. Price (1865) 20 Wis. 117.

England. — Cavander v. Bulteel (1871) L. R. 9 Ch. 79, 43 L. J. Ch. N. S. 370, 29 L. T. N. S. 710, 22 Week. Rep. 177; Holderness v. Shackels (1828) 8 Barn. & C. 612, 108 Eng. Reprint, 1170, 3 Mann. & R. 25, 6 L. J. K. B. 80, 24 Eng. Rul. Cas. 216.

And conversely it has been held that one partner is entitled to a preference over the individual creditors of another partner as to assets owed by the latter to the firm, debts to the firm constituting firm assets. In other words, one partner may set off the debt of another partner to the firm before the separate creditors of the latter can take his share. Meridian Nat. Bank v. Brandt (1875) 51 Ind. 56; Skipp v. Harwood (1747) 2 Swanst. 586, 36 Eng. Reprint, 739; West v. Skipp (1749) 1 Ves. Sr. 239, 27 Eng. Reprint, 1006; Ryall v. Rowles (1750) 1 Ves. Sr. 348, 27 Eng. Reprint, 1074; Ex parte King (1810) 17 Ves. Jr. 115, 34 Eng. Reprint, 45, 1 Rose, 212, 11 Revised Rep. 34. The lien of the partner extends to general personal accounts with the firm. Lane v. Jones (1882) 9 Lea (Tenn.) 627.

And the authorities are agreed that a partner has a claim on the partnership assets to secure the payment of any balance that may be found due him upon an adjustment or settlement of partnership accounts which is entitled to preference over the

claims of individual creditors of his copartners.

Alabama.—Warren v. Taylor (1877) 60 Ala. 218.

Arkansas.—Parker v. Wells (1907) 84 Ark. 172, 105 S. W. 75.

Indiana. — Roberts v. McCarty (1857) 9 Ind. 16, 68 Am. Dec. 604; Meridian Nat. Bank v. Brandt (1875) 51 Ind. 56.

Kentucky. — Hodges v. Holeman (1833) 1 Dana, 50; Pearson v. Keedy (1845) 6 B. Mon. 128, 43 Am. Dec. 160; Simrall v. O'Bannon (1847) 7 B. Mon. 608; White v. Woodward (1848) 8 B. Mon. 484; Robinson v. Winn (1882) 4 Ky. L. Rep. 54; Graves v. McKinney (1884) 6 Ky. L. Rep. 220; Holmes v. Stix (1898) 104 Ky. 351, 47 S. W. 243; Harlan v. Bennett (1907) 127 Ky. 572, 128 Am. St. Rep. 360, 106 S. W. 287; CAIN v. HUBBLE (reported herewith) ante, 146.

Louisiana. — Reily v. Creditors (1893) 45 La. Ann. 470, 12 So. 519.

Maryland.—Ridgely v. Carey (1798) 4 Harr. & McH. 167.

Michigan.—Kunze v. Cox (1897) 113 Mich. 546, 67 Am. St. Rep. 480, 71 N. W. 864.

Missouri. — Wright v. Radcliffe (1895) 61 Mo. App. 257.

New Hampshire.—Tappan v. Blaisdell (1830) 5 N. H. 190.

New Jersey.—Standish v. Babcock (1894) 52 N. J. Eq. 628, 29 Atl. 327; Longley v. Sperry (1907) 72 N. J. Eq. 537, 66 Atl. 1062.

New York.—Wilson v. Conine (1807) 2 Johns. 280; Buchan v. Sumner (1847) 2 Barb. Ch. 165, 47 Am. Dec. 305; Menagh v. Whitwell (1873) 52 N. Y. 146, 11 Am. Rep. 683; Wade v. Rusher (1859) 4 Bosw. 337; Ryder v. Carpenter (1878) 8 N. Y. Week. Dig. 25; Lovins v. Laub (1914) 85 Misc. 336, 147 N. Y. Supp. 304.

Oregon.—Caldwell Bkg. & T. Co. v. Porter (1908) 52 Or. 318, 95 Pac. 1, 97 Pac. 541.

Tennessee.—Lane v. Jones (1882) 9 Lea, 627.

Texas.—McCutcheon v. Davis (1888) — Tex. —, 8 S. W. 123; Sherk v. First Nat. Bank (1918) — Tex. —, 206 S. W. 507; Holder v. Shelby (1909) — Tex. Civ. App. —, 118 S. W. 590.

Virginia. — *Maddock v. Skinker* (1896) 93 Va. 479, 25 S. E. 535.

Wisconsin.—*Miller v. Price* (1865) 20 Wis. 117.

England.—*Croft v. Pyke* (1733) 3 P. Wms. 180, 24 Eng. Reprint, 1020; *Skipp v. Harwood* (1747) 2 Swanst. 586, 36 Eng. Reprint, 739; *West v. Skip* (1749) 1 Ves. Sr. 239, 27 Eng. Reprint, 1006; *Taylor v. Fields* (1799) 4 Ves. Jr. 396, 31 Eng. Reprint, 201; *Dutton v. Morrison* (1810) 17 Ves. Jr. 193, 34 Eng. Reprint, 75, 1 Rose, 213, 11 Revised Rep. 56, 4 Eng. Rul. Cas. 112; *Ex parte King* (1810) 17 Ves. Jr. 115, 34 Eng. Reprint, 45, 1 Rose, 212, 11 Revised Rep. 34.

This, of course, is upon the theory that the law does not permit the separate creditor to obtain more than the partner who is his debtor is entitled to. As illustrative of that large class of cases which adhere to this general principle, see the following cases, which fall within the scope of the present annotation: *Sherk v. First Nat. Bank* (1918) — Tex. —, 206 S. W. 507; *Maddock v. Skinker* (1896) 93 Va. 479, 25 S. E. 535, and authorities cited; *West v. Skip* (1749) 1 Ves. Sr. 239, 27 Eng. Reprint, 1006; *Taylor v. Fields* (1799) 4 Ves. Jr. 396, 31 Eng. Reprint, 201.
G. J. C.

JOHN ELLIS et al., Admrs., etc., of George Ellis, Deceased, Appts.,
v.

CITIZENS' NATIONAL BANK of Portales, New Mexico.

New Mexico Supreme Court — November 21, 1918.

(— N. M. —, 183 Pac. 34.)

Banks — national — right to guarantee paper.

1. A contract of guaranty of the paper of a third person to which a national bank holds no title, and concerning which the contract of guaranty is not necessary or incidental to the transfer of title to the instrument, and the loan is for the benefit of a third person, is beyond the power of the bank, as conferred by the National Banking Act, is ultra vires, and no suit can be maintained upon any such guaranty, and in no case is the bank estopped from pleading ultra vires of such a contract.

[See note on this question beginning on page 172.]

— repayment of loan — guaranty.

2. A national bank, however, has the power to borrow money, and to issue evidence of indebtedness therefor, and where a bank puts forward a third party as a borrower, and the bank guarantees the repayment of the loan, and all the proceeds of the loan go to the bank, and are converted to its own use, such contract of guaranty is not

ultra vires, and suit can be maintained upon the contract.

On Motion for Rehearing.

Appeal — brief — omission of questions.

3. On appeal, a party must present all questions in his original brief which he desires the court to consider, and he will not be permitted to present new points in a petition for rehearing.

Headnotes by ROBERTS, J.

APPEAL by plaintiffs from a judgment of the District Court for Roosevelt County (Richardson, J.) dismissing the complaint in an action brought to hold defendant liable on an alleged written guaranty on the part of its president, of the paper of a third person. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. George L. Reese and James A. Hall, for appellants:

The action instituted by the plaintiffs on the guaranty can be maintained against the defendant bank.

People's Bank v. Manufacturers' Nat. Bank, 101 U. S. 181, 25 L. ed. 907; Davenport v. Stone, 104 Mich. 527, 53 Am. St. Rep. 471, 62 N. W. 722; Auten v. United States Nat. Bank, 174 U. S. 148, 43 L. ed. 928, 19 Sup. Ct. Rep. 628; Thomas v. City Nat. Bank, 40 Neb. 505, 24 L.R.A. 265, 58 N. W. 944; Cochran v. United States, 157 U. S. 297, 39 L. ed. 708, 15 Sup. Ct. Rep. 628; Creditors' Claim & Adjustment Co. v. Northwest Loan & T. Co. 81 Wash. 247, L.R.A. 1917A, 737, 142 Pac. 670, Ann. Cas. 1916D, 551; First Nat. Bank v. Greenville Oil & Cotton Co. 24 Tex. Civ. App. 645, 60 S. W. 828; Seeber v. Commercial Nat. Bank, 77 Fed. 957.

The president of the bank, J. P. Stone, had authority to make the guaranty in question, and the contract is not ultra vires.

Cherry v. City Nat. Bank, 75 C. C. A. 343, 144 Fed. 587; People's Bank v. Manufacturers' Nat. Bank, 101 U. S. 181, 25 L. ed. 907; United States Nat. Bank v. First Nat. Bank, 24 C. C. A. 597, 49 U. S. App. 67, 79 Fed. 296; Commercial Nat. Bank v. Pirie, 27 C. C. A. 171, 49 U. S. App. 596, 82 Fed. 799; Palmer v. Nassau Bank, 78 Ill. 380; Hutchins v. Planters' Nat. Bank, 128 N. C. 72, 38 S. E. 252; Houghton v. First Nat. Bank, 26 Wis. 663, 7 Am. Rep. 107; Seeber v. Commercial Nat. Bank, 77 Fed. 957.

The defendant bank is estopped from setting up or claiming that the making of the guaranty in question was an ultra vires act.

Thomp. Corp. § 5258; American Nat. Bank v. National Wall-Paper Co. 23 C. C. A. 83, 40 U. S. App. 646, 77 Fed. 85; Eastman v. Parkinson, 133 Wis. 375, 18 L.R.A. (N.S.) 921, 113 N. W. 649; G. V. B. Min. Co. v. First Nat. Bank, 36 C. C. A. 633, 95 Fed. 23; Union Nat. Bank v. Matthews, 98 U. S. 626, 25 L. ed. 189; Denver F. Ins. Co. v. McClelland, 9 Colo. 11, 59 Am. Rep. 134, 9 Pac. 771; Sherman Center Town Co. v. Morris, 43 Kan. 282, 19 Am. St. Rep. 134, 23 Pac. 569; Dewey v. Toledo, A. A. & N. M. R. Co. 91 Mich. 351, 51 N. W. 1063; Erb v. Yoerg, 64 Minn. 463, 67 N. W. 355; Vought v. Eastern Bldg. & L. Asso. 172 N. Y. 508, 92 Am. St. Rep. 761, 65 N. E. 496; Zinc Carbonate Co. v. First Nat. Bank, 103 Wis. 125, 74 Am. St.

Rep. 845, 79 N. W. 229; Moriarity v. Meyer, 21 N. M. 521, L.R.A. 1916E, 1165, 157 Pac. 652.

Plaintiffs' cause of action was not barred by the Statute of Limitations.

Emigh v. Earling, 134 Wis. 565, 27 L.R.A. (N.S.) 243, 115 N. W. 129; 16 Cyc. 170; Missouri, K. & T. R. Co. v. Pratt, 73 Kan. 210, 85 Pac. 141, 9 Ann. Cas. 751; Ward's Appeal, 35 Conn. 161; Link v. Jarvis, 5 Cal. Unrep. 750, 33 Pac. 206; Bank of Commerce v. Harrison, 11 N. M. 50, 66 Pac. 460; Patterson v. Hewitt, 11 N. M. 1, 55 L.R.A. 658, 66 Pac. 552.

Messrs. Reid, Hervey, & Iden and T. E. Mears, for appellee:

The instrument, if a guaranty of the bank, is ultra vires.

Commercial Nat. Bank v. Pirie, 27 C. C. A. 171, 49 U. S. App. 596, 82 Fed. 799; First Nat. Bank v. American Nat. Bank, 173 Mo. 153, 72 S. W. 1059; California Nat. Bank v. Kennedy, 167 U. S. 362, 42 L. ed. 198, 17 Sup. Ct. Rep. 831; Appleton v. Citizens' Cent. Nat. Bank, 190 N. Y. 417, 32 L.R.A. (N.S.) 543, 83 N. E. 470; Bowen v. Needles Nat. Bank, 36 C. C. A. 553, 94 Fed. 925; Seligman v. Charlottesville Nat. Bank, 3 Hughes, 647, Fed. Cas. No. 12,642; Norton v. Derry Nat. Bank, 61 N. H. 589, 60 Am. Rep. 334; Merchants' Bank v. Baird, 17 L.R.A. (N.S.) 526, 90 C. C. A. 338, 160 Fed. 642; Fidelity & D. Co. v. National Bank, 48 Tex. Civ. App. 301, 106 S. W. 782; Citizens' Cent. Nat. Bank v. Appleton, 216 U. S. 196, 54 L. ed. 443, 30 Sup. Ct. Rep. 364; Rankin v. Emigh, 218 U. S. 27, 54 L. ed. 915, 30 Sup. Ct. Rep. 672; McCormick v. Market Nat. Bank, 165 U. S. 538, 41 L. ed. 817, 17 Sup. Ct. Rep. 433.

The Statute of Limitations has barred any action by the plaintiffs for money had and received.

2 Wood, Limitations, 4th ed. §§ 276c (1), 276c (2); Brown v. Stair, 25 Colo. App. 140, 136 Pac. 1003; Miller v. Schloss, 218 N. Y. 400, 113 N. E. 837; Tiernan v. Rescaniere, 10 Gill & J. 217; Bailey v. Carter, 42 N. C. (7 Ired. Eq.) 282; Larwill v. Burke, 19 Ohio C. C. 449, 10 Ohio C. D. 605; H. B. Claffin Co. v. Middlesex Bkg. Co. 113 Fed. 958.

Roberts, J., delivered the opinion of the court:

Only a brief statement of the facts in this case will be necessary, in view of the full statement made in the case of Ellis v. Stone, 21 N.

M. 730, L.R.A.1916F, 1228, 158 Pac. 480. That cause of action was instituted against Lula Stone, executrix of the estate of James P. Stone, deceased, upon a guaranty of a loan made by Ellis to W. W. Humble. The letter relied upon as constituting the guaranty is set out in full in the reported case. It is there held that the letter constituted a guaranty, but further held that it was not the individual undertaking of Stone; consequently, it would necessarily follow that it was the undertaking of the bank. This cause of action was instituted against the bank by the administrators of the estate of Ellis to recover on the guaranty. The bank received all the benefits from the loan, Humble getting no money, but simply receiving credit on the past-due note which he owed the bank.

The appellee bank answered the complaint, alleging that the guaranty was beyond the power of the bank and ultra vires, admitting that the complaint stated a cause of action in the alternative for money had and received, but as to this cause of action pleaded the Statute of Limitations. The court held that the suit could not be maintained upon the guaranty, and that as to the action for money had and received the Statute of Limitations had run. Judgment was entered for the appellee, dismissing the complaint.

If the suit can be maintained upon the written guaranty, concededly the statute has not run against the cause of action. On the other hand, if no cause of action is sustainable on the written guaranty, the statute has run against the action for money had and received. This, therefore, presents the only real question for determination in the case.

On behalf of appellee it is contended that a contract of guaranty of the paper of a third person, to which a national bank holds no title, and concerning which the contract of guaranty is not necessary or incidental to the transfer of title to the instrument, is beyond the powers of

the bank, as conferred by the National Banking Act (Act Cong. June 3, 1864, chap. 106, 13 Stat. at L. 99), is ultra vires, and no suit can be maintained upon any such guaranty, and that in no case is the bank estopped from pleading its ultra vires to any suit brought thereon. The section of the National Banking Act defining the powers of national banks is as follows:

"To exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this title." Section 8 (Comp. Stat. § 9661, 6 Fed. Stat. Anno. 2d ed. p. 654).

Many authorities are cited by appellee holding that a national bank has no power to guarantee the debt of another, and that its act in so doing is ultra vires, when such loan is for the benefit of a third person, and that the bank is not estopped from setting up the ultra vires character of the act, even though the contract has been executed on the part of the party receiving such guaranty. *Bowen v. Needles Nat. Bank*, 36 C. C. A. 553, 94 Fed. 925; *Commercial Nat. Bank v. Pirie*, 27 C. C. A. 171, 49 U. S. App. 596, 82 Fed. 799; *First Nat. Bank v. American Nat. Bank*, 173 Mo. 153, 72 S. W. 1059; *California Nat. Bank v. Kennedy*, 167 U. S. 362, 42 L. ed. 198, 17 Sup. Ct. Rep. 831; *Merchants' Bank v. Baird*, 17 L.R.A. (N.S.) 526, 90 C. C. A. 338, 160 Fed. 642; *Fidelity & D. Co. v. National Bank*, 48 Tex. Civ. App. 301, 106 S. W. 782; *Norton v. Derry Nat. Bank*, 61 N. H. 589, 60 Am. Rep. 334; *Citizens' Cent. Nat. Bank v. Appleton*, 216 U. S. 196, 54 L. ed. 443, 30 Sup. Ct. Rep. 364; *Rankin*

v. Emigh, 218 U. S. 27, 54 L. ed. 915, 30 Sup. Ct. Rep. 672.

It is beyond question that the cases referred to sustain the contention of appellee, and many other cases might be cited to the same effect, but these cases do not reach the point involved in this case, and are distinguishable in this: In all these cases the bank did not receive the proceeds obtained in the transaction in which the guaranty was given.

Consequently, a national bank being precluded from loaning its credit to another, its attempt to do so is beyond its power.

That a national bank has the power to borrow money is not questioned, and is liable in an action for money so borrowed, whatever may be the nature of the obligation given for the loan. The question always is, "Was it a loan to the bank and did it receive the benefits?"

In the present case all the benefits of the transaction accrued to the bank. Stripped of form, the transaction was simply this: The bank was hard pressed for money. Humble owed it past-due obligations which he was unable to meet. It put him forward as a borrower for the purpose of procuring money, and gave a written guaranty for the repayment of the loan to be made to Humble. The proceeds of the loan were all received by the bank and converted to its use. Under such circumstances we think, beyond question, that the contract was not

—repayment of loan—guaranty.

ultra vires, and that the bank is liable on the same.

The case of People's Bank v. Manufacturers' Nat. Bank, 101 U. S. 181, 25 L. ed. 907, while not exactly on all fours with the present case, clearly demonstrates, in our judgment, the liability of the bank on the guaranty in question here. The only difference between the two cases being that in the People's Bank v. Manufacturers' Nat. Bank the notes in question passed through the bank. The court said:

"A few remarks will suffice to give our view of the law touching the rights of the parties.

"The National Banking Act (18 Stat. at L. 99, chap. 106, Rev. Stat. § 5136, Comp. Stat. § 9661, 6 Fed. Stat. Anno. 2d ed. p. 654) gives to every bank created under it the right 'to exercise by its board of directors, or duly authorized agents, all such incidental powers as shall be necessary to carry on the business of banking, by *discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt*, by receiving deposits,' etc. Nothing in the act explains or qualifies the terms italicized. To hand over with an indorsement and guaranty is one of the commonest modes of transferring the securities named. Undoubtedly, a bank might indorse, 'waiving demand and notice,' and would be bound accordingly. A guaranty is a less onerous and stringent contract than that created by such an indorsement. We see no reason to doubt that, under the circumstances of this case, it was competent for the defendant to give the guaranty here in question. It is to be presumed the vice president had rightfully the power he assumed to exercise, and the defendant is estopped to deny it. Where one of two innocent parties must suffer by the wrongful act of a third, he who gave the power to do the wrong must bear the burden of the consequences.

"The doctrine of ultra vires has no application in cases like this. Merchants' Nat. Bank v. State Nat. Bank, 10 Wall. 604, 19 L. ed. 1008.

"All the parties engaged in the transaction and the privies were agents of the defendant. If there were any defect of authority on their part, the retention and enjoyment of the proceeds of the transaction by their principal constituted an acquiescence as effectual as would have been the most formal authorization in advance, or the most formal ratification afterwards. These facts conclude the defendant

from resisting the demand of the plaintiff. Wharton, Agency, § 89; Bigelow, Estoppel, 423; Chicago, R. I. & P. R. Co. v. Howard, 7 Wall. 392, 19 L. ed. 117; Kelsey v. National Bank, 69 Pa. 426; Baltimore & P. S. B. Co. v. McCutcheon, 13 Pa. 13. A different result would be a reproach to our jurisprudence.

"Whether, if the guaranty were void, the fund received by the defendant as its consideration moving from the plaintiff could be recovered back in this action upon the common count is a point which we do not find it necessary to consider. See *United States v. State Nat. Bank*, 96 U. S. 33, 24 L. ed. 647."

Other cases following and approving the rule are *Davenport v. Stone*, 104 Mich. 527, 53 Am. St. Rep. 467, 62 N. W. 722; *Auten v. United States Nat. Bank*, 174 U. S. 148, 43 L. ed. 928, 19 Sup. Ct. Rep. 628; *Thomas v. City Nat. Bank*, 40 Neb. 505, 24 L.R.A. 268, 58 N. W. 943; *Cochran v. United States*, 157 U. S. 297, 39 L. ed. 708, 15 Sup. Ct. Rep. 628; *Creditors' Claim & Adjustment Co. v. Northwest Loan & T. Co.* 81 Wash. 247, L.R.A.1917A, 737, 142 Pac. 670, Ann. Cas. 1916D, 551. The case of *Appleton v. Citizens' Cent. Nat. Bank*, 190 N. Y. 417, 32 L.R.A.(N.S.) 543, 83 N. E. 470, Id., 216 U. S. 196, 54 L. ed. 443, 30 Sup. Ct. Rep. 364, is very instructive.

It is true in this case the Supreme Court of the United States sustained a recovery upon the theory of money had and received, but the guaranteeing bank did not receive all the proceeds of the loan, and a recovery was allowed to the extent of the money which went to the credit of the bank. The court refused to pass upon the question as to whether the suit could have been maintained upon the contract. The court of appeals of New York used this significant language: "The plaintiff has been defeated on the theory that the execution of the guaranty by the defendant bank was *ultra vires*, and not binding upon it; and upon this ground the judgments below are

sought to be sustained. Had the guaranty been limited to the amount which the bank, under its agreement with Samuels, was to receive out of the loan, we should be entirely clear that it was within the legitimate powers of the bank under the decisions of the Supreme Court of the United States, in *People's Bank v. Manufacturers' Nat. Bank*, 101 U. S. 181 25 L. ed. 907; *Cochran v. United States*, 157 U. S. 286, 39 L. ed. 704, 15 Sup. Ct. Rep. 628. It was there held that a contract of guaranty of paper held by it was within the implied powers of a national bank, and this though, as in the later of the cases cited, the note was not made to the guaranteeing bank, but directly to the order of another bank to which the guaranty was made. We think, however, that the defendant's power to guarantee was limited by the extent of its interest in the subject-matter of the guaranty. To allow a bank to guarantee the payment by one of its debtors of a larger sum, in order that the bank might receive or retrieve a lesser sum, would be to permit it to enter upon every hazardous speculation, and authorize very wild and unsafe banking. The learned counsel for the appellant frankly conceded on the argument that a recovery should be limited to the amount received by the defendant. It is insisted, however, that the contract of guaranty must be deemed either good or bad as an entirety, and cannot be upheld in part and rejected in part. I am not willing to concede this claim; but it is unnecessary to discuss it, for its determination is not necessary to the decision of the case."

A very instructive note follows the case of *Creditors' Claim & Adjustment Co. v. Northwest Loan & T. Co.* Ann. Cas. 1916D, p. 551.

For the reasons stated, we conclude that the contract of guaranty was not *ultra vires*, and this suit could be maintained thereon. This being true, it follows that the trial court was in error in holding that the action could only be maintained

for money had and received, and that the Statute of Limitations had run against the same. The judgment of the District Court will therefore be reversed, and the cause remanded, with instructions to enter judgment for the appellant for the amount found to be due; and it is so ordered.

Hanna, Ch. J., and Parker, J., concur.

A motion for rehearing having been filed, Roberts, J., on July 8, 1919, handed down the following additional opinion:

Appellee has filed a motion for rehearing in which he contends: First, that the opinion of this court is contrary to the decisions of the Federal courts construing the National Bank Act. As to this proposition it is sufficient to say that we are satisfied with the original opinion.

The second proposition urged is that the evidence in the record as to whether appellant relied upon the guaranty of the bank is conflicting; that the court made no finding upon this proposition, but as judgment was entered for appellee, it is to be presumed that this question was resolved against appellant, and that by reason of the record the decision by this court is in conflict with the case of Dailey v. Foster, 17 N. M. 654, 134 Pac. 206, to the effect that in case of special findings silence upon a material point must be regarded as a finding against the party having the burden of proof. Appellee, however, is precluded from raising this contention on rehearing. In its original brief, it presented but three questions for the consideration of the court, which were stated as follows:

First, the instrument in question is not a guaranty; second, the instrument, if a guaranty of the bank, is ultra vires; third, the Statute of Limitations has barred any action by the plaintiff for money had and received.

The uniform rule in appellate

courts is that a party must present all questions in his original brief, which he desires the court to consider, ^{Appeal—brief—omission of questions.} and he will not be permitted to present new points in a petition for rehearing. Elliott, App. Proc. § 557.

In the case of Loretto Literary Soc. v. Garcia, 18 N. M. 318, 136 Pac. 858, this court refused to consider on rehearing the question as to whether appellants waived their objection to the amended complaint by filing an answer to it because the point had not been raised on the first hearing of the case.

In the case of Dow v. Irwin, 21 N. M. 576, L.R.A.1916E, 1153, 157 Pac. 490, appellee attempted to raise a new question in his motion for a rehearing. The court said: "In civil cases it is a well-recognized rule that questions not advanced on the original hearing will not be considered on the petition for rehearing."

In the case of State v. Williams, 22 N. M. 337, 161 Pac. 334, and State v. McKnight, 21 N. M. 14, 153 Pac. 76, it was held that the appellant could not raise on motion for rehearing new questions not presented in his original brief.

In 4 C. J., p. 633, it is said: "The mere fact that the court has overlooked a certain point presented by the record is not sufficient to authorize a rehearing, however, unless it further appears that its attention was called to the point in question by the briefs or arguments of counsel."

In the original opinion filed in this case there certainly is no legal principle enunciated which conflicts in any way with the case of Dailey v. Foster. Appellee brings forward for consideration a portion of the record not called to the attention of the court in its original brief, and asks the court at this time to consider this question and to deny the relief awarded appellant. Under all the authorities the question is not available on rehearing.

For the reasons stated, the motion for rehearing will be denied; and it is so ordered.

Parker, Ch. J., concurs.

Raynolds, J., being absent, did not participate.

ANNOTATION.

Liability of national bank on guaranty of loan to third person from which it derives benefit.

The holding of the reported case (*ELLIS v. CITIZENS' NAT. BANK*, ante, 166), that a national bank is liable on its guaranty of a loan to a third person on which a benefit accrues to it, finds complete support in but one adjudicated case, that of *People's Bank v. Manufacturers' Nat. Bank* (1879) 101 U. S. 181, 25 L. ed. 907. In that case it appeared that a customer of the bank delivered to it ten promissory notes, aggregating \$50,000, to be negotiated to the plaintiff, pursuant to a prior agreement between the customer and the bank, that the latter should so negotiate the notes and apply the proceeds to the cancelation of other indebtedness then due from the customer. This was done, the bank guaranteeing the payment of the principal sum and interest of the notes. It was held that the bank was liable on its guaranty, the opinion being quoted in the reported case (*ELLIS v. CITIZENS' NAT. BANK*).

In *First Nat. Bank v. Womack* (1916) 56 Okla. 359, 156 Pac. 207, the action was on a guaranty by a national bank of a loan to a third person. Reversing a judgment for the bank because of the exclusion of evidence that the bank received the benefit of the loan, the court said: "Had the court admitted the evidence of the witness Harraway in relation to the conversation with Gilmore above set out, and allowed the question to go to the jury, there was evidence upon which the jury might have found that the letter, exhibit B, was the act of Gilmore, cashier of the defendant bank, and that the defendant bank received and accepted the benefit of the loan made by reason of such letter. Under such circumstances, neither the plea of lack of authority of its cashier nor that of ultra vires would have been available to the defendant bank."

It seems, however, that where a national bank has benefited to a lesser degree than the entire amount of the loan guaranteed by it, it will be liable on its guaranty for such of the proceeds as were received by it. Thus, it has been held that a national bank which, in pursuance of a previous agreement with its debtor that he will devote to the discharge of his indebtedness a part of the proceeds of a loan to be obtained by him from another bank, regulates the making of such loan, and guarantees its payment at maturity, must account to the lending bank for the sum which it receives for its own use in the execution of the agreement, though the guaranty is beyond its powers under the National Banking Act (6 Fed. Stat. Anno. 2d ed. p. 654). *Appleton v. Citizens' Cent. Nat. Bank* (1908) 190 N. Y. 417, 32 L.R.A.(N.S.) 543, 83 N. E. 470, affirmed in (1910) 216 U. S. 196, 54 L. ed. 443, 30 Sup. Ct. Rep. 364, wherein the New York court said: "We may assume that the contract was ultra vires. We may further assume that in transactions by national banks we should adopt the law of ultra vires as it prevails in the Federal courts, and not the local law on the subject. Yet the defendant, in our opinion, became plainly liable for the amount which it received under the ultra vires contract. The law which obtains in this state and in several other jurisdictions is that where one party has received the full benefit of an ultra vires contract, it cannot plead the invalidity of the contract to defeat an action upon it by the other party." The United States Supreme Court, in affirming the judgment, said: "The plaintiff in error insists that the guaranty given by the Central National Bank to the Cooper Exchange Bank was beyond its

power, was in violation of the National Banking Act, and, therefore, could not be made the foundation of an action against the guarantor bank. But this action need not be regarded as one on the written contract of guaranty, but as based on an implied contract between the Cooper Exchange Bank and the Central National Bank, whereby the latter, under the circumstances disclosed by the record, came under a duty to account to the former for the \$10,000 of the \$12,000 actually paid to Samuels at its request and on its guaranty. The law would be very impotent to do justice if it could not, under those circumstances and without violating established legal principles, compel the Central National Bank to recognize and discharge that duty. Samuels owed the Central National Bank \$10,000, and—with knowledge perhaps of his financial condition—he was put forward by that bank to obtain \$12,000 from the Cooper Exchange Bank so that it could get \$10,000 out of that sum for its own use. The circumstances show that the latter bank would not have loaned the money to Samuels except at the request and on the guaranty of the Central National Bank. All this, it may be observed, occurred under a previous agreement between the Central National Bank and Samuels, that that bank was to have \$10,000 of the \$12,000 in discharge of its claim upon him. In short, the Central National Bank, by means of the device mentioned, got \$10,000 of the money of the Cooper Exchange Bank for its own use, and having used it for its own benefit, it now seeks to avoid liability therefor upon the ground that it was not allowed by the law of its creation to execute the guaranty in question. We know of no adjudged case that stands in the way of relief being granted as asked by the plaintiff. But there are many that will authorize such relief."

In *Oklahoma City Nat. Bank v. Ezard* (1916) 58 Okla. 251, L.R.A. 1918A, 411, 159 Pac. 267, the plaintiff sued to recover a sum of money loaned to one Holcomb, which it was alleged the defendant bank by a contract of

guaranty had agreed to pay at maturity if it was not paid by him. It was admitted that the bank received part of the sum borrowed from the plaintiff, and the court, in holding the bank liable for the sum so received, said: "Conceding, for the purpose of this case, that the contract of guaranty was beyond the power of the bank to make, yet, when it induced plaintiff to part with her money on the faith of its promise to repay the same in the event of Holcomb's default, a sense of right and natural justice requires that it be not permitted to receive and retain the fruits of its illegal agreement and at the same time escape liability for the amount received by it. If the contract be unlawful, it is not inherently immoral, and in such cases, while refusing to permit an action upon the unlawful contract, the law will, in consonance with sound legal principles, seek to do justice between the parties by permitting a recovery of that which has been obtained upon the faith of the unlawful contract. It would be a reproach upon the law and its administration if no relief could be had under such circumstances."

On the other hand, it has been held that a national bank has not power to guarantee the payment of the obligations of others, though the obligation incurred is one from which the bank derives a benefit. "A bank can lend its money, but not its credit." *First Nat. Bank v. Monroe* (1910) 135 Ga. 614, 32 L.R.A. (N.S.) 350, 69 S. E. 1123. In that case it appeared that the bank had loaned one of its customers an amount in excess of 10 per cent of its capital stock and surplus, in violation of the National Bank Law, and to replace this sum it guaranteed a loan to the customer by another bank, accepting part of the proceeds. It was held that the transaction was ultra vires and void as to liability on the guaranty. "Viewing the transaction from any standpoint," the court said, "the guaranty of the national bank was one which the bank could not ratify, or estop itself from having declared void." In distinguishing the case of *Appleton v.*

Citizens' Cent. Nat. Bank (N. Y.) supra, it was further said: "The facts were in many respects the same as they are in the case we are considering, but the suit there held to be maintainable was construed to be one on an implied contract, and not on

the express contract of guaranty. Whether the plaintiffs could recover the amount received by the national bank in a suit other than one on the guaranty is a question not involved, and it need not be considered."

W. M. C.

COUNTY OF STARK, Respt.,

v.

ADAM F. MISCHEL et al., Appts.

North Dakota Supreme Court — May 31, 1919.

(— N. D. —, 173 N. W. 817.)

Attorney and client — contract to save client harmless — champerty.

1. A contract between attorney and client, which provides that the attorney shall save the client harmless from all expenses that may be incurred in proposed litigation, out of which the attorney is entitled to a contingent fee of the amount received, if successful, is champertous in its nature and void as against public policy.

[See note on this question beginning on page 184.]

— attorney for public — resignation.

2. It is the duty of an attorney to exercise the highest good faith in the interests of his client, whether in public or in private office, and, for private reward to himself, he cannot abandon the cause of his client as a public officer, without reasonable cause, and undertake an employment as a private attorney upon litigation pending which he has instituted and established in a court of law as a valid and just cause, where such action is antagonistic to the interests of his client and his duty as an attorney.

[See 2 R. C. L. 974.]

— illegal fee — recovery.

3. Where a state's attorney, in the performance of his duty, instituted an action upon a claim in favor of the county, which thereafter the state court adjudicated to be a valid and just claim in favor of such county, by its judgment entered, and prior thereto the board of county commissioners enacted a resolution providing that such state's attorney should handle such claim upon a contingent fee of 50 per cent, and

should save the county harmless from all costs involved therein, and thereafter, subsequent to the entry of such judgment in the state court, such state's attorney resigned and entered into a contract with the board of county commissioners in accordance with the terms of the said resolution, and the board of county commissioners thereupon appointed as state's attorney the former assistant state's attorney, who had assisted in and was familiar with such litigation, and where thereafter such former state's attorney acted for the county pursuant to such contract and secured the payment of such judgment by a recognition and settlement of such judgment in certain actions pending in the Federal court concerning such claim, and received, pursuant to such settlement, the fee stipulated, it is held, in an action to recover from such former state's attorney and the former county commissioners and their sureties the amount so paid as an unauthorized and illegal payment, that the same was void for reasons of public policy, and that the trial court did not err in so finding.

[See 2 R. C. L. 1041.]

Headnotes by BRONSON, J.

(Christianson, Ch. J., dissents in part.)

APPEAL by defendants from a judgment of the District Court for Stark County (Nuessle, Special J.) in favor of plaintiff in an action brought to recover county funds alleged to have been unlawfully converted by defendant Murtha, former state's attorney. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. J. F. Sullivan and Engerud, Divet, Holt, & Frame, for appellants:

The Federal court had jurisdiction of the controversy because it involved more than \$3,000, and the three surety companies were foreign corporations, having claims that were adverse to all the other claimants who were residents of North Dakota.

National Surety Co. v. State Bank, 61 L.R.A. 394, 56 C. C. A. 657, 120 Fed. 593; Farmers' Loan & T. Co. v. Lake Street Elev. R. Co. 177 U. S. 59, 44 L. ed. 670, 20 Sup. Ct. Rep. 564; Harkrader v. Wadley, 172 U. S. 148, 43 L. ed. 399, 19 Sup. Ct. Rep. 119; Gage v. Riverside Trust Co. 86 Fed. 984; Freeman v. Howe, 24 How. 450, 16 L. ed. 749; Heidritter v. Elizabeth Oil Cloth Co. 112 U. S. 294, 28 L. ed. 729, 5 Sup. Ct. Rep. 135.

When Murtha resigned, which he had the right to do, with or without reason, he ceased to have any further right or obligation to act as attorney for the county in the pending litigation unless a contract was made for his services after the resignation.

United States v. Wright, 1 McLean, 509, Fed. Cas. No. 16,775; People v. Porter, 6 Cal. 26; State ex rel. Lockhart v. Hauss, 43 Ind. 105, 13 Am. Rep. 384; Leech v. State, 78 Ind. 570; Gates v. Delaware County, 12 Iowa, 405; State ex rel. Nourse v. Clarke, 3 Nev. 566; Gilbert v. Luce, 11 Barb. 91; Conner v. New York, 2 Sandf. 356, 5 N. Y. 285; State ex rel. Roberts v. Lincoln, 4 Neb. 260; State ex rel. Williams v. Fitts, 49 Ala. 402.

If the contract was one which could lawfully be made in the first instance, then the officers who had the power to make it in the first instance could by ratification validate it afterwards, if for any reason it was defectively executed originally.

11 Cyc. 478; Appel v. State, 9 Wyo. 187, 61 Pac. 1015.

It was lawful and proper to make such a contract on a contingent fee basis.

Storey v. Murphy, 9 N. D. 115, 81 N. W. 23; Reed v. Gormley, 47 Wash. 355, 91 Pac. 1093; Lessen Co. v. Shinn, 88 Cal. 510, 26 Pac. 365.

While the official record of the proceedings of the board of county com-

missioners is prima facie evidence of their doings, and consequently of any contract made and entered therein, such record is neither conclusive nor the only evidence of the contract.

Sims v. Milwaukee Land Co. 20 Idaho, 513, 119 Pac. 37; Slaughter v. Mallet Land & Cattle Co. 72 C. C. A. 430, 141 Fed. 232; Duluth, S. S. & A. R. Co. v. Douglas County, 103 Wis. 75, 79 N. W. 34.

Under a general denial the defendant may prove any fact or facts which disprove any one or more material allegations of the complaint.

Hogen v. Klabo, 13 N. D. 319, 100 N. W. 847; Scone v. Amos, 38 Minn. 79, 35 N. W. 575; Ellingsen v. Cooke, 37 Minn. 400, 34 N. W. 747; Broadwater v. Jacoby, 19 Neb. 77, 26 N. W. 629; Johnson v. Pennell, 67 Iowa, 669, 25 N. W. 874; Kendig v. Overhulser, 58 Iowa, 195, 12 N. W. 264.

The board of county commissioners is the tribunal vested by law with the power to make such contracts; and their action in such a matter cannot be reviewed by the courts unless it can be impeached for fraud.

Lancaster County v. Lincoln Auditorium Asso. 87 Neb. 87, 127 N. W. 226; Hagler v. Kelly, 14 N. D. 218, 103 N. W. 629; Reed v. Gormley, 47 Wash. 355, 91 Pac. 1093; Brown County v. Jenkins, 11 S. D. 330, 77 N. W. 579; State v. Davis, 11 S. D. 111, 74 Am. St. Rep. 780, 75 N. W. 897; Agnew v. Brall, 124 Ill. 312, 16 N. E. 230; Storey v. Murphy, 9 N. D. 115, 81 N. W. 23.

Messrs. W. F. Burnett, L. A. Simpson, Thomas H. Pugh, and J. P. Cain, for respondent:

The county board, by whatever name known, is vested with, possesses, and can exercise only such powers as are by statute conferred upon it, or as may be necessarily or reasonably implied from the powers thus expressly conferred.

Morse v. Granite County, 44 Mont. 78, 119 Pac. 286; State v. Buckstegge, 18 Ariz. 277, 158 Pac. 837; Wadsworth v. Livingston County, 217 N. Y. 484, 112 N. E. 163; Pierson v. Minnehaha County, 28 S. D. 534, 38 L.R.A.(N.S.) 261, 134 N. W. 212; Fox v. Walley, 13 N. D. 613, 102 N. W. 161; Logan County v. Jones, 4 Okla. 341, 51 Pac. 566;

News-Dispatch Printing & Auditing Co. v. Grady County, — Okla. —, 161 Pac. 207.

The alleged contracts were *ultra vires* and against public policy and void.

Storey v. Murphy, 9 N. D. 115, 81 N. W. 23; Pierson v. Minnehaha County, 28 S. D. 534, 38 L.R.A. (N.S.) 261, 134 N. W. 212; Wilson v. Otoe County, 71 Neb. 485, 98 N. W. 1050; Platte County v. Gerrard, 12 Neb. 244, 11 N. W. 298; Brome v. Cumming County, 31 Neb. 362, 47 N. W. 1050; State v. Stockwell, 23 N. D. 70, 134 N. W. 767.

It was the duty of the defendants to pay the money received from the Northern Trust Company, whether obtained justly or unjustly, to the county treasurer. Having done so, defendants cannot now illegally take the money out. It did not belong to them.

People v. Van Ness, 79 Cal. 84, 12 Am. St. Rep. 134, 21 Pac. 554; State v. Porter, 69 Neb. 203, 95 N. W. 769.

The auditing of the claim filed, the issuing of the warrant, and the subsequent payment of the warrant would not bar the county from recovering back the money, for the indebtedness which boards of this character are authorized to audit and pay from the county funds must be legal demands against the county.

7 Am. & Eng. Enc. Law, 2d ed. 960; Foster v. Clinton County, 51 Iowa, 541, 2 N. W. 207; Campbell County v. Overby, 20 S. D. 640, 108 N. W. 247; Spencer v. Sully County, 4 Dak. 474, 33 N. W. 97; Otoe County v. Stroble, 71 Neb. 415, 98 N. W. 1065; Endion Improv. Co. v. Evening Telegram Co. 104 Wis. 432, 80 N. W. 732.

If the money was paid out illegally by the commissioners they are liable therefor.

Buyck v. Buyck, 112 Minn. 94, 140 Am. St. Rep. 464, 127 N. W. 452; Russell v. Tate, 52 Ark. 541, 7 L.R.A. 180, 20 Am. St. Rep. 193, 13 S. W. 130; Blair v. Lantry, 21 Neb. 247, 31 N. W. 790.

Bronson, J., delivered the opinion of the court:

This is an action at law to recover county funds from the former county commissioners and the former state's attorney of Stark county and their sureties, alleged to have been unlawfully converted to the use of such former state's attorney. The action was tried to the court without a jury, and from a

judgment rendered in favor of the plaintiff for \$4,794.74 and interest, the defendants have appealed.

There is practically no dispute in the record concerning the facts. The record therefore presents for consideration only questions of law. The necessary facts to be stated in accordance with the principles of law applied by this court are as follows:

One J. S. White was formerly county auditor of Stark county for four successive terms, up to December 15, 1909, when it was discovered that during several terms of his office he had forged and secured payment of county warrants which aggregated, in payments out of county funds, over \$30,000; he was removed from office, subsequently convicted, and sentenced to the state penitentiary.

Later the county of Stark instituted an action against the respective county treasurers and their sureties during the said county auditor's terms, to recover amounts that had been paid out of county funds by such county treasurers upon such forged warrants. As a result of this action judgments were rendered and collected in favor of the county to the amount of over \$33,000. The defendant Murtha became state's attorney of Stark county, through election, in January, 1911. After becoming such state's attorney, he assisted in collecting and settling up such judgments.

Later some of the surety companies upon the bonds of the county treasurers in question instituted suit in equity in the Federal court to recover from the surety, upon the official bond of the convicted county auditor, for the amount that they had been compelled to pay as sureties upon principles of subrogation. This was in the fall or latter part of the year of 1911. In one of the actions so instituted in the Federal court, the Dakota National Bank of Dickinson was made a defendant, to recover from it amounts that had been paid the bank upon such spurious warrants upon the

ground that such bank had not acquired the same in good faith. Thereupon such bank and another bank in the city of Dickinson and the city of Dickinson filed a cross bill and complaint in intervention in the month of March, 1912, setting up spurious warrants paid by them and held by them, which had been acquired in good faith, and asserting the right of recovery thereupon from the defendant surety on the convicted auditor's bond, upon equities superior to the claim of the plaintiff surety company.

In the month of July, 1912, the defendant Murtha, as state's attorney for Stark county, instituted an action in the district court of that county against the convicted county auditor and his surety to recover an additional claim due the county by reason of his defalcations, including interest and expenses incurred, not theretofore paid upon the prior actions instituted and maintained by the county against the county treasurers and their sureties. When this new action in the state court became known to the parties to the action in the Federal court, action was then taken in such Federal court whereby the county of Stark was brought in as a party claimant to the money sought to be recovered. In the action in the state court, the surety company answered. The action subsequently came to trial on the 4th day of January, 1913, before the court without a jury.

In the meantime, the defendant Murtha had been re-elected as state's attorney. He continued to handle this action. On February 1, 1913, the trial court made findings in favor of the county, and ordered judgment against the convicted auditor and his surety for \$9,203.13 and costs. In this action the defendant Murtha, however, testified that these findings, though dated February 1, 1913, were not signed by the trial court until February 17, 1913.

Pursuant to such findings, judgment was rendered in favor of the county on February 19, 1913. Later
6 A.L.R.—12.

it appears that the Federal court served an order to show cause upon said Murtha, as attorney for the county, why execution should not be enjoined in the state court, and Murtha testified that the Federal judge did not so issue an injunction because he agreed not to take out an execution. On February 18, 1913, the defendants the county commissioners of Stark county passed the following resolution: "Resolved that T. F. Murtha, an attorney at law of Dickinson, North Dakota, be retained to attend to the defense of this county in the three cases now pending in the United States district court for the district of North Dakota, and he is to save this county harmless from all expense on account of said litigation, and is to receive for said services and such disbursements a sum equal to one half of the sum recovered, actually paid into the county treasury of this county from the Northern Trust Company on the bonds of former Auditor J. S. White. If there is no recovery on said bonds, said attorney is to receive no compensation, either for services or disbursements."

At that time the defendant Murtha was state's attorney.

Later, on August 8, 1913, in the evening, at a meeting of such county commissioners, the defendant Murtha, being present before such commissioners, tendered his resignation as state's attorney, and the same was accepted and ordered filed. Thereupon such commissioners at such meeting appointed as state's attorney J. P. Cain, who was then the assistant state's attorney, to fill the unexpired term. Then at such meeting the following agreement was drawn and signed:

It is agreed that T. F. Murtha, an attorney at law of Dickinson, North Dakota, be retained to attend to the defense of this county in the three cases now pending in the United States court at Fargo, North Dakota, and he is to save the county harmless from all expenses on ac-

count of said litigation, and is to receive for said services and such disbursements a sum equal to one half of the sum recovered, actually paid into the treasury of said county from the Northern Trust Company on the bonds of former Auditor J. S. White. If there is no recovery on said bonds, said attorney is to receive no compensation either for services or disbursements.

Dated this 8th day of August, 1913.

Board of Commissioners,
D. Hughes, Chm.
F. A. Roquette.
A. F. Mischel.
T. F. Murtha.

On September 4, 1913, the cases mentioned in the Federal court came up for hearing. Then the parties recognized, through a settlement then made, the priority and validity of the claim of Stark county, as evidenced by the judgment rendered in the state court, and thereupon made arrangement to pay the same in full. The defendant Murtha there represented the county of Stark, pursuant to the agreement made. Pursuant thereto, on September 8, 1913, the check of the Northern Trust Company, the surety of the convicted county auditor, was issued, payable to the county treasurer of Stark county, for \$9,589.43. On the same day a county warrant was issued, pursuant to a voucher filed therefor, to the defendant Murtha for one half of such amount; namely, \$4,794.71, upon which the county treasurer on September 11, 1913, issued his check in payment therefor.

Accordingly, on December 26, 1913, this action was instituted to recover such amount as an illegal and unauthorized payment. The defendant demurred to the complaint and this court passed upon such demurrer in *Stark County v. Mischel*, 33 N. D. 432, 156 N. W. 931, holding the complaint to state a cause of action against such former officials and their sureties. Subsequently, on December 27, 1916,

upon issues framed, the action came to trial in the district court.

On November 8, 1917, in this action, the trial court made its findings, holding, among other things, as follows: On February 18, 1913, and for more than two years preceding such time, Stark county had a valid claim and cause of action for \$9,239.13 against said convicted auditor and his surety; that prior to said February 18, 1913, the district court had made its order for judgment in favor of said Stark county upon such claim and cause of action; that on February 18, 1913, judgment was about to be entered for the amount of such claim, which the former county commissioners and the former state's attorney, the defendants herein, then knew; that on such date the defendant county commissioners unlawfully engaged and agreed to pay said defendant Murtha, pursuant to the terms of the resolution adopted on said date; that it was then the duty of said defendant Murtha, as state's attorney, to perform such services without receiving any additional compensation, which the defendants then knew; that on the evening of August 8, 1913, the defendant Murtha submitted his resignation as state's attorney to the said board of county commissioners; that the same was then accepted and said J. P. Cain appointed as state's attorney; that said Cain had theretofore been assistant state's attorney, and had assisted in the case involved and was familiar with all the facts in connection with the same; that he qualified as state's attorney on August 9, 1913; that the resolution dated August 8, 1913 (hereinbefore set forth), was not recorded in the minutes of the proceedings of the board of county commissioners, was not published in any of the official newspapers of the county as a part of such proceedings, was not in the records or files of the commissioners' proceedings or in the office of the county auditor, and was produced at the time of the trial by the defendants; that the existence of

such exhibit was unknown to the attorneys for the plaintiff or to anyone else, excepting only the said county commissioners, or defendant Murtha and the county auditor. The trial court, in its conclusions, determined the attempted employment to be unlawful, void, and against public policy; that it was violative of the official duties of the defendants as public officers; that, furthermore, it was the official duty of the defendant Murtha, and his successor, J. P. Cain, to perform the work and services of collecting such judgment. Pursuant to such findings, on November 12, 1917, judgment was rendered against the appellants herein.

The appellants specify error of the trial court in excluding offered testimony, rejecting their proposed findings, and in making erroneous findings. In view of the principles of the law applicable in the determination of this appeal, the trial court committed no error in rejecting the offered testimony of the defendant Murtha concerning advice of former Attorney General Miller to the board of county commissioners upon its right of recovery upon the subject-matter involved in the action of Stark county against the convicted auditor and his surety.

The principal contention of the appellants is based upon the proposition that the county of Stark did not have a valid cause of action against the convicted auditor and his surety upon the judgment for which it recovered judgment for \$9,239.13; that when the state's attorney resigned the claim of the county was very shadowy and doubtful; that the county commissioners were unwilling to spend further county moneys in an attempt to recover the amount claimed; that the state's attorney had a perfect right to resign and a perfect right to make a contract as a private attorney with the county commissioners concerning this doubtful litigation, and that the former county commissioners, within their lawful powers, legally made this contract with the

former state's attorney; and that therefore the claim paid, after the successful termination of the litigation, to such former state's attorney, was a valid, legal, and binding obligation upon the county.

We are wholly satisfied, upon this record, that the trial court has erred neither in its findings of fact nor in its conclusion of law.

The appellants' counsel are in no position to assert, or even contend, that the claim of the county was of doubtful or questionable validity. By so doing they impugn the good faith and ability of their client, the defendant Murtha, in performing his duties as state's attorney. As an attorney, he, in fact, instituted this action in the state court in behalf of the county. It was his duty as an attorney to exercise his best judgment in determining the merits of the claim before action. It is to be presumed that he did. He does not testify to the contrary. It is likewise presumed that the county commissioners permitted him to institute this action, and acted in accordance with the advice that he gave concerning the institution of such action.

Kinkead, in his work on Professional Ethics, p. 342, states that "lawyers first pass judgment upon the merits of a case or defense, and it is believed that the courts and the public have a right to demand that in arriving at that judgment they shall exercise great care and diligence in ascertaining the facts and the law applicable to the facts, and act only in the line of their best judgment so formed."

Necessarily, therefore, as state's attorney, the defendant Murtha first passed judgment upon the merits of the claim of the county; necessarily, if it be conceded that he acted in the interests of his client, the county, he believed that the county had a valid and just claim. Otherwise he would not have brought the action. Fundamental rules, therefore, of common honesty as well as of legal ethics, prevent the appellants from now trying to assert that that which

they believed in exercising their best judgment was a valid claim, and which the state court determined to be a valid and just claim, was of doubtful validity. In addition, there is the further fact that the parties in the Federal court did not dispute the validity of the claim of the county, but, in fact, recognized and paid the same. The appellants, in part, concede that, if the judgment were valid, the payment would be illegal, because the collection of the judgment would be a part of the defendant Murtha's official duties as state's attorney, and that he could not legally be paid anything except his regular salary for duties he might be required to perform as state's attorney. We have no hesitancy in arriving at the conclusion that the trial court properly determined that there was a valid subsisting claim in favor of the county existing at the time the resolution of February 18, 1913, was adopted, at least, so far as the parties herein are concerned. For this reason alone the judgment of the trial court might properly be affirmed.

Attorney and client—illegal fee—recovery.

There is, however, another principle of law which directly applies to the record facts in this case, upon which the contract made by the defendant former officials was illegal and against public policy. Upon the record herein, the plain duty of the defendant Murtha to his client, whether it be viewed as that of state's attorney or in the relation of attorney and client, is plain. No other reason is shown in the record for the resignation of the defendant Murtha except for the purpose of receiving this appointment as a private attorney. No other inference can be drawn as a cause of such resignation other than the possible reward which would accrue to him while acting as an attorney for such county in a capacity other than his theretofore official position. Above all things, it is the prime duty of an

attorney, whether, as such, in public office or as a private attorney, to exercise the highest good faith in the interests of his client. It was the duty of the defendant Murtha, as state's attorney, to prosecute and use his best endeavors to collect this claim. It is not shown in the record that he would not have been equally successful if he had remained state's attorney and continued in that capacity to represent his client in the litigation already adjudicated in the state court. In effect, his resignation and the acceptance thereof were antagonistic to the best interests of his client. It gave to him the opportunity, against the highest interests of his client, to receive a reward and a compensation that otherwise he would not have received as state's attorney in the performance of his official duty.

—attorney for public—resignation.

It was one of his particular duties as a lawyer, and acting in that capacity in a public office, with this important litigation pending, to not abandon his client without just cause therefor, and to not seek thereby to reap a reward and a compensation by means of knowledge and information gained while acting in such public office. Among the fundamental rules of ethics is the principle that an attorney who undertakes to conduct an action impliedly stipulates to carry it to its termination, and he is not at liberty to abandon it without reasonable cause. *Weeks, Attorneys*, § 255; 6 C. J. 673. See *Nichells v. Nichells*, 5 N. D. 125, 33 L.R.A. 515, 57 Am. St. Rep. 540, 64 N. W. 73.

This court would indeed be derelict in its duty in the administration of justice if it sought for a moment to uphold the right of an officer of this court, an attorney at law, to recover upon a contract of this sort so made which disregards the prime duties of an attorney to his client, and which thereby would serve to reflect upon the just and proper administration of justice. We have no hesitancy in determining such con-

tract to be illegal and void upon grounds of public policy, whether the matter be viewed in connection with the duties of the defendant Murtha as a public officer or as a private attorney. Furthermore, the resolution of February 8, 1913, and the contract of August 8, 1913, both of them, contained a provision violative of another fundamental rule of legal ethics, long recognized in the history of the bar and in law, concerning the relations of attorney and client.

Under the doctrine of champerty, long has been recognized the impropriety of an attorney's speculating in lawsuits, and becoming a gambler in litigation, at his own cost. The provision in such resolution and contract which required the defendant Murtha to save harmless the county of Stark against all costs, and which thereby imposed the burden of carrying on the litigation and

—contract to
save client
harmless—
champerty.

paying the costs and expenses thereof at his own peril, was champertous in its nature for reasons of public policy long and well established; it served to vitiate and render void such contract. 11 C. J. 241; 5 R. C. L. 276. See *Woods v. Walsh*, 7 N. D. 376, 75 N. W. 767. See *Rohan v. Johnson*, 33 N. D. 179, L.R.A. 1916E, 64, 156 N. W. 936, Ann. Cas. 1918A, 794. See No. 10 Canon of Ethics, Am. Bar. Asso.

The judgment of the trial court is affirmed, with costs to the respondent.

Robinson and Grace, JJ., concur.

Birdzell, J., concurring specially:

I concur in the affirmance of the judgment for the reasons assigned in the opinion of the court as prepared by Mr. Justice Bronson, except wherein it is held that champerty necessarily vitiates and renders void a contract for the employment of an attorney. By thus qualifying my concurrence in the main opinion, I do not wish to be understood as either countenancing or

discountenancing so-called champertous agreements.

This agreement being void for the other reasons assigned, I deem it unnecessary to consider whether or not its champertous character would, of itself, vitiate it. This might depend upon the circumstances, and, while I am not willing to say that the circumstances in the instant case might not justify holding the contract void on that ground, I am not prepared to hold that under all circumstances such agreements are void. It is unnecessary to so hold. The question is primarily one of public policy, and as such it has been somewhat discussed in the prior decisions of this court. See *Woods v. Walsh*, 7 N. D. 376, 75 N. W. 767; *Rohan v. Johnson*, 33 N. D. 179, L.R.A.1916E, 64, Ann. Cas. 1918A, 794, 156 N. W. 936; *Greenleaf v. Minneapolis, St. P. & S. Ste. M. R. Co.* 30 N. D. 112, 151 N. W. 879, Ann. Cas. 1917D, 908.

In these cases it has been shown that the reasons which formerly existed for holding contracts involving champerty and maintenance void no longer obtain, at least in equal degree. I would not be disposed to differentiate between legal and illegal agreements on the basis that they are differentiated in some jurisdictions, where distinctions are recognized between agreements which provide that the attorney is to have for his services a portion of the proceeds, and agreements that he is to have an amount equivalent to a certain percentage of the proceeds and a lien upon the proceeds for payment. See *Blaisdell v. Ahern*, 144 Mass. 393-395, 59 Am. Rep. 99, 11 N. E. 681.

Such distinctions are based upon no real differences of situation or of actual tendency, and the same is true as to maintenance. In my view, one contributes quite as much to the maintenance of an action, that might not otherwise be brought, by agreeing to pursue it for a contingent fee, as he does by agreeing to contribute something in the way of costs. The ultimate effect is, gen-

erally, when the attorney stipulates for a contingent fee, that a suit is brought that would not otherwise have been brought, because of the inability of the client to pay a stipulated fee. Without such arrangements there would often be a failure of justice. There is yet a legitimate scope for the contingent fee. *Greenleaf v. Minneapolis, St. P. & S. Ste. M. R. Co.* supra. I mention these matters here merely to indicate that, in my judgment, there is no occasion either to define illegal champerty and maintenance upon the basis of the presence or absence of stipulations insuring against costs and actually sharing in the proceeds of the litigation, or to characterize all such agreements as void because they result in giving those who are not otherwise interested an incentive to pursue litigation. As said above, there are other arrangements that have the same effect.

There is another reason why I wish to qualify my concurrence. In the opinion of the court it is said that "common honesty as well as legal ethics prevent the appellants from now trying to assert that that which they believed in exercising their best judgment was a valid claim, and which the state court determined to be a valid and just claim, was of doubtful validity."

I can see no occasion for characterizing the action of the appellants in presenting the doubtful features of the county's claim as being dishonest. I can see no question of honesty involved in arguing to this court or any other court that the claim which the county had, and which it agreed to share with the attorney, was of doubtful validity. Nor can I see the force of the suggestion that an attorney, in bringing an action, is subsequently precluded from asserting what he actually believes to be the case; namely, that the claim upon which the action was founded was of somewhat uncertain legal validity. He

might have honestly so believed at the time the action was instituted, and he might have honestly so advised his client. The client would have had a perfect right to bring the action, even though the claim were somewhat doubtful. I can see nothing in these circumstances to prevent the attorney from subsequently asserting his belief in the doubtful character of the claim, so long as it is not done to his client's detriment. And it is inconceivable to me that his assertions to this effect can be regarded as dishonest.

As a matter of fact this court knows judicially that approximately two thirds of the claim was, at the time the action was brought, so gravely doubtful in character, it being based upon interest, that this court, in *Dickinson v. White*, 25 N. D. 523, 49 L.R.A. (N.S.) 362, 143 N. W. 754 (which was pending for decision at the time the action was brought by the county), upon petition for rehearing, receded from views previously expressed and held that interest, as against sureties on official bonds, could be recovered only from the date of the notice to the sureties of the breach or from the date of the demand. This was held in a companion case to that brought by Murtha on behalf of the county, having arisen out of the same defalcation. It was pending when that case was brought, and was undecided at the time the judgment was rendered in the county's action and at the time of the settlement in the Federal court.

I agree, however, with the proposition asserted in the opinion of the court that the same ethical considerations which render the contract for employment invalid also operate to prevent the contention of the appellants, based upon the doubtful character of the county's claim, from having any weight in support of the claim for fees. The contract for fees being void, for the reasons assigned, is not legally revived or reinstated by the good for-

tune of the county in having its doubtful claim fully satisfied.

Christianson, Ch. J., concurring in part and dissenting in part:

I concur in the conclusion reached by the majority members in this case, but am not prepared to concur in all that is said in the majority opinion. That opinion holds, in effect, that a contract between an attorney and client whereby the former agrees, in consideration of having a part of the money or thing recovered, to pay the costs and expense of the litigation, is champertous and void. This is directly contrary to the ruling of this court in *Woods v. Walsh*, 7 N. D. 376, 75 N. W. 767. That decision was rendered in 1898. The court therein pointed out that the legislature had defined champerty, and in so doing had singled out certain agreements which were champertous at common law and declared them to be misdemeanors; but that the legislature had not declared a contingent fee contract between attorney and client to be champertous, even though the attorney agreed to pay the costs and expenses of the litigation. No subsequent legislature has seen fit to declare such contracts to be void. The law upon the subject remains as it was. See Comp. Laws 1913, §§ 9412-9418. The declaration of the public policy of the state is primarily a matter for the lawmaking body. It is for the legislature to determine what is best for the public good and to provide for it by legislative enactments. The province of the courts is to expound the law as it is, and to enforce the public policy as therein expressed. 6 R. C. L. 109.

Nor do I concur in what is said with respect to appellant's being estopped from asserting that the claim of Stark county against the

surety company was one of doubtful validity. As a matter of fact this court knows not only that the claim was of doubtful validity, but that under the ruling of this court in *Dickinson v. White*, 25 N. D. 523, 49 L.R.A.(N.S.) 362, 143 N. W. 754, more than two thirds thereof, was without any validity whatsoever. If the litigation between the county and the surety company and the different claimants had not been determined or adjusted before that decision was handed down, there can be no question but that the county would have received not to exceed one third of the amount of money which it did. Are suits never brought except where the right of recovery is certain and undebatable? The question requires no answer. An examination of the decisions of this court, and of other courts of last resort, will disclose that in many of the cases the members of the court disagreed upon the question of liability. The very fact that a lawsuit is brought by one able and reputable attorney and defended by another equally able and reputable indicates that there is a difference of opinion and some doubt as to liability. While it is true the major portion of the claim upon which Stark county recovered did not constitute a valid claim against the surety company and the adverse claimants, this could not affect the validity of the arrangement between the county commissioners and Murtha, although it does have some bearing upon the actual good faith of the parties thereto. But if that arrangement was void, as a matter of law, from its inception, it was not validated by the fact that the adverse parties permitted Stark county to receive more than was legally coming to it.

ANNOTATION.

Validity of agreement by attorney to save client harmless from costs and expenses.

I. General rule, 184.

II. Contrary doctrine, 185.

III. Effect of statutes:

a. In general, 185.

b. New York cases, 186.

I. General rule.

A contract for a contingent fee by which an attorney agrees to save his client harmless from costs and expenses of proposed litigation is void.

United States.—Peck v. Heurich (1896) 167 U. S. 624, 42 L. ed. 302, 17 Sup. Ct. Rep. 927; Sun Life Assur. Co. v. Casanova (1919) 260 Fed. 449.

District of Columbia.—Johnson v. Van Wyck (1894) 4 App. D. C. 294, 41 L.R.A. 520; Warder v. Newburgh (1913) 40 App. D. C. 385.

Georgia.—Taylor v. Hinton (1881) 66 Ga. 743.

Illinois.—Thompson v. Reynolds (1874) 73 Ill. 12; Geer v. Frank (1899) 179 Ill. 570, 45 L.R.A. 110, 53 N. E. 965.

Iowa.—Abye v. Hanna (1877) 47 Iowa, 264, 29 Am. Rep. 484.

Kansas.—Atchison, T. & S. F. R. Co. v. Johnson (1883) 29 Kan. 218; Moreland v. Devenney (1905) 72 Kan. 471, 83 Pac. 1097.

Maine.—Low v. Hutchinson (1853) 37 Me. 196.

Massachusetts.—Belding v. Smythe (1885) 138 Mass. 530; Lancy v. Havender, 146 Mass. 615, 16 N. E. 464 (not stating whether the contract was with an attorney).

Missouri.—Million v. Ohnsorg (1881) 10 Mo. App. 432 (as stating the rule); Comstock v. Flower (1904) 109 Mo. App. 275, 84 S. W. 207 (as stating the rule); Taylor v. Perkins (1913) 171 Mo. App. 246, 157 S. W. 122, s. c. subsequent appeal in (1904) 183 Mo. App. 204, 170 S. W. 409; Mytton v. Missouri P. R. Co. (1919) — Mo. App. —, 211 S. W. 111 (as stating the rule).

North Dakota.—STARK COUNTY v. MISCHEL (reported herewith) ante, 174).

Ohio.—Key v. Vattier (1823) 1 Ohio, 182; Brown v. Ginn (1902) 66 Ohio St. 316, 64 N. E. 123; Emslie v. Ford Plate Glass Co. (1903) 25 Ohio C. C. 548 (the rule is laid down but the contract is not clear as reported).

Pennsylvania. — Maries's Appeal (1899) 189 Pa. 99, 41 Atl. 988.

Rhode Island.—Martin v. Clarke (1866) 8 R. I. 389, 5 Am. Rep. 586.

Virginia.—Roller v. Murray (1907) 107 Va. 527, 59 S. E. 421; Roller v. Murray (1911) 112 Va. 780, 38 L.R.A. (N.S.) 1202, 72 S. E. 665, Ann. Cas. 1913B, 1088.

Wisconsin. — Stearns v. Felker (1871) 28 Wis. 594; Kelly v. Kelly (1893) 86 Wis. 170, 56 N. W. 637.

Canada. — O'Connor v. Gemmill (1897) 29 Ont. Rep. 47.

A contract by an attorney to pay witness fees out of a contingent fee to be allowed him for successful services in a suit is champertous. Barngrover v. Pettigrew (1905) 128 Iowa, 533, 2 L.R.A. (N.S.) 260, 111 Am. St. Rep. 206, 104 N. W. 904.

The contract is void "where an attorney purchases the claim of his client in suit with the intent to thereafter carry on the litigation at his own expense and for his own benefit, the same as where he agrees to carry on litigation at his own expense, in whole or in part, in the name of another." Miles v. Mutual Reserve Fund Life Asso. (1901) 108 Wis. 421, 84 N. W. 159.

But "an agreement between attorney and client by which the former is to advance money for expenses, and is permitted to deduct the amount thereof from the amount recovered, is not against public policy, where it does not appear that it was agreed that the client should not be liable for the expenses in case there was no recovery." Johnson v. Great Northern R. Co. (1915) 128 Minn. 365, L.R.A. 1917B, 1140, 151 N. W. 125.

II. Contrary doctrine.

The contrary to the general rule was held in *Lytle v. State* (1857) 17 Ark. 608; *Hoffman v. Vallejo* (1873) 45 Cal. 564; *Van Gieson v. Magoon* (1910) 20 Haw. 146.

In *Clancy v. Kelly* (1918) 182 Iowa, 1207, 166 N. W. 583, the court seems disposed to hold contra to the general rule, but perhaps its view of the facts may enable it to escape such a precedent.

The two following cases, while apparently decided as not contradictory to the general rule, do not seem to be consistent with it:

In *Grace v. Floyd* (1913) 104 Miss. 613, 61 So. 694, an attorney and client having agreed that the attorney should have 50 per cent for his services, it was held that an agreement was not illegal, made after judgment for the client in the court below, that in consideration of the attorney paying the supreme court costs if the case was reversed, he was to have all the interest on the judgment rendered in the circuit court, and the statutory damages of 5 per cent if the case was affirmed.

In *Reece v. Kyle* (1892) 49 Ohio St. 475, 16 L.R.A. 923, 31 N. E. 747, it was held that a promise by an attorney to render legal services in an effort to collect a judgment, for obtaining which the attorney has not been fully paid, and to advance costs and expenses in the first instance, one half to be repaid by the client in case of failure, will form, as between attorney and client, a valid consideration to support an assignment of a judgment, the net proceeds of which are to be equally divided in case of success.

(Of course, if the attorney is already an interested party as one of the owners of the property involved, the rule does not apply; see *Gilbert-Arnold Land Co. v. O'Hare* (1896) 93 Wis. 194, 67 N. W. 38).

*III. Effect of statutes.**a. In general.*

It has been held that the general rule is no longer in force under a statute providing "that all existing laws, rules, and provisions of law re-

stricting or controlling the right of a party to agree with an attorney, solicitor, or counsel for his compensation, are repealed, and hereafter the measure of such compensation shall be left to the agreement, express or implied, of the parties." *Willey v. Crane* (1886) 63 Mich. 720, 30 N. W. 321 (see also *Willey v. Crane* (1888) 69 Mich. 17, 36 N. W. 734); *Grand Rapids & I. R. Co. v. Cheboygan Circuit Judge* (1910) 161 Mich. 181, 137 Am. St. Rep. 495, 126 N. W. 56; *Lehman v. Detroit, G. H. & M. R. Co.* (1914) 180 Mich. 362, 147 N. W. 628.

In *Rooney v. Second Ave. R. Co.* (1858) 18 N. Y. 368, the court upheld a contract between client and attorney that the latter should commence and prosecute the action to its final termination, without fee and at his own risk, and upon his final success he should receive for his services one half the recovery, and if the amount should not exceed \$600, he was also to have the taxable costs, the statute then in force declaring that all statutes establishing or regulating the costs and fees of attorneys, solicitors, etc., in civil actions, and all existing rules and provisions of law restricting or controlling the right of a party to agree with an attorney, etc., for his compensation, are repealed, and that the measure of such compensation shall be left to the agreement, express or implied, of the parties.

The courts are not agreed as to the effect of a statute leaving the compensation of the attorneys to the agreement of the parties. Some cases hold that under such a statute the attorney may agree to pay the expenses. *Johnson v. Missouri P. R. Co.* (1919) — Ark. —, 214 S. W. 17; *Smits v. Hogan* (1904) 35 Wash. 290, 77 Pac. 390, 1 Ann. Cas. 297.

Other cases hold the contrary. *Nelson v. Evans* (1900) 21 Utah, 202, 60 Pac. 557; *Re Evans* (1900) 22 Utah, 366, 53 L.R.A. 952, 83 Am. St. Rep. 794, 62 Pac. 913, reversed on rehearing on other grounds in (1913) 42 Utah, 282, 130 Pac. 217. So it has been said that it is not competent for an attorney who contracts for a contingent fee to agree to pay the advance fees and costs of

the suit thereafter to be commenced. *Croco v. Oregon Short Line R. Co.* (1898) 18 Utah, 311, 44 L.R.A. 285, 54 Pac. 985; *Kennedy v. Oregon Short Line R. Co.* (1898) 18 Utah, 325, 54 Pac. 988. But where the advances are made as a loan the contract is not improper. *Potter v. Ajax Min. Co.* (1900) 22 Utah, 278, 61 Pac. 999.

A contract by an attorney to pay expenses is not legalized by a statute declaring that the compensation of an attorney is governed by agreement "which is not restrained by law." *Taylor v. Perkins* (1913) 171 Mo. App. 246, 157 S. W. 122.

See also New York cases *infra*, b.

An agreement between attorney and client by which the attorney is to pay the costs and expenses of the suit and is to have one half of the sum recovered is contrary to the Porto Rico Civil Code of 1902, prohibiting lawyers from purchasing rights in litigation. *Jones v. Pettingill* (1917) 157 C. C. A. 461, 245 Fed. 269, writ of certiorari denied in (1917) 245 U. S. 663, 62 L. ed. 536, 38 Sup. Ct. Rep. 61; *Sun Life Assur. Co. v. Casanova* (1919) 260 Fed. 449.

"The promise of an attorney at law to defray all the expenses incident to the collection of his client's claim for damages, if not a literal promise to pay him money, is, at least, a promise to give or grant a valuable thing to his client," within a statute which made it a misdemeanor for an attorney at law, in seeking or obtaining employment, to "promise to give, loan or otherwise grant money or other valuable thing to the person from whom such employment is sought before such employment in order to induce such employment." *Ft. Worth & D. C. R. Co. v. Carlock* (1903) 33 Tex. Civ. App. 202, 75 S. W. 931 (where it was further held that whether such promise induced the employment was an issue for the jury).

See also New York cases *infra*, b.

b. New York cases.

Under the earlier statutes it was held in *Fogerty v. Jordan* (1864) 2 Robt. 319, where a client having no money to carry on a suit agreed with

an attorney to give him two thirds of the proceeds, he to furnish all lawyers, expenses, and everything else, that such an agreement was not a violation of the New York statutes.

See also *Rooney v. Second Ave. R. Co.* (1858) 18 N. Y. 368, *supra*, III. a.

But in *Brotherson v. Consalus* (1863) 26 How. Pr. 213, the court expressed the opinion "that a contract between an attorney and his client, that he will carry on a suit at his own expense, and indemnify the client against costs, is still subject to the just denunciation of the law."

In *Coughlin v. New York C. R. Co.* (1877) 71 N. Y. 443, 27 Am. Rep. 75, it was held that an agreement by an attorney to find all the money necessary to carry on a case was a violation of the statute providing that "no attorney, . . . either before or after suit brought, shall lend or advance, or agree to lend or advance, or procure to be lent or advanced, any money . . . to any person as an inducement to the placing, or in consideration of having placed, in the hands of such attorney, counselor or solicitor, or in the hands of any other person, any debt, demand, or thing in action for collection."

So, an agreement to advance all money necessary to carry on the suit. *Re Clark* (1906) 184 N. Y. 222, 77 N. E. 1.

An agreement is against the New York statute which provides for a contingent fee upon a recovery, the attorney to advance all the court costs. *Taylor v. Enthoven* (1904) 88 N. Y. Supp. 138.

It is illegal for an attorney in an agreement for a contingent fee to agree to "pay all court fees, fees of witnesses, and necessary disbursements to judgment." *Re Speranza* (1906) 186 N. Y. 280, 78 N. E. 1070.

In *Stedwell v. Hartmann* (1902) 74 App. Div. 126, 77 N. Y. Supp. 498, affirmed on opinion below in (1903) 173 N. Y. 624, 66 N. E. 1117, it was held that the New York statute was violated by a contract by which an attorney, in consideration of having a claim placed in his hands for suit, gives the valuable consideration as an

inducement that the attorney will himself pay all the expenses, or, in other words, that he himself will maintain the suit; the court following *Coughlin v. New York C. R. Co.* supra.

The same was held in *McCoy v. Gas Engine & Power Co.* (1912) 152 App. Div. 642, 137 N. Y. Supp. 591, affirmed in (1913) 208 N. Y. 631, 102 N. E. 1106, and in *Re Newell* (1916) 174 App. Div. 94, 160 N. Y. Supp. 275.

The *Stedwell* Case was also followed in *Begly v. Weddigen* (1903) 86 App. Div. 629, 83 N. Y. Supp. 805, affirmed in (1904) 179 N. Y. 542, 71 N. E. 1128.

The foregoing cases would seem clear and definite, but it must be admitted that there are some cases which do not make for the distinctness of the New York law on the subject.

In *Fowler v. Callan* (1886) 102 N. Y. 395, 7 N. E. 169, it was held that a contract was valid under the New York statute where a client, entitled as devisee to certain real estate, the validity of the will being threatened, sought out an attorney and gave him a deed of the one undivided half part of the property, taking back his covenant to conduct the defense to its close, paying all costs and expenses of the litigation, and indemnifying the devisee against all such liability. The theory of the decision seems to be that inasmuch as the attorney was "sought out" by the client, that the agreement of the attorney was not made as an

"inducement" to placing the matter in his hands.

Fowler v. Callan, supra, seems to have been followed, at least in opinion, in *Chester v. Jumel* (1889) 2 Silv. Sup. Ct. 159, 5 N. Y. Supp. 809, reversed on other grounds in (1891) 125 N. Y. 237, 26 N. E. 297; it was also followed in *Ransom v. Cutting* (1907) 188 N. Y. 447, 81 N. E. 324, holding that an agreement for a contingent fee, with a provision that the attorney would not call upon the client "for any sum or sums of money to pay the necessary disbursements required in the said proceedings" to be taken by the attorney, is not a violation of the statute providing that "an attorney or counselor shall not, by himself, or by or in the name of another person, either before or after action brought, promise to give, or procure to be promised or given, a valuable consideration to any person, as an inducement to placing, or in consideration of having placed, in his hands, or in the hands of another person, a demand of any kind, for the purpose of bringing an action thereon."

It should be noted, in considering the New York cases, that since the Code of Civil Procedure the modern New York statutes have contained a provision that "the compensation of an attorney or counselor for his services is governed by agreement, express or implied, which is not restrained by law." Code Civ. Proc. § 66; Judiciary Law, § 474. B. B. B.

ELMER LAPE, Plff. in Err.,

v.

VIRGINIA LAPE.

Ohio Supreme Court — December 31, 1913.

(— Ohio St. —, 124 N. E. 51.)

Divorce — alimony — personal earnings.

1. Where a decree for divorce is granted to a wife on account of the aggression of her husband, an allowance of alimony may be based on future personal earnings or wages of the husband. In such a case the court is

Headnotes 1 and 2 by the COURT.

not necessarily limited to a consideration of property in possession of the husband at time of decree.

[See note on this question beginning on page 192.]

— how paid.

2. Such decree for alimony may provide that it be made in weekly payments of specified sums.

[See 1 R. C. L. 926.]

Husband and wife — alimony — how created.

3. Permanent alimony is purely a creature of statutory creation.

[See 1 R. C. L. 921.]

— woman as ward of court.

4. A good wife who has faithfully kept the marriage vows, but who has been denied the support of her husband,

should in a sense be the ward of the court.

Divorce — alimony — statutory provision.

5. A statutory provision that the court shall allow such alimony out of the husband's property as it deems reasonable, having due regard to property which came to him by marriage and the value of his real and personal estate, does not limit the court to property owned by the husband at the time of the divorce in allowing alimony.

[See 1 R. C. L. 930.]

ERROR to the Court of Appeals for Hamilton County to review a judgment reversing a judgment of the Court of Insolvency in favor of defendant in a proceeding for a divorce. Affirmed.

The facts are stated in the opinion of the court.

Mr. Owen N. Kinney for plaintiff in error.

Messrs. Bolsinger, Kuhn, & Bolsinger for defendant in error.

Messrs. Alfred G. Allen and Lorbach & Garver, amici curiæ:

In allowing alimony, the court is controlled by statute.

De Witt v. De Witt, 67 Ohio St. 340, 66 N. E. 136; Marleau v. Marleau, 95 Ohio St. 162, 115 N. E. 1009; 1 R. C. L. p. 877; Baker v. Baker, 18 Ohio C. C. N. S. 302.

If the husband has no property, no allowance for alimony can be made.

Feigley v. Feigley, 7 Md. 537, 61 Am. Dec. 375.

The word "property" as used in the statute does not cover the wages that a person may earn in the future.

Re Home Discount Co. 147 Fed. 538; State v. Wheeler, 141 N. C. 776, 5 L.R.A.(N.S.) 1139, 115 Am. St. Rep. 700, 53 S. E. 358; Jackson v. Burns, 116 La. 695, 41 So. 40.

Mr. David Davis, amicus curiæ:

Wages and future earnings should be taken into consideration in decreeing alimony.

Fickel v. Granger, 83 Ohio St. 101, 32 L.R.A.(N.S.) 270, 93 N. E. 527, 21 Ann. Cas. 1347; Cox v. Cox, 20 Ohio St. 441; Davis v. Davis, 12 Ohio C. C. N. S. 31; 2 Bishop, Marr. & Div. 6th ed. § 446; Eidenmuller v. Eidenmuller, 37 Cal. 364; Peyre v. Peyre, 79 Cal. 336, 21 Pac. 838; Ex parte Spencer, 83 Cal. 460, 17 Am. St. Rep. 266, 23 Pac.

395; Hedrick v. Hedrick, 128 Ind. 522, 26 N. E. 768; Elzas v. Elzas, 171 Ill. 633, 49 N. E. 717; Stewart v. Stewart, 51 App. Div. 629, 65 N. Y. Supp. 927; Warren v. Warren, 89 Mich. 127, 14 L.R.A. 545, 50 N. W. 842; Jaynes v. Jaynes, 39 Hun, 40.

Nichols, Ch. J., delivered the opinion of the court:

The court of appeals of Hamilton county held in the first proposition of the syllabus of the case at bar as follows: "An allowance of alimony to a wife cannot be based on future personal earnings or wages of the husband, and, where the allowance is made in connection with a decree for divorce to the wife on account of the aggression of the husband, it must be based on property owned by him at the time the decree is granted."

This conception of the law of alimony is somewhat startling—and if such construction of the Alimony Statute is the necessary one, it would follow that erroneous judgments to the number of tens of thousands have been rendered and enforced in this state.

Let us give a concrete illustration of the effect of this proposition of law—the divorced wife of a man of property is to be awarded support; but the divorced wife of a man

without property in possession, but earning, say, \$100 a week, is to go hence without relief.

It would follow that the fortunate wife so divorced (fortunate in a financial sense only) could fasten upon her former husband, if he had accumulated but a pittance of property, an obligation to support her during his lifetime, in the form of weekly payments in specified sums, unless changed circumstances of either of the parties might intervene, although the sum total of these payments might in the passing years exceed many times the whole value of the husband's estate at the time of the decree.

On the other hand, the doubly unfortunate wife of the husband in fault, without property at the time of the decree, could not receive alimony either in gross or in divisional payments, although the husband was capable of earning, and in fact receiving, a handsome salary or wages.

Thus, this state of the law would operate to favor the derelict propertyless husband by making a virtue of his very shortcomings, perchance in respect to the very causes that gave ground for divorce; for all too frequently the fact that the party in fault is without property is clearly associated with conduct that directly led up to the necessity of separation.

The seriousness and obvious injustice of such a situation is at once apparent, especially when we contemplate the very great number of worthy women who would thereby be deprived of a remedy which the law supposedly holds out to them.

Permanent alimony, it is true, is purely a creature of statutory creation, but it has been defined as late

as 83 Ohio St. at
page 101, 32 L.R.A.
(N.S.) 270, 93 N. E.
527, 21 Ann. Cas. 1347, in the case
of Fickel v. Granger, as being "an
award by the court upon considera-
tions of equity and public policy and
... founded upon the obligation,
which grows out of the marriage re-

lation, that the husband must support his wife, which obligation continues after legal separation without her fault."

It is a known fact that the divorce courts, while all too frequently resorted to by folks of property, are mostly occupied in solving the domestic difficulties of those not blessed with the possession of this world's goods, and it certainly is to be granted that a good woman who ^{—woman as ward of court.} has faithfully kept the marriage vows, but who has been denied the support of her husband, should in a sense be the ward of the court.

It would be difficult, it seems to us, to defend the equity of the situation or to commend as really enlightened a public policy which would decree that the erring husband with property should be made to fulfil this obligation, at once moral as well as legal, while another, just as much sinning against the law of both God and man, who made good wages or salary, as the case might be, but who squandered instead of saved, should be released.

There is no question of the effect of the decision of the court of appeals. It holds squarely that the court is absolutely without power to render any judgment for alimony whatever, unless the aggrieved wife can show that her husband is the owner of property.

Reasonable men must agree that such a distinction is manifestly opposed to a public policy of enlightenment, and does violence to every principle of equity and fairness.

The question remains: Is such an unfortunate construction of the statute imperative? It must be granted that if any other construction of the Alimony Statute is possible, it should be adopted.

So much of § 11,990, General Code, as is to be construed is: "The court shall . . . allow such alimony out of her husband's property as it deems reasonable, having due regard to property which came to him by marriage and the value of

his real and personal estate at the time of the divorce."

The contention of those who hold that no alimony can be allowed unless there is property in possession is that paramount importance should be given to the phrase, "out of her husband's property," going so far as to hold that this is the exclusive source from which alimony can be awarded.

A second contention, very likely correct, is that future earnings, such as salary and wages, are not property within the strict, technical, legal definition of the term.

We are not of the opinion that the phrase, "out of her husband's property," is entitled to receive such controlling force. Were it entirely withdrawn from the statute, it would in no wise limit or weaken the force of the law or power of the court.

It was of far greater importance to provide that alimony should be allowed than to provide the method, manner, or source of payment. It is essentially directory in its nature, and its inclusion in the section is to be explained more especially by that which follows, where the expression, "having due regard," is employed.

"Having due regard" is clearly a directory clause, and not of mandatory or all-controlling influence. "Having due regard" does not mean that other facts, circumstances, or conditions cannot be entertained. Quite the contrary. It is a direction simply to the effect that the court in fixing the alimony must not overlook or fail to take into account the property which the wife may have brought into the common fund, nor must the court fail to consider the value of the real and personal estate of the husband at the time of the decree. Manifestly, these are proper considerations, and should have "due weight," but certainly it is not to be held that exclusive consideration should be given to them.

For instance, a man with \$5,000

in property, with an earning capacity of \$20 a week, would on the face of things be much less able to pay substantial weekly instalments of alimony than one of no property, but who at the time of the decree is making \$100 a week.

Kent, in vol. 1 of his *Commentaries on American Law*, 13th ed. *461, says: "In the exposition of statutes, . . . the intention of the lawgiver . . . will always prevail over the literal sense of terms, . . . and the reason and intention of the lawgiver will control the strict letter of the law. . . . The intention is to be taken or presumed, according to what is consonant to reason and good discretion."

This rule of construction would certainly commend itself as a model of good sense and inherent justice, and guided by such rule we are quite unwilling to impute to the general assembly an intention, in cases where parties are in equal fault, to hold the one to the sacred obligation of the law and permit the other to escape; for the illogical reason that the one has some property and the other none, although having something of far greater value, the ability to earn a good salary or wages.

Measuring the statute under consideration by the yardstick of what is "consonant to reason and good discretion," we are of the opinion that it was the intention of the general assembly, when it granted to the courts the power to "allow such alimony," not necessarily to preclude the court from giving consideration to the ability of the husband to earn money.

Judge Thurman, in the case of *Tracy v. Card*, 2 Ohio St. 431, says at page 441: "On the one hand, the judiciary should be careful not to make its office of expounding statutes a cloak for the exercise of legislative power; on the other hand, it is equally bound not to stick in the mere letter of the law, but rather to seek for its reason and

Divorce—
alimony—
statutory
provision.

—alimony—
personal
earnings.

spirit in the mischief that required a remedy, and the general scope of the legislation designed to effect it."

Judge Thurman, in the same case, quotes Lord Coke as follows: "The equity of a statute . . . is a construction made by the judges that cases out of the letter of a statute, yet being within the same mischief or cause of the making of the same, shall be within the same remedy that the statute provideth."

It is also said in the Tracy Case that "the words of a remedial statute are to be construed largely and beneficially, so as to suppress the mischief and advance the remedy. It is by no means unusual, in construing remedial statutes, to extend the enacting words beyond their natural import and effect, in order to include cases within the same mischiefs" (quoting Dwarrris, Stat. 734, 735).

When the statute providing for the award of alimony was enacted, the mischief that required a remedy was the want of a law compelling a husband from whom a wife was divorced to provide permanent support. The mischief in the case of a wife of a husband without property in possession was just as manifest as in the case of the husband with property, and we cannot lead ourselves to believe that it was the intention of the general assembly to classify women so as to make certain a remedy in one aspect of the case and deny it in the other.

The award of the alimony is one thing, its recovery on execution by the wife is another, and must be left to take care of itself, with such assistance as the law of execution provides.

We are altogether in agreement with the court of appeals in its

holding, to be found in the third proposition of the syllabus of the case at bar, that § 11,991, General Code, authorizes a decree of alimony in weekly payments of specified sums.

The language of this section, that the alimony as allowed may be made "payable either in gross or instalments, as the court deems —how paid. equitable," clearly grants the power of providing weekly or monthly payments of specified sums.

The fact that this section, which at the time of the passage of the Alimony Act was a part of old § 5699, Revised Statutes of Ohio, and separated from it by the codifying commission, provides for the payment of alimony in instalments, furnishes an added reason for the holding we have made that the ability to earn wages or salary, generally payable in instalments, is an element properly to be considered by the court in fixing alimony.

The court of appeals reversed the judgment of the court of insolvency, notwithstanding its view of the law of the case, for the reason that the record of the case did not affirmatively show that the husband at the time of the original decree was without property.

Our judgment, therefore, while founded on an entirely different conception of the law, will be one of affirmance of the Court of Appeals, and the case will be remanded to the Court of Insolvency of Hamilton county, with directions to proceed in accordance with this finding.

Judgment affirmed, and cause remanded.

Wanamaker, Newman, Jones, Matthias, Johnson, and Donahue. JJ., concur.

ANNOTATION.

Earning capacity or prospective earnings of husband as basis of alimony.

I. Alimony pendente lite:

- a. Husband possessed of other means, 192.
- b. Earning capacity as only asset of husband, 193.

1. *Alimony pendente lite.*

a. *Husband possessed of other means.*

Though it appears, on an application for alimony pendente lite, that the husband is possessed of other means, his earning capacity or future earnings may be considered therewith in determining the amount of alimony to be awarded. *Ex parte Whitehead* (1913) 179 Ala. 652, 60 So. 924; *Jones v. Jones* (1903) 111 Ill. App. 396; *Mulhall v. Mulhall* (1913) 120 Md. 22, 87 Atl. 490; *Kelly v. Kelly* (1918) 179 Ky. 586, 200 S. W. 925; *Kirby v. Kirby* (1828) 1 Paige (N. Y.) 261; *Lawrence v. Lawrence* (1832) 3 Paige (N. Y.) 267.

In *Ex parte Whitehead* (Ala.) *supra*, the petitioner prayed for the vacation of a decree awarding his wife \$60 a month as alimony pendente lite, contending that the court had no authority to consider his earning capacity in fixing the amount of alimony, and that the amount was out of proportion to his income from invested capital. The court, denying the application, held that it was proper to consider the capacity of the petitioner for earning money, saying: "He is young and vigorous and has been actively engaged in business, earning on an average, as we roughly estimate, from \$150 to \$175 a month, probably a good deal more. The wife has no other source of income whatever, and is dependent upon the provision the court may make for her. Petitioner's idea that the court ought not to consider his personal earning capacity apparently concedes that if it might be properly taken into account the allowance is not excessive. That is not our opinion as to the law of the case. The allowance may be based upon the husband's earnings or his ability to

II. Permanent alimony:

- a. Husband possessed of other means, 195.
- b. Earning capacity as only asset of husband, 202.
- c. Rule in Tennessee, 207.

earn money in connection with all the circumstances of the case. . . . It is not at all difficult to see the inequity of the rule which would exclude personal capacity from consideration."

In *Jones v. Jones* (1903) 111 Ill. App. 396, the court held that an uncontroverted averment that the husband had property of the value of \$1,000, and was earning the sum of \$30 a month, constituted a sufficient showing on which to base an allowance of \$3 per week as temporary alimony, in addition to counsel fees. It was said that the amount of the alimony was within the sound discretion of the chancellor, he having been advised as to the husband's means and earning capacity.

In *Mulhall v. Mulhall* (1913) 120 Md. 22, 87 Atl. 490, it was said that in cases warranting alimony pendente lite, the court in making the allowance should have due regard, among other things, to the financial condition and earning ability of the husband.

In *Kelly v. Kelly* (1918) 179 Ky. 586, 200 S. W. 925, it was held to be proper to take into consideration the earning capacity of the husband, as well as the size of his estate and his income, in fixing the amount of alimony pendente lite.

In the early case of *Kirby v. Kirby* (1828) 1 Paige (N. Y.) 261, the chancellor said that in determining the amount of alimony pendente lite the court would take into consideration the daily earnings of the husband as well as his property.

And this rule was restated by the chancellor in *Lawrence v. Lawrence* (N. Y.) *supra*, to the effect that the capacity of the husband to provide support by his own exertions would be considered in determining the amount of alimony to be awarded.

b. Earning capacity as only asset of husband.

Where the husband has no estate or other means, the court, in determining the amount of alimony to be awarded pendente lite, will consider his earning capacity or prospective earnings as the basis in making an award.

California.—*Peyre v. Peyre* (1889) 79 Cal. 336, 21 Pac. 838; *Meyer v. Meyer* (1898) 5 Cal. Unrep. 944, 52 Pac. 485.

District of Columbia.—*Sparks v. Sparks* (1905) 25 App. D. C. 356.

Georgia.—*Vinson v. Vinson* (1894) 94 Ga. 492, 19 S. E. 898; *Culpepper v. Culpepper* (1895) 98 Ga. 804, 25 S. E. 443; *Ayers v. Ayers* (1896) 99 Ga. 325, 25 S. E. 674.

Kentucky.—*Pearce v. Pearce* (1889) 11 Ky. L. Rep. 485.

Montana.—*Finkelstein v. Finkelstein* (1893) 14 Mont. 1, 34 Pac. 1090.

New York.—*Mix v. Mix* (1814) 1 Johns. Ch. 108; *Weigand v. Weigand* (1905) 103 App. Div. 42, 92 N. Y. Supp. 679.

North Carolina.—*Muse v. Muse* (1881) 84 N. C. 85.

Pennsylvania.—*Ames v. Ames* (1898) 7 Pa. Super. Ct. 456.

South Carolina.—*Messervy v. Messervy* (1903) 80 S. C. 277, 61 S. E. 442.

England.—*Hawkes v. Hawkes* (1828) 1 Hagg. Eccl. Rep. 526.

Canada.—*McNair v. McNair* (1913) 24 Ont. Week. Rep. 390, 10 D. L. R. 829.

An order in a suit for maintenance and support allowing a wife alimony pendente lite in the amount of \$25 a month, together with reasonable counsel fees, has been held not to be an abuse of discretion by the trial court, where it appeared that the husband was in receipt of a salary of \$1,400 per year. *Sparks v. Sparks* (D. C.) *supra*.

In *Peyre v. Peyre* (Cal.) *supra*, the court stated that it was not necessary that the husband have money or property before a decree awarding temporary alimony could be entered, adding that "the allowance may be based upon his earnings or his ability to earn money."

In *Meyer v. Meyer* (Cal.) *supra*, the 6 A.L.R.—13.

court reduced an award of alimony pendente lite from \$125 per month to \$50 per month, because it appeared that the husband's earnings above the latter amount were required by him in his support and in payment of his debts, he being without other means.

And where it appeared that the husband's earnings were very small, and barely sufficient to support himself, the court held that it was error to allow his wife temporary alimony in the amount of \$8 per month. *Vinson v. Vinson* (Ga.) *supra*.

Where a husband did not own any property and he was unable to earn more than his board and clothing, the court held that an award of \$350 for temporary alimony, together with counsel fees, and a further allowance of \$25 per month as future alimony, was an abuse of the discretion vested in the court below. In arriving at this conclusion the court said that since the husband was a man without profession, trade, or business, and his earning capacity was so limited, it would be impossible for him to pay such amount, and a further discussion of the matter would be useless. It seems that in the absence of other means the award must be in reasonable proportion to the earning capacity of the husband. *Culpepper v. Culpepper* (1895) 98 Ga. 804, 25 S. E. 443.

In *Ayers v. Ayers* (Ga.) *supra*, it appeared, on an application for temporary alimony, that the husband was a chronic invalid, without means and unable to perform physical labor, who held a situation in a hotel at nominal wages more as a matter of charity than because of any physical ability to labor. The court held that it was an abuse of discretion to make an award of \$105 in cash, together with \$30 per month pending the determination of the action.

Where, in an action for divorce and alimony, it appeared that the defendant earned a salary of \$150 per month, the court said that an award of temporary alimony in the sum of \$20 per month was a small allowance. *Pearce v. Pearce* (Ky.) *supra*.

In *Finkelstein v. Finkelstein* (Mont.) *supra*, it was held that the fact that

the defendant was conducting a large tailoring business was a fair showing of his ability to earn, even though the business belonged to another, and that the showing was sufficient to warrant an allowance of alimony pendente lite in the amount of \$30 per month.

In the early case of *Mix v. Mix* (N. Y.) *supra*, in which the plaintiff wife, having instituted a proceeding for divorce, petitioned for an allowance pendente lite, and it appeared that the husband possessed no means other than his salary of \$70 per month as an officer in the Navy, the court, in consideration of his earnings, directed an allowance of \$30 per month until further order.

In *Weigand v. Weigand* (1905) 103 App. Div. 42, 92 N. Y. Supp. 679, the plaintiff in an action for separation presented some evidence tending to show that the defendant earned upward of \$50 a week, but this the defendant denied, conceding, however, that he did earn \$20 a week. It was held that in view of the unsatisfactory evidence presented by the plaintiff the court could not base an award of alimony pendente lite on her estimate of the defendant's earnings, but must consider the lesser amount. On this basis the court held that an award of \$12 a week would be proper for the support of the wife and children during the pendency of the action.

In *Muse v. Muse* (1881) 84 N. C. 35, on the hearing of a motion for divorce, the plaintiff denied that he had any property, but admitted that he was an able-bodied man. The court made an allowance of \$3 per month as alimony pendente lite. On appeal, the plaintiff complained of this award, but the court said: "If his Honor had fixed the wife's allowance at such a sum as to leave any doubt as to the ability of the plaintiff fairly to earn the amount, and at the same time provide for his own necessities, it could be seen that some good could come of an inquiry into his ability to work and the probable amount of his earnings. But as the court adopted the very minimum that 'an able-bodied man' can earn,—10 cents a day,—there can be no error

of which the plaintiff can complain, however his wife might."

In *Ames v. Ames* (1898) 7 Pa. Super. Ct. 456, the appellant petitioned for an award of alimony pendente lite and counsel fees. The respondent claimed that he was unable to earn sufficient money to pay alimony, having returned from an asylum only a few months previous to this application. It appeared that he was employed in a responsible position in his father's bank, but he alleged that the employment was merely to occupy and divert him, and no more than nominal. The court argued that since the respondent was in the bank, and in its apparent control as cashier or manager, the inference was that he possessed sufficient mental and business capacity, and added: "If he can act as cashier, he can earn the salary of a cashier; the fact that it is not given him is not controlling. A man cannot give away his services or his earning power and deprive those who are entitled to it." And, estimating his earning ability as not less than \$60 per month, the court made an allowance of \$30 per month as alimony pendente lite, stating that this would leave at least half of the respondent's earnings, or ability to earn, untouched.

In *Messervy v. Messervy* (1908) 80 S. C. 277, 61 S. E. 442, it was said: "Temporary alimony may be granted when the defendant is without estate or certain income, but is able, by the use of his faculties, to provide reasonable maintenance for his wife. The absence of an estate or fixed income cannot absolve the husband from his personal duty to exert himself to support his wife."

In *Hawkes v. Hawkes* (1828) 1 Hagg. Eccl. Rep. (Eng.) 526, the court, on an application in a divorce proceeding for alimony pendente lite, based an award of £250 per annum on the husband's earnings of £1,700 a year as an army officer. But in so doing the court remarked that where the husband's income arose out of pay the proportion allowed for alimony would be smaller than in a case where his income proceeded from substantial property.

In *McNair v. McNair* (1913) 24 Ont.

Week. Rep. 390, 10 D. L. R. 829, on a motion for interim alimony it appeared that the defendant husband was entirely without means, and he alleged that he was unable to obtain employment. The court held that "it would be useless to make an order against a man who has no property on which it could operate, and where there is no evidence as to his earning power."

II. Permanent alimony.

a. Husband possessed of other means.

Though on an application for alimony it appears that the husband is possessed of property or other resources, his personal earnings are an element to be considered together with such other means in the determination of the amount of alimony to be awarded.

Alabama.—Folda v. Folda (1911) 174 Ala. 286, 56 So. 533; Black v. Black (1917) — Ala. —, 74 So. 338.

California.—Eidenmuller v. Eidenmuller (1869) 37 Cal. 364; Ex parte Spencer (1890) 83 Cal. 460, 17 Am. St. Rep. 266, 23 Pac. 395.

Colorado.—Fahey v. Fahey (1908) 43 Colo. 354, 18 L.R.A. (N.S.) 1147, 127 Am. St. Rep. 118, 96 Pac. 251.

Indiana.—Stutsman v. Stutsman (1903) 30 Ind. App. 645, 66 N. E. 908; Hedrick v. Hedrick (1891) 128 Ind. 522, 26 N. E. 768; Gussman v. Gussman (1894) 140 Ind. 433, 39 N. E. 918; Driver v. Driver (1898) — Ind. —, 52 N. E. 401; Van Atta v. Van Atta (1919) — Ind. —, 121 N. E. 825.

Iowa.—Ensler v. Ensler (1887) 72 Iowa, 159, 33 N. W. 384; Evans v. Evans (1913) 159 Iowa, 338, 140 N. W. 801.

Kentucky.—Bristow v. Bristow (1899) 21 Ky. L. Rep. 481, 51 S. W. 819; Snedager v. Kincaid (1901) 22 Ky. L. Rep. 1347, 60 S. W. 522; Thompson v. Thompson (1905) 27 Ky. L. Rep. 516, 85 S. W. 730; Irwin v. Irwin (1899) 105 Ky. 632, 49 S. W. 432; Muir v. Muir (1906) 133 Ky. 125, 4 L.R.A. (N.S.) 909, 92 S. W. 314; Sebastian v. Rose (1909) 135 Ky. 197, 122 S. W. 120; Carter v. Carter (1910) 140 Ky. 228, 130 S. W. 1102; Duvall v. Duvall (1912) 147 Ky. 426, 144 S. W. 78; Anderson v. Anderson (1913) 152 Ky. 773,

154 S. W. 1; Green v. Green (1913) 152 Ky. 486, 153 S. W. 775; Shehan v. Shehan (1913) 152 Ky. 191, 153 S. W. 243; Ramsey v. Ramsey (1915) 162 Ky. 741, 172 S. W. 1082.

Louisiana.—Gagneaux v. Desonier (1899) 51 La. Ann. 1095, 25 So. 946; Ghisaiberti v. Calamari (1917) 143 La. 507, 78 So. 751.

Michigan.—Donaldson v. Donaldson (1903) 134 Mich. 289, 96 N. W. 448; Abbott v. Abbott (1918) — Mich. —, 168 N. W. 950; Skinner v. Skinner (1919) — Mich. —, 171 N. W. 383.

Minnesota.—Warren v. Warren (1911) 114 Minn. 389, 131 N. W. 379.

Mississippi.—Verner v. Verner (1886) 64 Miss. 184, 1 So. 52.

Missouri.—Wright v. Wright (1915) 192 Mo. App. 633, 179 S. W. 950.

Nebraska.—Hays v. Hays (1906) 75 Neb. 728, 106 N. W. 773; Anderson v. Anderson (1911) 89 Neb. 570, 131 N. W. 907, Ann. Cas. 1912C, 1.

New York.—Forrest v. Forrest (1861) 8 Bosw. 640; Stewart v. Stewart (1900) 51 App. Div. 629, 65 N. Y. Supp. 927; Curtin v. Curtin (1906) 111 App. Div. 447, 97 N. Y. Supp. 771.

South Dakota.—Tuttle v. Tuttle (1910) 26 S. D. 545, 128 N. W. 695.

Utah.—Read v. Read (1904) 28 Utah, 297, 78 Pac. 675.

Virginia.—Bailey v. Bailey (1871) 21 Gratt. 43; Cralle v. Cralle (1887) 84 Va. 198, 6 S. E. 12.

Washington.—Hendrix v. Hendrix (1918) 101 Wash. 535, 172 Pac. 819.

West Virginia.—Reynolds v. Reynolds (1910) 68 W. Va. 15, 69 S. E. 381, Ann. Cas. 1912A, 889; Reynolds v. Reynolds (1913) 72 W. Va. 349, 78 S. E. 360; Deussenberry v. Deussenberry (1918) 82 W. Va. 135, 95 S. E. 819.

Wisconsin.—Pauly v. Pauly (1887) 69 Wis. 419, 34 N. W. 512; Hooper v. Hooper (1899) 102 Wis. 598, 44 L.R.A. 725, 78 N. W. 753; Minahan v. Minahan (1911) 145 Wis. 514, 130 N. W. 476; McCaughey v. McCaughey (1915) 160 Wis. 287, 151 N. W. 812.

Canada.—Dupuis v. St. Mars (1903) 5 Quebec Pr. Rep. 404.

And see the reported case (*LAPE v. LAPE*, ante, 187).

In *Bailey v. Bailey* (Va.) supra, the court, affirming an allowance of al-

imony based in part on the husband's earnings, stated the principle on which the amount of alimony should be fixed, as follows: "While alimony is commonly defined 'a proportion of the husband's estate,' yet the duty of a husband to maintain his wife does not depend alone upon his having visible tangible property. While the parties are living together, they are bound to contribute by their several personal exertions to a common fund, which in law is the husband's, but from which the wife may claim support. If she is compelled to seek a divorce on account of his misconduct, she loses none of her rights in this respect, only she is to draw her maintenance in a different way, that is, under a decree for alimony, based, if he has no property, upon his earnings or ability to earn money."

In *Tuttle v. Tuttle* (S. D.) *supra*, the court said: "In arriving at what is a just and equitable amount of permanent alimony that should be allowed the wife on separation by divorce for the fault of the husband, various matters should be taken into consideration. The value of his property, both real and personal, and his capacity to earn money, may and should be considered."

In *Green v. Green* (1913) 152 Ky. 486, 153 S. W. 775, the court stated that, "in fixing the amount of alimony, the husband's present and future prospects, as well as his ability to earn money, should be taken into account."

In *Evans v. Evans* (1913) 159 Iowa, 338, 140 N. W. 801, the court took into consideration the earning capacity of the defendant as well as the value of his property, holding that alimony must be measured by the financial resources of both parties.

In *Van Natta v. Van Natta* (1919) — Ind. —, 121 N. E. 825, it was held that the trial court "had a right to consider the age of appellant, his state of health, and his ability to earn money," as well as the value of his property, as bearing on his ability to pay alimony.

In *Hedrick v. Hedrick* (1891) 128 Ind. 522, 26 N. E. 768, the court stated the rule applicable to the computation

of alimony as follows: "The statute (Rev. Stat. 1881, § 1045) provides that 'the court shall make such a decree for alimony, in all cases contemplated by this act, as the circumstances of the case shall render just and proper,' etc. For the purpose of determining the amount of alimony to be given in a particular case, the court has the right to inquire into the circumstances of the parties and ascertain the amount of property owned by the husband at the time, the source from whence it came, the ability of the husband to pay by reason of his financial circumstances, his income, and his ability to earn money, as well as his inability to earn money, on account of ill health, and upon a full investigation it is the duty of the court to make such an allowance for alimony as is just and proper."

In *Ex parte Spencer* (1890) 83 Cal. 460, 17 Am. St. Rep. 266, 23 Pac. 395, the court refused an application for discharge from imprisonment on a charge of contempt of court for refusing to pay alimony as adjudged. Maintaining the right to compel payment of monthly sums out of his future earnings, the court said: "It is the duty of the court at the time of dissolving the marriage, to make proper division of the community property . . . and, as we understand the law, it may . . . in its discretion compel the husband, in addition, to make what it deems suitable allowance for the future support of the wife during life, or for a shorter period, having reference to their circumstances, etc. . . . In fixing this compensation or allowance, the court may regard the earnings of the husband, or his ability to earn money."

In *Carter v. Carter* (1910) 140 Ky. 228, 130 S. W. 1102, the court reversed a judgment dismissing a wife's petition for divorce, and remanded the cause with the direction that on the evidence a divorce should be granted and an allowance of alimony made, based on what the husband had and his earning capacity, in addition to the fact that he had a child to support.

In the reported case (*LAPE v. LAPE*, ante, 187), it is held that a statute

providing for the allowance of alimony to a wife "out of her husband's estate" does not preclude the court from giving consideration to the earning capacity of the husband, and that such element may properly be considered in fixing alimony.

In the consideration of a bill for alimony in *Folda v. Folda* (1911) 174 Ala. 286, 56 So. 533, it appeared that the husband had no means other than an interest in unproductive lands worth about \$200, but that he was earning \$75 per month in his employment. The wife had an income of \$100 per year from her own property. The court held that, since the husband's sole income was his personal earnings of \$75 per month, an award of \$30 per month as alimony would be equitable under the circumstances.

In a case wherein it appeared that the husband owned property worth from \$1,500 to \$3,700, the court held that, since his annual earnings from his activities in farming, merchandising, and in the practice of medicine were between \$500 and \$1,000, an award of \$200 a year alimony, in consideration of these circumstances, was not excessive. *Black v. Black* (1917) — Ala. —, 74 So. 338.

In *Eidenmuller v. Eidenmuller* (1869) 37 Cal. 364, the court reduced an award of alimony from \$75 to \$50 per month, stating that in its opinion a monthly allowance of \$75 was too large a portion of the husband's earnings, which amounted to about \$150 per month. The court said: "There is no doubt that the court, in granting a divorce, has authority to direct the defendant to pay the plaintiff alimony, and the allowance may be based upon his earnings or his ability to earn money."

In *Fahey v. Fahey* (1908) 43 Colo. 354, 127 Am. St. Rep. 118, 18 L.R.A. (N.S.) 1147, 96 Pac. 251, wherein the wife of the defendant was allowed \$30 per month as alimony in a suit for separate maintenance, and the defendant showed that his property only amounted to \$1,200, and that he was unable to earn anything, being aged and infirm, the court reversed the decree, saying: "While the amount to

be awarded as permanent alimony is largely in the discretion of the court, the value of the husband's estate, if he has any, is a chief factor in the determination of the amount to be allowed; and if he has no estate, his earning capacity becomes of the first importance. . . . The appellate courts of this state have repeatedly held that, in determining the amount of temporary alimony to be allowed, the ability of the husband is an element to be considered, and the same element must necessarily be taken into consideration in fixing the amount of permanent alimony. Our statute provides that when a divorce is decreed the court 'may make such order and decree touching alimony and maintenance . . . as may be reasonable and just.' 3 Mills, Rev. Stat. § 1567. While the above statute relates to alimony in divorce suits, we apprehend that the allowance of alimony in actions for separate maintenance should be governed by the rule above stated; that is, that the allowance should be reasonable and just, taking into consideration the estate of the husband and his earning capacity. Having in mind the value of the husband's estate and his inability to earn anything, the allowance of alimony made by the court in this case was unreasonable and unjust, and for this reason the decree must be reversed."

In *Driver v. Driver* (1898) — Ind. —, 52 N. E. 401, the appellant sought the reversal of a judgment of divorce awarding the appellee alimony of \$450, with \$4 per month for the support of a child. The court, in affirming the judgment, stated that the amount of alimony was not excessive, considering the youth and health and earning capacity of the appellant, who was a physician, and added: "Not only the present property of the husband, but his health, occupation, and future prospects of making money, may be taken into account."

In *Stutsman v. Stutsman* (1903) 30 Ind. App. 645, 66 N. E. 908, the appellant sought a modification of a judgment of divorce awarding \$1,000 alimony to the appellee, besides \$1 per

week for the support of a child. It appeared that the appellant had realty of the value of \$50, and that his earning capacity was \$50 per month. The court, holding the amount of alimony to be excessive, stated the rule applicable in the computation thereof as follows: "The statute requires the court, in awarding alimony, to make such decree therefor 'as the circumstances of the case shall render just and proper.' . . . The amount of the alimony must be largely within the sound discretion of the trial court; yet abuse of discretion in this regard will be corrected on appeal. Manifestly, under such a statute, the determination in a particular case must depend upon its own circumstances, viewed in the light of justice, and having reference to sound public policy. In awarding alimony the court may properly consider not only the value of the husband's estate, but also his income and his ability to earn money."

Where an appeal was taken from a decree of divorce awarding alimony in the sum of \$1,400, the court, in affirmance, stated that in awarding alimony it was proper to consider the husband's ability to earn money, as well as the amount of his property. *Gussman v. Gussman* (1894) 140 Ind. 433, 39 N. E. 918.

Where it appeared that the defendant in a divorce action owned property worth not more than \$1,500, and that he was sixty-eight years old and unable to earn more than \$6 per week, the court held that in consideration of the amount of his property and his earning capacity a decree awarding \$450 alimony was excessive. *Ensler v. Ensler* (1887) 72 Iowa, 159, 33 N. W. 384.

On an appeal from a decree of divorce directing the payment of counsel fees, together with \$25 per month alimony, the testimony showed that the appellant had but little property, but that he was a music teacher, earning \$125 per month. The court said that so long as the appellant continued to earn \$125 per month the alimony did not appear excessive. *Bristow v. Bristow* (1899) 21 Ky. L. Rep. 481, 51 S. W. 819.

In *Snedager v. Kincaid* (1901) 22 Ky. L. Rep. 1347, 60 S. W. 522, the appellant contended that an award of \$300 alimony was excessive in view of the small amount of property which he owned. The court, affirming the award, stated that even if the appellant did not own any property he was a young man, able to work and support the appellee.

And in *Thompson v. Thompson* (1905) 27 Ky. L. Rep. 516, 85 S. W. 730, the court said that considering the husband's property as worth \$3,500, and the fact that he was in good health and had the capacity to earn money, an award of \$1,000 alimony to the wife was reasonable.

In *Irwin v. Irwin* (1899) 105 Ky. 632, 49 S. W. 432, the court held that an award of \$7,500 as alimony, together with \$200 annually for the support of a child, was excessive, where the husband's estate was worth \$1,500 and he earned \$5,000 per year as a physician, since a large part of his earnings was necessarily expended in the performance of his professional duties, and his wife had some property. The amount of alimony was reduced to \$4,000.

In *Muir v. Muir* (1906) 133 Ky. 125, 4 L.R.A.(N.S.) 909, 92 S. W. 314, the complainant appealed from a decree granting his wife a divorce, while she as cross complainant appealed from that portion of the decree fixing the amount of her alimony. The court affirmed the judgment on the original appeal, but reversed it on the cross appeal, with a direction for increased alimony. In deciding what would be a reasonable amount of alimony under the circumstances, the court considered both the property and earning capacity of the husband. The court referred to a statute (§ 2122, Ky. Stat. 1903) providing that "if the wife have not sufficient estate of her own, she may, on a divorce obtained by her, have such allowance out of that of her husband as shall be deemed equitable," saying: "But this does not mean that, if the husband have no present estate, his wife shall not be entitled to alimony. His con-

templated probable earnings may be the basis for such allowance."

In *Sebastian v. Rose* (1909) 135 Ky. 197, 122 S. W. 120, the appellant secured the reversal of an order of the circuit court, denying a motion to make the appellee show cause why he should not pay the balance of alimony awarded her. It was held that the allowance of \$1,500 as alimony was inadequate, though it was not satisfactorily shown just what property the appellee owned, since it appeared that he had youth, strength, and business ability, which, the court added, were no mean assets in these times.

In *Duvall v. Duvall* (1912) 147 Ky. 426, 144 S. W. 78, the court held that, considering the net value of the husband's estate as \$4,500, and the fact that he was a strong man and able to work, it was not error to allow the wife \$1,660 alimony, with counsel fees, and the return to her of \$500 which he had obtained by reason of the marriage.

In *Anderson v. Anderson* (1913) 152 Ky. 773, 154 S. W. 1, the court, in discussing the amount of alimony allowed, held that an award in gross of \$800, with \$10 per month for the support of his children, was not unreasonable, where the appellant was able to earn from \$50 to \$100 per month, and he was already possessed of three or four thousand dollars' worth of realty.

In *Shehan v. Shehan* (1913) 152 Ky. 191, 153 S. W. 243, the appellant contended that an award of \$500 alimony, together with \$12.50 per month for the support of a child, was excessive, since his only property was an estate in expectancy, worth at the time about \$1,350. It appeared that the appellant was a young and vigorous man. The court affirmed the judgment, saying: "The statute is (Ky. Stat. 1903, § 2122): 'If the wife have not sufficient estate of her own she may, on a divorce obtained by her, have such allowance out of that of her husband as shall be deemed equitable.' But this does not mean that, if the husband have no present estate, his wife shall not be entitled to alimony. His con-

templated probable earnings may be the basis for such allowance."

In *Ramsey v. Ramsey* (1915) 162 Ky. 741, 172 S. W. 1082, wherein it appeared that the appellant was entitled to a divorce from bed and board, the court, in assessing the amount of alimony, said: "As it appeared from the evidence that appellee's earnings as a locomotive fireman amount to not less than \$70, and occasionally to as much as \$100, per month, he should be required to pay her at least \$25 per month for her support and \$10 per month in addition, for the support of their infant child. . . . The alimony thus indicated is not deemed sufficient for the support of the wife and child, but it is as much as appellee should be required to pay, in view of his straitened circumstances; for it appears from the evidence that he owns no real estate, and that the only personal property owned by him is a small quantity of furniture upon which he is owing a part of the purchase price agreed to be paid for it."

Where the rental of community real estate was close to \$36 per month, and the defendant had the occupancy of the matrimonial domicile, the court held that these facts, considered with his earning capacity, which should easily furnish his living, would justify an increase of alimony from \$10 to \$15 per month. *Gagneaux v. Desonier* (1899) 51 La. Ann. 1095, 25 So. 946.

In *Ghisalberti v. Calamari* (1917) 143 La. 507, 78 So. 751, the appellant complained of an interlocutory decree ordering the payment of \$30 per month as alimony. The appellee testified that her husband earned \$200 per month and had \$7,000 invested in an ice company. The husband denied having any investment, and gave evidence of net earnings of \$69.25 per month. The court held that on this evidence of his earnings and property an allowance of \$30 per month was proper.

Where it appeared that the husband's net property holdings amounted to \$1,500, and that he was in debt several hundred dollars and was only earning a small salary, the court refused, under the circumstances, to in-

crease an award of \$250 alimony. *Donaldson v. Donaldson* (1903) 184 Mich. 289, 96 N. W. 448.

In *Abbott v. Abbott* (1918) — Mich. —, 168 N. W. 950, the court refused to modify a decree awarding the plaintiff wife the expenses of a suit for divorce and \$5 per week alimony, it appearing that the allowance was based on the husband's earnings of \$15 per week, and was a lien on his real estate, which was valued at several hundred dollars.

Where the trial court considered the defendant's salary of \$2,200 per annum in making the original allowance of alimony, and it appeared, on an application for a modification of the award, that his earnings had been so reduced that he could no longer pay the award without depleting what little property he had, the decree was modified, the defendant's earning capacity being made a continuing basis for the allowance. *Skinner v. Skinner* (1919) — Mich. —, 171 N. W. 383.

Where, at the time the award of alimony was made, the husband possessed some property, and was receiving an annual salary of \$2,500, which salary was considered by the court in fixing the amount of the alimony, and later, by reason of his failing health, his salary was reduced to \$1,250 per year, it was held that the reduction was cause for modifying the allowance. *Warren v. Warren* (1911) 114 Minn. 389, 131 N. W. 379.

In *Verner v. Verner* (1886) 64 Miss. 184, 1 So. 52, it was held that an allowance of alimony in the sum of \$150 per annum was not excessive, when based on the husband's ownership of an estate worth from \$1,200 to \$2,000, and on his ability to earn more than a support by his own labor.

In *Wright v. Wright* (1915) 192 Mo. App. 633, 179 S. W. 950, wherein it appeared that the husband owned property to the value of \$6,500, the court stated that, considering his earnings of \$340 per month, no fault could be found with the amount of a decree awarding \$100 per month alimony.

Where the husband was an able-bodied man earning \$125 per month and possessing property worth from

\$2,200 to \$2,400, the court held that an allowance of \$1,000 alimony, together with \$6.66 per month for the support of each child under fourteen years of age, would not be excessive in view of these circumstances. *Hays v. Hays* (1906) 75 Neb. 728, 106 N. W. 773.

In *Anderson v. Anderson* (1911) 89 Neb. 570, 181 N. W. 907, Ann. Cas. 1912C, 1, it was held proper in determining the amount of alimony to be allowed, to consider the defendant's earning capacity, together with the rents from his property; and where he was earning \$35 per month over his expenses and received \$60 per month rent, the court held that an award of \$25 per month alimony for the support of his wife and child was proper, although the defendant maintained that the entire \$60 rent was required for taxes and interest on his property.

In *Forrest v. Forrest* (1861) 8 Bosw. (N. Y.) 640, although the husband's property was valued between \$200,000 and \$300,000, the court held that it would be proper to base the allowance of alimony on his earnings from his profession, as well as on his estate, and that an annual allowance of \$4,000, being but one third of the husband's earnings, could not in itself be deemed excessive.

In *Stewart v. Stewart* (1900) 51 App. Div. 629, 65 N. Y. Supp. 927, the court considered both the earning capacity of the defendant and the value of his property in making an award of alimony, and where the former was between \$3,000 and \$3,500 per year, and the latter was less than \$3,000, it was held that a just requirement would be \$650 per year alimony, with \$500 per annum in addition for the maintenance of a child.

In *Curtin v. Curtin* (1906) 111 App. Div. 447, 97 N. Y. Supp. 771, it appeared that the defendant in an action for a limited divorce owned a small amount of property and received wages of \$30 a week. The wife had an income of \$41 a month. In view of this circumstance, the court reduced the allowance of alimony from \$10 to \$7.50 a week.

In *Read v. Read* (1904) 28 Utah, 297, 78 Pac. 675, the court stated that

the amount of alimony which should be awarded was a question the determination of which rested in the sound discretion of the trial court, but that in reaching a basis for the award the amount of property and the capabilities and opportunities of the husband would be considered. It appearing that the husband was in good health and able to earn from \$250 to \$300 per month, and owned property worth \$10,000, an award of \$70 per month alimony was held to be proper.

In *Cralle v. Cralle* (1887) 84 Va. 198, 6 S. E. 12, an award of \$150 per annum was held proper, where the considerations on which it was based were the husband's possession of property worth \$3,800 and the fact that he was a man "of good business habits and capacity." The court said: "The duty of a husband to maintain his wife does not depend alone upon his having visible tangible property, and . . . where she obtains a divorce on account of his misconduct she is entitled to a decree for alimony, based upon his ability to earn money, if he has no property. The general rule undoubtedly is that the income of the husband, whether derived or to be derived from his personal exertions or from permanent property, or from both, is the fund from which alimony is decreed, and the amount, as already said, will depend upon the particular circumstances of each case."

In *Reynolds v. Reynolds* (1910) 68 W. Va. 15, 69 S. E. 381, Ann. Cas. 1912A, 889, it appeared that the wife of the defendant had been granted a decree of divorce, with the conveyance of a one-fourth part of her husband's interest in certain realty as permanent alimony. On an appeal from the allowance, the court remanded the case with directions to make a reasonable money decree by way of alimony, saying: "The general rule is, without doubt, that the income of the husband, whether derived or to be derived from his personal exertions, or from permanent property, or from both, is the fund from which alimony is derived, and the amount will depend on the circumstances of each case."

On a second appeal of the same case *Reynolds v. Reynolds* (1913) 72 W. Va. 349, 78 S. E. 360, the court held that an award of \$12 per month alimony was reasonable where it was based on the husband's earnings of from \$20 to \$25 a month and his ownership of property valued at \$1,000. The doctrine was reaffirmed that "the amount of alimony proper to be allowed depends upon the wife's needs and her station in life, and upon the husband's means and ability to earn money. It is a matter within the sound discretion of the chancellor, and this court will not disturb his findings unless it clearly appears that he has abused it."

In *Deussenberry v. Duesenberry* (1918) 82 W. Va. 135, 95 S. E. 819, complaint was made that an allowance of \$24 per month alimony was excessive. The respondent at the time of the decree was earning \$65 per month and owned \$3,000 worth of property. The court held that in view of the circumstances the award as made was not excessive.

In *Pauly v. Pauly* (1887) 69 Wis. 419, 34 N. W. 512, wherein it appeared that the defendant had recently disposed of the bulk of his estate, but that he was a man of great physical and mental ability, and of skill and industry in accumulating property, it was held that an award of \$5,000 permanent alimony was proper. The court said: "In respect to the appellant's pecuniary ability to pay within one year \$5,000 to the respondent, as a final division and distribution of his estate, it is proper to say that something more than the present visible property of the appellant as a means of such payment may be considered. 'The husband's ability to maintain his wife does not depend alone upon his having property accumulated in any of its visible forms.' His ability to earn money must be considered."

In *Hooper v. Hooper* (1899) 102 Wis. 598, 44 L.R.A. 725, 78 N. W. 753, the court, affirming an award of alimony based in part on the husband's earning capacity as an attorney at law, stated that the earning capacity of the husband is to be considered, as well

as the amount and character of his property.

In *Minahan v. Minahan* (1911) 145 Wis. 514, 130 N. W. 476, it was held that an award of \$23,000, as a final division of the property following a decree of divorce, was a proper exercise of judicial discretion, where it appeared that the award was based on the husband's estate worth \$100,000 over and above his debts, and his earning capacity in his profession as a physician which amounted to \$8,000 per year.

In *McCaughey v. McCaughey* (1915) 160 Wis. 287, 151 N. W. 812, an appeal by a divorced wife for an increase in alimony from \$50 per month to \$100 per month, in addition to \$100 per month for the support of the minor children, it appeared that the respondent had very little unencumbered property, but was in receipt of net earnings of from six to seven thousand dollars a year. On this income as a basis, the court held that a larger allowance was proper, and increased the alimony to \$100 per month, to include the maintenance of the children.

In *Hendrix v. Hendrix* (1918) 101 Wash. 535, 172 Pac. 819, findings that a divorced husband was an able-bodied man capable of earning \$135 a month, and that he was possessed of property of the value of from \$7,000 to \$10,000, were held sufficient to warrant an award of \$5,250 as alimony and suit money, where he had failed to comply with orders for temporary alimony.

In *Dupuis v. St. Mars* (1903) 5 Quebec Pr. Rep. 404, wherein it appeared that the husband had an annuity of \$150, but his earning capacity was not sufficient to support himself, the court refused to base an award of alimony thereon.

b. Earning capacity as only asset of husband.

If the husband has no property or other income, the court, in determining the amount of alimony to be awarded, will consider his earning capacity or prospective earnings as a basis therefor.

Arkansas. — *Meffert v. Meffert* (1915) 118 Ark. 582, 177 S. W. 1.

District of Columbia. — *Creel v. Creel* (1915) 43 App. D. C. 82.

Georgia. — *Johnson v. Johnson* (1908) 131 Ga. 606, 62 S. E. 1044.

Illinois. — *Elzas v. Elzas* (1898) 171 Ill. 632, 49 N. E. 717.

Indiana. — *Logan v. Logan* (1888) 90 Ind. 107.

Iowa. — *Aitchison v. Aitchison* (1896) 99 Iowa, 93, 68 N. W. 573.

Kentucky. — *Green v. Green* (1890) 11 Ky. L. Rep. 715, 12 S. W. 945; *Canine v. Canine* (1891) 13 Ky. L. Rep. 124, 16 S. W. 367; *Parsons v. Parsons* (1904) 26 Ky. L. Rep. 256, 80 S. W. 1187; *Newton v. Newton* (1905) 28 Ky. L. Rep. 15, 88 S. W. 1050; *White v. White* (1913) 152 Ky. 769, 154 S. W. 33; *Griffin v. Griffin* (1913) 154 Ky. 766, 159 S. W. 597; *Goff v. Goff* (1915) 166 Ky. 715, 179 S. W. 856; *Griffin v. Griffin* (1917) 173 Ky. 636, 191 S. W. 458; *Burton v. Burton* (1919) — Ky. —, 211 S. W. 869.

Louisiana. — *Dale v. Hauer* (1902) 109 La. 711, 33 So. 741; *Azar v. Khalid* (1917) 141 La. 949, 76 So. 159.

Maryland. — *Compare Feigley v. Feigley* (1855) 7 Md. 537, 61 Am. Dec. 375.

Michigan. — *Russell v. Russell* (1889) 75 Mich. 572.

Minnesota. — *Smith v. Smith* (1899) 77 Minn. 67, 79 N. W. 648; *Haskell v. Haskell* (1912) 119 Minn. 484, 138 N. W. 787.

New Jersey. — *Furth v. Furth* (1898) — N. J. Eq. —, 39 Atl. 128; *Downing v. Downing* (1903) — N. J. Eq. —, 54 Atl. 542; *Dietrick v. Dietrick* (1918) 88 N. J. Eq. 560, 103 Atl. 242.

New York. — *Wells v. Wells* (1887) 10 N. Y. S. R. 248; *Williams v. Williams* (1889) 17 N. Y. Civ. Proc. Rep. 297, 6 N. Y. Supp. 645; *Scragg v. Scragg* (1892) 63 Hun. 633, 44 N. Y. S. R. 845, 18 N. Y. Supp. 487; *Snyder v. Snyder* (1917) 98 Misc. 431, 162 N. Y. Supp. 607; *Cowles v. Cowles* (1898) 29 App. Div. 476, 51 N. Y. Supp. 1057; *Dushinsky v. Dushinsky* (1905) 107 App. Div. 607, 94 N. Y. Supp. 638; *Merriman v. Merriman* (1918) 103 Misc. 445, 171 N. Y. Supp. 252.

Oklahoma. — *Fowler v. Fowler* (1916) — Okla. —, L.R.A.1917C, 89, 161 Pac. 227.

Pennsylvania. — *Heidenreich v. Heidenreich* (1900) 9 Pa. Dist. R. 123; *McAndrews v. McAndrews* (1906) 31 Pa. Super. Ct. 252.

South Carolina.—*Messervy v. Messervy* (1910) 85 S. C. 189, 80 L.R.A. (N.S.) 1001, 137 Am. St. Rep. 873, 67 S. E. 130.

South Dakota.—*Vert v. Vert* (1893) 3 S. D. 619, 54 N. W. 655.

Washington. — *Cooper v. Cooper* (1911) 64 Wash. 219, 116 Pac. 673.

Wisconsin. — *Newton v. Newton* (1911) 145 Wis. 261, 130 N. W. 105.

In *Creel v. Creel* (D. C.) *supra*, the appellant sought the reversal of a decree granting his wife a divorce and \$6 per week alimony. The court, in affirmance, stated that inasmuch as the appellant was earning \$18 per week the award was not excessive.

Where it appeared that the husband, although in debt about \$1,800, was a healthy, robust man in the prime of life, earning \$125 a month, the court held that an award of \$65 per month alimony was reasonable. *Meffert v. Meffert* (Ark.) *supra*.

In *Johnson v. Johnson* (Ga.) *supra*, it appeared that an award of \$10 per month alimony had been made despite the facts that the husband had no property and that his earning capacity only amounted to that sum. He contended on this appeal that since he had no property the court erred in awarding any alimony. The court said that if a husband has the capacity to labor he is not excused from the support of his wife and children because he lacks an estate. But since it appeared that the award was to the full amount of the husband's earning capacity, the court held that it was excessive.

In *Elzas v. Elzas* (Ill.) *supra*, an allowance of \$1,000 per year alimony was held to be reasonable, where it was based on the husband's net earnings of \$2,500 per year.

In *Logan v. Logan* (1883) 90 Ind. 107, wherein the evidence left the court in doubt whether the husband owned any property, but it appeared that he was a young man of vigorous health, a decree of divorce awarding \$200 alimony, in addition to \$50 an-

nually for the support of a child, was affirmed, the court saying: "In fixing the amounts of alimony, and for the support of the child, the court must consider the amount of the husband's property, but this is not the sole consideration. It will not do to say that because the husband may have but little property, or none at all at the time of trial, no decree should be rendered for alimony or for the support of children. In many cases, he who has a strong right arm and vigorous intellect is in fact more wealthy than another with less health and mind, in the present possession of property; and hence the ability of the husband to earn money should be considered in fixing such allowances."

Where it appeared that the defendant was a competent business man, receiving a salary of \$1,500 a year, the court held that this was a sufficient basis for an award of \$750 per annum as alimony. *Aitchison v. Aitchison* (1896) 99 Iowa, 93, 68 N. W. 573.

In *Green v. Green* (1890) 11 Ky. L. Rep. 715, 12 S. W. 945, it appeared that the defendant in a proceeding for divorce and alimony possessed no property. The chancellor, however, awarded alimony in the amount of \$150 per year for two years, and \$100 per annum thereafter, during the joint lives of the husband and wife. The defendant on this appeal complained of the allowance in view of his impecunious condition, but the court, in affirmance, said that although it did not appear that the husband owned any property the fact that he was young and able to labor was a sufficient basis for the allowance.

In *Canine v. Canine* (1891) 13 Ky. L. Rep. 124, 16 S. W. 367, the appellant complained of the action of the trial court in refusing to award alimony to her on a decree of absolute divorce. The court said: "The fact that the appellee had no estate is no reason why a just allowance should not be made, because he is shown to be about thirty years of age, blessed with good health, and educated in a profitable profession. She has a right to claim a support from his personal exertions. What she would have been

entitled to claim if yet living with him, she has a right to now ask. The extent of it justly depends upon and must be regulated by circumstances, such as the condition in life of the parties, their health, the estate of the one or the other, his income or ability to earn money, and various other matters that will readily occur to the just mind of the chancellor. Manifestly the appellant is entitled to something. If the appellee is not making money at his profession, he, being able-bodied, can find some business, the income from which should be equitably divided between them."

In *Parsons v. Parsons* (1904) 26 Ky. L. Rep. 256, 80 S. W. 1187, it appeared that, since the original agreement of the husband to pay two thirds of his annual income by way of alimony, he had been ill and suffered a lessened earning capacity. The court stated that in making a reasonable allowance, in view of the changed circumstances of the parties, it would take into consideration "the present and probable future earning capacity of the husband," what the wife had received from him, and his finances generally.

To award \$400 alimony to the wife, in addition to counsel fees, where the husband was a cripple, unable to earn more than \$125 a year, has been held to be excessive, and the award was reduced to \$150, it appearing that the wife was able to support herself. *Newton v. Newton* (1905) 28 Ky. L. Rep. 15, 88 S. W. 1050.

Where the evidence clearly showed an abandonment of the wife, the court held that she was clearly entitled to alimony, and the mere fact that the husband was a poor man and had no property was no reason for denying her relief, when the record showed that he was able-bodied and capable of earning wages. *White v. White* (1913) 152 Ky. 769, 154 S. W. 33.

In *Griffin v. Griffin* (1913) 154 Ky. 766, 159 S. W. 597, it appeared that the defendant in a divorce action had no estate of his own, but was able to work, and that he was the only child of his mother, and would inherit her estate. The plaintiff prosecuted an

appeal from a judgment of divorce refusing alimony, and the court awarded \$500 alimony on the dual basis of the probable earnings of the defendant from his own efforts and his probable inheritance from the estate of his mother.

In *Goff v. Goff* (1915) 166 Ky. 715, 179 S. W. 856, it was held that the chancellor erred in refusing to award alimony because the husband had no estate, and the court, making an allowance of \$150 per year, said: "The husband is young and strong and is able, and capable of supporting the mother and children. His daily earnings constitute his estate, but lack of other means will not justify a failure to award alimony."

In *Griffin v. Griffin* (1917) 173 Ky. 636, 191 S. W. 458, the appellant sought a reversal of a judgment of divorce which denied her alimony. It appeared that the appellee had no estate, but was able to work. The court, in view of the financial condition of the parties, directed the entry of judgment fixing the wife's alimony at \$6 per month, with the further sum of \$6 per month for the support of a child, saying: "While the fact that his estate consisted solely of his ability to earn money may affect the amount of alimony, it cannot relieve him of paying what is proper."

Where the wife, who had been the defendant in a successful divorce proceeding, asked for alimony, and it appeared that the appellee was earning from \$70 to \$75 per month, the court based an allowance of alimony thereon to the amount of 10 per cent of his wages. *Burton v. Burton* (1919) — Ky. —, 211 S. W. 869.

In *Dale v. Hauer* (1902) 109 La. 711, 33 So. 741, wherein it was shown that the husband was earning \$60 a month, the court held that an allowance of \$6 a month alimony, based thereon, was proper.

In *Azar v. Khalid* (1917) 141 La. 949, 76 So. 159, wherein it appeared that the husband was earning \$60 per month, the court held that an award of \$30 per month alimony was proper, in consideration of his earnings.

Where the defendant was shown to

have nothing but his monthly earnings as an employee of the fire department, and a few hundred dollars saved since the separation, the court refused to increase an allowance to the wife of \$2 per week, based thereon. *Russell v. Russell* (1889) 75 Mich. 572.

Where it appeared that the wife had some means, while the husband, who was sixty-two years of age, possessed no property, and, because of his age and health, could not expect to maintain his earning capacity as a locomotive engineer for any great length of time, the court held that it would be unjust to enforce further payments of alimony in the amount of \$12 monthly. *Smith v. Smith* (1899) 77 Minn. 67, 79 N. W. 648.

In Minnesota, it is provided by statute that the amount of alimony cannot exceed one third in value of the husband's property, and a portion of his earnings and income not exceeding in present value the same proportion thereof. In a case arising under that act, where the defendant's affidavit showed that he had lost all his property, the court held that a modification of the first award should be made; but even in the absence of present property and income a substantial allowance was decreed, it appearing that the defendant was capable of earning a large amount in his profession. *Haskell v. Haskell* (1912) 119 Minn. 484, 138 N. W. 787.

In *Williams v. Williams* (1889) 17 N. Y. Civ. Proc. Rep. 297, 6 N. Y. Supp. 645, wherein it appeared that the defendant earned from \$3,000 to \$3,500 in the practice of his profession as a physician, and the plaintiff had an income of about \$1,000, the court held that an allowance of \$1,000 a year alimony and \$500 annually for the support of a child was too large, as it would give the plaintiff a total income of \$2,500, and leave the defendant from \$1,500 to \$2,000. On the basis of the husband's earnings and the wife's income, the decree was modified so as to provide \$500 alimony for the wife, with a similar allowance for the maintenance of the child.

In *Furth v. Furth* (1898) — N. J. Eq. —, 39 Atl. 128, an action for non-

support, there was a doubt as to the husband's earning capacity, and he alleged that he had earned only \$1.50 per day at occasional employment, and was without means. The court said: "As there is no affirmative proof of present capacity fully to maintain the wife, I think it is right that the sum allowed for alimony should be made so low that any healthy man, irrespective of a favorable engagement, should be able to earn it, and there should go into the decree a provision that the money be payable each week, subject to the further order of the court. This will keep the matter under control, and make the defendant understand that the duty which is required of him is the support of his wife according to his circumstances in life. . . . I think any man engaged in any employment, the very lowest, if he is a mere carter or digger on the streets, ought to be able to earn enough to support himself and pay \$2 per week."

In *Downing v. Downing* (1903) — N. J. Eq. —, 54 Atl. 542, the plaintiff in a divorce action made application for permanent alimony. It appeared that the defendant possessed no property, but had the ability to work, and had been earning from \$820 to \$1,000 a year. The court stated that it must make these figures the basis from which to estimate the permanent alimony, and ordered an award of \$30 a month to the wife and \$10 a month for the maintenance of the child.

In *Dietrick v. Dietrick* (1918) 88 N. J. Eq. 560, 103 Atl. 242, wherein the plaintiff appealed from a final decree in her favor, which failed to award permanent alimony, and it appeared that the husband's net earnings from his practice as a dentist amounted to about \$45 a week, the court held that, taking into consideration the husband's earnings and the wife's income of about \$5 a week from her property, an award of \$10 a week alimony was proper.

In *Wells v. Wells* (1887) 10 N. Y. S. R. 248, wherein it appeared that the defendant had no property, but the testimony showed that "defendant is an able-bodied man and capable of earning \$75 per month when sober,"

the referee reported that a fair award of alimony for the support of the plaintiff and her child would be \$450. The court stated that while this sum represented one half of the earning power of the defendant, it was neither unusual nor excessive.

In *Cowles v. Cowles* (1898) 29 App. Div. 476, 51 N. Y. Supp. 1057, the defendant in a divorce action appealed from so much of the judgment of divorce as directed him to pay the sum of \$48 per week for the support of his wife and child. For the five years prior to the trial the defendant had averaged about \$7,500 from his profession as an opera singer, but it appeared that his earnings for the year following the trial would be considerably reduced. The defendant had no property, and the amount of his salary depended on the will of the theatrical manager as well as on his ability to sing. The court held that under the circumstances the award was excessive, and reduced the amount of alimony for the support of the wife and child to \$35 per week, saying that where earnings are "based entirely upon the personal services rendered by a husband, and which are liable to be reduced or entirely taken away by conditions beyond the control of the husband, thus being of such an uncertain character that they cannot be depended upon, and where the defendant has absolutely no income or means from which it can be supplied, it would seem that an allowance of one third of the income was in excess of that which should be allowed."

In *Scragg v. Scragg* (1892) 63 Hun, 633, 44 N. Y. S. R. 845, 18 N. Y. Supp. 487, the court held that, even if the limit of the defendant's earnings was \$25 per week, it was not excessive to base thereon an award of \$10 per week alimony.

In *Dushinsky v. Dushinsky* (1905) 107 App. Div. 607, 94 N. Y. Supp. 638, the wife, defendant in an action for separation, appealed from an order denying her motion for alimony and counsel fees. The moving papers tended to establish that the plaintiff was earning from \$40 to \$50 a week, and that he had a bank account of

about \$500. The plaintiff denied the existence of a bank account, and showed that he was earning \$15 weekly, alleging, in addition, that he was supporting his widowed mother. The court awarded \$8 per week as alimony.

In *Snyder v. Snyder* (1917) 98 Misc. 431, 162 N. Y. Supp. 607, it appeared that the defendant in an action for separation was without means and without profitable employment, but that he was well and strong, of good education, and more than usual intelligence. The court remarked that nothing but a disinclination to work seemed to interfere with the defendant's ability to earn a reasonable living for his wife and child, and awarded alimony in the amount of \$8 per week.

Where, by reason of the government allowance to the families of soldiers, it was possible for the defendant to meet an award of \$40 per month alimony by making an allotment of half his pay, to be added to the government allowance, the court held that such award was proper, and decreed that this method of meeting such an award should be in satisfaction thereof during his enlistment. *Merriman v. Merriman* (1918) 103 Misc. 445, 171 N. Y. Supp. 252.

In *Fowler v. Fowler* (1906) — Okla. —, L.R.A.1917C, 89, 161 Pac. 227, the defendant sought the reversal of an order adjudging him guilty of contempt for failure to pay alimony as directed. It was shown that the only means the defendant had of obtaining money for the payment of the alimony was by working, he having no property or income. The court affirmed the order, and, in a discussion of the "faculties" which are to be considered in fixing alimony, quoted from *Bishop, on Marriage, Divorce, & Separation*, as follows: "The husband's faculties are his capabilities of maintaining a family, ordinarily consisting of his income from whatever source derived. But if he refuses to acquire income, the sum which he might obtain by due exertion is also to be estimated as faculties." And: "The husband's duty to maintain his wife does not depend alone on his hav-

ing visible property. . . . Plainly, the husband's ability is the measure of his duty, so that if he exerts himself his actual earnings become faculties for alimony, or if he will not exert himself his capacity for earning must be estimated."

In *Heidenreich v. Heidenreich* (1900) 9 Pa. Dist. R. 123, the uncontradicted evidence showed that the appellant earned \$16 per month and his board, and that he had no other income. The parties had two children. The court held that under the circumstances an award of alimony in the amount of one half of the husband's cash earnings would not be an excessive allowance.

In *McAndrews v. McAndrews* (1906) 31 Pa. Super. Ct. 252, wherein it appeared that the wife had some independent income, the court held that an award of \$20 a month alimony was not unreasonable where based on the husband's salary of \$135.40 per month.

In *Messervy v. Messervy* (1910) 85 S. C. 189, 30 L.R.A.(N.S.) 1001, 137 Am. St. Rep. 873, 67 S. E. 130, the court said that while an award of alimony might be based on the earning capacity of the husband, still he could not be compelled to find employment in order to comply with the decree. As to the first proposition it was said: "This court has held that a judgment may be given against a husband for alimony, when he has neither property nor income, but is able by the use of his faculties to provide maintenance for her. . . . If a husband has property or an income, or if, by the exercise of his faculties, he does derive an income, the court may in its discretion, to be exercised according to the facts of the case and the circumstances of the parties, order a part of such property or income in excess of what is necessary for the support of the husband devoted to the support of the wife."

In *Vert v. Vert* (1893) 3 S. D. 619, 54 N. W. 655, the appellant sought the reversal of an order denying her an increase in alimony from \$15 per month to \$25 per month. The respondent had no means, and in his previous employment as teacher had

earned \$35 per month. It appeared that the appellant was earning moderate wages at typewriting. The court held that the award of \$15 per month was proper in view of the circumstances of the parties.

In *Cooper v. Cooper* (1911) 64 Wash. 219, 116 Pac. 673, wherein the record showed that the appellant was thirty-six years old, in good health, and engaged in the insurance business, in which he was capable of earning considerable money, the court held that a decree of divorce allowing the appellee the sum of \$25 per month as alimony, with \$150 counsel fees, was not unreasonable.

In *Newton v. Newton* (1911) 145 Wis. 261, 130 N. W. 105, wherein the plaintiff in a divorce proceeding was allowed the household furniture and an award of alimony in the sum of \$23 per month, based on the defendant's earnings of from \$100 to \$150 per month, and later the defendant petitioned for a modification of the award in view of his decreased earning capacity, claiming that for the two years past he had not earned to exceed \$97 per month, the court held that it would be proper under the circumstances to reduce the allowance to \$18 per month.

But, in Maryland, it has been held that alimony may be awarded only when the husband is possessed of a present estate. Thus, in *Feigley v. Feigley* (1855) 7 Md. 537, 61 Am. Dec. 376, the complainant alleged that her husband had fraudulently transferred his property in anticipation of her action for divorce and to avoid a decree for alimony therein. The husband denied any fraudulent intent in the transaction. Since she was unable to overcome his denial by proof to the contrary, the court held that, as the defendant was left entirely without property, no decree of alimony could be passed against him. The rule as stated by the court was that "where there is no estate there can therefore be no alimony."

c. Rule in Tennessee.

Under the English ecclesiastical law as a part of the common law, no alimony was allowable on a divorce a

vinculo matrimonii, such allowance being confined to a divorce from bed and board. This was on the theory that with the absolute termination of the marital relation the husband's obligation to support his wife ceased. Apparently in line with this early doctrine, a distinction has been made in Tennessee in the method of fixing the amount of alimony in these cases, it having been held that on a divorce a vinculo matrimonii the amount of alimony must be based on the husband's present estate only, while in the event of a divorce from bed and board the husband's future earnings may be considered as well as his present estate. *Chenault v. Chenault* (1857) 5 Sneed, 251; *Boggers v. Boggers* (1873) 6 Baxt. 299.

Thus, in *Chenault v. Chenault*, supra, it was said that a husband could not be discharged from the obligation of supporting his wife after a separation or divorce from bed and board, any more than before, on the ground

that his estate or income was inadequate, since his future earnings would be chargeable with such allowance. But it was added that, in case of a divorce a vinculo, "the wife can have no claim on the future earnings or acquisitions of the husband, any more than upon his protection, society, or other conjugal rights or duty; he is alike discharged from them all."

And in *Boggers v. Boggers*, supra, the court said: "Where the divorce is only from bed and board, the marriage relation still subsists, and the husband is still bound to maintain his wife, and this duty the court may from time to time enforce; but where the divorce is from the bonds of matrimony, the obligation of the husband to support the wife no longer subsists, and no order or decree can be made upon the husband to bind his future services or earnings. In such case the court can only give the wife a decree for part or all that the defendant then owns."

R. E. B.

CHARLES H. ZARBAUGH, County Treasurer, Plff. in Err.,
v.

JOHN P. ELLINGER.

Ohio Supreme Court — December 31, 1918.

(— Ohio St. —, 124 N. E. 68.)

Constitutional law — construction of fence — taking of property.

1. The enforcement of an obligation to fence a private right of way in the manner provided by statute is not a taking of the property of the owner of such private right of way, in violation of the Constitution.

[See note on this question beginning on page 212.]

Fence — private right of way.

2. Where the owner of a private right of way which passes through farm lands owned by others uses it as a farm outlet to a public highway, he is required by the provisions of §§ 5908 and 5919, General Code, to build and keep up one half of the fence on each side of his private right of way.

[See annotation in 2 A.L.R. 778.]

Courts — duty to enforce legislation.

3. When legislative action is founded in reason and has a real relation to a subject properly within the scope of legislative power, the legislative will must be judicially enforced.

[See 25 R. C. L. 807, 808.]

Headnotes 1 and 2 by the COURT.

ERROR to the Court of Appeals for Fairfield County to review a judgment affirming a judgment of the Court of Common Pleas in favor of

defendant in a suit to recover taxes charged against him on the tax duplicate, and for the sale of certain land on which the taxes were alleged to be a lien. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. J. H. Fultz and M. A. Daugherty, for plaintiff in error:

Section 5919 of the Code is constitutional.

McDorman v. Ballard, 61 Ohio L. J. 439.

All assessments fall within the purview of § 5697 of the General Code.

Chapman v. Sollars, 38 Ohio St. 378.

Messrs. William Davidson and Dowd, Crawfis, Bradford, & Dones for defendant in error.

Johnson, J., delivered the opinion of the court:

The treasurer of Fairfield county brought suit against Ellinger to recover taxes charged against him on the tax duplicate, and prayed for the sale of a tract of land on which the taxes were claimed to be a lien. Ellinger is the owner of a private right of way leading from his premises to a public highway. The adjacent lands are farms, on which the owners conduct ordinary farming operations, and the private right of way passes through them. Ellinger uses his right of way for the usual purposes of a farm outlet to and from his lands. The trustee of the township in which the lands are situated, proceeding under § 5908, General Code, and sections following, ordered Ellinger to build one half of the fence on each side of his right of way. This he refused to do. The trustees then caused the fence to be built pursuant to the statute, and the cost of it was certified to the county auditor. The cause was tried to a jury and a verdict rendered for the defendant. The judgment entered on this verdict was affirmed by the court of appeals, and error is prosecuted here.

It is conceded that the verdict of the jury necessarily followed the charge of the trial court, which entertained the view that the statutory provisions under which the assessment was made are unconstitutional.

6 A.L.R.—14.

Section 5908, General Code, provides that "the owners of adjoining lands shall build, keep up and maintain in good repair in equal shares all partition fences between them," etc.

And § 5919 enacts: "In this chapter, the term 'owner' shall apply to the owner of such land in fee simple, of estates for life or of rights of way while used by the owners thereof as . . . outlets, but these proceedings shall not bind the owner unless notified as provided herein."

It is conceded that there was no gate at the point where the right of way enters upon the public road, and it is contended that, if §§ 5908 and 5919 are to be so construed as to permit the laying of the cost for half of the fence on either side of the right of way upon the "owner" thereof, it would be a taking of his property in violation of the Constitution.

The legislation in Ohio with reference to fencing lands has advanced from time to time in the light of experience, and to meet what the general assembly regarded as the requirements of changing conditions.

In the early days, farmers were permitted to allow their stock to run at large. A farmer was obliged to fence out live stock in order to protect his crops. The situation at that time is well set forth in *Kerwhacker v. Cleveland, C. & C. R. Co.* 3 Ohio St. 172, 182, 62 Am. Dec. 246.

As the state developed and the quantity of cleared land increased, new conditions arose. It was found necessary to require farmers to fence in, instead of fencing out. But for many years before that, the legislature had made provisions for the payment of one half the cost of partition or line fences by which adjoining farmers secured inclo-

tures. In the early times there were fence viewers provided for by statute, and later these were abolished and jurisdiction of the subject was conferred on the township trustees.

But in order to impose the liability on a farmer to pay for one half of the line fence under the law as it stood during that long period, it was necessary that his land should thereby be inclosed.

In *Kingman v. Williams*, 50 Ohio St. 722, 36 N. E. 667, it was held that one adjoining proprietor can compel another to contribute to the expense of building or maintaining a partition fence between their lands only when the partition fence completes an inclosure which contains no other lands than those of the latter.

Section 4239, Rev. Stat. of 1880, provided that "the owner . . . of land adjoining a fence . . . on the line of his land, who makes or causes to be made an inclosure adjoining such fence, so that such fence answers the purpose of inclosing his land, shall pay," etc.

This continued to be the state of the law until April 18, 1904 (97 Ohio Laws 138), when the general assembly amended § 4239, Rev. Stat., so as to read: "That the owners of adjoining lands shall build, keep up and maintain in good repair all partition fences between them in equal shares, unless otherwise agreed," etc.

This amendment was under examination in *Alma Coal Co. v. Cozad*, 79 Ohio St. 348, 20 L.R.A. (N.S.) 1092, 87 N. E. 172. The allegations of the petition, which were admitted by demurrer, showed that the lands of the coal company were wild, uncultivated, and unfenced, that the company had no intention to improve, fence, or cultivate any portion of them, and that the fence could be of no value to it whatever. The court says, at page 355 of 79 Ohio St.: "The powers of the imagination will be exhausted in vain to find a member of society who will be benefited by the imposition

which is sought to be made upon the plaintiff, except Allen, the adjoining proprietor."

It was held in the syllabus: "1. The provisions of the Constitution forbid not only the taking of the private property of one, but as well the laying of an imposition upon it, for the sole benefit of another.

"2. The Act of April 18, 1904 (97 Ohio Laws 138), may not be so construed and administered as to charge an owner of lands which are, and are to remain, uninclosed, with any part of the expense of constructing and maintaining a line fence for the sole benefit of the adjoining proprietor."

It will be observed that the court did not, in that case, hold the amended § 4239, Revised Statutes, to be unconstitutional. But the right to invoke its application to a situation such as found in that case was denied. In the facts as they there existed there was no possible basis for the assessment on account of benefit, for there was none.

It is equally evident that there could be no compulsion under the police power to build the fence or contribute to the cost of it, because there was no such use of the coal company's property as to indicate probable injury to its neighbors or to the community in the absence of a fence.

It must be noted that the whole scheme of legislation on the subject only applies to the rural districts. The urban districts are expressly excluded.

From the fact that for so long a time the statutes required an owner to contribute to the cost only where the "fence answered the purpose of inclosing his land," it would seem to be apparent that at that time the general assembly felt that the only benefit conferred on a farmer's land by a fence was by its making a complete inclosure. The amendment to the statute in 1904, now §§ 5908 et seq., General Code, evidences a different view by the legislature and a determination to impose a larger duty, namely, the view that there

are conditions and circumstances in which a partition fence is of advantage and value to a landowner, even when it does not make a complete inclosure. When such a situation is presented, the enforcement of the requirements of the statute is not a violation of rights guaranteed by the Constitution.

Manifestly entertaining the same view, and with the same purpose and intent, the legislature enacted the subsequent amendment (98 Ohio Laws, p. 149), now § 5919. General Code, which includes the provision that the term "owners" shall apply to the owners of rights of way while used by the owners thereof as farm outlets. It is easy to understand that the general assembly contemplated that the fencing of such a right of way, would confer a benefit on the owner thereof, and be of assistance and convenience in driving stock in and out of his own farm, to and from the public road beyond. The annoyance and the inevitable trespassing on adjoining fields and crops which would result from the absence of a fence along a private road through cultivated lands on either side are apparent. But it was for the general assembly to

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deal with that matter; and when its action is founded in reason, and has a real relation to a subject properly within the scope of the legislative power, its will must be judicially enforced.

Moreover, a statute prescribing the duty of adjoining owners to fence is in the nature of the exercise of the police power. The assessment differs from a special assessment to pay for a public improvement made by a governmental body. In the latter case the special assessment is made and sustained because the public improvement confers a special benefit on the property assessed, different from the general benefit conferred on the public; and the special assessment must be limited to the extent of the special benefit. But, in the case of

the fence, there is no assessment in the sense just described. The owner is required by the statute to himself build his part of the fence. That is a duty that is imposed upon him, because of the situation and the use made of his property; and because of its relation to the property of his neighbors. If he does not perform it, the designated authorities proceed to build the fence and collect the cost thereof from him in the manner laid down in the statute.

The state is invested with the power, in the presence of the necessities of economic conditions, to prescribe such regulations with reference to persons and property as are reasonable and have a real relation to the subject. And if, in the judgment of the legislature, the natural result of the ordinary use by the owner of a private right of way which is bounded upon either side by farming lands owned by others would be to subject the crops and property of the latter to the risk of probable damage from the passage of stock and the encroachments of traffic, it may, in the exercise of the police power for the ulterior public advantage, require the owner of such right of way to join with his adjacent neighbors in building a fence on their respective lines.

The validity of such a requirement is to be determined wholly without reference to whether gates are fixed at the end of the right of way, making a complete inclosure. The making of the complete inclosure of the right of way is not the necessary thing. It is not the thing which gives the economic value to the fence, or makes the economic condition which justifies legislation passed to assist the orderly development of agriculture in the interest of the general welfare. It is upon these general grounds that legislation has proceeded which requires railroad companies to build fences along their rights of way through private lands, sufficient to turn stock; and to erect private

crossings over railway tracks where the right of way separates a private owner's land. Legislation of that character has uniformly been upheld.

In *Noble State Bank v. Haskell*, 219 U. S. 104, 55 L. ed. 112, 32 L.R.A.(N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487, which involved the constitutionality of a law, passed in the exercise of the police power, to establish a deposit guaranty fund, objection was made that the tax was an appropriation of the private property of one bank to pay the debts of another without due process of law. The court says, at page 110 of 219 U. S.: "Nevertheless, notwithstanding the logical form of the objection, there are more powerful considerations on the other side. In the first place it is established by a series of cases that an ulterior public advantage may justify a comparatively insignificant taking of private property

for what, in its immediate purpose, is a private use."

We think there is not presented here a case in which the enforcement of the legislation under examination will be a violation of rights guaranteed by the Bill of Rights.

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property.

In this case the defendant set up another defense in which he contended that the right of way here involved was not private, but public.

In the view taken by the courts below this issue was not reached on the trial. Of course, if the defendant does not own it, if it is not private, but public, he could not be compelled to pay the tax. So that, as to that issue, the cause will be remanded for further proceedings according to law.

Judgment reversed.

Wanamaker, Newman, Jones, Matthias, and Donahue, JJ., concur.

ANNOTATION.

Constitutionality of fencing and stock laws.

- I. In general, 212.
- II. Laws relating to partition fences, 213.
- III. Laws relating to barbed wire fences, 214.
- IV. Laws relating to fencing and stock districts:
 - a. In general, 215.
 - b. Titles; amendments, 216.
 - c. Delegation of power; local option, 218.
 - d. Taxation, 221.
 - e. Special, local, or discriminatory laws, 222.

I. In general.

This note, in so far as it relates to stock laws, is limited to those which have to do with the confining or running at large of stock. Statutes requiring railroads to fence their rights of way and those relating to so-called "spite fences" are not considered, nor are municipal ordinances, except as to the constitutionality of statutes by which municipalities are authorized to legislate on the subject.

IV.—continued.

- f. Taking property without due process or just compensation, 227.

V. Laws relating to stock trespassing or running at large:

- a. In general, 228.
- b. Denying recovery for trespasses on unfenced premises, 230.
- c. Seizure and sale of trespassing stock, 230.

VI. Miscellaneous, 233.

That the general subject of fences, including the relative rights and responsibilities of the proprietors of lands and the owners of stock, is within the control of the legislature, seems to be nowhere denied, while it is positively asserted in many cases.

"Thus, it is said in *Dillard v. Webb* (1876) 55 Ala. 468: "The question of requiring or dispensing with fences, requiring cattle to be confined, or permitting them to run at large is one

of unquestioned police regulations, and clearly within the power of the sovereignty."

"Laws compelling the building, maintaining, and keeping in repair of partition fences are enacted in the exercise of the police power, and are an ancient branch of legislation which has been uniformly sustained." *Tomlinson v. Bainaka* (1904) 163 Ind. 112, 70 N. E. 155.

In *Wills v. Walters* (1869) 5 Bush. (Ky.) 351, it is held that the legislature has constitutional power to regulate by statute the relative rights and responsibilities of the proprietors of inclosed lands and the owners of stock going at large, or kept in adjacent inclosures.

The foregoing are typical examples, and the principle they assert is sustained, expressly or impliedly, by practically all of the cases cited in this note.

Numerous questions of constitutionality arise, however, in regard to the manner in which the various legislatures have attempted to exercise their conceded power over this subject, and as to particular regulations which they have prescribed.

II. Laws relating to partition fences.

It seems to be well settled that statutes requiring adjoining owners to contribute to the erection and maintenance of partition fences are constitutional. *Hill v. Tohill* (1907) 225 Ill. 384, 80 N. E. 253, 8 Ann. Cas. 423; *Tomlinson v. Bainaka* (1904) 163 Ind. 112, 70 N. E. 155; *Collins v. Wilber* (1909) 173 Ind. 361, 89 N. E. 372; *McKeever v. Jenks* (1882) 59 Iowa, 300, 13 N. W. 295; *Gilson v. Munson* (1897) 114 Mich. 671, 72 N. W. 994; *Vincent v. Ackerman* (1909) 155 Mich. 614, 119 N. W. 1085; *Nichols v. Turner* (1907) 10 Ohio C. C. N. S. 509; *Alma Coal Co. v. Cozad* (1909) 79 Ohio St. 348, 20 L.R.A. (N.S.) 1092, 87 N. E. 172; *McDorman v. Ballard* (1916) 94 Ohio St. 183, 118 N. E. 836; *ZARBAUGH v. ELLINGER* (reported herewith) ante, 208.

A statute which provides for the erection and maintenance of partition fences, and leaves to the township trustee the determination of whether

a new fence shall be built or the old one repaired, what proportion thereof shall be done by each landowner, and the sufficiency of the fence when built or repaired, and provides for the erection of such fences by the township trustee upon the default of the landowner, making the cost thereof a lien upon the land, is held in *Tomlinson v. Bainaka* (1904) 163 Ind. 112, 70 N. E. 155, not unconstitutional as denying the right to trial by jury, merely because it does not provide how the action to foreclose the lien shall be tried, since that is provided for by the general law, and for the further reason that the constitutional right to trial by jury does not apply to the proceedings under this statute.

Such a statute does not deprive the owner of his property without due process of law, nor is it open to the objection of taking property without just compensation. *Tomlinson v. Bainaka* (Ind.) supra; *Collins v. Wilber* (1909) 173 Ind. 361, 89 N. E. 372.

In *Hill v. Tohill* (Ill.) supra, it is held that a statute giving fence viewers the power to assign division fences between adjoining owners for construction or maintenance is not unconstitutional as taking private property without due process of law, even though under it a fence built by one owner may be assigned to another owner to maintain.

In *Collins v. Wilber* (Ind.) supra, it is held that a statute providing for the construction of partition fences and making it the duty of the township trustee, upon application of one of the adjoining landowners, to determine whether a new fence shall be built or the old one repaired, and the proportion which each owner shall build, together with the sufficiency of the fence when constructed, does not violate the Constitution by conferring judicial powers upon such trustee, as the duties he is to perform are ministerial in character.

The statute involved in *McKeever v. Jenks* (1882) 59 Iowa, 300, 13 N. W. 295, provided that, where one landowner builds a hedge on the entire line between his own lands and uninclosed lands of another, he might re-

cover the value of one half the hedge if the adjoining land was subsequently inclosed, and gave the fence viewers jurisdiction to determine the sufficiency of the hedge and its value, and made their decision upon these questions conclusive. It was held that this was not a denial of due process.

In *Gilson v. Munson* (1897) 114 Mich. 671, 72 N. W. 994, it is held that a statute authorizing fence viewers to ascertain and certify the amount to be paid by one adjoining landowner to another for the construction of a partition fence does not deprive the landowner of his property without due process of law, although it makes no specific provision for notice to him of the meeting of the fence viewers, since it will be held that it does so provide by implication.

The same case holds that a provision in the statute declaring the sum assessed by fence viewers a lien on the land of the party whose fence was deficient, and providing for the collection thereof in the same manner as a tax, is a legitimate exercise of the police power and is not unconstitutional as an attempt to tax for other than public purposes, since it does not impose a tax, but merely provides a method of enforcing the lien.

In *Vincent v. Ackerman* (1909) 155 Mich. 614, 119 N. W. 1085, a statute providing for proceedings by fence viewers upon application of one adjoining owner and notice to the other, for the assignment to each owner of his share of the division fence, and making it obligatory upon such owners thereafter to maintain their respective portions of such fence, is held to be constitutional.

In *Nichols v. Turner* (1907) 10 Ohio C. C. N. S. 509, it is held that a statute providing that the owners of adjoining land shall build, keep up, and maintain in good repair all partition fences between them in equal shares, unless otherwise agreed upon, is constitutional, although it applies to lands which are not inclosed.

In *Alma Coal Co. v. Cozad* (1909) 79 Ohio St. 348, 20 L.R.A. (N.S.) 1092, 87 N. E. 172, however, it is held that such a statute could not be so con-

strued as to charge an owner of lands which are, and are to remain, uninclosed with any part of the expense of constructing and maintaining a line fence for the sole benefit of the adjoining proprietor, as that would be, in effect, a taking of private property of one for the sole benefit of another. This case is followed in *McDorman v. Ballard* (1916) 94 Ohio St. 183, 113 N. E. 836.

Numerous other cases reach the same conclusion as to the construction of similar statutes, but are not cited here as they do not directly raise the question of constitutionality.

The reported case (*ZARBAUGH v. ELLINGER*, ante, 208), however, points out that partition fences may be a benefit to the owner or occupant of land even though his lands are not entirely inclosed, and that in such case, certainly, he can be required to contribute to the erection and maintenance thereof, without any violation of his constitutional rights. It is further intimated that such a statute is in the nature of an exercise of the police power, and that the public advantage might be a sufficient justification therefor, even in the absence of a direct benefit to the landowner upon whom the obligation is imposed. In this case it was held that the owner of a private right of way passing through the farm lands of others, and used by him as a farm outlet to a public highway, might constitutionally be required to build and keep up one half of the fence on each side of his right of way, even though the right of way was not closed at the ends.

III. Laws relating to barbed wire fences.

In *Buckley v. Clark* (1897) 21 Misc. 138, 47 N. Y. Supp. 42, it is held that a statute forbidding the use of barbed wire for division fences without the adjoining owner's consent, and making persons violating the act liable to the adjoining owner for treble the damages resulting to the latter therefrom, is constitutional.

In *Com. v. Barrett* (1891) 13 Ky. L. Rep. 451, 17 S. W. 336, it is held that a statute making it unlawful to have any kind of wire save that which is smooth and round in any fence along

the public roads in a specified county, and providing a penalty for its violation, is not unconstitutional as taking private property without due process of law, but is a valid exercise of the police power.

IV. Laws relating to fencing and stock districts.

a. In general.

Statutes relating to fencing or stock districts are, in general, held to be within the powers of the legislature. *Spigener v. Rives* (1894) 104 Ala. 437, 16 So. 74; *Spillers v. Smith* (1908) 85 Ark. 228, 107 S. W. 985; *Busby v. Reid* (1919) — Ark. —, 210 S. W. 625; *Puckett v. Young* (1901) 112 Ga. 578, 37 S. E. 880; *Anderson v. Locke* (1887) 64 Miss. 283, 1 So. 251; *Montgomery County v. State* (1893) 71 Miss. 153, 15 So. 28; *Newsom v. Earnheart* (1882) 86 N. C. 391; *State v. Mathis* (1908) 149 N. C. 546, 63 S. E. 99; *Archer v. Joyner* (1917) 173 N. C. 75, 91 S. E. 699; and see also cases cited below under the various subdivisions of this topic.

But particular statutes, or parts of statutes, are frequently held to be unconstitutional. See cases cited below under the various subdivisions of this topic.

"That laws to prevent the running of stock at large within certain districts are within the constitutional power of the legislature cannot be questioned." *Spigener v. Rives* (Ala.) *supra*.

In *Spillers v. Smith* (1908) 85 Ark. 228, 107 S. W. 985, it is held to be within the power of the legislature to create a fencing district, and subsequently to change its boundaries.

In *Busby v. Reid* (1919) — Ark. —, 210 S. W. 625, it is held that a fencing district formed under a statute authorizing the creation of districts wherein animals are prohibited from running at large, but not providing that such districts shall exist for any specified length of time, may be dissolved by the legislature without any infringement of vested rights, such dissolution being merely the exercise of a phase of the state police power.

In *Puckett v. Young* (1901) 112 Ga.

578, 37 S. E. 880, a statute providing that the Stock Law should not go into effect unless within six months after an election adopting it a lawful fence with proper gates should be erected around the parts of the district touching nonstock or fence law districts or counties, but providing no method or means by which such fences or gates shall be erected, is not unconstitutional as unreasonable, unjust, or intended to destroy the efficacy of the Stock Law, or as imposing impossible conditions, or as against public policy.

In *Anderson v. Locke* (1887) 64 Miss. 283, 1 So. 251, a statute providing that all persons residing in certain districts shall confine their stock in order that crops may be cultivated without fences is held to be constitutional.

In *Montgomery County v. State* (1893) 71 Miss. 153, 15 So. 28, a statute providing that the board of supervisors of counties affected by the establishment of a Stock Law in one of them shall jointly build and keep in repair fences on or near the county line, to prevent stock straying from one county, in which the Stock Law is not in force, to the other in which it is in force, is held to be constitutional.

In *Newsom v. Earnheart* (1882) 86 N. C. 391, it is held that a statute permitting the association of detached parts of several townships into a single stock or fencing district is not unconstitutional on the ground that the Constitution recognizes only the territorial division of the county and township municipal organization.

In *State v. Mathis* (1908) 149 N. C. 546, 63 S. E. 99, it is held that the legislature may require stock to be fenced in, and relieve landowners of the duty to fence it out, either in respect to the whole state or political divisions thereof, and that it may declare a mountain range, a creek, or other natural or political boundary a lawful fence, or the limit within which the law shall operate.

In *Archer v. Joyner* (1917) 173 N. C. 75, 91 S. E. 699, it is held that a statute providing for the impounding

of stock trespassing on lands in certain townships, and authorizing any one or more citizens in such township, or in those adjacent thereto, to construct at their own expense a line fence, erect gates, etc., when considered necessary for their proper protection, and to condemn land upon which to place the fence, is constitutional.

b. Titles; amendments.

Statutes providing for the establishment and regulation of fencing or stock districts, and for the distraining of stock trespassing therein, have been generally sustained as against attacks on the ground of violation of constitutional provisions that statutes should embrace but one subject, which should be expressed in the title, and that laws should not be amended, extended, or repealed by mere reference to the title or number thereof. *Dillard v. Webb* (1876) 55 Ala. 468; *Street v. Hooten* (1902) 131 Ala. 492, 32 So. 580; *Flowers v. State* (1907) 83 Ark. 208, 103 S. W. 384; *Harrington v. White* (1917) 131 Ark. 291, 199 S. W. 92; *Puckett v. Young* (1901) 112 Ga. 578, 37 S. E. 880; *Erlinger v. Boneau* (1869) 51 Ill. 94; *Peterson v. State* (1900) 104 Tenn. 127, 56 S. W. 834; *Wright v. Cunningham* (1905) 115 Tenn. 445, 91 S. W. 293; *Thomas v. State* (1916) 136 Tenn. 47, 188 S. W. 617.

In *Dillard v. Webb* (Ala.) *supra*, the statute was entitled, "An Act to Establish the Canebrake Agricultural District, to Provide for the Securing of the Same and the Management of Its Affairs." It contained provisions as to the territory to be included; the construction within the boundary lines of said district of one outside fence with necessary gates and outlets; the election of commissioners who should have entire control over said fences and gates; the levying of tax on all lands therein for erecting pounds and building the fence and keeping the same in repair; the restraining of stock from going at large, the impounding of any stock found at large or trespassing, and the reclaiming thereof by the owner upon the payment of such fees and com-

pensation as the commissioners might establish, together with such damages as any person might have sustained by the trespass, the appointment of superintendents and agents to carry into effect the provisions of the act, and the fixing of the compensation of the commissioners and their agents. The court held that the title of the act sufficiently disclosed the subject, and that all the powers granted were cognate and incidental to the one controlling subject, namely, the growth, cultivation, and preservation of field crops, since whether land should be fenced, whether stock should be permitted to run at large or should be kept in inclosures, and a speedy method of preventing the destruction of crops if animals trespass upon them, are among the obvious inquiries and economics of successful agriculture.

In *Street v. Hooten* (1902) 131 Ala. 492, 32 So. 580, it is held that a statute entitled, "An Act to Amend an Act Entitled an Act to Provide for the Extension of Stock Law in Clay County, Approved February 11, 1897," is not unconstitutional on the ground that the title fails to express the subject of the act, which was to extend the Stock Law in the said county, where such subject is clearly expressed in the act which is amended, even though such amended act was itself unconstitutional. It is also held that a constitutional provision that "no law shall be revived, amended, or the provisions thereof extended or conferred by reference to its title only, but so much thereof as is revived, amended, extended, or conferred shall be re-enacted and published at length," is not violated by a provision that adjacent Stock Law districts established under it should be governed by the law prohibiting stock from running at large in Clay county, but providing a complete system for the organization and regulation of such districts, and incorporating and re-enacting all the provisions of the prior law applicable thereto.

In *Erlinger v. Boneau* (1869) 51 Ill. 94, it is held that a constitutional provision that no private or local law

which may be passed by the general assembly shall embrace more than one subject, and that shall be expressed in the title, is not violated by the statute entitled, "An Act to Prevent Domestic Animals from Running at Large in the Counties of Monroe, St. Claire, and Other Counties," even though the body of the statute provides that if the majority of the legal voters of a county reject the act, and the majority of those in one or more precincts of such county adopt it, such act shall go into effect in such precinct.

This case further holds that a provision that if the owner of stock found trespassing within the stock district fails to claim the same within a specified time, it shall be considered as estray, and dealt with accordingly, is not an amendment of the general Estray Law so as to make it invalid, because that fact is not stated in its title.

In *Harrington v. White* (1917) 181 Ark. 291, 199 S. W. 92, it is held that a constitutional provision that the provisions of no law shall be extended by reference to its title only is not violated by a section of a law providing for the establishment of Stock Law districts, which, after providing for the distraining of stock found running at large therein, states that if the owner of such stock be not known, or fail to make compensation for the taking up and keeping of the same, the stock shall be dealt with as required by law with respect to taking up such property, as estrays under the Estray Law of the state, since it comes within the rule that where a statute by its own language grants some power, confers some right, or creates some burden or obligation, it is not in conflict with the Constitution, although it may refer to some other existing statute for the purpose of pointing out the procedure in executing the power, enforcing the right, or discharging the burden.

In *Flowers v. State* (1907) 83 Ark. 208, 103 S. W. 384, it is held that there is no constitutional objection to a statute intended to authorize the establishment of districts to restrain

small stock being enacted in form as an amendment to the general Fencing Law, though in fact it repeats the provisions of the general law and adds the provision relating to small stock.

In *Puckett v. Young* (1901) 112 Ga. 578, 37 S. E. 880, it is held that a constitutional provision that "no law or section of the Code shall be amended or repealed by mere reference to its title" or number, "but the amending or repealing act shall distinctly describe the law to be amended or repealed, as well as the alteration to be made," is not violated by a statute entitled, "An Act to Amend Sections 1778 and 1781 of the Code of Georgia of 1895, in Regard to Stock Law in Militia Districts by Providing When, and on What Conditions, the Stock Law Is to Go into Effect in Such Districts."

Constitutional provisions that an act shall embrace but one subject, which shall be expressed in the title, are held not to be violated by statutes entitled, in substance, acts to prevent live stock from running at large in counties having a designated population, and to prevent the necessity of fencing lands in counties affected by this act or that may hereafter be affected by it, although they not only provide that it shall be a misdemeanor to allow stock to run at large in such counties, but further enact that the owners of such stock shall be liable for damage done by it, and give the injured party a right to distrain the stock and to a lien upon the same for the damage done, in *Peterson v. State* (1900) 104 Tenn. 127, 56 S. W. 834; *Thomas v. State* (1916) 136 Tenn. 47, 188 S. W. 617.

In *Wright v. Cunningham* (1905) 115 Tenn. 445, 91 S. W. 293, it is held that a statute entitled, "An Act to Amend Chapter 177 of the Act of 1903 Being an Act to Prohibit the Running at Large of" small stock in counties having a specified population, "and Fixing the Penalty for the Violation of Same," does not violate a constitutional provision that "no bill shall become a law which embraces more than one subject and that subject to

be expressed in the title. All acts which repeal, revive or amend former laws shall recite in their caption or otherwise the title or substance of the law repealed, revived or amended,"—although the body of the act provides for an election in the counties affected thereby, for the purpose of determining whether or not such acts shall be operative therein.

In a few cases, however, such statutes have been overthrown on the ground that they violated constitutional provisions of this character. *Rider v. State* (1918) 132 Ark. 27, 200 S. W. 275; *State v. Sloan* (1914) 258 Mo. 305, 167 S. W. 500; *Ward Cattle & Pasture Co. v. Carpenter* (1918) — Tex. —, 200 S. W. 521, affirming (1914) — Tex. Civ. App. —, 168 S. W. 408.

In *Rider v. State* (Ark.) *supra*, it is held that a constitutional provision that no law shall be revised, amended, or the provisions thereof extended or conferred by reference to the title only, but so much thereof as is revised, amended, extended, or conferred shall be re-enacted and published at length, is violated by a statute entitled, "An Act to Amend Act No. 310 of the Act of the General Assembly of 1909," where the sole provision of the law was that, wherever the original act which created a stock district read "Charleston District of Franklin County," it should be amended to read "Charleston District of Franklin County and Barham and Wittich Townships of Franklin County."

In *State v. Sloan* (1914) 258 Mo. 305, 167 S. W. 500, a statute entitled, "An Act to Amend Section 794 of Article 6, and Chapter 6 of the Revised Statutes of Missouri of 1909 Entitled, 'Herding by Nonresidents,' by Adding Certain Words Thereto," is held to violate a constitutional provision that the subject-matter of a statute shall be embraced in its title, where the body of the act applied to residents equally with nonresidents.

In *Ward Cattle & Pasture Co. v. Carpenter* (Tex.) *supra*, it is held that a statute entitled, in substance, An act to amend a specified law with refer-

ence to the mode of preventing animals from running at large in counties named so as to include certain counties, is violative of the constitutional requirement as to the titles of statutes, where the body of the act attempts to exclude another county from the operation of the original law.

c. Delegation of power; local option.

The question of the constitutionality of statutes relating to fencing districts or districts within which stock is allowed to run at large arises most frequently with reference to the delegation of powers.

A few cases hold that the operation of such statutes in particular districts cannot be made contingent upon the favorable vote of the electors thereof. *Weir v. Cram* (1873) 37 Iowa, 649 (a statute allowing the distraining of trespassing cattle, regardless of the lawfulness of a fence surrounding the property trespassed upon); *Lammert v. Lidwell* (1876) 62 Mo. 188, 21 Am. Rep. 411 (a statute making it unlawful for cattle to run at large in any county which, by majority vote, should agree to restrain them); *Wright v. Cunningham* (1905) 115 Tenn. 445, 91 S. W. 293 (a statute prohibiting the running at large of certain animals in certain counties, to be effective only in such counties as should adopt it by majority vote).

It is, however, generally held that, where the statute is complete in itself, there is no unconstitutional delegation of power in making its operation dependent upon the vote or petition of the electors or freeholders of the district, or upon the determination by a local court of the existence of the conditions prescribed in the statute.

Alabama.—*Stanfill v. County Revenue Ct.* (1885) 80 Ala. 287; *Dunn v. County Revenues Ct.* (1888) 85 Ala. 144, 4 So. 661; *McGraw v. Greene County* (1890) 89 Ala. 407, 8 So. 852; *Edmondson v. Ledbetter* (1897) 114 Ala. 477, 21 So. 989; *Davis v. State* (1904) 141 Ala. 84, 109 Am. St. Rep. 19, 37 So. 454; *Benedict v. Board of*

Revenue (1912) 177 Ala. 52, 58 So. 306; *Edwards v. Bibb County* (1915) 193 Ala. 554, 69 So. 449.

Arkansas.—*Harrington v. White* (1917) 181 Ark. 291, 199 S. W. 92.

Illinois. — *Erlinger v. Boneau* (1869) 51 Ill. 94.

Mississippi. — *Ormand v. White* (1905) 85 Miss. 276, 37 So. 834.

North Carolina.—*Cain v. Davie County* (1882) 86 N. C. 8; *Newsom v. Earnheart* (1882) 86 N. C. 391.

Texas. — *Armstrong v. Traylor* (1895) 87 Tex. 598, 30 S. W. 440; *Roberson v. State* (1901) 42 Tex. Crim. Rep. 595, 63 S. W. 884; *Ex parte Cowden* (1914) 74 Tex. Crim. Rep. 449, 168 S. W. 539.

Utah. — *Peterson v. Petterson* (1913) 42 Utah, 270, 130 Pac. 241.

Washington. — *State v. Storey* (1909) 51 Wash. 630, 99 Pac. 878.

West Virginia.—*Haigh v. Bell* (1895) 41 W. Va. 19, 31 L.R.A. 131, 23 S. E. 666.

In *Dunn v. County Revenues Ct.* (1888) 85 Ala. 144, 4 So. 661, it is said: "No doubt can exist as to the power of the legislature to confer on the governing body of a county the authority to accept or reject the terms of a Stock Law, and to fix the area of the district" to which it shall apply, in the mode pointed out by the law.

And it is held that laws which are complete in themselves, providing for the regulating of the running of stock at large and the enforcement of the rights of all parties to be affected by them in the particular locality to which they are made applicable, do not violate the constitutional rule against delegation of legislative authority, even though they leave to the court of county revenue the power to determine the contingency on which the laws, or certain designated portions of them, may go into effect.

In *Davis v. State* (1904) 141 Ala. 84, 109 Am. St. Rep. 19, 37 So. 454, it is held that a statute providing that whenever ten freeholders or householders in any beat, or part of a beat, in a specified county, shall petition the probate judge of said county, asking that an election be held in said beat, or part of said beat,

to decide whether in said beat, or part of said beat, stock shall be prohibited from running at large, the probate judge shall order an election in such beat, or part of beat, described in such petition, to decide such question, is not unconstitutional, as attempting to delegate to the petitioners the power to determine the boundaries of the proposed stock district and the voters who shall participate in the election, since it simply bestows on them the right to petition for an election to be held in the beat, or part thereof, designated in the petition, but at the election all the qualified voters of the beat or part of beat designated have a right to vote, and may approve or defeat the recommendation of the petitioners.

That a statute providing that whenever any ten freeholders petition in writing for an order establishing a district wherein stock shall not be allowed to run at large, and such petition is filed and notice thereof given as provided in the statute, the court must hear the petition and any person opposed to it, and make an order granting or dismissing such petition in whole or in part, does not unconstitutionally delegate legislative power to the court, is held in *Stanfill v. County Revenue Ct.* (Ala.) *supra*; *McGraw v. Greene County* (1890) 89 Ala. 407, 8 So. 852; *Edmondson v. Ledbetter* (1897) 114 Ala. 477, 21 So. 989.

A statute authorizing commissioners' courts to establish or abolish Stock Law districts is not an unwarranted delegation of legislative power. *Benedict v. Board of Revenue* (1912) 177 Ala. 52, 58 So. 306.

A statute which confers upon the courts of county commissioners, or the courts of like jurisdiction in their respective counties, authority to direct and supervise the holding of elections for establishing Stock Law districts and to declare the results of such elections, and provides that proceedings to establish a Stock Law district shall be commenced by petition of the freeholders, is a valid exercise of the police power. *Ed-*

wards v. Bibb County (1915) 193 Ala. 554, 69 So. 449.

In *Harrington v. White* (1917) 131 Ark. 291, 199 S. W. 92, a statute providing that upon petition of a prescribed percentage of the voters in a district the county court shall make an order for an election in such district on the question of restraining stock from running at large, and that if the election result in favor of enforcing the law it shall go into effect six months thereafter in such district, is held to come within the rule that the legislature may make a law to delegate the power to determine some fact or state of things upon which the law makes or intends to make its own action depend.

In *Erlinger v. Boneau* (1869) 51 Ill. 94, it is held that it is fairly within the scope of legislative power to prescribe as one of the conditions upon which a Stock Law shall come into operation, or be defeated, that it shall depend upon a vote of the people of the locality to be affected thereby.

In *Ormand v. White* (1905) 85 Miss. 276, 37 So. 834, it is held that a statute providing for the establishment of Stock Law districts by petition and vote is not in violation of a constitutional provision vesting the legislative power of the state in the legislature.

In *Cain v. Davie County* (1882) 86 N. C. 8, a provision in a statute intended to prevent live stock from running at large in certain counties by erecting a fence around the boundaries, that such statute should take effect upon the petition of a majority of the qualified voters within the territory affected thereby, is held not to be an unconstitutional transfer of legislative power to the voters.

In *Newson v. Earnheart* (1882) 86 N. C. 391, it is held that a statute making it unlawful for stock to run at large within the limits of specified counties upon condition that the qualified voters in them, respectively, shall adopt the provisions of the act, is not unconstitutional. The court says: "Certainly the power to pass

laws operating within a limited locality has been too long exercised by the general assembly to be now called into question, and it is well settled that its operation at all may be made to depend upon the will of the electors within its bounds, expressed at the ballot box."

In *Armstrong v. Traylor* (1895) 87 Tex. 598, 30 S. W. 440, it is held that under a constitutional provision that the legislature may pass laws for the regulation of live stock, and exempt from the operation of such laws any counties or sections, providing any local laws thus passed shall be submitted to the freeholders of the section to be affected thereby, and approved by them before it shall go into effect, the legislature might authorize the voters to designate the boundaries of the subdivision in which they desire that the law shall be applied, and might enact a law regulating live stock in any given county or in any subdivision of such county, or a law not to be in force in any county or part of a county until adopted by the voters thereof.

In *Roberson v. State* (1901) 42 Tex. Crim. Rep. 595, 63 S. W. 884, it is held that under a constitutional provision that "the legislature may pass laws for the regulation of live stock and the protection of live stock raisers in the stock-raising portion of the state, and exempt from the operation of such laws other portions," any local law thus passed to be submitted to the freeholders of the section to be affected thereby, and approved by them, the legislature might pass a law authorizing freeholders of an agricultural county to vote on a law regulating live stock. Followed in *Ex parte Cowden* (1914) 74 Tex. Crim. Rep. 449, 168 S. W. 539.

In *Peterson v. Petterson* (1913) 42 Utah, 270, 130 Pac. 241, it is held that a statute providing that any county or precinct thereof may, by vote, declare in favor of fencing farms and allowing domestic animals to run at large, and that in such case the provisions of a statute authorizing the detention and sale of

animals for damages should be inoperative, is not void as a delegation of legislative functions to the voters.

In *State v. Storey* (1909) 51 Wash. 630, 99 Pac. 878, it is held that a statute providing that it shall be unlawful for stock to run at large in any county of a state in which three fourths of the land outside of incorporated cities and towns are under fence, and that it shall be the duty of the board of county commissioners of the respective counties, when ten or more freeholders shall make application for the enforcement of the act, to at once determine whether three fourths of such land are under fence, is not invalid as delegating legislative power to the petitioners, nor as conferring judicial powers on the commissioners.

In *Haigh v. Bell* (1895) 41 W. Va. 19, 31 L.R.A. 131, 23 S. E. 666, it is held that there is no unconstitutional delegation of power in a provision that a statute making it unlawful for owners to permit their hogs to run at large extends to all "counties in the state, provided that the county court may, upon the petition of one hundred voters of the county, direct to have the same enforced in their said county or in any district or districts thereof."

In *Smalley v. Rutherford County* (1898) 122 N. C. 607, 29 S. E. 904, it is held that a statute providing that the question of adopting a statute relating to fences and the keeping of stock might be submitted to the electors of townships, districts, or other territories of the county, or of the county itself, is not violative of local self-government, even though under it the voters in a smaller subdivision, which has adopted the law, may petition and vote for its extension to include the whole county.

d. Taxation.

Assessments for the construction of fences around stock or fencing districts are generally held to be in the nature of assessments for local improvements, and hence not within constitutional provisions relating to taxes in general. *Stiewel v. Fencing*

Dist. (1902) 71 Ark. 17, 70 S. W. 308, affirmed in (1902) 71 Ark. 28, 71 S. W. 247; *Cain v. Davie County* (1882) 86 N. C. 8; *Shuford v. Lincoln County* (1882) 86 N. C. 552; *Greene County v. Lenoir County* (1885) 92 N. C. 180; *Busbee v. Wake County* (1885) 93 N. C. 143; *Tripp v. Pitt County* (1912) 158 N. C. 180, 73 S. E. 896; *Evans v. Forbes* (1912) 158 N. C. 586, 73 S. E. 898.

A statute providing for the levying of a tax upon the land within districts availing themselves of the Stock Law, for the purpose of constructing fences around their boundaries, is held to be in the nature of a local assessment, and hence not obnoxious to a constitutional provision that taxation shall be equal, uniform, and ad valorem upon all property, in *Cain v. Davie County* (1882) 86 N. C. 8; *Shuford v. Lincoln County* (1882) 86 N. C. 552; *Greene County v. Lenoir County* (1885) 92 N. C. 180; *Busbee v. Wake County* (1885) 93 N. C. 143.

In *Greene County v. Lenoir County* (1885) 92 N. C. 180, *supra*, this conclusion is said not to be affected by the fact that parts of two counties are united in the district, and that more fencing would be required in one county than in the other.

In *Shuford v. Lincoln County* (1882) 86 N. C. 552, it is held that a constitutional provision that no tax, except for necessary expenses, shall be levied by any county or other municipal corporation unless sanctioned by a vote of the majority of the qualified voters therein, does not apply to a tax levied under the provisions of the Stock Law for the purpose of erecting fences in compliance therewith, as such tax is in the nature of a local assessment. This is approved in *Greene County v. Lenoir County* (N. C.) *supra*; *Busbee v. Wake County* (1885) 93 N. C. 143; *Tripp v. Pitt County* (1912) 158 N. C. 180, 73 S. E. 896; *Evans v. Forbes* (1912) 158 N. C. 586, 73 S. E. 898.

In *Busbee v. Wake County* (1885) 93 N. C. 143, the court intimates, although basing its decision upon other points, that a constitutional provision prohibiting counties, towns, etc., from contracting debts and levying

taxes except for their necessary expenses, might not apply to an assessment for fencing in stock districts, on the ground that the cost of such fence would be a necessary expense, but the later cases of *Keith v. Lockhart* (1916) 171 N. C. 451, 88 S. E. 640, Ann. Cas. 1918D, 916, and *Archer v. Joyner* (1917) 173 N. C. 75, 91 S. E. 699, hold directly to the contrary.

In *Stiewel v. Fencing Dist.* (1902) 71 Ark. 17, 70 S. W. 308, affirmed in (1902) 71 Ark. 28, 71 S. W. 247, it is held that a statute requiring the assessment of the cost of a district fence upon the land in such district, assessing each parcel according to its value as shown by the last county assessment, is not unconstitutional as authorizing an assessment irrespective of benefits, since it must be construed as containing an implied proviso that such cost shall not exceed the benefits received.

In *McCullough v. Graham* (1904) 70 S. C. 63, 49 S. E. 1, it is held that a statute exempting certain townships from the operation of a general Stock Law, and providing for levying and collecting a tax for the purpose of erecting and maintaining a fence separating such townships from the section subject to the general Stock Law, is not rendered void by the subsequent adoption of a constitutional provision that the general assembly shall not have power to authorize any county or township to levy a tax for any except certain specified purposes, none of which include the building or maintaining of a fence, since the provision of the Constitution was prospective.

In *Harper v. New Hanover County* (1903) 133 N. C. 106, 45 S. E. 526, however, it is held that a statute repealing the Stock Law as to a particular township, and providing that the commissioners of the county within which such township was located should fence where necessary, paying the expenses from the general fund in the county treasury, and thereafter levy on all taxable real estate in the county a tax sufficient to replace the amount so drawn out, if regarded as authorizing a tax, is in

violation of a constitutional provision directing that all taxes shall be uniform and ad valorem upon all property, while, if regarded as providing for a special assessment, it is invalid as authorizing assessments on the real estate of the entire county, including that of the township withdrawn from the benefits of the Stock Law, and that it could not be held valid as to provisions other than that imposing the tax, since it could not be presumed that the legislature would have authorized a building of the fence with funds drawn out of the general fund, without also making provision for replacing the money withdrawn.

While in *Keith v. Lockhart* (1916) 171 N. C. 451, 88 S. E. 640, Ann. Cas. 1918D, 916, it is held that a statute authorizing a special tax for the construction of county fences, and exempting therefrom the property of natural persons, violates a constitutional provision that all taxes shall be uniform and ad valorem on all property, except property exempted by the Constitution.

In *Archer v. Joyner* (1917) 173 N. C. 75, 91 S. E. 699, a provision of a Stock Law for an assessment on property returned for taxation in the county, to erect fences between the lines of certain townships therein named and townships adjacent to them, cannot be upheld as an assessment, because it is imposed upon both real and personal property, and, as to a portion of it, in territory to receive no benefit from the erection of the fence.

e. Special, local, or discriminatory laws.

Statutes relating to fencing or stock districts have generally been held not to conflict with constitutional provisions against local, special, or discriminatory laws.

Alabama.—*Dunn v. County Revenues Ct.* (1888) 85 Ala. 144, 4 So. 661; *Benedict v. Revenue & Road Comrs.* (1912) 177 Ala. 52, 58 So. 306.

Arkansas.—*Hendricks v. Block* (1906) 80 Ark. 333, 97 S. W. 63; *Henderson v. Dearing* (1909) 89 Ark. 598, 117 S. W. 1066.

California. — *Wigmore v. Buell* (1898) 122 Cal. 144, 54 Pac. 600.

Dakota.—*Sprague v. Fremont, E. & M. V. R. Co.* (1888) 6 Dak. 86, 50 N. W. 617.

Iowa.—*Dalby v. Wolf* (1862) 14 Iowa, 228.

Kansas.—*Noffziger v. McAllister* (1873) 12 Kan. 315; *Keyes v. Snyder* (1875) 15 Kan. 143.

Missouri.—*State use of Ott v. Aubuchon* (1880) 8 Mo. App. 325.

New Mexico.—*Sears v. Fewson* (1909) 15 N. M. 132, 103 Pac. 268; *Scarborough v. Wooten* (1918) 23 N. M. 616, 170 Pac. 743; *Eschliman v. Vernon* (1918) 24 N. M. 332, 171 Pac. 503.

Oklahoma.—*Johnson v. Mocabee* (1893) 1 Okla. 204, 32 Pac. 336; *Ad-dington v. Canfield* (1901) 11 Okla. 204, 66 Pac. 355.

South Carolina.—*Goodale v. Sowell* (1902) 62 S. C. 516, 40 S. E. 970; *Brown v. Tharpe* (1906) 74 S. C. 207, 54 S. E. 363; *Sanders v. Donnelly* (1910) 86 S. C. 94, 67 S. E. 1070; *Murphy v. Donnelly* (1910) 86 S. C. 115, 67 S. E. 1071.

Tennessee. — *Peterson v. State* (1900) 104 Tenn. 127, 56 S. W. 834; *Murphy v. State* (1905) 114 Tenn. 531, 86 S. W. 711; *Wright v. Cunningham* (1905) 115 Tenn. 445, 91 S. W. 293; *Hall v. State* (1911) 124 Tenn. 235, 137 S. W. 500; *Thomas v. State* (1916) 136 Tenn. 47, 188 S. W. 617; *Sullivan v. State* (1916) 136 Tenn. 194, 188 S. W. 1153.

Texas. — *Ex parte Thompkins* (1904) 47 Tex. Crim. Rep. 356, 83 S. W. 379; *Neuvar v. State* (1914) 72 Tex. Crim. Rep. 410, 163 S. W. 58; *Bishop v. State* (1914) 74 Tex. Crim. Rep. 214, 167 S. W. 363.

Utah. — *Peterson v. Petterson* (1913) 42 Utah, 270, 130 Pac. 241.

Washington.—*State v. Storey* (1909) 51 Wash. 630, 99 Pac. 878.

In some cases, however, a contrary conclusion is reached. *Mathis v. Jones* (1890) 84 Ga. 804, 11 S. E. 1018; *Darling v. Rodgers* (1871) 7 Kan. 592; *Robinson v. Perry* (1876) 17 Kan. 248; *Utsey v. Hiott* (1889) 30 S. C. 360, 14 Am. St. Rep. 910, 9 S. E.

338; *Sanders v. Venning* (1893) 38 S. C. 502, 17 S. E. 134; *Goodale v. Sowell* (1902) 62 S. C. 516, 40 S. E. 970; *Carter v. Barnes* (1910) 87 S. C. 102, 68 S. E. 1054; *Sutton v. State* (1896) 96 Tenn. 696, 33 L.R.A. 589, 36 S. W. 697.

In *Henderson v. Dearing* (1909) 89 Ark. 598, 117 S. W. 1066, it is held that the legislature has the power to create a fencing district by a special act and to change its boundaries by a subsequent act.

A constitutional provision prohibiting local laws creating Stock Law districts does not prohibit the passage of general laws authorizing commissioners' courts to create and to abolish such districts. *Benedict v. Revenue & Road Comrs.* (1912) 177 Ala. 52, 58 So. 306.

In *Wigmore v. Buell* (1898) 122 Cal. 144, 54 Pac. 600, it is held that a statute concerning damages done by animals trespassing on private lands does not violate a constitutional provision that all laws of a general nature shall have a uniform operation because it applies to certain counties only, nor because it allows an attachment for the trespass without an affidavit, thus introducing a remedy different from that pointed out in the Code.

In *Dalby v. Wolf* (1862) 14 Iowa, 228, it is held that a statute which provides that the county judge may submit to the people of his county the question whether stock shall be permitted to run at large or at what time it shall be prohibited, does not violate a constitutional provision that all statutes of a general nature shall have a uniform operation.

In *Noffziger v. McAllister* (1873) 12 Kan. 315, a similar provision is held not to be violated by a statute providing that the board of county commissioners of any county may, upon a petition of a majority of the qualified electors of any township, make an order that all persons owning domestic animals shall keep them confined in the nighttime for certain portions of the year. Followed by *Keyes v. Snyder* (1875) 15 Kan. 143.

In *Dunn v. County Revenues Ct.*

(1888) 85 Ala. 144, 4 So. 661, it is held that acts authorizing the court of county revenue to establish or abolish districts in which stock may be prevented from running at large do not violate a constitutional provision that the legislature shall not have power to authorize any municipal corporation to pass any law inconsistent with the general laws of the state, since counties are not municipal corporations within the meaning of such provision.

On the same ground it is held in *Johnson v. Mocabee* (1893) 1 Okla. 204, 32 Pac. 336, that a statute which enables the electors, voting by districts, to determine whether or not they will permit stock to run at large, is not in conflict with the act of Congress prohibiting territorial legislatures from passing local or special laws regulating township and county affairs, or from passing special laws where general laws can be made applicable.

In *Sears v. Fewson* (1909) 15 N. M. 132, 103 Pac. 268, the same Federal statute was held not to be contravened by a territorial statute requiring the owners of cultivated land in a specified county to protect it with fences within a prescribed time, and making the right to recover damages from the owners of animals injuring the crops thereon depend on the maintenance of fences.

In *Scarborough v. Wooten* (1918) 23 N. M. 616, 170 Pac. 743, which is followed in *Eschliman v. Vernon* (1918) 24 N. M. 332, 171 Pac. 503, it is held that a statute providing that the inhabitants of any precinct in certain specified counties might prohibit the running at large of cattle, horses, etc., within such precinct, in the manner therein provided, did not violate a constitutional provision prohibiting the legislature from passing local or special laws regulating counties, precincts, or district affairs, since such constitutional provision related only to the county or precinct in its corporate capacity. This statute is further held not to be a violation of a constitutional provision forbidding the passing of

special laws where a general law could be made applicable, on the ground that it was within the discretion of the legislature to determine whether or not a general law would be applicable.

This legislative discretion is held in *Addington v. Canfield* (1901) 11 Okla. 204, 66 Pac. 355, to save a statute providing that, in one portion of the state, stock should be prohibited from running at large unless permitted by a vote of the people in established districts, while in the other portion it should be permitted to run at large unless prohibited by a vote of the people, from the condemnation of a constitutional prohibition against the enactment of local laws, where a general law can be made applicable.

In *State use of Ott v. Aubuchon* (1880) 8 Mo. App. 325, it is held that a statute which prohibits cattle and other animals from running at large or being herded on lands other than those of the owner, which by its terms is applicable only to the city and county of St. Louis, does not violate a constitutional provision that no local or special law shall be enacted where a general law can be made applicable, since no law general in its terms could be passed on the subject of inclosing stock without inflicting intolerable mischief upon some portions of the state.

In *Peterson v. Petterson* (1913) 42 Utah, 270, 130 Pac. 241, it is held that a statute providing that any county or precinct thereof might, by a majority vote, declare in favor of fencing farms and allowing domestic animals to run at large, and that in such cases the provisions of the chapter authorizing the detention and sale of animals for damages should be inoperative, is not objectionable as special legislation or as lacking uniformity in operation.

In *State v. Storey* (1909) 51 Wash. 630, 99 Pac. 878, it is held that a statute providing that it shall be unlawful for live stock to run at large in counties in which three fourths of the lands, outside of incorporated cities or towns, are under fence, which fact is to be determined by

the board of county commissioners upon petition, is not invalid as discriminatory.

Statutes exempting certain territory from the operation of a general Stock Law are constitutional. *Sprague v. Fremont, E. & M. V. R. Co.* (1888) 6 Dak. 86, 50 N. W. 617; *Goodale v. Sowell* (1902) 62 S. C. 516, 40 S. E. 970; *Brown v. Tharpe* (1906) 74 S. C. 207, 54 S. E. 363; *Sanders v. Donnelly* (1910) 86 S. C. 94, 67 S. E. 1070.

In *Sprague v. Fremont, E. & M. V. R. Co.* (1888) 6 Dak. 86, 50 N. W. 617, it is said that such a statute "comes within the police power of the legislature, being such a subject-matter as was proper for the legislature to act upon as is deemed best for the interest of such localities."

In *Brown v. Tharpe* (1906) 74 S. C. 207, 54 S. E. 363, it is held that a statute exempting certain territory from the operation of a general Stock Law does not deny equal protection of the laws, even though its effect is to impose upon citizens the burden of fencing in the cultivated lands, when the same is not required of citizens outside the district, and to compel citizens along the boundary line to pay a penalty if their stock should wander across the boundary line.

In *Hendricks v. Block* (1906) 80 Ark. 333, 97 S. W. 63, it is held that a statute making a specified kind of fence a lawful fence in certain portions of a named county, and declaring it to be unlawful for any swine, sheep or goats, or domestic animals of that kind to run at large within such portion of the county, and authorizing persons having control of land where such animals are found running at large to take them up and impound them, is not in violation of a provision of the Constitution declaring that the general assembly shall not grant to any citizen or any class privileges or immunities which, upon the same terms, shall not equally belong to all, nor of one providing that no special law shall be enacted where a general law can be made applicable; it is said that this latter pro-

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vision of the Constitution is merely cautionary, and not enforceable by the courts.

In *Wright v. Cunningham* (1906) 115 Tenn. 445, 91 S. W. 293, an amendment to a previous act prohibiting the running at large of small stock in counties having a certain population, by providing that such act shall apply only to such counties as may adopt the same by a majority vote of the legal voters, is held not to violate a constitutional provision that the legislature shall have no power to suspend any general law for the benefit of any particular individual, nor to pass any law for the benefit of individuals inconsistent with the general laws of the land, nor to pass any law granting to any individual or individuals rights, privileges, immunities, or exemptions other than such as may, by the same law, be extended to any member of the community who may be able to bring himself within the provisions of such law.

In *Darling v. Rodgers* (1871) 7 Kan. 592, however, it is held that a statute exempting certain counties from the operation of a general law, and declaring what shall constitute a legal fence, and requiring all fields and inclosures to be inclosed therewith, is in violation of a constitutional provision that all laws of a general nature shall have a uniform operation throughout the state, and that in all cases where a general law can be made applicable no special law shall be enacted.

While a statute which exempts a particular county from the operation of a general law making it unlawful for the owners of cattle to allow them to roam at large, but with a proviso that the act should not affect those citizens of the county who had conformed to the general Stock Law, violates a constitutional provision that no person shall be subjected in law to any restraint in regard to his personal rights not laid on others under like circumstances. *Utsey v. Hiott* (1839) 30 S. C. 360, 14 Am. St. Rep. 910, 9 S. E. 338; *Sanders v.*

Venning (1893) 38 S. C. 502, 17 S. E. 134.

In *Carter v. Barnes* (1910) 87 S. C. 102, 68 S. E. 1054, it is held that a statute exempting a specified portion of a county from the operation of a general Stock Law would be, in and of itself, constitutional, but that, when joined with a provision that the inhabitants of the exempted section should build and maintain a fence, the imposition of such additional burden rendered the statute unconstitutional.

In *Robinson v. Perry* (1876) 17 Kan. 248, an act prohibiting sheep from running at large except in a specified county, and except as otherwise in the act provided, is held to violate a constitutional provision that all laws of a general nature should have uniform operation throughout the state. The act in question was an amendment to a statute prohibiting sheep from running at large in certain named counties, except as the voters might decide otherwise, and the court intimates that the original act would also violate this provision of the Constitution.

In *Mathis v. Jones* (1890) 84 Ga. 804, 11 S. E. 1018, it is held that where there is in existence an optional Fence Law, general in its nature and of uniform operation throughout the state, an act requiring unconditionally that all domestic animals be kept from running at large in specified districts violates a constitutional provision that laws of a general nature shall have uniform operation throughout the state, and that no special law shall be enacted in any case for which provision has been made by an existing general law. This case is followed in *Camp v. Tompkins* (1890) 84 Ga. 812, 11 S. E. 1021.

In *Goodale v. Sowell* (1902) 62 S. C. 516, 40 S. E. 970, it is held that a statute authorizing commissioners to exclude from or include within territory exempted from the provisions of the general Stock Laws such persons as they might think proper is unconstitutional, as giving the commis-

sioners arbitrary power to discriminate.

In *Sutton v. State* (1896) 96 Tenn. 696, 33 L.R.A. 589, 36 S. W. 697, it is held that a statute providing that in counties having a certain population according to a specified census it should be a misdemeanor to allow live stock to run at large, and giving a lien upon such stock for damage done by them, is an unconstitutional classification by reason of the fact that it does not apply equally to counties which might thereafter have the same population. And such a statute is not saved by the fact that it further provides that any county in the state may come under its provisions upon a favorable vote of the electors thereof.

Similar statutes, but with the provision that they should apply also to counties having the designated population according to any subsequent Federal census, were sustained in *Peterson v. State* (1900) 104 Tenn. 127, 56 S. W. 834; *Murphy v. State* (1905) 114 Tenn. 531, 86 S. W. 711; *Hall v. State* (1911) 124 Tenn. 235, 137 S. W. 500; *Thomas v. State* (1916) 136 Tenn. 47, 188 S. W. 617; *Sullivan v. State* (1916) 136 Tenn. 194, 188 S. W. 1153,—it being held that population was a proper basis for classification.

In *Hall v. State* (1911) 124 Tenn. 235, 137 S. W. 500, it is held that such a statute is not invalid as class legislation by reason of the fact that it continues in force in the original counties, notwithstanding a subsequent change in population which might take them out of the designated class.

Under a constitutional provision that the legislature shall have power to pass such Fence Laws, applicable to any subdivision of the state or county, as may be needed to meet the wants of the people, and may pass laws in stock-raising portions of the state, and exempt from the operation thereof other portions, sections, or counties, provided that any local law thus passed shall be submitted to the freeholders of the section to be affected thereby and approved by them,

the legislature may pass a Stock Law, to be made applicable to parts of a county other than political subdivisions thereof, by a vote of the inhabitants. *Ex parte Tompkins* (1904) 47 Tex. Crim. Rep. 356, 83 S. W. 379; *Neuvar v. State* (1914) 72 Tex. Crim. Rep. 410, 168 S. W. 58; *Bishop v. State* (1914) 74 Tex. Crim. Rep. 214, 167 S. W. 363.

1. Taking property without due process or just compensation.

Most cases involving questions of due process or compensation occur in connection with statutes permitting the seizure and sale of trespassing animals, and, so far as considered in this note, are to be found under V. c. below. A few cases, however, seem to be more properly treated here.

In *Smith v. Bivens* (1893) 56 Fed. 352, a statute exempting certain lands from a general law requiring the owners of stock to keep them fenced in, the effect of which was to require the owners of lands so exempted to fence their whole tracts against cattle or submit to have them trespassed upon without redress, is held to be in violation of the 14th Amendment of the Federal Constitution as depriving such owners of their property without due process of law.

Statutes providing for the establishment of stock districts or the incorporation of adjacent territory into existing stock districts upon petition to a court, which, if it finds certain conditions complied with, is thereupon to order an election upon the question, do not violate the due process clause of the Constitution because they fail to provide for the giving of notice of the application to the court. *Street v. Hooten* (1902) 131 Ala. 492, 32 So. 580; *Edwards v. Bibb County* (1916) 193 Ala. 554, 69 So. 449.

In the former case, the court says: "No man has such estate or interest in the lands of another as entitles him to turn his live stock at large upon it, and a requirement that he keep his stock on his own premises deprives him of no property right or other right assertable in any court.

The legislature might, in the exercise of its police power, have forbidden the running at large of all stock . . . absolutely without notice to owners, . . . and it was clearly competent for that body to confer upon the commissioners' court the power to designate the districts in which the Stock Law enacted by the legislature should operate and be effective, without any notice to persons living and owning stock within any such district."

In *Goodale v. Sowell* (1902) 62 S. C. 516, 40 S. E. 970, which is followed in *Brown v. Tharpe* (1906) 74 S. C. 207, 54 S. E. 368, it is held that the exemption of certain sections of a county from the operation of a general Stock Law is not the taking of the property within the exempted territorial limits, either for a public or a private purpose, even though the principal effect of the statute is to convert the lands therein to a common pasture.

The former case, however, held that a provision of the statute requiring the residents of the exempted section to build and keep in repair a fence along the boundary was unconstitutional as taking property for private purposes without compensation. See also *Carter v. Barnes* (1910) 87 S. C. 102, 68 S. E. 1054, *supra*.

In *Fort v. Goodwin* (1892) 36 S. C. 445, 15 S. E. 723, it is held that a statute which exempts certain lands from the operation of a general law prohibiting stock owners from allowing their cattle to run at large, so long as the fences around said section are kept in good condition, and provides that the county commissioners shall keep them in repair and for that purpose levy from time to time a tax on the stock within the inclosure, and "that, for the building, rebuilding, and repairing said fences, the right of way and all necessary timber shall be obtained in the same manner as is now obtained by railroad companies," is in conflict with the constitutional provision prohibiting the taking of private property for public or private use without the consent of the owner or a just compensation to be made therefor, it being held that the

provision in the statute requiring that the property be obtained in the same manner as it is obtained by railroad companies refers to the manner of obtaining the right of way, and not to the payment of compensation.

V. Laws relating to stock trespassing or running at large.

a. In general.

In *Reser v. Umatilla County* (1906) 48 Or. 326, 120 Am. St. Rep. 815, 86 Pac. 595, it is held that the keeping of live stock within the state is under police regulation, and that the state may prohibit the running at large of such animals and compel their owners to keep them within their own inclosures.

In *Welch v. Bowen* (1885) 103 Ind. 252, 2 N. E. 722, it is held that a statute giving the board of county commissioners power to determine what kinds of animals shall be allowed to run at large or pasture on the uninclosed lands or public commons is not unconstitutional as permitting the taking of property without just compensation.

A statute empowering the electors of each town to determine the time and manner in which stock shall be permitted to go at large on highways is not unconstitutional as taking private property for public use without compensation. *Griffin v. Martin* (1849) 7 Barb. (N. Y.) 297; *Hardenburgh v. Lockwood* (1856) 25 Barb. (N. Y.) 9.

In *Sullivan v. State* (1916) 136 Tenn. 194, 188 S. W. 1153, it is held that a statute prohibiting the running at large of hogs, sheep, or goats is not unconstitutional as making an unreasonable classification because it makes no similar provision as to horses and cattle, since the greater ease of fencing against the larger animals is a just basis for different classification.

In *Broadfoot v. Fayetteville* (1897) 121 N. C. 418, 39 L.R.A. 245, 61 Am. St. Rep. 668, 28 S. E. 515, it is held that discrimination in favor of non-residents of a city by a statute granting them partial or entire exemption from penalties for allowing stock to

run at large in the streets is not unconstitutional.

In *Smith v. Oatts* (1893) 92 Ga. 692, 18 S. E. 1007, it is held that a statute amending a prior statute conferring power upon the authorities of an incorporated town to regulate or prohibit the running at large of animals therein, by enacting that the authorities should not exercise the powers conferred thereby over or upon the property of nonresidents, is not unconstitutional either as class legislation discriminating in favor of non-residents or as violating a constitutional provision inhibiting any special legislation that contravenes a general law, even though another statute empowers the authorities of any town or city to abate and remove nuisances.

In *Pyramid Land & Stock Co. v. Pierce* (1908) 30 Nev. 237, 95 Pac. 210, it is held that a clause in a statute authorizing the recovery of damages against one unlawfully herding or grazing stock on another's land, providing that such recovery shall include an attorney's fee, is a proper police regulation and is constitutional.

In *Sifers v. Johnson* (1901) 7 Idaho, 798, 54 L.R.A. 785, 97 Am. St. Rep. 271, 65 Pac. 709, it is held that a statute making it unlawful to herd or graze sheep on the land or possessory claims of other persons, or within 2 miles of the dwelling house of the owner or owners of such possessory claims, is a valid exercise of the police power and not unconstitutional.

The holding is approved in the subsequent cases of *Sweet v. Ballentyne* (1902) 8 Idaho, 431, 69 Pac. 995; *Walling v. Bown* (1904) 9 Idaho, 740, 76 Pac. 318, 2 Ann. Cas. 720 (on the ground of stare decisis); *Spencer v. Morgan* (1905) 10 Idaho, 542, 79 Pac. 459; *Walker v. Bacon* (1905) 11 Idaho, 127, 81 Pac. 155 (following previous decisions without discussion of principles); *Chandler v. Little* (1917) 30 Idaho, 119, 163 Pac. 299.

Walling v. Bown (1904) 9 Idaho, 740, 76 Pac. 318, 2 Ann. Cas. 720, and *Walker v. Bacon* (1905) 11 Idaho, 127, 81 Pac. 155, supra, were carried to the United States Supreme Court and

there affirmed, it being held that the statute in question was not open to the objection that it took the property of the sheep owner without due process of law, or that it constituted an unconstitutional discrimination against the sheep industry. *Bacon v. Walker* (1907) 204 U. S. 811, 51 L. ed. 499, 27 Sup. Ct. Rep. 289; *Bown v. Walling* (1907) 204 U. S. 320, 51 L. ed. 503, 27 Sup. Ct. Rep. 292.

In *Phipps v. Grover* (1904) 9 Idaho, 415, 75 Pac. 64, it is held that this statute is not to be construed as making it unlawful to drive sheep through the state, or from one place to another within the state, even though in so doing they pass within 2 miles of the dwelling house of a settler, and that, if so construed, it would be in violation of both the state and Federal Constitutions.

In *State v. Horn* (1915) 27 Idaho, 782, 152 Pac. 275, it is held that a statute making it a misdemeanor for any person owning or having charge of sheep to permit the same to be herded, grazed, or pastured on any cattle range previously occupied by cattle or usually occupied by any cattle grower as a range, the priority of possessory rights between cattle and sheep owners to be determined by the priority in the usual and customary use of such range either as a cattle or sheep range, is not unconstitutional either as depriving the sheep owners of the right to acquire, possess, or protect their property, as an encroachment upon the powers of a general government, as an arbitrary interference with a private business or the imposition upon such business of unusual and unnecessary restrictions, or as a violation of the 14th Amendment to the Federal Constitution.

In *State v. Omaechevviaria* (1915) 27 Idaho, 797, 152 Pac. 280, *State v. Horn* (Idaho) *supra*, is followed, and it is further held that the statute is not unconstitutional as a criminal statute by reason of its uncertainty. This case also went to the United States Supreme Court and was there approved. (1918) 246 U. S. 843, 62 L. ed. 763, 38 Sup. Ct. Rep. 323.

The delegation to local authorities of power to enact ordinances, etc., regulating the confining or running at large of stock, is held constitutional in many cases.

Alabama.—*Dillard v. Webb* (1876) 55 Ala. 468.

Illinois.—*Roberts v. Ogle* (1866) 30 Ill. 459, 83 Am. Dec. 201.

Iowa.—*Gosselink v. Campbell* (1856) 4 Iowa, 296; *Dalby v. Wolf* (1862) 14 Iowa, 228.

Kansas.—*Noffziger v. McAllister* (1873) 12 Kan. 315; *Keyes v. Snyder* (1875) 15 Kan. 143.

Kentucky.—*McKee v. McKee* (1848) 8 B. Mon. 433.

Missouri.—*Spitler v. Young* (1876) 68 Mo. 42.

New York.—*Griffin v. Martin* (1849) 7 Barb. 297; *Hardenburgh v. Lockwood* (1856) 25 Barb. 9.

North Carolina.—*State v. Mathis* (1908) 149 N. C. 546, 63 S. E. 99.

Ohio.—*Fox v. Fox* (1878) 24 Ohio St. 335; *Ratcliff v. Teters* (1875) 27 Ohio St. 66.

In *Dillard v. Webb* (1876) 55 Ala. 468, it is held that it is clearly competent for the legislature, by express authority, to delegate to a municipal or other public corporation municipal in character the right to enact that fences shall be dispensed with, that cattle shall be kept within inclosures, that they may be distrained if found at large damage feasant, that they may be impounded and, if after reasonable notice they be not redeemed and the reasonable damages and expenses paid, that they be sold therefor.

In *Roberts v. Ogle* (1863) 30 Ill. 459, 83 Am. Dec. 201, it is held that the legislature may confer upon an incorporated town authority to abridge or destroy within its limits the right of owners of stock to turn them upon the common range of the county.

In *Dalby v. Wolf* (1862) 14 Iowa, 228, it is held that a statute which provides that the county judge may submit to the people of his county the question whether stock shall be permitted to run at large, or at what time it shall be prohibited, is not an

unconstitutional delegation of legislative power.

This case was considered in *Weir v. Cram* (1873) 37 Iowa, 649, supra, and distinguished on the ground that the statute here considered permitted the people of each county to adopt certain police regulations in regard to stock, and provided for the manner of their adoption and enforcement, while there a positive enactment by the legislature was made to depend for its validity upon the approval of the people by a vote.

In *Noffziger v. McAllister* (1873) 12 Kan. 315, it is held that a statute providing that the board of county commissioners of any county may, upon a petition of a majority of the qualified electors of any township, make an order that all persons owning domestic animals of any kind, therein to be specified, shall keep them confined in the nighttime for certain portions of the year, and that for any violation of said order the owners of stock shall be liable in damages to the party injured, is not an unconstitutional delegation of power where the Constitution provides that the legislature may confer upon tribunals transacting county business of the several counties such powers of local legislation and administration as it shall deem expedient. Followed by *Keyes v. Snyder* (1875) 15 Kan. 143.

In *Gosselink v. Campbell* (1856) 4 Iowa, 296, *McKee v. McKee* (1848) 8 B. Mon. (Ky.) 433, and *Spitler v. Young* (1876) 63 Mo. 42, it is held that the legislature may confer upon a town the power to adopt regulations respecting the prohibition of stock from running at large and to impose fines and penalties for violation thereof.

The power to make rules and regulations for ascertaining the sufficiency of fences and for determining the time and manner in which stock shall be permitted to go at large on the highways may be delegated by the legislature to the electors of the town. *Griffin v. Martin* (1849) 7 Barb (N. Y.) 297; *Hardenburgh v. Lockwood* (1856) 25 Barb. (N. Y.) 9.

In *State v. Mathis* (1908) 149 N. C. 546, 68 S. E. 99, it is held that the

legislature may confer upon county commissioners authority to forbid stock running at large in the county or any township thereof, and to declare a mountain range, a creek, or other natural or political boundary a lawful fence, or the limit within which the law shall operate.

In *Fox v. Fox* (1873) 24 Ohio St. 335, it is held that it is within the scope of legislative power to grant to commissioners of counties and trustees of townships authority to grant general and special permission for specified animals to run at large. Followed by *Ratcliff v. Teters* (1875) 27 Ohio St. 66.

b. Denying recovery for trespasses on unfenced premises.

Statutes prohibiting owners of lands not securely fenced from recovering for trespasses of cattle are held to be constitutional as an exercise of the police powers, in *Myers v. Dodd* (1857) 9 Ind. 290, 68 Am. Dec. 624; *Clark v. Stipp* (1881) 75 Ind. 114; *Chase v. Chase* (1880) 15 Nev. 259; *Bileu v. Paisley* (1889) 18 Or. 47, 4 L.R.A. 840, 21 Pac. 934; *Poindexter v. May* (1900) 98 Va. 143, 47 L.R.A. 588, 34 S. E. 971.

In the three latter cases and in *Union P. R. Co. v. Rollins* (1869) 5 Kan. 167, and *Caulkins v. Mathews* (1869) 5 Kan. 191, attention is called, however, to the fact that such statutes give no authority to a stock owner to drive his stock upon the land of another, whether fenced or unfenced, and that any statute giving such a right would be unconstitutional.

c. Seizure and sale of trespassing stock.

Statutes authorizing the seizure and sale of trespassing stock have generally been held constitutional.

Alabama.—*Dillard v. Webb* (1876) 55 Ala. 468.

Arkansas. — *Hendricks v. Block* (1906) 80 Ark. 333, 97 S. W. 63.

California. — *Rood v. McCarger* (1874) 49 Cal. 117.

Idaho.—*Fall Creek Sheep Co. v. Walton* (1913) 24 Idaho, 760, 136 Pac. 438, Ann. Cas. 1915C, 1252.

Mississippi. — *Anderson v. Locke* (1887) 64 Miss. 283, 1 So. 251.

Nebraska.—*Randall v. Gross* (1903) 67 Neb. 255, 93 N. W. 223.

New York.—*Cook v. Gregg* (1871) 46 N. Y. 439; *Leavitt v. Thompson* (1873) 52 N. Y. 62; *Fox v. Dunkel* (1869) 38 How. Pr. 186; *Squares v. Campbell* (1871) 41 How. Pr. 193; *Campbell v. Evans* (1869) 54 Barb. 566, affirmed in (1871) 45 N. Y. 356.

North Carolina.—*Hogan v. Brown* (1899) 125 N. C. 251, 34 S. E. 411.

Tennessee.—*Hall v. State* (1910) 124 Tenn. 235, 137 S. W. 500; *Sullivan v. State* (1916) 136 Tenn. 194, 188 S. W. 1153.

Texas.—*Graves v. Rudd* (1901) 26 Tex. Civ. App. 554, 65 S. W. 63.

West Virginia.—*Haigh v. Bell* (1895) 41 W. Va. 19, 31 L.R.A. 131, 23 S. E. 666.

But in a few cases where the statute authorized a sale for the purpose of paying private damages, with no provision for a judicial determination of the amount of such damage, such law was held to be unconstitutional. *Greer v. Downey* (1903) 8 Ariz. 164, 61 L.R.A. 408, 71 Pac. 900; *Rockwell v. Nearing* (1866) 35 N. Y. 302; *Sutton v. State* (1896) 96 Tenn. 696, 33 L.R.A. 589, 36 S. W. 697; *Armstrong v. Traylor* (1895) 87 Tex. 598, 30 S. W. 440.

In *Hogan v. Brown* (1899) 125 N. C. 251, 34 S. E. 411, it is said: "Statute laws, giving the right to impound stock and to sell the same for damages committed upon property while estray, and costs for impounding, have been enacted in many of the states, and they have stood the test of the courts when they have been attacked as unconstitutional on the ground that they deprive one of his property without due process of law." In this case a horse was impounded and sold for the payment of fees due by law to the impounder, and it was held that no notice was necessary to be given to the owner other than that which was given by the advertisement required by law in such cases.

In *Rood v. McCargar* (1874) 49 Cal. 117, it is held that a statute authorizing hogs damage feasant to be impounded by the owner of the premises trespassed upon until the damage

they have committed and the cost of keeping them are paid is not obnoxious to any constitutional objection.

In *Dillard v. Webb* (1876) 55 Ala. 468, it is held that a statute authorizing the distress and impounding of cattle taken damage feasant does not deprive the owner of his property without due process where it provides that such owner may redeem his stock by the payment of such fees and compensation as the commissioners may establish, together with the damages sustained by any person as the result of such animals going at large and trespassing.

In *Hendricks v. Block* (1906) 80 Ark. 333, 97 S. W. 63, it is held that a statute making it unlawful for certain kinds of domestic animals to run at large and giving persons upon whose lands they trespass the right to take them up, and providing that notice shall be given to the owners, who may thereupon regain possession on payment to the taker up of all expenses incident to the taking up, including feeding and caring for the animals, or, in default thereof, that said animals may be advertised and sold upon public notice for the payment of such expenses, any balance to be turned over to the owners, is not violative of the constitutional provision against taking property without due process of law.

In *Fall Creek Sheep Co. v. Walton* (1913) 24 Idaho, 760, 136 Pac. 438, Ann. Cas. 1915C, 1252, it is held that a statute providing that the owner or occupant of premises is not required to fence against hogs, and that hogs found trespassing may be taken up by the owner or occupant of the premises, and held until payment of the expense and damages and a fee, with provisions for notice to the owner of the hogs, for arbitration of the amount of the damages, and for a sale upon failure to pay, or for a transfer of absolute ownership of the hogs to the person taking them up, is not obnoxious to the constitutional provision against taking property without due process of law.

In *Anderson v. Locke* (1887) 64 Miss. 283, 1 So. 251, a statute provid-

ing that all persons residing in certain districts "shall inclose, confine or herd their stock in order that crops may be cultivated without fences; that, if any animals are found trespassing upon fields or cultivated lands of anyone other than that of the owner of such animals, they may be taken up by anyone interested, and the owner of such animals shall pay to such person taking them up a certain sum for each day kept, for feeding the same, and the owner cannot recover them until such sum is paid; that the party taking up any animals shall, without delay, give notice to the owner, if known, and if the owner does not call for them and pay charges within five days, then it is the duty of the party so taking them up to deliver them to the nearest justice of the peace who shall, after giving five days' notice posted in three public places, sell such animal or animals at public auction, etc.," is held to be constitutional.

In *Randall v. Gross* (1903) 67 Neb. 255, 93 N. W. 223, it is held that a statute providing that when stock is found upon the cultivated lands of another it may be impounded, that notice is to be given to the owner, if known, who may, within a specified time, reclaim the stock by making payment of damages and costs, with a provision for arbitration as to the amount of such damages, and giving a lien upon the stock, does not violate the constitutional provision against the taking of property without due process of law.

Graves v. Rudd (1901) 26 Tex. Civ. App. 554, 65 S. W. 63, holds a statute regulating the running at large of stock, and providing that "if any stock forbidden to run at large shall enter the inclosed lands . . . of any person other than the owner of such stock . . . the owner, lessee or person in lawful possession of said lands may impound such stock and detain the same until his fees and all damages occasioned by said stock are paid to him," not unconstitutional either on the ground of depriving a person of his property without due process of law, or denying him the

right to a trial by jury, or prohibiting an appeal.

In *Haigh v. Bell* (1895) 41 W. Va. 19, 31 L.R.A. 131, 23 S. E. 666, a statute making it unlawful for owners to permit their hogs to run at large, and giving the owner of property injured by hogs running at large double damages and a lien on the hogs for the payment thereof, with the right to distrain and, after notice, to sell, is held not to violate a constitutional provision against depriving persons of property without due process of law.

In *Rockwell v. Nearing* (1866) 35 N. Y. 302, it is held that a statute authorizing the seizure and sale, without judicial process, of animals found trespassing within a private inclosure, is unconstitutional. The court says: "The legislature transcends the limits of its authority when it enacts that one citizen may take, hold, and sell the property of another, without judicial process, and without notice to the owner, as a mere penalty for a supposed private injury."

This statute was afterwards amended so as to provide that the persons taking up the trespassing stock should make immediate complaint to a justice of the peace, who should thereupon issue a summons requiring the owner or any proper party interested in the property seized to show cause why the animals should not be sold and the proceeds applied as directed by the act, the summons to be served by posting it publicly, and that the issue might be tried by jury if desired by either party, and that an appeal might be taken to the county court. As so amended, the statute was held to be constitutional in *Cook v. Gregg* (1871) 46 N. Y. 439; *Leavitt v. Thompson* (1873) 52 N. Y. 62; *Fox v. Dunckel* (1869) 38 How. Pr. (N. Y.) 136; *Squares v. Campbell* (1871) 41 How. Pr. (N. Y.) 193.

The same statute was held constitutional as to stock taken up while running at large in the public highways in *Campbell v. Evans* (1869) 54 Barb. (N. Y.) 566, affirmed in (1871) 45 N. Y. 356.

In *Greer v. Downey* (1903) 8 Ariz.

164, 61 L.R.A. 408, 71 Pac. 900, a statute providing that in districts where a majority of the taxpayers so petitioned no fence should be required around the land, that it should be unlawful for any animal to run at large, and that animals found trespassing might be impounded and detained for a certain amount of damages and costs, without providing any judicial proceeding to ascertain either the damages to be paid or whether or not the animals were in fact running at large within the meaning of the statute, is held to be void as depriving the owner of his property without due process of law. It is pointed out in the opinion that this provides for private damages, and not merely for the recovery of official expenses, fees, etc.

In *Armstrong v. Traylor* (1895) 87 Tex. 598, 30 S. W. 440, it is held that a statute providing that the owner of inclosed premises may impound stock unlawfully trespassing thereon, that the damages might be assessed by any three disinterested freeholders, and the stock sold to pay the same, is in violation of a constitutional provision that no citizen shall be deprived of property without due process of law. The fact that the injured party might select the freeholders who were to assess his damages is emphasized in the opinion.

In *Sutton v. State* (1896) 96 Tenn. 696, 33 L.R.A. 589, 36 S. W. 697, it is held that a constitutional provision declaring that no man shall be deprived of his property but by law of the land is violated by a statute making it a misdemeanor in counties having a designated population according to a particular census, for the owners of live stock to allow the same to run at large, imposing a fine therefor, and giving a lien upon the stock for damage done by them, since such statute does not apply equally to all counties which might thereafter have the same population.

Similar statutes, except that they are made applicable to counties having the designated population according to the specified census or any subsequent census, are held not to vio-

late this principle in *Hall v. State* (1911) 124 Tenn. 235, 137 S. W. 500; *Sullivan v. State* (1916) 136 Tenn. 194, 188 S. W. 1158.

VI. Miscellaneous.

In *Blewett v. Smith* (1881) 74 Mo. 404, a statute requiring any person who voluntarily throws down any fence and leaves the same down, other than those that lead into his own inclosures, to pay the party injured a penalty and double damages, and under which nonpayment might subject the defendant to commitment to the county jail, is held not to violate a constitutional provision against imprisonment for debt except for the nonpayment of fines and penalties imposed for violation of law, nor a provision of the Constitution declaring that the clear proceeds of all penalties and forfeitures, and all fines, collected from several counties, for any breach of the penal laws of the state, should belong to the counties and public school funds.

In *Dilworth v. State* (1896) 36 Tex. Crim. Rep. 189, 36 S. W. 274, it is held that a statute making it a misdemeanor to build or maintain a fence extending more than 3 miles in the same general direction without providing a gateway of a specified kind, and providing no compensation to the owner, is unconstitutional as providing for the taking of private property for public use without compensation, since it impliedly gives the public the right to pass through the gates and over the land, and requires the owner to maintain the gate at his own expense.

In *United States v. Douglas-Willan Sartoris Co.* (1889) 3 Wyo. 287, 22 Pac. 92, it is held that an act of Congress declaring any inclosure of public land made by any person without claim or color of title to any portion of the land so inclosed, unlawful, is, so far as it forbids the erection by a landowner of a fence wholly within the limits of his own land, not a legitimate exercise of the police power, but an unwarranted invasion of private property. In this case the defend-

ant owned certain sections of land so situated as to surround a considerable number of other sections which were still public land, and had built and

proposed to build a fence wholly on his own lands, but which would inclose with them such interior public lands.
M. A. L.

STATE OF OKLAHOMA, Plff. in Err.,
v.
W. A. EMERY.

Oklahoma Supreme Court — August 13, 1918.

(— Okla. —, 174 Pac. 770.)

Bills and notes — discounting — purchase.

1. The mere discounting of a negotiable note for a customer by a bank, and crediting the amount to be paid therefor to the customer's account, does not of itself make the bank a purchaser for value, but such transaction creates the relation of debtor and creditor, and in such a state of case the bank will be deemed a holder in due course, only when it has paid the full amount to be paid therefor to the assignor of said note, before notice of any equities or defenses against the same.

[See note on this question beginning on page 252.]

— notice of defect.

2. In an action upon a negotiable note by the holder thereof, who acquires it for value before maturity without notice, against the payor, from whom the note was obtained for an illegal consideration, knowledge of such facts as would put a prudent man upon inquiry is not sufficient to defeat the right of the holder to recover.

[See 3 R. C. L. 1071-1075.]

Evidence — bad faith.

3. The evidence in this case examined, and the circumstances surrounding the transaction are not sufficiently strong for it to be said that bad faith may be reasonably inferred therefrom.

Notice — to vice president of bank.

4. A vice president of a bank, who is not in active charge of the business of the bank, acting for himself in a transaction with the bank, must be regarded as a stranger to it, dealing as if he had no official relation with it, and knowledge upon his part as to the illegal consideration of the note assigned by him to the bank is not sufficient to impute knowledge to the bank.

[See 3 R. C. L. 479, 1070.]

Bills and notes — defective title.

5. Under § 4105, Rev. Laws 1910, the title of a person who negotiated an instrument is defective when he obtains the same for an illegal consideration.

[See 3 R. C. L. 1020.]

Evidence — burden of proof — consideration.

6. And under § 4109, Rev. Laws 1910, when the title is defective, the burden is on the holder to prove that he, or some person under whom he claims, acquired the title as a holder in due course, and where the bank purchases a negotiable note and deposits the money to the credit of the seller, the burden is on the bank to prove that it had paid the entire consideration for said note to the seller, before it acquired knowledge of any infirmities or defenses.

[See 3 R. C. L. 1044, 1045.]

— payment.

7. Where the sole issue is one of payment, the burden rests upon the party pleading the same to prove it; and the evidence in this case examined, and held, that the same fails to establish payment in whole or in part.

[See 3 R. C. L. 1285.]

Headnotes by HOOKER, C.

ERROR to the County Court for Washita County (Shean, J.) to review a judgment in favor of defendant in an action brought to recover the amount alleged to be due on two certain promissory notes. *Reversed.*

The facts are stated in the Commissioner's opinion.

Messrs. S. P. Freeling, Attorney General, and William H. Zwick, Assistant Attorney General, for the State, and M. M. Thomas, for State Banking Board:

The execution of the notes sued on herein having been admitted by the answer of the defendant, and there being no proper proof of payment on the part of the defendant, plaintiff is entitled to an instructed verdict.

Forbes v. First Nat. Bank, 21 Okla. 206, 95 Pac. 785; *McPherrin v. Tittle*, 36 Okla. 510, 44 L.R.A. (N.S.) 395, 129 Pac. 721; *Citizens' Sav. Bank v. Landis*, 37 Okla. 530, 132 Pac. 1101; *First State Bank v. Tobin*, 39 Okla. 96, 134 Pac. 395; *Stockyards State Bank v. Johnston*, 52 Okla. 32, 152 Pac. 585; *Hodgins v. Northwestern Finance Co.* 46 Okla. 95, 143 Pac. 717.

If notice and knowledge were received by the payee in a business transaction in which he was interested, there was no legal obligation on his part to inform the bank of any infirmities in said negotiable paper, and the concealing of any facts which he knew in regard thereto could not be imputed to the bank.

First Nat. Bank v. Dikeman, 96 Kan. 765, 153 Pac. 559; 1 *Michie, Banks & Bkg. p.* 830; *Graham v. Orange County Nat. Bank*, 59 N. J. L. 225, 35 Atl. 1053; *Davis v. Boone County Deposit Bank*, 25 Ky. L. Rep. 2078, 80 S. W. 161; *Union State Bank v. First Nat. Bank*, 122 Ark. 612, 184 S. W. 411; *Guaranty State Bank v. Bland*, — Tex. Civ. App. —, 189 S. W. 546; *Rusmisseil v. White Oak Stove Co.* 80 W. Va. 400, L.R.A.1917F, 453, 92 S. E. 672; *Corcoran v. Snow Cattle Co.* 151 Mass. 74, 23 N. E. 727; *Wardlaw v. Troy Oil Mill*, 74 S. C. 368, 114 Am. St. Rep. 1004, 54 S. E. 658; *Ohio Valley Bkg. & T. Co. v. Citizens Nat. Bank*, 173 Ky. 640, 191 S. W. 433; 10 Cyc. 1063.

Messrs. Smith, Jones, & Smith for defendant in error.

Hooker, C., filed the following opinion:

In February, 1915, the banking department of the state of Oklahoma took charge of the Farmers' & Merchants' Bank of Mountain View, Oklahoma, and thereby acquired the assets of the bank,

among which were the two notes involved in this action. Thereafter the state of Oklahoma instituted a suit upon said notes against W. A. Emery, in the county court of Washita county. "Exhibit A" is a note for the sum of \$550 of date April 18, 1914, and due December 1, 1914, bearing interest at 10 per cent per annum from maturity until paid, signed by W. A. Emery, and payable to one T. E. Givens; and the other note is for the sum of \$80.25, of date April 19, 1913, and due October 1, 1913, executed to the Mountain View Trading Company, or order, with 10 per cent interest from maturity, signed by W. A. Emery, and assigned by the Mountain View Trading Company to said bank. The petition in this case alleged the execution and delivery of said notes by said W. A. Emery, and the transfer and assignment thereof, before maturity, by the payees to said bank, and the acquisition of said notes by the banking department of the state of Oklahoma. The answer filed consisted of a general denial and a plea of usury charged as to the transaction between Emery and Givens, and as a result of which there is excessive interest or usury. It is alleged that the total consideration of said note was usurious interest on said note executed by Emery to Givens, and the same is pleaded as a defense to this action. A plea of payment was made as to the renewal of the note mentioned above. The plaintiff filed a reply in the form of a general denial to the answer of the defendant, and in March, 1916, the cause was tried.

From the evidence it appeared that in December, 1912, W. A. Emery executed his note to T. E. Givens in the sum of \$500, due December 1, 1913, with 10 per cent interest from date, and that on the 16th day of April, 1913, T. E. Givens assigned and transferred said note to the Farmers' & Mer-

chants' Bank of Mountain View, Oklahoma, and that the bank on that date, in consideration of that note, deposited to the credit of said T. E. Givens with it the sum of \$500; that said note was not paid when due; and that a short time after the maturity thereof said note was renewed by the execution of the \$550 note sued upon in this cause.

The evidence discloses that T. E. Givens is payee in said note, and the one who assigned the same to the bank was vice president of the bank, but was not in active charge of the operation thereof at the time the bank purchased this note; that he had not been an active officer in the bank since 1908, but continued to act as vice president until January, 1914, and that, in his negotiations with the bank, President L. C. West acted for the bank; and that Givens did not have anything to do with conducting the affairs of the bank in this or other transactions, so far as the discounting of paper was concerned, after 1908.

It is further shown that West, president of the bank, had no personal knowledge of any defense or equity that Emery might have against the note in question at the time he purchased the same for the bank, but while he had a general knowledge as to the methods of Givens in charging excessive interest to his customers and patrons, yet he did not have any specific knowledge of the transactions between Emery and Givens in reference to the note in question.

The evidence also discloses that Emery did not make any defense or charge of usury until after the maturity of the second note; that he did not contend to the bank, when the first note matured, that there was any usury embraced therein, but renewed the same when it matured, and raised the defense of usury only after the maturity of the note, upon and after the bank had become insolvent and its assets taken over by the state.

The testimony of Emery in this action discloses that he had been

dealing with Givens for a number of years, and had paid him excessive interest for the use of money, and that, upon final settlement in 1912, he executed the \$500 note in question, and that after deducting the illegal interest he did not at that time owe him anything, and that the total consideration for this \$500 note was illegal interest. His testimony gives in detail the amount of money loaned at various times by Givens to him, and the usury charged, and his testimony is not disputed, and, if true, clearly shows that the \$550 note in question had for its consideration only illegal interest.

At the conclusion of the evidence here, by an agreement of the parties the case was withdrawn from the jury and submitted to the court, and the court, after taking the matter under advisement, rendered a judgment in favor of the defendant below, from which judgment the state has appealed.

The state contends that the bank was a holder in due course before maturity, for a valuable consideration, without notice of any equity or defense, and that under the evidence here it was entitled to a judgment for the full amount of said note. Section 4102, Rev. Laws 1910, provides:

"A holder in due course is a holder who has taken the instrument under the following conditions:

"First. That it is complete and regular upon its face;

"Second. That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact;

"Third. That he took it in good faith and for value;

"Fourth. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

Section 4104, Rev. Laws 1910, provides: "Where the transferee receives notice of any infirmity in the instrument or defect in the title

of the person negotiating the same before he has paid the full amount agreed to be paid therefor he will be deemed a holder in due course only to the extent of the amount theretofore paid by him."

Applying the provisions of § 4102, Revised Laws 1910, to the facts in this case, we must determine whether the bank is an innocent purchaser before maturity for a valuable consideration, and without notice of the defense and equity urged against this note.

There is no contention here that the instrument is not complete and regular upon its face, or that the bank became the holder of it before it was due, and without notice that it had been previously dishonored. But it is a disputed fact as to the bank acquiring this note for value, and without notice of defenses.

It is the contention of the defendant in error that inasmuch as West, the president of the bank, had a general knowledge of the methods of Givens in transacting his business with his customers, that was sufficient to put the bank upon inquiry, and, inasmuch as Givens himself was the vice president of the bank, that these facts were sufficient to impute knowledge to the bank of the illegal consideration of said note. Inasmuch as Givens was not an active officer of the bank, and in no manner had charge of the discounting of notes for it, we are of

Notice—to vice
president of
bank.

the opinion that the bank is not bound or charged with knowledge by reason of his conduct, nor do we believe that the general knowledge of West as to the methods of Givens in the transaction of

Evidence—had
faith.

his business was sufficient to impute bad faith to the bank in the purchase of this note.

In the case of First Nat. Bank v. Dikeman, 96 Kan. 765, 153 Pac. 559, it is said: "A bank which buys a negotiable note is not prevented from becoming a holder in due course by the fact that its cashier, through whom the purchase is made,

was a director of the bank to which the note was given, at the time of its execution; he having no actual notice of any defect or defense. Nor is such bank prevented from becoming a holder in due course by the fact that its cashier knew the note was given as the result of a settlement between the maker and the payee, and that, knowing of the pendency of negotiations to that end, he had agreed with the payee to purchase the note."

And in 1 Michie on Banks & Bkg. p. 830, it is said: "The rule seems to be that knowledge or notice on the part of an officer or agent with respect to discounts and securities, when such matters are within the scope of his duties or agency, are chargeable to the bank, and bind it in subsequent proceedings. But the rule cannot hold good when the officer is also acting, in part, for himself and in his own behalf. The bank whose president has knowledge of a defect in a guaranty on negotiable bonds at the time that it, acting through him, makes a loan thereon, is not charged with notice, he being a part owner in the bonds and the loan being in part for his benefit. The knowledge of an officer of a bank, being also a member of its discount committee, who takes part in discounting a note made to him individually for an unlawful purpose, in which he participates, is not imputable to the bank."

And in Davis v. Boone County Deposit Bank, 25 Ky. L. Rep. 2078, 80 S. W. 161, the court of appeals of Kentucky said: "Where the interest of the president of a bank, who was also its attorney, in the discount of a note sued on, was adverse to the bank, his knowledge of an infirmity in the paper was insufficient to charge the bank therewith."

And in Union State Bank v. First Nat. Bank, 122 Ark. 612, 184 S. W. 411, the Arkansas supreme court said: "Where the president of an insurance company, who had knowledge that its agent had misrepresented the value of corporate stock sold, was also the president of the

bank to which the certificate of deposit of the proceeds of the sale of the stock in another bank was assigned, the president's knowledge of the fraud is not imputed to the bank, if he, in assigning the certificate to the bank, acted only for the insurance company."

And in *Guaranty State Bank v. Bland*, — Tex. Civ. App. —, 189 S. W. 546, it is said: "A bank taking a note was not taxed with notice of facts relative to fraud in the inception of the note, known to its cashier, whose knowledge was acquired when acting solely in his individual capacity, for himself and another concern in which the bank had no interest."

See also *Rusmisset v. White Oak Stove Co.* 80 W. Va. 400, L.R.A. 1917F, 453, 92 S. E. 672; *Corcoran v. Snow Cattle Co.* 151 Mass. 74, 23 N. E. 727; *Wardlaw v. Troy Oil Mill*, 74 S. C. 368, 114 Am. St. Rep. 1004, 54 S. E. 658.

And in 10 Cyc. 1063, the law is laid down as follows: "If a corporate officer or agent acts avowedly for himself in a transaction with the corporation, he is regarded as a stranger to the corporation, dealing as if he had no official relation with it."

And further in said Cyc.: "If, therefore, it is desired to charge the corporation with a knowledge of such facts, affirmative evidence must be given that the officer has made a disclosure thereof to other and disinterested officers of the corporation, whose knowledge may properly be said to be that of the corporation, or at least that he made such disclosures as ought to have put them on inquiry."

And it is further said in Cyc.: "When, therefore, an officer, director, or agent of a corporation deals with the corporation for himself in his private capacity, any uncommunicated knowledge which he may have in respect of the transaction will not be imputed to the latter by reason of his possession of it."

This court in the case of *Forbes v. First Nat. Bank*, 21 Okla. 206,

95 Pac. 785, said: "In an action on a negotiable draft by the holder thereof, who acquired it for value before maturity, without notice, against an indorser from whom the draft was obtained by fraud, knowledge of such facts as would put a prudent man upon inquiry in reference <sup>Bills and notes—
notice of defect.</sup> to the draft is not

sufficient to defeat the right of the holder to recover, and the court may direct a verdict in favor of the holder, when the circumstances surrounding the transaction are not sufficiently strong for it to be said as a matter of law that bad faith may be reasonably inferred therefrom."

And in *McPherrin v. Tittle*, 36 Okla. 510, 44 L.R.A. (N.S.) 395, 129 Pac. 721, the court says: "Suspicion of defect of title, or the knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or of circumstances sufficient to put him upon inquiry, will not defeat his title; that result can be produced only by bad faith on his part."

See also *Citizens Sav. Bank v. Landis*, 37 Okla. 530, 132 Pac. 1101; *First State Bank v. Tobin*, 39 Okla. 96, 134 Pac. 395.

The question arises here as to whether, under this evidence, it can be said that the bank was the holder of this note for value.

The court has laid down the rule that the mere discounting of an undue note for a customer by the bank, <sup>—discounting—
purchase.</sup> and crediting the amount to be paid therefor to the customer's account, does not of itself make the bank a purchaser for value, but such transaction creates the relation of debtor and creditor.

And under § 4104, Rev. Laws 1910, a bank, in that state of case, will only be deemed a holder in due course when it has paid the full amount agreed to be paid for said note, or, in other words, when the money thus deposited to the credit of the assignor has been paid to him. See *Morrison v. Farmers &*

M. Bank, 9 Okla. 697, 60 Pac. 273, and National Bank v. Armbruster, 42 Okla. 656, 142 Pac. 393, and Southwestern Nat. Bank v. Armbruster, — Okla. —, 157 Pac. 1146.

The facts here disclose that when the bank bought this note from Givens it deposited the amount thereof to his credit, and the relation of debtor and creditor was thereby established to this extent, and, under the rule thus announced, the bank could not become an innocent holder for value unless it paid to the seller of the note the amount due for the same before notice of infirmities and defenses was acquired by it. Section 4105, Rev. Laws 1910, provides: "The title of a person who negotiates an instrument is defective within the meaning of this chapter —defective title. when he obtained the instrument, or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to fraud."

Under the evidence here, and under the finding of the court, the total consideration for the note in question was usury, and illegal. That being true, then, under the statute above quoted, the title of Givens to said note was defective within the meaning of said statute. And under § 4109, Revised Laws 1910, when the title is defective, the burden is on the holder to prove that he, or some person under whom he claims, acquired the title as a holder in due course. That being true, then it was incumbent upon the state here to show that the

Evidence—burden of proof—consideration.

bank had paid out the entire consideration of said note to Givens before it acquired knowledge of the infirmities or defenses thereto. This it did not do.

Upon the trial of this cause the state introduced in evidence the small note sued upon here, to which there was only a defense of payment, and no evidence was introduced to establish the payment. It —payment.

was, therefore, error for the court to overrule the demurrer of the state to this evidence of the defendant below as to the second cause of action, and render judgment against the state.

For this reason the judgment of the lower court is reversed, and this cause is remanded for a new trial.

Per Curiam:

Adopted in whole.

NOTE.

In holding that the mere deposit of the proceeds of a negotiable note in a deposit account is not such a payment of value as will constitute the bank a holder in due course, but that it will be such if the entire amount of the proceeds is drawn out on the faith of the instrument, the court, in the reported case (STATE v. EMERY, ante, 234), is in harmony with practically all of the decisions in this country (see note to OLD NAT. BANK v. GIBSON, post, 252, especially II. c, and III. a). But the holding that the "entire consideration" must have been paid out would be, if no statute had been involved, contrary to the weight of authority. See III. e, and IV. of the note. But see VI. as to effect of statute upon the question.

MARION NATIONAL BANK

v.

SILAS HARDEN, Trading, etc., Plff. in Err.

West Virginia Supreme Court of Appeals — November 15, 1918.

(— W. Va. —, 97 S. E. 600.)

Bills and notes — crediting by bank — holder in due course.

1. The mere crediting by a bank to a depositor's account of the proceeds of a note will not constitute the bank a holder in due course, when, after nonpayment, the amount remains to the credit of such depositor. And if the instrument was given for the price of property sold, and the sale and purchase thereof were manifestly to prevent the defense of breach of warranty, the transaction will be regarded fraudulent. In such a case the transaction lacks the quality of a purchase in "good faith and for value," required of a purchaser in due course.

[See note on this question beginning on page 252.]

—series — maturity for nonpayment
—bona fide holder.

2. Where more than one note is executed, and it is stipulated therein, or in the security given therefor, that failure to pay any one of the notes when due will automatically mature all the others, such stipulation will be given effect according to its terms, and a purchaser of such notes, with notice, after such maturity, will thereby be deprived of the rights of a purchaser in due course.

[See 3 R. C. L. 1048, 1215.]

— good faith — suspicion.

3. On the question of "good faith and for value" required of a purchaser in due course, mere knowledge of facts sufficient to create suspicion, without actual knowledge, will not deprive him of the rights of a purchaser in due

course, but if the facts, circumstances, and conditions attending his purchase are so cogent and obvious that to remain passive amounts to bad faith on his part, and show bad faith on the part of the seller, the purchaser will be deprived of the status of holder in due course.

[See 3 R. C. L. 1071-1075.]

—assignment — qualified indorsement.

4. An assignment of "all right, title, and interest in and to the within note," indorsed on the back of an instrument, being a qualified indorsement, in no way affects the negotiability of the paper, and the indorsee having possession thereof is deemed prima facie a holder in due course.

[See 3 R. C. L. 996.]

Headnotes by MILLER, J.

ERROR to the Circuit Court for Kanawha County to review a judgment in favor of plaintiff in an action brought to recover the amount alleged to be due on seven promissory notes. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Morgan Owen and E. B. Dyer, for plaintiff in error:

The contract was one to be performed in the state of Indiana.

Prentice v. Zane, 2 Gratt. 262; Union Trust Co. v. McClellan, 40 W. Va. 405, 21 S. E. 1025; Davis v. Miller, 14 Gratt. 14; Mercantile Bank v. Boggs, 48 W. Va. 289, 37 S. E. 588.

The notes sued on were past due in the hands of the Harwood-Barley Manufacturing Company long before they

were discounted by the plaintiff bank. The moment defendant refused to pay the note, which was due in three months from date, all of the subsequent notes of the series became due and payable under the terms of the deed of trust, and when purchased by the plaintiff bank they were subject to all of the equities and defenses which the maker had against the payee manufacturing company.

Rowe v. Scott, 28 S. D. 145, 182 N. W.

695; *Missouri K. & T. R. Co. v. Newton*, 60 Tex. Civ. App. 116, 127 S. W. 873; *Crilly v. Gallice*, 78 C. C. A. 525, 148 Fed. 835; *Stoy v. Bledsoe*, 31 Ind. App. 643, 68 N. E. 907; *Marion Bond Co. v. Blakely*, 30 Ind. App. 374, 65 N. E. 291, 66 N. E. 71; 1 Dan. Neg. Inst. p. 924; *Noell v. Gaines*, 68 Mo. 649; *Hodge v. Wallace*, 129 Wis. 84, 116 Am. St. Rep. 938, 108 N. W. 212; *Merchants Nat. Bank v. Brisch*, 154 Mo. App. 631, 136 S. W. 28; *Indiana Bond Co. v. Bruce*, 13 Ind. App. 550, 41 N. E. 958; *Ft. Wayne, C. & L. R. Co. v. Woodward*, 112 Ind. 119, 18 N. E. 260; *Buchanan v. Berkshire L. Ins. Co.* 96 Ind. 510; *Green v. Louthain*, 49 Ind. 139; *First Nat. Bank v. Peck*, 8 Kan. 660; *Lewis v. Lewis*, 58 Kan. 563, 50 Pac. 454; *Douthitt v. Farrell*, 60 Kan. 195, 56 Pac. 9; *Wheeler & W. Mfg. Co. v. Howard*, 28 Fed. 742; *Tiedeman, Com. Paper*, § 297; 2 *Randolph, Com. Paper*, 2d ed. § 1047; *Hart v. Stickney*, 41 Wis. 630, 22 Am. Rep. 728; *Newell v. Gregg*, 51 Barb. 263; *Peat v. Chicago, M. & St. P. R. Co.* 128 Wis. 92, 107 N. W. 355; *First Nat. Bank v. Forsyth*, 67 Minn. 258, 64 Am. St. Rep. 415, 69 N. W. 909; *Joyce, Defenses to Com. Paper*, §§ 472-474; *Nashville Trust Co. v. Smythe*, 94 Tenn. 513, 27 L.R.A. 663, 45 Am. St. Rep. 748, 29 S. W. 903; *Ray v. Baker*, 165 Ind. 74, 74 N. E. 624; *State v. Baltimore & O. C. R. Co.* 120 Ind. 298, 22 N. E. 307; *First Nat. Bank v. Ruhl*, 122 Ind. 279, 23 N. E. 766; *Moore v. Sargent*, 112 Ind. 484, 14 N. E. 466; 1 *Pom. Eq. Jur.* 439; *Malcolm v. Allen*, 49 N. Y. 448; *Bradley v. Whicker*, 28 Ind. App. 380, 55 N. E. 490; *Bunting v. Mick*, 5 Ind. App. 289, 31 N. E. 378, 1055; *Parker v. Hickman*, 61 Ind. App. 159, 111 N. E. 649; *McMillan v. Gardner*, 88 Kan. 279, 128 Pac. 391, Ann. Cas. 1914B, 755; *Snyder v. Miller*, 71 Kan. 410, 69 L.R.A. 250, 114 Am. St. Rep. 489, 80 Pac. 970; *Voris v. Ferrell*, 57 Ind. App. 12, 103 N. E. 122; *Horn v. Bennett*, 135 Ind. 158, 24 L.R.A. 800, 34 N. E. 321, 956; *Bank of Bushnell v. Buck Bros.* 161 Iowa, 362, 142 N. W. 1004; *McNight v. Parsons*, 136 Iowa, 390, 22 L.R.A. (N.S.) 718, 125 Am. St. Rep. 265, 113 N. W. 858, 15 Ann. Cas. 665.

The plaintiff bank was not a purchaser for value or a holder in due course.

1 Dan. Neg. Inst. p. 909; *Joyce, Defenses to Com. Paper*, p. 243; *Union Nat. Bank v. Winsor*, 101 Minn. 470, 118 Am. St. Rep. 641, 112 N. W. 999, 11 Ann. Cas. 204; *Manufacturers Nat.*

6 A.L.R.—16.

Bank v. Newell, 71 Wis. 309, 37 N. W. 422.

It was the duty of the bank to know what the terms of the deed of trust were, and especially so in the state of Indiana, where the conditions of this deed of trust were to be performed.

Stoy v. Bledsoe, 31 Ind. App. 643, 68 N. E. 907; *Billingsley v. Dean*, 11 Ind. 331; *Brown v. Maulsby*, 17 Ind. 10; *Jones v. Schulmeyer*, 39 Ind. 119; *Buchanan v. Berkshire L. Ins. Co.* 96 Ind. 510.

The burden of proof was upon the plaintiff bank to prove that it was a holder of said notes in due course.

Bank of Bushnell v. Buck Bros. 161 Iowa, 362, 142 N. W. 1004; *McNight v. Parsons*, 136 Iowa, 390, 22 L.R.A. (N.S.) 718, 125 Am. St. Rep. 265, 113 N. W. 858, 15 Ann. Cas. 665.

Messrs. Brown, Jackson, & Knight, for defendant in error:

Plaintiff became a holder of the notes before they were overdue, and without notice that they had been previously dishonored.

1 Dan. Neg. Inst. p. 945; *Pape v. Hartwig*, 23 Ind. App. 333, 55 N. E. 271; *Johnson County Sav. Bank v. Capito*, 47 Ind. App. 461, 94 N. E. 797; *Wilson v. National Fowler Bank*, 47 Ind. App. 689, 95 N. E. 269; *First Nat. Bank v. Rupert*, 178 Ind. 669, 100 N. E. 5.

The plaintiff bank took them in good faith, and for value.

Mayer v. Heidelberg, 123 N. Y. 332, 9 L.R.A. 850, 25 N. E. 416; *Greenwood v. Lowe*, 7 La. Ann. 197; *Mickles v. Colvin*, 4 Barb. 304; *Bacon v. Holloway*, 2 E. D. Smith, 159; *Howlett v. Fitzgibbon*, 1 N. Y. Supp. 321; *Adams v. Soule*, 33 Vt. 538; *Lally v. Colgate*, 10 Jones & S. 544; *Russell v. Haddock*, 8 Ill. 233, 44 Am. Dec. 693; *Matlock v. Scheuerman*, 51 Or. 49, 17 L.R.A. (N.S.) 747, 93 Pac. 823; 2 *Randolph, Com. Paper*, § 479.

At the time the notes were negotiated to it, the bank had no notice of any infirmity in them, or defect in the title of the person negotiating them.

Tescher v. Merea, 118 Ind. 586, 21 N. E. 316; *Wilson v. National Fowler Bank*, 47 Ind. App. 689, 95 N. E. 269; *Parker v. Hickman*, 61 Ind. App. 152, 111 N. E. 649; *Colvert v. Harrington*, 61 Ind. App. 608, 112 N. E. 249; *First Nat. Bank v. Rupert*, 178 Ind. 669, 100 N. E. 5; 1 Dan. Neg. Inst. § 796; *Merchants & M. Nat. Bank v. Ohio Valley Furniture Co.* 57 W. Va. 625, 70 L.R.A. 312, 50 S. E. 880; *Shaw v. North Penn-*

sylvania R. Co. 101 U. S. 557, 25 L. ed. 892; *Swift v. Smith*, 102 U. S. 444, 26 L. ed. 194.

Possession and production of negotiable paper by an indorsee raise the presumption that it was purchased in good faith, for value, in the usual course of business, and without notice of any defenses, and the burden to prove that the indorsee is not a bona fide holder is on the defendant.

Johnson County Sav. Bank v. Capito, 47 Ind. App. 461, 94 N. E. 797; *Wilson v. National Fowler Bank*, 47 Ind. App. 689, 95 N. E. 269; *First Nat. Bank v. Rupert*, 178 Ind. 669, 100 N. E. 5; *Colvert v. Harrington*, 61 Ind. App. 608, 112 N. E. 249; *Hill v. Ward*, 45 Ind. App. 458, 91 N. E. 38; *Hinkley v. Fourth Nat. Bank*, 77 Ind. 475; *Shirk v. Mitchell*, 137 Ind. 185, 36 N. E. 850; *Goodman v. Simonds*, 20 How. 343, 15 L. ed. 934; *Bank of Spencer v. Simmons*, 43 W. Va. 79, 27 S. E. 299; 1 *Dan. Neg. Inst.* p. 962; *Joyce, Defenses to Com. Paper*, § 240; 1 *Randolph, Com. Paper*, p. 652; 8 *Cyc.* 222 et seq.

Miller, J., delivered the opinion of the court:

Plaintiff, doing business in the city of Marion, Indiana, as indorsee, sued defendant, doing business as City Taxicab Company at Charleston, West Virginia, as maker in assumpsit upon seven notes, dated Marion, Indiana, August 6, 1915, payable to the order of Harwood-Barley Manufacturing Company, the indorser, in ten, eleven, twelve, thirteen, fourteen, fifteen, and sixteen months respectively, each for the sum of one hundred and forty-nine and 37/100 dollars, at Grant Trust & Savings Company, Marion, Indiana, each note showing on its face that it was executed for the sale by and purchase from the payee of certain Indiana motor trucks and certain motor truck parts, the title to any and all of which property was thereby expressly declared to be and remain in the payee, or its assignee, until the said notes should be fully paid, with right to payee or assignee to take possession thereof if the maker should sell or dispose thereof before maturity of the notes, and hold the same, and in default of the note at

maturity, to sell same or any part thereof without further notice, and to apply the proceeds to the payment of the note, returning the excess to maker, less expenses connected with the sale. The indorsements, signed "Harwood-Barley Mfg. Co., S. W. Winder, Sec'y," are as follows:

Marion, Ind. June 5, 1916.

For value received we hereby assign, transfer, and set over to the Marion National Bank all our right, title, and interest in and to the within note, and in and to the said Indiana motor trucks for which said note was executed.

Upon the trial, and here upon writ of error awarded the defendant to the judgment below against him, the questions presented by the pleadings and proof and by instructions to the jury given and refused are: First, was there total or partial failure of consideration for the notes as between maker and payee thereof? Second, were said notes procured from maker by payee fraudulently? Third, was the plaintiff holder of said notes in due course, as defined by § 52, chap. 98A, Barnes's Code 1918 (Code 1913, § 4223)? Fourth, was there any error in the giving and refusing of instructions? Fifth, was the verdict of the jury supported by the weight and preponderance of the evidence, or did the court err in not sustaining defendant's motion to set aside the verdict and grant him a new trial?

That there was at least partial failure of consideration for the notes there is not a shadow of doubt. The notes were given in payment of the balance of the purchase price of a twenty-passenger motor truck manufactured by the payee, and which was purchased by defendant for a particular purpose known to the manufacturer and its agent, who represented it to be suitable for and capable of doing the work desired. That it was practically useless for any purpose we think is proven beyond question.

Defendant made every effort to test it out, with the help of representatives of the manufacturer sent to Charleston to assist him. The engine and other parts of the machine were, by request of the payee on the notes, returned to the factory, where an effort was made to make them good for the work, but without success. While these efforts to make the machine good were in progress, one or two of the notes first falling due were paid, others of the series were disposed of to Grant Trust & Savings Company, the bank where payable, which sued as holder in due course and obtained judgment against defendant, which was paid by him, and the record shows that he had paid on said machine, altogether, about \$2,000. The notes here sued on are the last of the series of sixteen notes, of which the payee still holds the four falling due in six, seven, eight, and nine months from date, and which were all due and unpaid before the date of the alleged assignments of the last seven of the series to the plaintiff. This assignment occurred on the day before the first of these fell due, and payment of which, as of the prior ones still held by the assignor or sued on by Grant Savings & Trust Company, was refused by defendant, and the paper sued on thereby dishonored.

Another important fact is that besides the retention of title by the seller, as evidenced by the notes, the maker on the same day, as further security for the payment thereof, executed to a trustee a deed of trust on the truck purchased, which was duly recorded in Kanawha county, West Virginia, where the machine was situated, which deed described the notes, and, among other things, contained this provision: "The party of the first part covenants to pay each of the aforesaid notes when they become due, and failure to pay any of the aforesaid notes when it becomes due shall cause all of the said notes to become due and payable."

We do not think the evidence suf-

ficient to establish fraud in the procurement of the notes, but it does satisfy us beyond doubt that in disposing of the notes, some of them to Grant Savings & Trust Company, and lastly the seven remaining of the series to plaintiff, the purpose of the Harwood-Barley Manufacturing Company was to defraud and defeat defendant in his lawful defense to the notes.

It is well settled by the laws of Indiana, with reference to which the contract must be construed and the rights of the parties determined, and elsewhere, that when more than one note is execut-

Bills and notes—
series—ma-
turity for
nonpayment—
bona fide holder.

ed, and it is stipulated therein, or in the security given therefor, that failure to pay any one of the notes when due will automatically mature the others, such provision will be given effect according to its terms, and that a purchaser of any one of the notes, after maturity of any prior one, with notice, will be thereby deprived of the rights of a purchaser in due course. 1 Dan. Neg. Inst. 6th ed. p. 924; Tiedeman, Com. Paper, § 297; Thorp v. Mindeman, 123 Wis. 149, 68 L.R.A. 146, 107 Am. St. Rep. 1003, 101 N. W. 417; Joyce, Defenses to Com. Paper, § 468; Moore v. Sargent, 112 Ind. 484, 14 N. E. 466; Rowe v. Scott, 28 S. D. 145, 132 N. W. 695; Hodge v. Wallace, 129 Wis. 84, 116 Am. St. Rep. 938, 108 N. W. 212. It is clear, therefore, that the notes sued on, by the provisions in the deed of trust referred to, were due and payable before the plaintiff claims to have purchased them in due course, and, if it had notice, were subject to all equities between the maker and the payee thereof. The notes on their face make no reference to the deed of trust, but the payee by whom the deed was executed, and to whom it was delivered, according to some of the authorities cited, was chargeable with notice of all the provisions thereof.

One of the pivotal questions presented is whether plaintiff became

the holder of the paper in suit in due course. To occupy this status under our law, § 52, chap. 98A, Barnes's Code 1918 (Code 1913, § 4223), the following conditions must exist: (1) The instrument must be complete and regular on its face; (2) the holder must have purchased it before due, without notice that it had been previously dishonored, if that was the fact; (3) he must have taken it in good faith and for value; (4) when negotiated to him, he must have had no notice of any infirmity in the instrument or defect in the title of the person negotiating it. Section 9089z1, Burns's Annotated Statutes (Ind.) contains the same provisions, defining who is a holder in due course. And § 9089c2 of the Indiana statutes renders the title of the person who negotiates the instrument defective when he obtains the instrument, or any signature there-to, by fraud, duress, or force and fear, or other unlawful means, or for an unlawful consideration, or where he negotiates it in *breach of faith, or under circumstances as amount to fraud*. And the next section, § 9089d2, says that to constitute notice of an infirmity in the instrument, or defect in the title of the person negotiating the same, the person to whom it is negotiated must have actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith.

On the question now under consideration we think the first requirement is satisfied; the notes appear regular on their face, and no controversy is presented thereon. On the second requirement, it clearly appears that the notes, when purchased, were, by the terms of the deed of trust, past due, and payment had been declined by the maker, and the notes thereby dishonored; but the notes not referring to the deed of trust, or in terms making it a part of the contract, the question of prime importance is, Did the plaintiff have actual notice of

the maturity and the dishonor of the notes, or knowledge of such facts that its action in taking them amounted to bad faith? for in either event it cannot occupy the position of holder in due course.

On the question of actual notice to plaintiff, its witness, Rhue, vice president of the bank, with whom the Harwood-Barley Manufacturing Company, through Winder, its secretary, negotiated the notes, when asked whether he knew the notes thus negotiated were part of a series of notes given by Harden to the Harwood-Barley Manufacturing Company, answered that, "from the notes, it would indicate they were a part of a larger series." And when asked if he knew that payment of the notes was secured by a deed of trust dated August 10, 1915, given by Harden to Prichard, trustee, his answer was: "I probably did at the time, but I don't remember now about that." And asked whether he knew that the deed of trust showed that there were nine of the notes due before the first of those negotiated to him, he evasively answered: "My recollection would be that if I did observe that feature, that I probably took for granted that they had been previously paid." He said that he did not remember whether he asked Winder or anybody connected with the Harwood-Barley Manufacturing Company whether they had been paid, although the first of the notes negotiated to him was due the next day. Immediately following these questions and answers, he was asked whether, when this series of notes was brought to him the day before the first was due, he did not make diligent inquiry about them, and answered: "It might have been that we did not." When further asked if he did not know that, upon default of payment of one note of the series, all, by the terms of the deed of trust, became due and payable, his reply was: "I don't know that I did." Is it not reasonably certain that if he knew at the time he took the notes for the bank, as he said he

probably did, that the notes were secured by a deed of trust, that he also knew of the provisions thereof? The evidence shows a close relationship between plaintiff and the Grant Trust & Savings Company, where the notes were made payable, in the handling of paper for the Harwood-Barley Manufacturing Company. What we shall have to say upon the third condition, and the facts disclosed in relation thereto, will also have a potent influence on the question of notice to plaintiff.

Respecting the third condition, "good faith and for value," the law is well settled that mere knowledge of facts sufficient to put a prudent man on inquiry, without actual knowledge, or mere suspicion of an infirmity or defect of

—good faith—
suspicion.

title, does not preclude a transferee from occupying the position of a holder in due course, unless the circumstances and conditions are so cogent and obvious that to remain passive would amount to bad faith. 8 C. J. 501, and cases cited. And as we construe § 9089d2 of the Indiana statutes, actual knowledge or knowledge of facts showing bad faith on the part of a party negotiating an instrument, and the consequent defect or infirmity of his title, will constitute bad faith on the part of a purchaser, and deny him the status of a holder in due course. Besides the facts alluded to in the preceding paragraphs, including the suspicious circumstance of offering the notes for discount the day before the first fell due, we have the very important admission of the bank officers that they credited the Harwood-Barley Manufacturing Company with the sum of \$1,097.53, principal and interest on the notes, accrued to date. Another fact is that the bank claims to have issued the Harwood-Barley Manufacturing Company its draft or check on New York on that day, for the amount of the credit. This draft was not produced in evidence, but it is conceded that if so issued the draft was immediately indorsed

back to the bank by the company, and never left the bank or passed through the drawee in New York. Why all this circumlocution for so simple a transaction as the alleged purchase of the notes? The evident purpose was to make it appear that the bank had parted with something of value for the notes, instead of simply crediting its customer with the proceeds, or principal and interest thereof, which was the real transaction. Moreover the evidence shows that at the time of this credit the company already had to its credit in the bank \$5,869.90, and it does not appear from the record what became of these credits. It does appear that on the following day, when the first of the notes sued on by its own provision became due, and was not paid, the entire amount remained to the credit of the customer. We think these facts impute bad faith to both seller and purchaser, and show infirmity in the right and title of both which is sufficient to deprive the bank of the rights of a purchaser in due course and for value.

Moreover, it seems to be well settled that the mere crediting to a depositor's account on the books of a bank, of the amount of a note or of a check drawn upon

—crediting by
bank-holder in
due course.

another bank, where the depositor's account continues to be sufficient to pay the check in case it is dishonored, does not constitute the bank a holder in due course. 1 Dan. Neg. Inst. 6th ed. 908 et seq.; Joyce, Defenses to Com. Paper, 243; Union Nat. Bank v. Windsor, 101 Minn. 470, 118 Am. St. Rep. 641, 112 N. W. 999, 11 Ann. Cas. 204; Manufacturers' Nat. Bank v. Newell, 71 Wis. 309, 37 N. W. 423. Of course the rule is different where something of actual value is parted with by the bank, or the purchaser gives credit for the note or check on an old debt, etc. But we do not think the transaction involved here, in law, amounts to anything more than passing to the credit of the customer the amount of the principal and

interest of the notes. It has been held that the negotiation of a note given for the price of property sold, for the purpose of preventing the defense of breach of warranty, constitutes fraud in its negotiation within the meaning of the statute. 8 C. J. 984; *Bank of Bushnell v. Buck Bros.* 161 Iowa, 362, 142 N. W. 1004; *McNight v. Parsons*, 136 Iowa, 390, 22 L.R.A. (N.S.) 718, 125 Am. St. Rep. 265, 113 N. W. 858, 15 Ann. Cas. 665.

It follows from what has been said that the fourth condition to constitute the bank a holder in due course is also absent. The facts disclosed, we think, impute notice to the bank at the time of the transaction, of infirmity in the title of the seller, and deprive it of the rights of a purchaser in due course.

In a reply brief, counsel for defendant make the point that, by the words of the assignment, "all our right, title, and interest in and to the within note," the indorsee acquired by substitution only such right as the indorser had, and not that of a purchaser in due course. The following are some of the authorities cited in support of this proposition: *Gale v. Mayhew*, 161 Mich. 96, 29 L.R.A. (N.S.) 648, 125 N. W. 781; 3 R. C. L. 569; *Tiedeman, Com. Paper*, § 265; *Lyons v. Divelbis*, 22 Pa. 185; *Ellsworth v. Varney*, 83 Ill. App. 94; 1 Dan. Neg. Inst. 6th ed. p. 763. Mr. Daniel says: "In Michigan, where the payee wrote on the back of a note, 'I hereby transfer my right, title, and interest of the within note to S. C. Y.,' the view has been strongly presented that such transfer was not an indorsement in the sense of the law merchant, but merely passed title, not rendering the assignor liable as an indorser in the event of due dishonor and notice." Citing *Aniba v. Yeomans*, 39 Mich. 171.

But Mr. Daniel does not approve the rule of the Michigan cases. On the contrary, he says in the same section that, while such an indorsement is a qualified

indorsement, it is a commercial indorsement, and is not a mere assignment, and does not in law discredit the paper or even bring it under suspicion. And the other cases cited by him show that the great weight of judicial decisions is against the view of the Michigan court. And it seems to us that by a proper construction of §§ 33 to 38 of our Negotiable Instruments Law (Code 1913, §§ 4204-4209), practically the same as the Indiana statute, no other conclusion can be reached. Section 33 says: "An indorsement may be either in blank or special; and it may also be either restrictive or qualified, or conditional."

The definitions of each of these classes given in the succeeding sections clearly exclude the indorsements on the notes sued on, unless it be a qualified indorsement defined by § 38 as follows: "A qualified indorsement constitutes the indorser a mere assignor of the title to the instrument; it may be made adding to the indorser's signature the words, 'without recourse,' or any words of similar import; such an indorsement does not impair the negotiable character of the instrument."

In *Evans v. Freeman*, 142 N. C. 61, 54 S. E. 847, the court distinctly holds that such an indorsement as we have under consideration here does not in any way affect the negotiability of the instrument, and that the indorsee is deemed prima facie a holder in due course if he has possession of the note under such indorsement. Other decisions cited give the statute the same construction.

These conclusions justify, in point of law, the giving of the plaintiff's several instructions to the jury, and the refusal of defendant's instructions numbered 3 and 4, the third relating to the burden of proof, the fourth based on the theory of fraud on the part of the Harwood-Barley Manufacturing Company in procuring the defendant to execute the notes. On the theory of the latter we do not find evidence of fraud, but

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qualified in-
dorsement.

of mistake in judgment only, not justifying the theory of actual fraud. But for the reasons set forth herein for sustaining the motion of the defendant to set aside the verdict and award him a new trial, as we have concluded the court below should have done, we think the court also erred in refusing his instructions numbered 5 and 6.

For the foregoing reasons we reverse the judgment, set aside the verdict, and remand the case for a new trial.

NOTE.

The question of crediting the proceeds of negotiable paper to holder's deposit account, as constituting bank a holder in due course, is considered in note to OLD NAT. BANK v. GIBSON, post, 252. It will be noted that the court, in the reported case (MARION NAT. BANK v. HARDEN, ante, 240), in holding that merely depositing the

proceeds of the instrument to the indorser's account does not constitute a giving of value such as will make the bank a holder in due course, is in harmony with the rule adopted by practically all of the courts in this country, and the case is cited to that point under subd. II. c, of the note. By reference to subd. III. c, it will also be seen that, under the rule that "the first money in is the first money out," the holding that there was in this case no drawing from the account on the faith of the instrument, such as would make the bank a holder in due course under the rule set out under subd. III. a, is also in harmony with the American authorities. The indorser already had in bank \$5,869.90; so, under the rule, that amount must have been drawn from the account before any draft or check paid out of the account could be said to have been paid "on the faith of the instrument."

The effect upon the rule of the Negotiable Instruments Law is discussed under subd. VI. of the note.

OLD NATIONAL BANK OF SPOKANE, Appt.,

v.

E. J. GIBSON and Wife, Respts.

Washington Supreme Court (In Banc) — February 20, 1919.

(— Wash. —, 179 Pac. 117.)

Checks — taking for collection — credit — holder in due course.

A bank which, after taking a check for collection and crediting it to the depositor's account upon condition that it may be charged back in case of dishonor, permits the depositor to draw his whole account, including that represented by the check credit, becomes a holder in due course under the Negotiable Instruments Act, and may maintain an act against the drawer of the check.

[See note on this question beginning on page 252.]

(Mackintosh, Fullerton, Main, and Mitchell, JJ., dissent.)

APPEAL by plaintiff from a judgment of the Superior Court for Spokane County (Huneke, J.), sustaining a demurrer to and dismissing the complaint in an action brought to recover the amount of a check. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Wakefield & Witherspoon, for appellant:

Banks are holders for value to the extent of any advances made by them on the strength of commercial paper held in their possession.

Dan. Neg. Inst. 4th ed. § 183a; 3 R. C. L. Banks, § 215; 7 Cyc. 929; Union Nat. Bank v. Winsor, 101 Minn. 470, 118 Am. St. Rep. 641, 112 N. W. 999, 11 Ann. Cas. 204; Shawmut Nat. Bank v. Manson, 168 Mass. 425, 47 N. E. 196; Jefferson Bank v. Merchants' Refrigerating Co. 236 Mo. 407, 139 S. W. 545; First Nat. Bank v. McNairy, 122 Minn. 215, 142 N. W. 139, Ann. Cas. 1914D, 977; Oppenheimer v. Radke, 20 Cal. App. 518, 129 Pac. 798; National Bank v. Armbruster, 42 Okla. 656, 142 Pac. 393; Fox v. Bank of Kansas City, 30 Kan. 441, 1 Pac. 789; Thompson v. Sioux Falls Nat. Bank, 150 U. S. 231, 37 L. ed. 1063, 14 Sup. Ct. Rep. 94; McNight v. Parsons, 136 Iowa, 390, 22 L.R.A. (N.S.) 718, 125 Am. St. Rep. 265, 113 N. W. 858, 15 Ann. Cas. 665; Elgin City Bkg. Co. v. Hall, 119 Tenn. 548, 108 S. W. 1069; Queen City Sav. Bank & T. Co. v. Reyburn, 163 Fed. 597; Union Nat. Bank v. Mailloux, 27 S. D. 543, 132 N. W. 168; Standing Stone Nat. Bank v. Walser, 162 N. C. 53, 77 S. E. 1006; Miller v. Norton, 114 Va. 609, 77 S. E. 452; Tatum v. Commercial Bank & T. Co. 185 Ala. 249, 64 So. 561; Warman v. First Nat. Bank, 185 Ill. 60, 49 L.R.A. 412, 57 N. E. 6; City Deposit Bank Co. v. Green, — Iowa, —, 103 N. W. 96; Sperlin v. Peninsular Loan & Discount Co. — Tex. Civ. App. —, 103 S. W. 232; Dreilling v. First Nat. Bank, 43 Kan. 197, 19 Am. St. Rep. 126, 23 Pac. 94; United States Nat. Bank v. McNair, 114 N. C. 335, 19 S. E. 361; Latham v. Spragins, 162 N. C. 404, 78 S. E. 282; Tapes v. Varley-Wolter Co. 184 Mo. App. 470, 171 S. W. 19; Morrison v. Farmers' & M. Bank, 9 Okla. 697, 60 Pac. 273; Little v. Arkansas Nat. Bank, 113 Ark. 72, 167 S. W. 75; Elmore County Bank v. Avant, 189 Ala. 418, 66 So. 509; Sherrill v. Merchants' & M. Trust & Sav. Bank, 195 Ala. 175, 70 So. 723; Bland v. Fidelity Trust Co. 71 Fla. 499, L.R.A. 1916F, 209, 71 So. 630; Fredonia Nat. Bank v. Tommei, 131 Mich. 674, 92 N. W. 348.

Mr. C. E. H. Maloy for respondents.

Tolman, J., delivered the opinion of the court:

Respondent E. J. Gibson drew a check upon his account in the Fidel-

ity National Bank of Spokane, in favor of one J. A. White, in the sum of \$440. White, upon receipt of the check, deposited the same to his account in the appellant bank. The deposit slip upon which White listed the check for deposit with appellant bank contained the following provision: "Items other than cash are received on deposit with the express understanding that they are taken for collection only."

A conditional credit for such deposit was given the depositor, White, who, on the same day, checked out his entire balance in the appellant bank, including the conditional credit derived through the deposit of the Gibson check, and has since made no further deposits. Thereafter, and in due course, the check was returned to appellant through the clearing house, with the notation that payment had been stopped thereon by the maker, Gibson. Appellant then demanded payment of the amount of the check from Gibson, which was refused, and brought this action to recover the amount thereof. The trial court sustained a demurrer to the complaint. Appellant elected to stand upon its complaint, and judgment of dismissal was entered, from which this appeal was taken.

According to the allegations of the complaint it is appellant's claim that the check was received by it in the first instance for collection only, according to the terms of the deposit slip, but, by later permitting the depositor to check out his entire account, including the amount of the check sued upon, that it thereby became a purchaser for value of such check, and entitled to maintain an action against its maker to recover the amount thereof. No rights are based upon the original deposit of the check for collection, but the contention is that the depositor, White, having been paid the full amount of his balance in reliance upon the check now in suit, then on deposit with it, the relationship of principal and agent, which had theretofore existed be-

tween the depositor, White, and the appellant bank, was terminated, and that it did, upon making such payment, cease to hold the check for collection, and became a holder in due course under the statute. The question, then, to be determined, is whether, having originally received the check as agent for collection, the bank, by honoring White's checks to an amount which entirely exhausted his balance, including the deposited check, thereby became a holder for value.

The respondent relies principally upon the following cases heretofore decided by this court: *Washington Brick, Lime, & Mfg. Co. v. Traders' Nat. Bank*, 46 Wash. 23, 123 Am. St. Rep. 912, 89 Pac. 157; *Morris-Miller Co. v. Von Pressentin*, 63 Wash. 74, 114 Pac. 912; *Belsheim v. First Nat. Bank*, 77 Wash. 552, 137 Pac. 1055; and *American Sav. Bank & T. Co. v. Dennis*, 90 Wash. 547, 156 Pac. 559. Of these cases, as we view them, only the first and the last touch upon the point involved, as no question of the payment of value or of who was a holder in due course was involved, or could have been raised under the facts or pleadings in either of the other cases.

In *Washington Brick, Lime, & Mfg. Co. v. Traders' Nat. Bank*, supra, there is language employed which seems to lend support to respondent's position, but when the issues are carefully analyzed, it does not appear that any party to that action was asserting that it had parted with value because of and in reliance upon the instrument, or had become a holder in due course; and, while the opinion might have stated the rule defining a holder in due course of negotiable paper, so as to avoid uncertainty and confusion, yet it is evident that the decision was arrived at and can be sustained without in any wise denying that rule.

In *American Sav. Bank & T. Co. v. Dennis*, supra, however, this exact question was squarely raised by the pleadings, but appears to

have been lost sight of both in the trial court and in this court. It was decided here upon questions of the admissibility of evidence, and the fundamental question of whether the bank in that case, by payments to its depositor after the check was deposited with it, became a holder for value without notice and in due course, was apparently overlooked.

It may be frankly conceded that in this case the bank received the check for collection in the first instance, or conditionally, with the right to charge it back to the depositor's account if dishonored; and, had no advances been made on account thereof, and so long as the original relationship continued unchanged between the bank and its depositor, the former had no right in or title to the check which would be sufficient to constitute it a holder in due course. It may likewise be conceded, for present purposes, as contended for by respondent, that the bank cannot occupy two different and inconsistent positions at the same time. But if the bank did not waive its right or privilege to charge the check back to the depositor upon its dishonor, and yet advanced its money upon the credit of the check so deposited, there is ample authority to support the view that, by making such advances on the credit of the deposited check, it thereby became a holder in due course to the extent of such advances, notwithstanding that it may still have claimed the right to charge the check back to its depositor, if it saw fit. *Scott v. W. H. McIntyre Co.* 93 Kan. 508, L.R.A. 1915D, 139, 144 Pac. 1002; *Noble v. Doughten*, 72 Kan. 336, 3 L.R.A. (N.S.) 1167, 83 Pac. 1048; *First Nat. Bank v. Armstrong (C. C.)* 39 Fed. 231.

It is, however, alleged and claimed in this case, that, after the making of the deposit and the giving of the conditional credit before referred to, the bank and its depositor made a new and different contract with reference to the deposited check; that the latter, by presenting his

own check and demanding the cash for his entire balance, and the bank, by accepting such check and paying the depositor his entire balance, in effect made a new contract, by which the bank waived the condition in the credit theretofore given, waived its right to charge back the check, if dishonored, and became the purchaser of the check for value without notice, or a holder in due course. No rule of law is perceived which prevents a bank and its depositor from changing, modifying, or making new and supplemental contracts, as often as they may agree so to do. And if any such new or changed and modified contract is material in this case, it appears to be sufficiently alleged. After the deposit of a check and the giving to the depositor of conditional credit therefor, the depositor, by presenting his own check for the amount of his balance, including such conditional credit, thus established beyond argument his desire and request that the theretofore existing condition in the credit be waived or modified. Upon the presentation by a depositor of a check against such conditional credit, the bank may do any one of a number of things: (1) It may refuse to pay the depositor's check until assured that the conditional credit shown in the account of the depositor has become absolute by the payment of the deposited check at the bank on which it is drawn. Such a course would be a refusal to waive or contract away the previously agreed upon condition involved in the depositor's credit. (2) The bank may cash the depositor's check solely upon his individual credit, looking to him solely to pay the overdraft if one shall result, which would constitute a new contract independent of and distinct from the previous conditional-credit contract, and the bank could sue its depositor thereon. (3) The bank might, under the situation which we are now considering, waive the condition created for its own protection, make the conditional credit abso-

lute, and pay the depositor's check upon the credit of the check theretofore deposited by him, but not yet collected. This would constitute an acceptance of the depositor's offer made by presenting his check, and would create a new contract wholly superseding the previous conditional-credit contract. (4) Or the bank may, without inconsistency, combine the last two courses suggested, and pay the depositor's check on the combined credit of the depositor and of the deposited check; just as in making a loan to a customer upon a note secured by collateral, the bank would grant the credit upon the combined worth of the borrower and of the collateral pledged. This also would be an acceptance of the depositor's offer to supersede the contract for conditional credit. The allegations of the complaint and the well-known custom of bankers both show that the bank in this instance relied upon the depositor's credit balance, which included the deposited check which went into and helped to create that credit balance, when it cashed its depositor's check in this instance, and thereby exhausted the credit balance. And it is immaterial in this case whether the bank relied solely upon the deposited check, or also in part relied upon the individual worth of its depositor. In either case it, by the subsequent transaction, and by paying out its money upon the credit of the deposited check (no matter what other security in the form of the worth of its depositor it may have thought it had), thereby became the holder of such check in due course.

Our Negotiable Instruments Law, which is the uniform law common to so many states, §§ 3417 and 3418, Rem. Code, provides:

"Where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who became such prior to that time."

"Where the holder has a lien on the instrument, arising either from contract or by implication of law,

he is deemed a holder for value to the extent of his lien."

So that under the statute it is immaterial to this inquiry whether the bank, by paying its depositor's check, became the absolute owner of the check now in question, or, as some authorities seem to hold, obtained only a lien thereon to the amount of its advances. In either case, according to the plain language of the statute, it, under the facts pleaded here, became a holder

Checks—taking
for collection—
credit-holder in
due course.

for value to the full
amount for which
the check was
drawn. The stat-

ute above referred to expresses only what has been the law of negotiable paper since the time "whereof the memory of man runneth not to the contrary." The following are a few of the many authorities which might be cited to the same effect: 5 Cyc. 497; 3 R. C. L. 1056; Morse, Banks & Bkg. 573; 7 C. J. 618; Citizens' State Bank v. E. A. Tesson & Co. 121 Minn. 34, 45 L.R.A. (N.S.) 606, 140 N. W. 178; Fredonia Nat. Bank v. Tommei, 131 Mich. 674, 92 N. W. 348; Shawmut Nat. Bank v. Manson, 168 Mass. 425, 47 N. E. 196; Jefferson Bank v. Merchants' Refrigerating Co. 236 Mo. 407, 139 S. W. 545; National Bank v. Armbruster, 42 Okla. 656, 142 Pac. 393; Oppenheimer v. Radke, 20 Cal. App. 518, 129 Pac. 798; and our own case of German-American Bank v. Wright, 85 Wash. 460, 148 Pac. 769, Ann. Cas. 1917D, 381, which lays down the same principle.

We are convinced that, whether misled by language used in cases where the rights of no holder of commercial paper in due course were involved, or through oversight, this court arrived at a wrong conclusion in the case of American Sav. Bank & T. Co. v. Dennis, supra, and that the trial court relied upon that case in making the ruling complained of here. In order, therefore, to be in harmony with the statute,

with the law of negotiable paper as it has existed from the beginning, and with the great weight of authority everywhere, the case of American Sav. Bank & T. Co. v. Dennis, supra, so far as it affects this question, must be, and it is hereby, overruled.

The demurrer admits that the bank in this case advanced to its depositor the amount of the check now in suit, upon the faith and credit of the check itself; that it did so in good faith and without notice of any possible defense on the part of the maker of the check; and it is therefore a holder in due course, as we have seen, and the demurrer must be overruled.

Judgment reversed.

Chadwick, Ch. J., and Holcomb, Parker, and Mount, JJ., concur.

Mackintosh, J., dissenting:

The case of American Sav. Bank & T. Co. v. Dennis, 90 Wash. 547, 156 Pac. 559, properly describes what was done by the plaintiff in this case as the granting of "a mere gratuitous privilege" which did not make it a holder for value of the deposited check. The bank cannot, by granting a privilege, alter the relationship contracted for and evidenced by the deposit slip and secure for itself the choice of a remedy against either its depositor or against the maker of the check, as it may deem most advantageous. When it received the check for collection it agreed to consider its depositor primarily liable by way of holding his account subject to a back charge in the event that the check was, for any reason, dishonored; and not to hold him liable as the indorser of the check, which liability would be more difficult to enforce; the one being a matter of bookkeeping and the other involving a lawsuit in the event liability was denied. I therefore dissent.

Fullerton, Main, and Mitchell, JJ., concur.

ANNOTATION.

Crediting the proceeds of negotiable paper to holder's deposit account as constituting bank a holder in due course.

- I. In general, 252.
- II. Where deposit remains intact:
 - a. In general, 253.
 - b. The rule in England and Canada, 253.
 - c. The rule in the United States, 255.
 - d. Deposit as a conditional credit, 258.
 - e. Cases to which the rule does not apply, 258.
- III. Where all of deposit has been withdrawn, or the debt otherwise made absolute:
 - a. The general rule, 259.
 - b. Where bank applies deposit to payment of depositor's debt to it, 260.

I. In general.

The question here raised is, When and under what circumstances will a bank that has acquired possession of a negotiable instrument and given credit to the one who presented it in his deposit account for the proceeds be held to have given value so as to be a holder in due course? The question being one as to giving value, it is assumed throughout the note that in all other respects the bank is within the law. For example, it is assumed that the bank took the paper before maturity or presumptive dishonor within the meaning of the law upon that point, etc.

The question thus presented is closely related to, but must not be confused with, the question of the bank's title to the paper as against the depositor or his creditors. Clearly a bank might acquire title to the paper as against the depositor and his creditors so that it could sue in its own name, or could successfully claim the proceeds as against them, and yet not be a holder in due course, so as to shut off any and all defenses that the maker or drawer may have against the instrument in the hands of the payee.

It may be observed here that the course. See IV. *infra*. On this one respect to this question of giving

III.—continued.

- c. As affected by state of depositor's general account; order of application of funds, 262.
- d. Where deposit withdrawn after maturity of paper, 266.
- e. Where instrument was received on conditional credit or for collection, 267.
- IV. Where but part of deposit has been withdrawn, 269.
- V. Where deposit is a check or draft as distinguished from time notes, etc., 271.
- VI. Effect of Negotiable Instruments Law, 273.

value, upon the kind of paper involved. They have applied the same rules whether discussing a promissory note, a check, a draft with a bill of lading attached, or any other kind of commercial paper. See V. *infra*.

And as a general proposition it may be said that the Negotiable Instruments Law, now enacted with slight variations in the several states, does not change the general rules already adopted by the courts in deciding the question here annotated. See *OLD NAT. BANK v. GIBSON* (reported herewith) ante, 247, and VI. *infra*. But the wording of the statute as quoted by the court in the case just cited is such that the courts will probably hold that, under the statute, a bank is a holder for value only to the amount drawn from the deposit on the faith of the instrument (see *National Bank v. Bonsor* (1909) 38 Pa. Super. Ct. 275, as discussed under VI. *infra*, and *STATE v. EMERY* (reported herewith) ante, 234), while most courts had previously held that if the account had been drawn upon, although not exhausted, on the faith of the instrument, the bank is a holder in due point alone the law may have worked a change in the rules. courts have based no distinction, in

II. Where deposit remains intact.**a. In general.**

There is a difference between the holdings of the courts of England and Canada, on the one side, and those of the United States and of the several states, on the other, the former holding that the mere crediting of the proceeds of a negotiable instrument to the indorser's deposit account and taking possession of the instrument constitutes the bank a holder in due course, and the latter holding that there must be, in order to constitute the bank a holder in due course, in addition to the mere credit, some payment by the bank, some credit on a prior debt of the depositor to it, or some transaction that fixes some absolute liability of the bank outside of the mere relation of debtor and creditor created by the deposit itself.

It may be said that, among all of the cases decided by both the Federal and the state courts in this country, there are but two or three in which the court seemed to adhere to the English and Canadian rule (see *Arkansas* and *Texas* cases cited under II. b, *infra*), and in both jurisdictions there are other cases to the contrary (see *Arkansas* and *Texas* cases cited under II. c, *infra*), which seems to indicate that even in those states the English and Canadian rule has not been generally adopted.

The adoption of the English and Canadian rule eliminates all of the other questions discussed throughout the note, so that the discussion, except that under II. b and II. c, *infra*, presupposes the adoption of the rule in vogue in the states.

b. The rule in England and Canada.

The rule in England and Canada is that a bank becomes a holder for value of a negotiable instrument that it has received from the indorser, and for the proceeds of which it has given him credit as a depositor, as soon as the credit is entered, regardless of the state of the account. *Ex parte Richdale* (1881) L. R. 19 Ch. Div. (Eng.) 409, 51 L. J. Ch. N. S. 462, 46 L. T. N. S. 116, 30 Week. Rep. 262; *Royal Bank v. Tottenham* [1894] 2 Q. B. (Eng.)

715, 64 L. J. Q. B. N. S. 99, 5 Reports, 569, 71 L. T. N. S. 168, 43 Week. Rep. 22; *Bank of British N. A. v. Warren* (1909) 19 Ont. L. Rep. 257, 12 Ont. Week. Rep. 1157.

The court, in *Bank of British N. A. v. Warren* (Ont.) *supra*, said: "This doctrine has also been clearly laid down by the court of appeal in England. In a similar case, *Ex parte Richdale* (1881) L. R. 19 Ch. Div. (Eng.) 417, Jessel, M. R., said: 'Alfred Palmer paid the check to his bankers, and they placed the amount of it to the credit of his current account. The bankers were the holders of the check for value; the moment they credited the amount of it to Alfred Palmer it became their property.' It is true that this case was prior to the passing of the Imperial Bills of Exchange Act; but it was approved by the same court in a case under the act, *Royal Bank v. Tottenham* [1894] 2 Q. B. (Eng.) 715, where Lord Esher, M. R., says, at p. 717: 'One defense in this case is that the bank gave no consideration for the check; but this point is determined against the defendant by the decision of the court of appeal in *Ex parte Richdale*. When the bank received the check from Mrs. Monson, they did so on an undertaking to give her credit to the amount of the check on her general account. This they did, and giving such credit is sufficient consideration between a bank and a customer. Consequently the bank were holders for value.' See also the remarks of Kay, L. J., to the same effect, on p. 718, and as to the debiting of the check when dishonored, as in this case, on p. 719. Section 53 of our act is an exact copy of § 27 of the Imperial Act, under which *Royal Bank v. Tottenham* was decided."

And American courts have at times recognized the above to be the rule in England. Thus, in *Miller v. Norton* (1918) 114 Va. 609, 77 S. E. 452, the court said: "In this country, though the rule seems to be different in England, it is settled that the mere giving of credit to a depositor's account of a check does not constitute the bank a holder for value, but, in order to have

that effect, the credit must be drawn upon."

And in *Manufacturers' Nat. Bank v. Newell* (1888) 71 Wis. 309, 37 N. W. 420, the court, after citing some authorities to the point that the mere deposit does not make the bank a holder for value, said: "These adjudications are to the effect that such mere discount and credit does not constitute a bona fide purchaser for value. To be such, the holder of the note must actually part with something of value for it. If, after such discount and credit, such holder receives notice of the infirmity of the note, he is thereby incapacitated from becoming such bona fide purchaser by any subsequent payment. We have not overlooked the remark of the late learned master of the rolls, cited by counsel, in *Ex parte Richdale* (1881) L. R. 19 Ch. Div. (Eng.) 417, 51 L. J. Ch. N. S. 462, 46 L. T. N. S. 116, 30 Week. Rep. 262. But that was under a bankrupt act, and the rights of third parties were involved. We must hold that the bank was not a bona fide purchaser for value so as to be protected against the infirmity of the note."

In two or three isolated cases in the United States the courts seem to have based their decisions upon the English and Canadian doctrine; but, on the whole, the courts in this country have, with remarkable unanimity, adopted the rule as stated under II. c, *infra*. Thus, in *Williamson Bank & T. Co. v. Miles* (1914) 113 Ark. 342, 169 S. W. 368, where it appears that the fund had been checked out, there is dicta as follows: "Whatever may be the rule elsewhere, under the principles of law decided in the case of the *Bank of Monette v. Hale* (1912) 104 Ark. 388, 149 S. W. 845, the court should have directed a verdict for the plaintiff. In that case the amount which the bank paid for the note was placed to the credit of the insurance company in whose favor the note was executed, and the proceeds remained in the bank for a period of one year. On the next day after the bank purchased the note, it was notified by the maker thereof that he had a valid defense to the note and did not intend

to pay it. Although the amount which the bank had paid for the note was then in the bank, placed to the credit of the corporation in whose favor the note was executed, the court held that the undisputed evidence showed that the bank was a bona fide purchaser for value in due course of business, and was entitled to recover."

And in *Southern Sand & Material Co. v. People's Sav. Bank & T. Co.* (1911) 101 Ark. 266, 142 S. W. 178, where the account of the indorsee was overdrawn at the time the check was deposited, in an amount in excess of the proceeds of the check, the court, by way of an apparently independent holding, said: "The undisputed testimony in this case shows that the appellee bank in effect cashed the check sued upon, in the usual course of business, upon the date it was drawn, without any notice of any infirmity in it, or any defense that might be available between the parties to it, crediting the whole amount of it to the payee, upon its account, and it thereby became a bona fide holder of the same for value, with the right to enforce it against the maker, free from any defects that may have existed between the original parties." The facts involved in this case, however, would class it with the cases cited under III. b, *infra*, so that the courts would uphold the decision under the American rule.

And in *Wheeler v. First Nat. Bank* (1886) 3 Tex. App. Civ. Cas. (Willson) 192, the court said: "Appellants executed and delivered to one Anderson their two promissory notes. Anderson indorsed said notes to Nichols, Shepard, & Company, and before said notes had matured, said Nichols, Shepard, & Company indorsed the same to appellee, and appellee credited the amount thereof on the bank account of said Nichols, Shepard, & Company, who then had deposits in the appellee's bank more than sufficient to pay all their liabilities, etc., to said bank. Appellee brought this suit to recover of appellants the amount of said notes. Appellants in due form pleaded failure of consideration, but upon the trial evidence offered by them to prove

said plea was rejected, and judgment rendered against them for the amount of said notes, etc. Held, there is but one question to be determined; viz., did appellee obtain the notes under such circumstances as make it an innocent holder thereof, unaffected by any equities that might exist between appellants and Anderson, or Nichols, Shepard, & Company? This question must be answered in the affirmative. It is not questioned that appellee acquired the notes in good faith. It is insisted, however, that they did not pay value for the same, and are not therefore protected as innocent purchasers. This position is not maintainable. When the bank placed the purchase price of the notes to the credit of Nichols, Shepard, & Company it thereby parted with value. Furthermore, the bank thereby altered its position to its detriment by assuming the responsibility of making demand of payment of the makers, and giving notice of nonpayment to the indorsers. By the weight of authority the facts of the case make appellee an innocent holder for value, and it is protected against equities of which it had no notice, existing between the other parties to the note. 1 Dan. Neg. Inst. § 831b; Brooklyn City & N. R. Co. v. National Bank (1880) 102 U. S. 25, 26 L. ed. 65; Ex parte Richdale (1881) L. R. 18 Ch. Div. (Eng.) 409, 51 L. J. Ch. N. S. 462, 46 L. T. N. S. 116, 30 Week. Rep. 262."

In any jurisdiction in which this rule obtains, the courts will, as a matter of course, follow the rule stated under III. a, *infra*. See Canadian cases there cited.

c. The rule in the United States.

Almost without exception the courts in this country have held that a bank is not a holder in due course of a negotiable instrument in its possession if it has given nothing of value therefor further than a credit as a deposit to the former holder, while it has not honored his checks against the deposit, or in any way bound itself absolutely to account to someone for the amount of the deposit.

United States.—Thompson v. Sioux Falls Nat. Bank (1893) 150 U. S. 231,

37 L. ed. 1063, 14 Sup. Ct. Rep. 94; Queen City Sav. Bank & T. Co. v. Reyburn (1903) 163 Fed. 597 (limited to accommodation indorser, affirmed in (1909) 96 C. C. A. 373, 171 Fed. 609).

Alabama.—First Nat. Bank v. Nelson (1894) 105 Ala. 180, 16 So. 707; Alabama Grocery Co. v. First Nat. Bank (1908) 158 Ala. 143, 182 Am. St. Rep. 18, 48 So. 340; Tatum v. Commercial Bank & T. Co. (1914) 185 Ala. 249, 64 So. 561; Sherrill v. Merchants' & M. Trust & Sav. Bank (1915) 195 Ala. 175, 70 So. 723; Armstrong v. Walker (1917) — Ala. —, 76 So. 280; Fruitticher Electric Co. v. Birmingham Trust & Sav. Co. (1918) — Ala. —, 79 So. 248; German-American Nat. Bank v. Lewis (1913) 9 Ala. App. 352, 63 So. 741; Citizens' Nat. Bank v. Buckheit (1916) 14 Ala. App. 511, 71 So. 82, certiorari denied in (1916) 196 Ala. 700, 72 So. 1019.

Arkansas.—Little v. Arkansas Nat. Bank (1914) 113 Ark. 72, 167 S. W. 75 (dictum; but see Arkansas cases cited under II. b, *supra*).

California.—Oppenheimer v. Radke (1912) 20 Cal. App. 518, 129 Pac. 798.

Illinois.—Warman v. First Nat. Bank (1900) 185 Ill. 60, 49 L.R.A. 412, 57 N. E. 6; North West State Bank v. Alter (1915) 195 Ill. App. 50.

Iowa.—City Deposit Bank Co. v. Green (1905) — Iowa, —, 103 N. W. 96; City Deposit Bank v. Green (1906) 130 Iowa, 384, 106 N. W. 942; McNight v. Parsons (1907) 136 Iowa, 390, 22 L.R.A. (N.S.) 718, 125 Am. St. Rep. 265, 113 N. W. 858, 15 Ann. Cas. 665; Montrose Sav. Bank v. Claussen (1908) 137 Iowa, 73, 114 N. W. 547.

Kansas.—Fox v. Bank of Kansas City (1883) 30 Kan. 441, 1 Pac. 789; Mann v. Second Nat. Bank (1883) 30 Kan. 412, 1 Pac. 579, second appeal in (1886) 34 Kan. 746, 10 Pac. 150; Dreilling v. First Nat. Bank (1890) 43 Kan. 197, 19 Am. St. Rep. 126, 23 Pac. 94; Farmers' & M. Bank v. Quasebarth (1919) 104 Kan. 422, 179 Pac. 300.

Kentucky.—Boswell v. Citizens' Sav. Bank (1906) 123 Ky. 485, 96 S. W. 797.

Maryland.—Merchants' Bank v. Marine Bank (1845) 3 Gill, 96, 43 Am. Dec. 300.

Michigan.—Drovers' Nat. Bank v.

Blue (1896) 110 Mich. 31, 64 Am. St. Rep. 327, 67 N. W. 1105; First Nat. Bank v. Wills Creek Coal Co. (1896) 110 Mich. 447, 68 N. W. 232; People's State Bank v. Miller (1915) 185 Mich. 565, 152 N. W. 257; Central Sav. Bank v. Stotter (1919) 207 Mich. 329, 174 N. W. 142.

Minnesota.—Union Nat. Bank v. Winsor (1907) 101 Minn. 470, 118 Am. St. Rep. 641, 112 N. W. 999, 11 Ann. Cas. 204; First Nat. Bank v. McNairy (1913) 122 Minn. 215, 142 N. W. 139, Ann. Cas. 1914D, 977.

Missouri.—Dymock v. Midland Nat. Bank (1896) 67 Mo. App. 97; Schneider v. Johnson (1912) 161 Mo. App. 375, 143 S. W. 78; Tapee v. Varley-Wolter Co. (1914) 184 Mo. App. 470, 171 S. W. 19.

New York.—Scott v. Ocean Bank (1861) 23 N. Y. 289; Citizens' State Bank v. Cowles (1905) 180 N. Y. 346, 105 Am. St. Rep. 765, 73 N. E. 33; Bank of America v. Waydell (1907) 187 N. Y. 115, 79 N. E. 857; Fulton Bank v. Phoenix Bank (1829) 1 Hall, 562; Platt v. Chapin (1875) 49 How. Pr. 318; Central Nat. Bank v. Valentine (1879) 18 Hun, 417; Dykman v. Northbridge (1894) 80 Hun, 258, 30 N. Y. Supp. 164, reargument denied in (1894) 30 N. Y. Supp. 1130; Albany County Bank v. People's Co-op. Ice Co. (1904) 92 App. Div. 47, 86 N. Y. Supp. 773; Consolidation Nat. Bank v. Kirkland (1904) 99 App. Div. 121, 91 N. Y. Supp. 353; Wallabout Bank v. Peyton (1908) 123 App. Div. 727, 108 N. Y. Supp. 42; National Bank v. Foley (1907) 54 Misc. 126, 103 N. Y. Supp. 553; First Nat. Bank v. Stengel (1918) 169 N. Y. Supp. 217.

North Carolina.—United States Nat. Bank v. McNair (1894) 114 N. C. 335, 19 S. E. 361; United States Nat. Bank v. McNair (1895) 116 N. C. 551, 21 S. E. 389; Standing Stone Nat. Bank v. Walser (1913) 162 N. C. 53, 77 S. E. 1006; Latham v. Spragins (1913) 162 N. C. 404, 78 S. E. 282; Third Nat. Bank v. Exum (1913) 163 N. C. 199, 79 S. E. 498.

Oklahoma.—Morrison v. Farmers' & M. Bank (1900) 9 Okla. 697, 60 Pac. 273; National Bank v. Armbruster (1914) 42 Okla. 656, 142 Pac. 393; STATE v. EMERY (reported herewith) ante, 234.

Pennsylvania.—National Bank v. Bonsor (1909) 38 Pa. Super. Ct. 275.

South Dakota.—Union Nat. Bank v. Mailloux (1911) 27 S. D. 543, 132 N. W. 168; Commerce Trust Co. v. Mailloux (1911) 27 S. D. 588, 132 N. W. 176.

Tennessee.—Elgin City Bkg. Co. v. Hall (1907) 119 Tenn. 548, 108 S. W. 1068.

Texas.—Sperlin v. Peninsular Loan & Discount Co. (1907) — Tex. Civ. App. —, 103 S. W. 232 (but see Texas case cited under II. b, supra).

Virginia.—Miller v. Norton (1913) 114 Va. 609, 77 S. E. 452.

Washington.—OLD NAT. BANK v. GIBSON (reported herewith) ante, 247.

West Virginia.—MARION NAT. BANK v. HARDEN (reported herewith) ante, 240.

Wisconsin. — Manufacturers' Nat. Bank v. Newell (1888) 71 Wis. 309, 37 N. W. 420; Hodge v. Smith (1907) 130 Wis. 326, 110 N. W. 192.

Reason for the rule.

In Alabama Grocery Co. v. First Nat. Bank (1908) 158 Ala. 143, 132 Am. St. Rep. 18, 48 So. 340, the court said: "Where a bank discounts paper for a depositor who is not in its debt, and gives him credit upon its books for the proceeds of said paper, it is not a bona fide holder for value, so as to be protected against infirmities in the paper, unless, in addition to the mere fact of crediting the depositor with the proceeds of the paper, some other and valuable consideration passes. Such a transaction simply creates the relation of debtor and creditor between the bank and the depositor; and so long as that relation continues, and the deposit is not drawn out, the bank is held subject to the equities of the prior parties, even though the paper has been taken before maturity and without notice."

In Mann v. Second Nat. Bank (1883) 30 Kan. 412, 1 Pac. 579, the court said: "The proposition rests on the plainest principles of justice, and in no manner impairs the desired negotiability and security of commercial paper. Whenever the holder is a bona fide holder, he has a right to claim protection, but protection only to the extent he has

lost or been injured by the acquisition of the paper. If he has parted with value, either by a cash payment or the cancelation of a debt, or giving time on a debt, or in any other manner, to that extent he has a right to claim protection; but when he has parted with nothing, there is nothing to protect. A mere promise to pay is no payment. He may rightfully say to the party from whom he purchased: 'The paper you have given me is valueless, and therefore I am under no obligations to pay;' and if the paper be in fact valueless, payment cannot be compelled. Now the relation of a bank to its depositor is simply that of debtor. The bank owes the depositor so much. If the deposit is valueless its obligation to pay is without consideration, and it may decline to pay. There is nothing in the relation of a bank to its depositor which takes its obligation to its depositor out of the general rule of debtor to creditor."

In *City Deposit Bank Co. v. Green* (1905) — Iowa, —, 103 N. W. 96, the court said: "With reference to the question whether plaintiff was a purchaser for value, there was evidence tending to show that when the note was indorsed to plaintiff by McLaughlin Brothers, plaintiff gave credit to McLaughlin Brothers for the agreed purchase price of the note; and that the amount thus placed to their credit remained to their account until after the bank had notice that defendants claimed a defense to the note. And the court instructed the jury as follows: 'Where a bank discounts paper for a depositor, and gives him credit upon its books for the proceeds of such paper, it is not a bona fide holder for value, so as to be protected against infirmities in the paper, unless, in addition to the mere fact of crediting the depositor with the proceeds of the paper, some other and valuable consideration passes. Such a transaction simply creates the relation of debtor and creditor between the bank and the depositor, and, so long as that relation continues and the deposit is not drawn out, the bank stands in the same position as the original party to whom

the paper was made payable, even though the bank took the paper before maturity, and without notice.' There seems to be no reasonable question as to the correctness of the proposition thus announced. By giving credit to the indorser of the note on his deposit account, the bank in effect agrees to pay him that amount of money on demand by check or order, and parts with nothing of value. When it receives notice of defenses to the note, it is still in a situation, provided the amount thus credited has remained undrawn by the depositor, to return the note to him and cancel the credit."

In *Union Nat. Bank v. Winsor* (1907) 101 Minn. 470, 118 Am. St. Rep. 641, 112 N. W. 999, 11 Ann. Cas. 204, the court said: "Where a bank discounts paper for a depositor, and gives him credit upon its books for the proceeds of such paper, it is not a bona fide holder for value, so as to be protected against infirmities in the paper, unless, in addition to the mere fact of crediting the depositor with the proceeds of the paper, some other and valuable consideration passes. Such a transaction simply creates the relation of debtor and creditor between the bank and the depositor, and so long as that relation continues and the deposit is not drawn out, the bank stands in the same position as the original party to whom the paper was made payable, even though the bank took the paper before maturity and without notice. By giving credit to the indorser on his deposit account the bank in effect agrees to pay him that amount of money on demand by check or order, and parts with nothing of value. As long as the amount thus credited remains undrawn by the depositor, the bank, if it receives notice of the fraud, is still in a position to return the note to the depositor and cancel the credit."

And see quotation from *Miller v. Norton* (1913) 114 Va. 609, 77 S. E. 452, under II. b, supra. Also see quotation from *Manufacturers' Nat. Bank v. Newell* (1888) 71 Wis. 309, 37 N. W. 420, under the same heading.

d. Deposit as a conditional credit.

The rule stated under II. c, *supra*, that merely giving credit to an indorser as a depositor for the proceeds of a negotiable instrument does not make the bank a holder thereof in due course, being sound, a fortiori the rule will apply when the credit is a conditional one, as paper taken for collection (see III. e, *infra*, on same point when deposit had been drawn upon.) *Arkansas Nat. Bank v. Martin* (1914) 110 Ark. 578, 163 S. W. 795; *Commercial Nat. Bank v. Citizens' State Bank* (1907) 132 Iowa, 706, 109 N. W. 198; *First Nat. Bank v. Wills Creek Coal Co.* (1896) 110 Mich. 447, 68 N. W. 232; *People's State Bank v. Miller* (1915) 185 Mich. 565, 152 N. W. 257; *Bank of America v. Waydell* (1907) 187 N. Y. 115, 79 N. E. 857; *Fayette Nat. Bank v. Summers* (1906) 105 Va. 689, 7 L.R.A. (N.S.) 694, 54 S. E. 862 (see discussion of same case under III. e, *infra*).

And if the bank has made the indorser or payee account to it for the proceeds of the instrument, and then brings an action against the maker, it is not a holder in due course, but is merely the agent for collecting. *Choctaw Trust & Bkg. Co. v. Smith* (1909) 133 Ky. 418, 118 S. W. 279.

In *Commercial Nat. Bank v. Citizens' State Bank* (1907) 132 Iowa, 706, 109 N. W. 198, *supra*, the court said: "The credit given was provisional; that is, if the certificate was paid by the issuing bank, the credit became absolute thereafter; but if it was not so paid, the same was to be charged back to the Exchange Bank. This was nothing more than a conditional credit, and the plaintiff did not thereby become a bona fide purchaser, either under the general law or by virtue of the statute relating to negotiable instruments. *City Deposit Bank v. Green* (1906) 130 Iowa, 384, 106 N. W. 942; *Hazlett v. Commercial Nat. Bank* (1890) 132 Pa. 118, 19 Atl. 55; *Rapp v. National Secur. Bank* (1890) 186 Pa. 426, 20 Atl. 508. In *City Deposit Bank v. Green* (Iowa) *supra*, the bank discounted paper, giving its depositor credit for the proceeds upon its books. We held that the bank was

not a bona fide holder of the paper unless some other and valuable consideration passed. In this case not even an unconditional credit was given, and it is manifest that the plaintiff bank parted with nothing of value in the transaction. The receipt of the certificate of deposit did not make the plaintiff a debtor for its amount, and by the custom of the banks it would not become such debtor until after collection of the proceeds thereof, and after it obtained possession of the money."

e. Cases to which the rule does not apply.

Where the deposit is entered in the name and to the credit of one not a party to the note, as where the note is signed by the directors of a corporation and the deposit entered in its name for the purpose of creating public confidence in the corporation, the bank becomes a holder of the note in due course, and the general rule that it does not until the deposit is withdrawn does not apply. *Interstate Trust & Bkg. Co. v. Irwin* (1915) 138 La. 325, 70 So. 313.

And the general rule will not be applied to prevent the bank from becoming a holder in due course of a draft with a bill of lading attached, where the draft was accepted by the drawee, even though the deposit account of the payee, containing the proceeds, remains intact. *Tapee v. Varley-Wolter Co.* (1914) 184 Mo. App. 470, 171 S. W. 19.

In *Elgin City Bkg. Co. v. Hall* (1907) 119 Tenn. 548, 108 S. W. 1063, the court observed that it is "said" that the rule enunciated under II. c, *supra*, does not apply if the plaintiff bank, in discounting the paper, instead of giving credit as a deposit on its own books, secures for the indorser a like credit with another bank, it being presumed that the plaintiff bank must have parted with value in order to secure the credit entry at the other bank. In the absence, however, of testimony showing that payment was made in this manner and the precise nature of the transaction, so that the court could judge if the plaintiff bank had actually parted with value, and in the absence of a showing that the in-

dorser had used the credit, it was held that the plaintiff had not satisfied the burden resting upon it to show that it was a holder for value, the note having had its inception in fraud practised by an agent of the payee.

III. Where all of deposit has been withdrawn, or the debt otherwise made absolute.

a. The general rule.

A bank that gets possession of a negotiable instrument by giving the one who presents it credit for the full amount of the proceeds, and honors his checks or drafts to the same amount, or parts with some security, or in some other way makes itself liable for the amount of the deposit outside of the obligation created by the mere deposit, on the faith of the instrument, is a holder of the instrument for value.

United States.—Boardman v. Hanna (1908) 164 Fed. 527 (statement made arguendo) affirmed in (1909) 96 C. C. A. 136, 170 Fed. 920; Reyburn v. Queen City Sav. Bank & T. Co. (1909) 96 C. C. A. 373, 171 Fed. 609; Amalgamated Sugar Co. v. United States Nat. Bank (1911) 109 C. C. A. 494, 187 Fed. 746 (see III. e, *infra*, for holding); Standard Trust Co. v. Commercial Nat. Bank (1917) 153 C. C. A. 229, 240 Fed. 303.

Alabama.—Elmore County Bank v. Avant (1914) 189 Ala. 418, 66 So. 509 (see statement of holding under III. c, *infra*); Sherrill v. Merchants & M. Trust & Sav. Bank (1915) 195 Ala. 175, 70 So. 723.

Arkansas.—Southern Sand & Material Co. v. People's Sav. Bank & T. Co. (1911) 101 Ark. 266, 142 S. W. 178; Little v. Arkansas Nat. Bank (1914) 118 Ark. 72, 167 S. W. 75; Williamson Bank & T. Co. v. Miles (1914) 113 Ark. 342, 169 S. W. 368; Merchants & P. Bank v. New First Nat. Bank (1914) 116 Ark. 1, 170 S. W. 852, Ann. Cas. 1917A, 944 (dictum).

California.—Oppenheimer v. Radke (1912) 20 Cal. App. 518, 129 Pac. 798.

Colorado.—Citizens Nat. Bank v. First Nat. Bank (1919) — Colo. —, 182 Pac. 12 (the point assumed).

Florida.—Bland v. Fidelity Trust

Co. (1916) 71 Fla. 499, L.R.A.1916F, 209, 71 So. 630.

Illinois.—First Nat. Bank v. Sherburne (1884) 14 Ill. App. 566; McCasland v. Southern Illinois Nat. Bank (1906) 127 Ill. App. 37; North West State Bank v. Alter (1915) 195 Ill. App. 50.

Iowa.—City Deposit Bank Co. v. Green (1905) — Iowa, —, 103 N. W. 96; City Deposit Bank v. Green (1906) 130 Iowa, 384, 106 N. W. 942; Montrose Sav. Bank v. Claussen (1908) 137 Iowa, 73, 114 N. W. 547.

Kansas.—Fox v. Bank of Kansas City (1883) 30 Kan. 441, 1 Pac. 789; Mann v. Second Nat. Bank (1883) 30 Kan. 412, 1 Pac. 579, second appeal in (1886) 34 Kan. 746, 10 Pac. 150; Dreilling v. First Nat. Bank (1890) 43 Kan. 197, 19 Am. St. Rep. 126, 23 Pac. 94; Farmers' & M. Bank v. Quasebarth (1919) 104 Kan. 422, 179 Pac. 300.

Massachusetts.—Fulton Nat. Bank v. Gosline (1897) 168 Mass. 86, 46 N. E. 406; Shawmut Nat. Bank v. Manson (1897) 168 Mass. 425, 47 N. E. 196; Symonds v. Riley (1905) 188 Mass. 470, 74 N. E. 926.

Michigan.—Drovers' Nat. Bank v. Blue (1896) 110 Mich. 31, 64 Am. St. Rep. 327, 67 N. W. 1105; First Nat. Bank v. Mills Creek Coal Co. (1896) 110 Mich. 447, 68 N. W. 232; Fredonia Nat. Bank v. Tommei (1902) 131 Mich. 674, 92 N. W. 348.

Minnesota.—Security Bank v. Petruschke (1907) 101 Minn. 478, 118 Am. St. Rep. 644, 112 N. W. 1000; First Nat. Bank v. Persall (1910) 110 Minn. 333, 125 N. W. 506, 136 Am. St. Rep. 499, rehearing denied in (1910) 110 Minn. 336, 136 Am. St. Rep. 501, 125 N. W. 675; First Nat. Bank v. McNairy (1913) 122 Minn. 215, 142 N. W. 139, Ann. Cas. 1914D, 977.

Missouri.—Jefferson Bank v. Merchants Refrigerating Co. (1911) 236 Mo. 407, 139 S. W. 545; Tapee v. Varley-Wolter Co. (1914) 184 Mo. App. 470, 171 S. W. 19.

Nebraska.—National Bank v. Bossemeyer (1917) 101 Neb. 96, L.R.A. 1917E, 374, 162 N. W. 508.

New York.—Bank of Salina v. Babcock (1839) 21 Wend. 499; Bank of

Sandusky v. Scoville (1840) 24 Wend. 115; *Bank of State v. Vanderhorst* (1865) 32 N. Y. 553; *Justh v. National Bank* (1874) 56 N. Y. 478; *Platt v. Beebe* (1874) 57 N. Y. 339; *Mechanics & T. Nat. Bank v. Crow* (1875) 60 N. Y. 85; *Southwick v. First Nat. Bank* (1881) 84 N. Y. 420; *Hatch v. Fourth Nat. Bank* (1895) 147 N. Y. 184, 41 N. E. 403; *Fulton Bank v. Phoenix Bank* (1829) 1 Hall, 562; *Market Bank v. Hartshorne* (1866) 3 Abb. App. Dec. 173, 3 Keyes, 137; *Clots v. Bently* (1872) 5 Abb. L. J. 286 (for holding, see same case under III. e, *infra*); *Wallabout Bank v. Peyton* (1908) 123 App. Div. 727, 108 N. Y. Supp. 42; *Merchants Nat. Bank v. Santa Maria Sugar Co.* (1914) 162 App. Div. 248, 147 N. Y. Supp. 498, affirmed in (1917) 220 N. Y. 732, 116 N. E. 1061; *Iron-bound Trust Co. v. Schmidt-Dauber Co.* (1918) 102 Misc. 708, 169 N. Y. Supp. 524.

North Carolina.—*United States Nat. Bank v. McNair* (1894) 114 N. C. 335, 19 S. E. 361; *United States Nat. Bank v. McNair* (1895) 116 N. C. 551, 21 S. E. 389; *Latham v. Spragins* (1918) 162 N. C. 404, 78 S. E. 282.

Ohio.—*First Nat. Bank v. Crawford* (1872) 2 Cin. Sup. Ct. Rep. 125; *Hamilton Mach. Tool Co. v. Memphis Nat. Bank* (1911) 84 Ohio St. 184, 95 N. E. 777.

Oklahoma.—*Morrison v. Farmers & M. Bank* (1900) 9 Okla. 697, 60 Pac. 273; *National Bank v. Armbruster* (1914) 42 Okla. 656, 142 Pac. 393.

Pennsylvania.—*Allentown Nat. Bank v. Clay Product Supply Co.* (1907) 217 Pa. 128, 66 Atl. 252; *Erisman v. Delaware County Nat. Bank* (1896) 1 Pa. Super. Ct. 144.

Tennessee.—*Griswold v. Davis* (1911) 125 Tenn. 223, 141 S. W. 205.

Washington.—*OLD NAT. BANK v. GIBSON* (reported herewith) ante, 247.

Wisconsin.—*Northfield Nat. Bank v. Arndt* (1907) 132 Wis. 383, 12 L.R.A. (N.S.) 82, 112 N. W. 451.

Canada.—*Cox v. Canadian Bank* (1912) 46 Can. S. C. 564; *Merchants Bank v. Thompson* (1912) 26 Ont. L. Rep. 183, 3 D. L. R. 577, 21 Ont. Week. Rep. 740, 3 Ont. Week. N. 1014; *Can-*

adian Bank v. Rogers (1911) 23 Ont. L. Rep. 109, 2 Ont. Week. N. 627, 18 Ont. Week. Rep. 401.

And if the bank assumes a legal obligation to a third person on the faith of the deposit, it thereby becomes a purchaser for value of the instrument which it has taken and for which it has given the credit represented by the deposit. *Montrose Sav. Bank v. Claussen* (1908) 137 Iowa, 73, 114 N. W. 547.

And the bank becomes a holder in due course of a negotiable instrument where it obtains possession of the same by issuing to the holder thereof a negotiable certificate, in good faith, even though it may have notice at the time it pays the certificate to a holder in due course. *Elmore County Bank v. Avant* (1914) 189 Ala. 418, 66 So. 509.

Likewise, where all of the proceeds are withdrawn, but, under a special agreement between the depositor and the bank, a portion thereof is at once deposited again in a special reserve fund to meet other obligations he owes to the bank as they become due, the bank is a holder in due course. *Iron-bound Trust Co. v. Schmidt-Dauber Co.* (1918) 102 Misc. 708, 169 N. Y. Supp. 524.

b. Where bank applies deposit to payment of depositor's debt to it.

Where the one who presents the instrument to the bank and receives the credit on his deposit account therefor is indebted to the bank, and the proceeds are applied to the payment of the debt, the bank is a holder in due course.

Alabama.—*Tatum v. Commercial Bank & T. Co.* (1914) 185 Ala. 249, 64 So. 561 (dictum).

Arkansas.—*Southern Sand & Material Co. v. People's Sav. Bank & T. Co.* (1911) 101 Ark. 266, 142 S. W. 178.

Iowa.—*City Deposit Bank v. Green* (1906) 130 Iowa, 384, 106 N. W. 942.

New Jersey.—*Mechanics Bank v. Chardavoyne* (1908) 69 N. J. L. 256, 101 Am. St. Rep. 701, 55 Atl. 1080.

New York.—*Bank of Salina v. Babcock* (1839) 21 Wend. 499; *Bank of Sandusky v. Scoville* (1840) 24 Wend. 115; *Mechanics & T. Nat. Bank v.*

Crow (1875) 60 N. Y. 85; *Hatch v. Fourth Nat. Bank* (1895) 147 N. Y. 184, 41 N. E. 403; *Consolidation Nat. Bank v. Kirkland* (1904) 99 App. Div. 121, 91 N. Y. Supp. 353 (but see same case, *infra*, for limitation on holding); *Wallabout Bank v. Peyton* (1908) 123 App. Div. 727, 108 N. Y. Supp. 42.

North Carolina.—*Latham v. Spragins* (1913) 162 N. C. 404, 78 S. E. 282.

Ohio.—*Hamilton Mach. Tool Co. v. Memphis Nat. Bank* (1911) 84 Ohio St. 184, 95 N. E. 777.

Pennsylvania.—*Erisman v. Delaware County Nat. Bank* (1896) 1 Pa. Super. Ct. 144.

Tennessee.—*Griswold v. Davis* (1911) 125 Tenn. 228, 141 S. W. 205.

Canada.—*Merchants Bank v. Thompson* (1912) 26 Ont. L. Rep. 183, 3 D. L. R. 577, 21 Ont. Week. Rep. 740, 3 Ont. Week. N. 1014.

In *Bank of Salina v. Babcock* (1889) 21 Wend. (N. Y.) 499, where credit had been entered for the proceeds of the note, and on the following day the amount of some overdue notes of the depositor which were lying under protest, and upon which were responsible indorsers, was charged up against the deposit and the notes canceled, the court said: "There is no question in the case but that the plaintiffs received and discounted the note in good faith, and the only pretense of objection to the recovery was, that no value had been given, and hence the defendant, Babcock, should be at liberty to set up the diversion of the paper. This seems to have been the view of the learned judge at the circuit, though the charge is somewhat obscure. The answer to the objection, however, is, that the proceeds of the note were placed to the credit of Trowbridge & Grant, for whom it was discounted; and were drawn out—not, I admit, by checking for the money, but by the cancelation of securities held by the plaintiffs, which was the same thing, in legal effect. The court ought not to speculate about the probability of reviving these canceled securities, in case the paper upon the strength of which they were canceled should turn out to be unavailable; much less ought we to go into a cal-

culuation of the chances of revival as the ground of defeating the substituted security. It is enough that the plaintiffs, in good faith, charged over and canceled them according to usage, and held them merely to be sent home. This is parting with value in the strictest sense of the term. The plaintiffs had a right to give up the old securities upon the faith of the new paper, and they have done an act that is equivalent, and so intended. What if the old debt might still remain, which seems to have been the idea of the judge at the circuit? The securities which were held beyond the responsibility of the debtor himself were destroyed. Regarding the usage of the bank in keeping its accounts with its customers, as detailed by the cashier, we may safely say that any alteration of the state of them to the prejudice of the institution, by reason of the discount of new paper, should be deemed a parting with value therefor, within the meaning of the rule of law. It was urged on the argument that there was no evidence that these securities were canceled in consequence of the receipt of the note in question; but this is most obvious, as well from the course of dealing as the testimony of the cashier."

But it has been held that testimony tending to show that the depositor, at the time credit was given, was indebted to the bank, is not sufficient to make the bank a holder in due course, since the indebtedness may have been secured by a mortgage or other security, and there must be something to show that the deposit was applied to the payment of the debt. *German-American Nat. Bank v. Lewis* (1913) 9 Ala. App. 352, 63 So. 741.

And in *Consolidation Nat. Bank v. Kirkland* (1904) 99 App. Div. 121, 91 N. Y. Supp. 353, it is held that an agreement between the parties that the bank shall appropriate the amount to depositor's indebtedness must be shown in order to make the bank a holder in due course. The court said: "It does not appear that the plaintiff paid anything to Wilson at the time it discounted the note in question for him, which was made by the defend-

ant, but it does appear that the entire amount of the avails of the note discounted was placed to Wilson's credit on the books of the plaintiff bank. That credit alone, however, was not a payment for the note or a parting of value on the part of the plaintiff. *Albany County Bank v. People's Co-op. Ice Co.* (1904) 92 App. Div. 47, 86 N. Y. Supp. 773. Wilson died insolvent the next day after the note was so discounted. It is true that at the time of his death the amount to his credit was a sum much less than the amount of such avails, but there is no proof as to what caused the difference,—whether it came from the payment by the plaintiff of an overdraft of Wilson's or by the payment of some other past-due obligation held by the plaintiff against Wilson, or by the payment of checks drawn by Wilson against his account,—and we have no right to infer or presume that the difference resulted from any such payments. *Spring Brook Chemical Co. v. Dunn* (1899) 39 App. Div. 130, 57 N. Y. Supp. 100. If the avails of the discount were applied to the payment of an existing indebtedness of Wilson's to the plaintiff, it was incumbent on the plaintiff to show that it was expressly agreed between it and Wilson that the avails should be so applied in payment and extinguishment of such indebtedness, in order to establish that the plaintiff was a bona fide holder for value. Case last cited, and *Phoenix Ins. Co. v. Church* (1880) 81 N. Y. 218, 37 Am. Rep. 494. But there was no such proof. Nor was there any proof that any checks were drawn by Wilson against his account, and paid by the plaintiff, or charged to his account, after the discount and before his death. We think, therefore, that the plaintiff failed to satisfy the burden resting upon it, and that its complaint was properly dismissed."

And the court in *Spring Brook Chemical Co. v. Dunn* (N. Y.) *supra*, adopted the same rule.

c. As affected by state of depositor's general account; order of application of funds.

Where the one making the deposit of the proceeds of a negotiable in-

strument upon presenting it to the bank has a regular account upon which he is drawing checks and making deposits from day to day, and the proceeds are credited in such an account, it frequently becomes difficult to decide whether or not he has drawn all or even a part of the proceeds of the particular instrument in question. The courts have, for this purpose, adopted the maxim that "the first money in is the first money out." That is, a man may draw out an amount of money equal to the amount he had in the account when he deposited the proceeds, not including the credit of the proceeds, and he will not be considered as having drawn upon the proceeds; but whatever amount he draws in excess of that amount will be held to have been drawn upon the proceeds, even though by later deposits he has kept his account at all times good to an amount equal to or far in excess of the amount of the proceeds. And the depositor is held to have exhausted the credit obtained by the instrument when he has drawn out an amount equal to the amount of its proceeds, plus what he had in the account when the credit was entered, even though before or after drawing, he deposits more than he draws.

It has been held that a bank which places the proceeds of a negotiable instrument to the credit of the holder in his regular deposit account and honors his checks to the full amount of his account as it stood at the time of the deposit, including the proceeds, before it has notice of any infirmity in the paper, is a holder in due course even though, because of subsequent deposits, there never was a time when there was not in the account sufficient funds to redeem the instrument, the holdings being based upon the theory that "the first money in is the first money out." *City Deposit Bank v. Green* (1906) 130 Iowa, 384, 106 N. W. 942 (see quotation from this case, *infra*); *Fox v. Bank of Kansas City* (1888) 80 Kan. 441, 1 Pac. 789; *Dreilling v. First Nat. Bank* (1890) 43 Kan. 197, 19 Am. St. Rep. 126, 23 Pac. 94; *Farmers' & M. Bank v. Quasebarth* (1919) 104 Kan. 422, 179 Pac. 300;

First Nat. Bank v. McNairy (1913) 122 Minn. 215, 142 N. W. 139, Ann. Cas. 1914D, 977 (see quotation *infra*); *Merchants Nat. Bank v. Santa Maria Sugar Co.* (1914) 162 App. Div. 248, 147 N. Y. Supp. 498, affirmed in (1917) 220 N. Y. 732, 116 N. E. 1061; *United States Nat. Bank v. McNair* (1894) 114 N. C. 335, 19 S. E. 361; *United States Nat. Bank v. McNair* (1895) 116 N. C. 551, 21 S. E. 389; *Standing Stone Nat. Bank v. Walser* (1913) 162 N. C. 53, 77 S. E. 1006; *Northfield Nat. Bank v. Arndt* (1907) 132 Wis. 383, 12 L.R.A.(N.S.) 82, 112 N. W. 451.

Application of rule.

In *Elmore County Bank v. Avant* (1914) 189 Ala. 418, 66 So. 509, the bank had issued a negotiable deposit certificate for the proceeds of the note, which certificate had been negotiated so that the bank could not defend against a suit for its payment. It was held that the issuing of this certificate in exchange for the note without notice of any infirmities in the note made the bank a holder in due course. Whether or not the depositor had a general account in the bank does not appear from the report of the case, so it might be inferred that the question was immaterial under these circumstances.

The fact that the indorser to whose credit the proceeds of a note were entered made deposits subsequently equal to or exceeding the amount of the proceeds does not change the rule that the bank became a holder in due course if his account had, prior to the maturity of the note, become exhausted by reason of the bank's honoring his checks. *Fredonia Nat. Bank v. Tommei* (1902) 131 Mich. 674, 92 N. W. 348.

In *City Deposit Bank v. Green* (1906) 130 Iowa, 384, 106 N. W. 942, the court said: "As the defense of fraud was not submitted, the burden was upon defendants to show that plaintiff was not an innocent holder. *Freittenberg v. Rubel* (1904) 123 Iowa, 154, 98 N. W. 624. If the bank allowed McLaughlin Brothers to check out more than these discounted notes amounted to before the maturity of the note, and before receiving notice

of an infirmity in the note, or if the firm was indebted to the bank in a sum greater or as great as the amount of the credit which was then due, then, under the authorities, it became a bona fide holder. *Warman v. First Nat. Bank* (1900) 185 Ill. 60, 49 L.R.A. 412, 57 N. E. 6; *Fox v. Bank of Kansas City* (1883) 30 Kan. 441, 1 Pac. 789; *Crosby v. Grant* (1858) 36 N. H. 273; *Dreilling v. First Nat. Bank* (1890) 43 Kan. 197, 19 Am. St. Rep. 126, 23 Pac. 94. If there was no showing as to the status of McLaughlin Brothers' account after the discounting of the notes, we should be inclined to hold that the burden was upon plaintiff to show that this credit appearing upon the books, of date April 4, 1903, was exhausted before the maturity of the note in suit, or that it held overdue paper upon which it might properly apply the same."

In *Fox v. Bank of Kansas City* (1883) 30 Kan. 441, 1 Pac. 789, the court said: "But it is claimed by counsel for plaintiff that if the mere fact of passing the amount to the credit of the Emporia bank was not of itself a payment, the amount of the credit was in fact drawn out by the Emporia bank before the plaintiff had notice of any infirmity in the paper. From the monthly account rendered by the plaintiff to the Emporia bank, which was offered in evidence, and which was the only evidence bearing upon the question, it appears that the note was discounted, and the amount credited to the Emporia bank on February 15; that at the close of that day the amount on the credit side of the account, from the first of February, was \$52,802.36. The amount on the debit side was \$32,479.58, leaving a balance due the Emporia bank of \$20,322.78; that during the subsequent five days, ending February 21, the Emporia bank drew out \$26,774.67, which but for subsequent deposits by the Emporia bank would have overdrawn the account and left the Emporia bank in debt to the plaintiff. In other words, within five days after this discount everything then due the Emporia bank was paid to it; and it is claimed by plaintiff that at that

time, if not before, the plaintiff had fully paid the note, and was entitled to the full protection of a purchaser for value. This claim we think is correct. The general rule as to the application of payments, there being no special facts to interfere, is that the first payments go to the oldest debts; so all the money drawn out by the Emporia bank, in the absence of some special facts, was a payment by the plaintiff of the oldest deposits and discounts; and when, at the close of February 21, the balance due February 15 had been fully checked out, the plaintiff had paid for every deposit and discount made by the Emporia bank prior to February 15."

In *First Nat. Bank v. McNairy* (1913) 122 Minn. 215, 142 N. W. 139, Ann. Cas. 1914D, 977, the court said: "The deposit account of Northland Motor Car Company showed, as hereinbefore stated, a balance in its favor at close of business on September 5 of \$295.08. On the next day this note was discounted with others and the amount credited to the company's account in the sum of \$1,241.90, and at the close of that day's business there was a balance in favor of the company of \$1,536.98. On the 7th of September \$1,000 was deposited, but on the same day checks drawn against the account had been paid, so that the balance at the close of business was only \$209.63. It therefore is clear that, if checks as presented are to be considered as paid from the oldest deposits, the checks drawn on the 7th exhausted all the funds or credits in the deposit account made prior to that day, and also \$790.37 of the \$1,000 then deposited. The note did not become due until September 11. We have failed to find any authority supporting the proposition that this situation does not make the plaintiff a purchaser for full value before maturity."

In *National Bank v. Foley* (1907) 54 Misc. 126, 103 N. Y. Supp. 553, the court said: "It does not appear that the plaintiff bank parted with value for the note without notice of Eagan's breach of faith. It gave the Barre Supply Company credit on the latter's business account for \$394, the pro-

ceeds of the note, less the discount. That alone is not enough to constitute the bank a holder in due course. *Citizens' State Bank v. Cowles* (1905) 180 N. Y. 346, 105 Am. St. Rep. 765, 73 N. E. 33. The Barre Supply Company drew \$300 at the time the note was discounted at the bank, and paid the same to Eagan. But it appears that the company had a general business account at the bank, and it does not appear what the condition of that account was at the time the note was discounted or at any time thereafter. It does not follow that \$300 was paid upon the note in suit then or at any other time. For all that appears, the Barre Supply Company may still have had to its credit at the bank the entire proceeds of the note when the bank first had notice of the fraud perpetrated by Eagan. *Albany County Bank v. People's Co-op. Ice Co.* (1904) 92 App. Div. 47, 86 N. Y. Supp. 773." Most likely there was more than \$300 in the account at the time credit for the proceeds was entered, not counting the credit, since the bank could easily have shown it if the fact had been otherwise.

In *Farmers' & M. Bank v. Quasebarth* (1919) — Kan. —, 179 Pac. 300, the court said: "When the note was purchased and added to the checking account which had been opened by the company with the bank a few days before, the balance was \$1,550. On March 25th, the company had checked out \$1,811.62, which was considerably more than the amount on deposit when the purchase was made. Under the rule of the cited cases, the avails of the purchased note having been drawn out, the indebtedness of the bank to the insurance company arising from the purchase of the note had been discharged. At that time, as we have seen, the bank had no knowledge of the defense to the note, nor for more than seven months afterward, and therefore it must be regarded as a bona fide purchaser for value. The fact that the insurance company subsequently added other deposits to its checking account, and that sometimes there was a balance in favor of the company (as there appears to have

been about the time the note became due), does not affect the attitude of the bank as a bona fide holder, nor deprive it of the right and the protection acquired when payment of the deposit was made through the checking out of the deposit on March 25, 1916."

And it has been held that if the account is drawn upon to the extent that, at the time the bank acquires notice of alleged infirmities, there is not in the account an amount equal to the credit obtained from the proceeds of the instrument, even though the account as it stood after deposit of the proceeds is not entirely exhausted, the bank is a holder in due course. *Bland v. Fidelity Trust Co.* (1916) 71 Fla. 499, L.R.A.1916F, 209, 71 So. 630; *Security Bank v. Petruschke* (1907) 101 Minn. 478, 118 Am. St. Rep. 644, 112 N. W. 1000; *First Nat. Bank v. Persall* (1910) 110 Minn. 333, 136 Am. St. Rep. 499, 125 N. W. 506, rehearing denied in (1910) 110 Minn. 336, 125 N. W. 675; *United States Nat. Bank v. McNair* (1894) 114 N. C. 335, 19 S. E. 361. Contra: *German-American Nat. Bank v. Lewis* (1913) 9 Ala. App. 352, 63 So. 741; *Merchants Bank v. Marine Bank* (1845) 3 Gill (Md.) 96, 43 Am. Dec. 300; *National Bank v. Bonsor* (1909) 33 Pa. Super. Ct. 275 (holding limited); *Albany County Bank v. People's Co-op. Ice Co.* (1904) 92 App. Div. 47, 86 N. Y. Supp. 773. See IV. *infra*, for full discussion of the general question here raised.

And in *Bland v. Fidelity Trust Co.* (1916) 71 Fla. 499, L.R.A.1916F, 209, 71 So. 630, the court said: "It appears from the testimony of the plaintiff's witnesses that the plaintiff in good faith, and without notice of an infirmity in the note, discounted this note with many others in one transaction, and gave the payees credit for \$61,150.40, and that before the plaintiff knew of the asserted defect in the payees' title, the credit was reduced to less than \$30,000, showing that at least half of the entire credit of \$61,150 was withdrawn by the payees, which constituted value for the note, it being one of a number of notes embraced in one discount transaction resulting

in the \$61,150.40 credit, the withdrawals covering a large portion of the aggregated credit resulting from the one transaction. If a mere credit upon the books of a bank does not of itself amount to the payment of a valuable consideration, the withdrawal by check of a substantial part of the amount so credited is such payment. *First Nat. Bank v. Persall* (1910) 110 Minn. 333, 136 Am. St. Rep. 499, 125 N. W. 506; *First Nat. Bank v. McNairy* (1913) 122 Minn. 215, 142 N. W. 189, Ann. Cas. 1914D, 977; *United States Nat. Bank v. McNair* (1894) 114 N. C. 335, 19 S. E. 361."

In *United States Nat. Bank v. McNair* (N. C.) *supra*, the court said: "It is not controverted that the note was sent by the First National Bank of Wilmington to the plaintiff with other notes, the whole aggregating \$17,000, which were, on November 23, 1891, rediscounted and the proceeds, \$16,911.33, placed to the credit of the Wilmington bank, but no money was paid thereon at that time. If that were all, the plaintiff was not a purchaser for value, for it had paid nothing, and to the action by it on the note the defendants could plead the set-off they had against the original payee. It further appears, however, that the balance to credit of the Wilmington bank on books of plaintiff on close of business on November 23d was \$28,338.75, including said credit of \$16,911.33. There were subsequent payments to check of the Wilmington bank before notice of defendant's equity, amounting to \$19,530.18. There were subsequent credits, also, which left a balance due the Wilmington bank on November 28th of \$21,279.33. The well-settled rule is that 'the first money in is the first money out.' *Boyden v. Bank of Cape Fear* (1871) 65 N. C. 13. Deducting, therefore, from the \$28,338.75 on plaintiff's books, 23d November, to credit of Wilmington bank, the \$19,530.14 paid out to its order before November 28th, there appears only \$8,808.61 of said balance which has not been paid. As the full value of all the notes rediscounted on 23d November was \$16,911.33, it follows that \$8,102.72 has

been paid by plaintiff on said notes. Thus the plaintiff was a purchaser for a valuable consideration, before maturity, and without notice."

But in *Merchants' Bank v. Marine Bank* (1845) 3 Gill (Md.) 96, 43 Am. Dec. 300, where almost all of the whole deposit had been drawn out, but on the day of notice of the forgery the account showed more than enough to redeem the paper, the court said: "It could not be successfully contended that if, at the time this forgery was discovered, and the demand made on the Merchants' Bank to refund to the Marine Bank the amount paid on the certificate, Weld & Jenks had withdrawn from the Merchants' Bank the balance standing to their credit, that the Merchants' Bank would not then have been holders of the certificate bona fide and for value. *Fulton Bank v. Phoenix Bank* (1829) 1 Hall (N. Y.) 573. But, if Weld & Jenks had received credit on the books of the Merchants' Bank for the amount of the certificate, that entry was not conclusive upon the Merchants' Bank; they were not concluded thereby from correcting their account when the forgery was discovered, on the 22d of November, 1839, if they had funds of Weld & Jenks in their possession, adequate to that purpose. It was, as it stood, evidence prima facie against the Merchants' Bank, but not conclusive. *Garland v. Salem Bank* (1812) 9 Mass. 409, 6 Am. Dec. 86."

In *National Bank v. Bonsor* (1909) 38 Pa. Super. Ct. 275, where a check for \$700 was taken by the bank, the amount being credited to the general deposit account of the indorser, making that account \$982.49, and the latter's check for \$381.71 having been later paid by the bank on the faith of the deposit account before notice to the bank, it was held that, under the Negotiable Instruments Law, the bank was a holder in due course to the amount of \$99.22 only. This amount was found by subtracting the amount drawn from the total amount of the deposit and subtracting the remainder from the amount of the check. See same case cited under VI. infra, on

effect of the Negotiable Instruments Law on the holding.

In *Albany County Bank v. People's Co-op. Ice Co.* (1904) 92 App. Div. 47, 86 N. Y. Supp. 773, where it was held that the bank was not a holder in due course, the court said: "The question is here free from any complication that may arise where such payee's account is an active one and the balance is materially changing from day to day. The evidence is undisputed that the proceeds of the note were deposited to the payee's account, and such proceeds of the note (except, perhaps, \$15 thereof), and also a much larger amount, remained on deposit with the plaintiff not only until the note was dishonored, but until long after the plaintiff brought this action, and, so far as appears, until long after defendant's answer was served."

In *German-American Nat. Bank v. Lewis* (1913) 9 Ala. App. 352, 63 So. 741, it is suggested that the bank would have been held to be a holder in due course if it had proved either that at the time the instrument was taken and the credit entered the account was overdrawn, so that the credit would operate to reduce the indebtedness, or that the account was not overdrawn, but that the whole account, including the credit of the proceeds, had subsequently been withdrawn before the bank had notice of the infirmities.

Where the indorser has an account with the bank, and the proceeds of the instrument are deposited therein, thus increasing the amount of its indebtedness to him, it does not become a holder of the instrument in due course so long as there remains at all times in the deposit account an amount equal to the credit given for the instrument, even though it has paid checks drawn upon the account. *Union Nat. Bank v. Winsor* (1907) 101 Minn. 470, 118 Am. St. Rep. 641, 112 N. W. 999, 11 Ann. Cas. 204.

d. Where deposit withdrawn after maturity of paper.

The fact that the plaintiff is a bank, of course, cannot change the law that one who is offered a negotiable instrument after its maturity is put up-

on inquiry as to existing infirmities, and if he purchases it, he will usually be held to be not a holder in due course. As is pointed out above, all of the discussions in the note are based upon the assumption that the paper was taken by the bank before maturity. This question as to checks, drafts, etc., is discussed under V. *infra*. The further question of time when, with reference to maturity of the instrument, the deposit must be withdrawn so as to make the bank a holder in due course under the rules stated under III. a, *supra*, has not been raised in many cases. It is stated or assumed in nearly all of the cases that the withdrawal of the deposit, etc., must have taken place before the bank had notice of the alleged infirmities.

But in *City Deposit Bank v. Green* (1906) 130 Iowa, 384, 106 N. W. 942; *Drover's Nat. Bank v. Blue* (1896) 110 Mich. 31, 64 Am. St. Rep. 327, 67 N. W. 1105; *Fredonia Nat. Bank v. Tommei* (1902) 131 Mich. 674, 92 N. W. 348; and *Central Sav. Bank v. Stotter* (1919) 207 Mich. 329, 174 N. W. 142, it is assumed that the withdrawal must be before maturity. In *National Bank v. Armbruster* (1914) 42 Okla. 656, 142 Pac. 393, however, the court holds that paying out the proceeds after maturity, without notice of infirmities in the paper, is sufficient to sustain the bona fides of the bank.

In that case, the court, in holding it reversible error to instruct the jury that if the withdrawal took place after the maturity of the note, the bank was not a holder in due course, said: "All of the foregoing authorities that take occasion to specifically mention the point will be found to state the rule to be that if the proceeds of a sale of a note, the same having been merely placed to the credit of the seller, be paid out by the bank at any time previous to notice of the infirmities of the paper, the purchaser, upon such payment within such time, becomes an innocent holder for value as against equities and defenses against it. We have found no case specifically dealing with the point that limits the time of paying out the proceeds to the date

of maturity of the note, as was done in the instruction under consideration, although there may be cases that do so. In this case the note was executed January 2, 1907, sold and transferred to the bank July 24, 1907, matured December 1, 1909; and the notice of infirmities and defenses was brought home to the bank by filing the answer in this case January 17, 1911, which, as may be observed, was more than a year after the maturity of the note and nearly a year after the filing of the suit on the note. There is good reason for this holding. In a transaction of this kind the sale and transfer of the note and deposit of the proceeds to the credit of the seller creates, as between the two, the relation of debtor and creditor; but there have been a sale and transfer of the title to the note just the same. But, so long as the purchasing bank has both the note and its proceeds as a deposit of the seller, it has not finally parted with value. We think that if, under such a condition, the bank should learn of the infirmities of the note even prior to its maturity, it would be its duty to withhold the proceeds then in its hands, returning the note to the seller, to the end that its validity, or want of such, could be tried out between the original parties. Likewise, if it had purchased the note prior to its maturity, and the seller had neglected to draw out the proceeds credited to him, that the bank, in the absence of notice of infirmities of the paper, would have the right to pay out such proceeds to the seller, even after maturity of the note; and this, being done in good faith and without notice of defects, would constitute such bank a bona fide owner and holder for value, with all the rights and protection afforded by the law to such holders."

e. Where instrument was received on conditional credit or for collection.

The weight of authority supports the holding in *OLD NAT. BANK v. GIBSON* (reported herewith) ante, 247, that paying the checks of the depositor on the faith of the credit given constitutes a parting with value that will make the bank a holder of the in-

strument in due course, even though it originally took the instrument for collection and entered the deposit conditionally. There is, however, some authority to the contrary.

If the deposit has been withdrawn by check, or the bank has otherwise given value for the instrument, the terms upon which the credit was originally extended and the paper taken by the bank are not material; so the bank becomes, after it parts with actual value, a holder in due course, even though the deposit was made conditionally and the paper taken for collection. *Amalgamated Sugar Co. v. United States Nat. Bank* (1911) 109 C. C. A. 494, 187 Fed. 746; *Shawmut Nat. Bank v. Manson* (1897) 168 Mass. 425, 47 N. E. 196; *Jefferson Bank v. Merchants' Refrigerating Co.* (1911) 236 Mo. 407, 139 S. W. 545; *OLD NAT. BANK v. GIBSON*. *Contra*: *Fayette Nat. Bank v. Summers* (1906) 105 Va. 689, 7 L.R.A. (N.S.) 694, 54 S. E. 862.

In *Shawmut Nat. Bank v. Manson* (1897) 168 Mass. 425, 47 N. E. 196, where the bank was held to be a holder in due course of a check the proceeds of which had been deposited to the credit of an indorser and drawn out by check, the following statement of facts is made by the court: "The plaintiff having introduced the check, the defendant Manson introduced evidence tending to support the defense alleged in the answer, of fraud and illegality. The plaintiff then, by its paying teller and bookkeeper, showed that the check in suit was deposited with it in the ordinary course of business, and without any special understanding or agreement regarding the same, on Saturday, December 21, 1895, and was then passed on the books of the bank to the credit of Pennycuick & Company; that the check went through the clearing house and was presented to the bank on which it was drawn on Monday, December 23, when it was refused payment, and returned to the plaintiff; that on the opening of the day's business on December 21, there was standing to the credit of Pennycuick & Company a balance of about \$68; and that on Monday, December 23, and before the check

was returned to the plaintiff, Pennycuick & Company presented their own check for \$1,000, which the paying teller, not knowing that the check in suit had been dishonored, paid. The paying teller testified further that, according to the usage prevailing between banks and their depositors, checks deposited with them were credited to the depositor and forwarded through the clearing house for collection, and that the depositors were not entitled to draw against the deposits until such checks had been paid; that in this case there was no special understanding regarding the check in suit, that it had not been treated differently from any other checks deposited in the usual course of trade, and that, at the time the \$1,000 draft was paid, the teller understood there was that amount to Pennycuick & Company's credit. There was also evidence tending to show that the plaintiff bank was a member of the Clearing House Association, according to whose written constitution it was provided 'that they, the said banks, receive checks and items payable by other banks for collection as agents only, and do not hold themselves liable for any loss or damage which may accrue through the default of any bank or banks upon which said checks and other items may be drawn.'"

A bank that receives a check for collection and credit, indorsed in blank, from another bank, credits the amount thereof and actually gives value to the amount of the credit to the forwarding bank without actual knowledge of the fact that the forwarding bank received the check on conditional deposit for collection, and of the latter's insolvency, is a holder in due course as against the drawer of the check. *Amalgamated Sugar Co. v. United States Nat. Bank* (Fed.) *supra*.

In *Clots v. Bently* (1872) 5 Alb. L. J. (N. Y.) 286, and in *Platt v. Beebe* (1874) 57 N. Y. 339, the bank, not having the means at the time to discount the note, held it and permitted the indorser to draw against it until such time as the bank could discount

it, no entry of any specific amount of credit being made. It was held that the bank was a holder in due course up to the amount actually drawn at the time the note matured.

But in *Fayette Nat. Bank v. Summers* (Va.) *supra*, the decision, holding that the bank was not a holder in due course, apparently turns upon the question of whether the check was taken for collection or purchased outright, rather than upon the fact that the deposit had not been drawn. It is held that if the parties intended, at the time the check was taken by the bank and the credit entered, that it should take the check merely for collection, title to it does not pass, and the bank remains the mere agent of the indorser, and not a holder in due course. This theory would seem to exclude the question of drawing upon the deposit as the criterion, and the court quoted with approval from another case in which it is explained that drawing against the conditional deposit before the check is collected is a mere privilege extended by the bank to its customer that does not indicate an intention to pass title to the check.

And in *American Sav. Bank & T. Co. v. Dennis* (1916) 90 Wash. 547, 156 Pac. 559, now overruled by *OLD NAT. BANK v. GIBSON* (reported herewith) *ante*, 247, the court took the same position as that indicated by the Virginia court.

IV. Where but part of deposit has been withdrawn.

In addition to the cases here cited, see discussion of one phase of the question here raised, under III. c, *supra*.

The weight of authority appears to support the view that a bank becomes a holder for value of a negotiable instrument of which it has acquired possession by crediting the proceeds thereof to the deposit account of the one who presented it, if it has honored his check, etc., upon the faith of the instrument, although the whole amount of the credit has not been exhausted. But there is considerable authority to the contrary. And it will be seen by reference to the holding in

National Bank v. Bonsor (1909) 88 Pa. Super. Ct. 275, *infra*, and to the discussion of the same case as cited under VI. *infra*, that the enactment of the Negotiable Instruments Law may lead to a change in this respect, if it has not already done so. According to that case the bank becomes a holder in due course, under the act, only to the amount actually drawn from the deposit on the faith of the instrument.

That the entire amount of the proceeds of a negotiable instrument that has been negotiated to a bank need not be drawn from the indorser's deposit account in order to make it a holder in due course, if part has been drawn, has been held to be the law.

United States.—*Reyburn v. Queen City Sav. Bank & T. Co.* (1909) 96 C. C. A. 373, 171 Fed. 609 (see holding, *infra*).

Florida.—*Bland v. Fidelity Trust Co.* (1916) 71 Fla. 499, L.R.A.1916F, 299, 71 So. 630.

Illinois.—*Warman v. First Nat. Bank* (1900) 185 Ill. 60, 49 L.R.A. 412, 57 N. E. 6.

Minnesota.—*Union Nat. Bank v. Winsor* (1907) 101 Minn. 470, 118 Am. St. Rep. 641, 112 N. W. 999, 11 Ann. Cas. 204; *Security Bank v. Petruschke* (1907) 101 Minn. 478, 118 Am. St. Rep. 644, 112 N. W. 1000 (for holding in these cases, see discussion thereof under III. c, *supra*, and see quotation from the following case, *infra*); *First Nat. Bank v. Persall* (1910) 110 Minn. 333, 136 Am. St. Rep. 499, 125 N. W. 506, rehearing denied in (1910) 110 Minn. 336, 125 N. W. 675.

North Carolina.—*United States Nat. Bank v. McNair* (1894) 114 N. C. 335, 19 S. E. 361; *United States Nat. Bank v. McNair* (1895) 116 N. C. 551, 21 S. E. 389.

In *First Nat. Bank v. Persall* (Minn.) *supra*, the court said: "Upon the petition for a reargument it is strenuously claimed that, in order to constitute the bank a bona fide holder of the note executed by Persall, it was necessary to show that the full amount of the purchase price credited to Lund by the bank had been actually paid over to Lund. Some of the authorities cited would appear to bear out this

contention, but that is not the rule in this state. *Union Nat. Bank v. Winsor and Security Bank v. Petruschke* (Minn.) *supra*. Under those decisions the payment by the bank of any substantial portion of the purchase price would be sufficient to place it in the position of a bona fide holder of the note, and, as stated in the opinion, we think the evidence must be taken as showing that at least a portion of the proceeds of the note was checked out by Lund."

The opinion in *Reyburn v. Queen City Sav. Bank & T. Co.* (Fed.) *supra*, clearly adheres to the principle to which the case has been cited, *supra*; but as the case was before the court on defendant's appeal only, and the trial court had entered judgment for the plaintiff for only the amount drawn when the bank received notice, on the theory that defendant was an accommodation maker who could release himself from liability by notice, the decision was affirmed notwithstanding that the appellate court held that defendant was not an accommodation maker.

And where part of the proceeds of the instrument was paid to the holder and the balance entered to his credit as a depositor, the bank becomes a holder in due course. *Choteau Trust & Bkg. Co. v. Smith* (1908) 133 Ky. 418, 118 S. W. 279.

An exception to this rule has been made in case there was fraud in the original transaction on the part of the indorser, but the exception will not be extended to a case where it is insolvent and in the hands of a receiver. *United States Nat. Bank v. McNair* (1895) 116 N. C. 550, 21 N. E. 389. The court in this case said: "Where the original consideration of the paper is illegal or fraudulent, or it is taken as collateral security, the right of recovery is restricted to the consideration actually paid by the indorsee before notice of the fraud (*Dresser v. Missouri & I. R. Constr. Co.* (1876) 93 U. S. 95, 23 L. ed. 817), or the amount of the debt to which it is collateral (*Kerr v. Cowen* (1833) 17 N. C. (2 Dev. Eq.) 356). But the exception does not extend further, not even to

cases where the note was issued without any consideration, though it may be purchased by the indorsee for less than its face. *Daniels v. Wilson* (1875) 21 Minn. 530. These propositions are also sustained (among a wealth of authorities) by 1 Dan. Neg. Inst. 4th ed. §§ 758 and 758b; *Allaire v. Hartshorne* (1848) 21 N. J. L. 665, 47 Am. Rep. 175; *Stalker v. McDonald* (1843) 6 Hill (N. Y.) 93, 40 Am. Dec. 389; *Edwards v. Jones* (1837) 7 Car. & P. (Eng.) 633; *Williams v. Huntington* (1888) 68 Md. 590, 6 Am. St. Rep. 477, 13 Atl. 336; *Cromwell v. Sac County* (1878) 96 U. S. 51, 24 L. ed. 681; *Hubbard v. Chapin* (1861) 2 Allen (Mass.) 328. Still less does the exception extend to a case like the present, in which there was neither fraud nor illegality, and where the note was executed for full consideration and indorsed to the plaintiff before maturity, without notice of set-off, and upon payment of half the purchase money, credit for the balance being entered on the books, subject to check by the indorser. To so extend the exception would not only be without precedent, but would impair the freedom of transfer and negotiability which is the distinctive feature of commercial paper, by means of which so large a part of the business of the world is transacted. Could the maker, after rediscount of this paper, by notifying the indorsee that he held a set-off against his note, have prevented the indorser from having its checks for the unpaid balance paid by the indorsee? And wherein does the indorser's insolvency extend the maker's rights in this regard? Has not the receiver the same right to check out this balance that the indorser would have had, if it had remained solvent? But where there is fraud, it is different, and the indorsee could not have paid the indorser's check for the balance after notice."

But in some cases the courts have either directly held that, in order to constitute the bank a holder in due course, the entire fund created by the proceeds must have been completely exhausted, or have so stated the gen-

eral rule as to convey the impression that such is the law.

Alabama.—*Tatum v. Commercial Bank & T. Co.* (1914) 185 Ala. 249, 64 So. 561.

Arkansas.—*Little v. Arkansas Nat. Bank* (1914) 113 Ark. 72, 167 S. W. 75.

California.—*Oppenheimer v. Radke* (1912) 20 Cal. App. 518, 129 Pac. 798.

Illinois.—*McCasland v. Southern Illinois Nat. Bank* (1906) 127 Ill. App. 37 (see statement of this case, *infra*).

Iowa.—*City Deposit Bank Co. v. Green* (1905) — *Iowa*, —, 103 N. W. 96.

Minnesota.—*Security Bank v. Petruschke* (1907) 101 Minn. 478, 118 Am. St. Rep. 644, 112 N. W. 100; *First Nat. Bank v. McNairy* (1913) 122 Minn. 215, 142 N. W. 139, Ann. Cas. 1914D, 977.

New York.—*Albany County Bank v. People's Co-op. Ice Co.* (1904) 92 App. Div. 47, 86 N. Y. Supp. 773.

Oklahoma.—*STATE v. EMERY* (reported herewith) ante, 234.

And see other cases holding the same way, cited under III. c, *supra*; also see discussion, *infra*.

And in *Citizens Nat. Bank v. Buckheit* (1916) 14 Ala. App. 511, 71 So. 82, certiorari denied in (1916) 196 Ala. 700, 72 So. 1019, it was held that a charge is properly refused if it instructs the jury that the bank is a holder in due course of a note that it has discounted and credited to the indorser, who has drawn out a substantial part of the proceeds. The court said: "Before a purchaser of a negotiable note under the facts hypothesized in charge 11 can be protected as a 'purchaser for value' in due course, it must be shown that the funds entered to the credit of the depositor were absorbed on antecedent indebtedness, or exhausted by withdrawal. *Tatum v. Commercial Bank & T. Co.* (Ala.) *supra*; *Alabama Grocery Co. v. First Nat. Bank* (1909) 158 Ala. 143, 132 Am. St. Rep. 18, 48 So. 340; *German-American Nat. Bank v. Lewis* (1913) 9 Ala. App. 353, 63 So. 741. And it is not enough that a material portion of the funds be checked

out. Charge 11 was therefore properly refused."

In *Albany County Bank v. People's Co-op. Ice Co.* (N. Y.) *supra*, where it was held that the bank was not a holder in due course, the court uses language which seems to support the rule that all of the deposit must be drawn in order to constitute it such. See quotation from this case under III. c, *supra*.

In *Tatum v. Commercial Bank & T. Co.* (Ala.) *supra*, the court said: "A bank does not become a purchaser in due course, for value, by crediting a note upon payee's account, if the credit is not absorbed by antecedent indebtedness or exhausted by subsequent withdrawals."

In *McCasland v. Southern Illinois Nat. Bank* (1906) 127 Ill. App. 37, there was a balance of \$7.20 of the proceeds remaining in the deposit when the bank received notice of the defenses to the check, and there was a remittitur of \$7.20 entered, and the court rendered judgment on the balance of the amount of the note. This would seem to indicate that the liability of the maker would be reduced by the amount that was not drawn.

And in Pennsylvania and in Oklahoma it has been held that the bank having a lien upon a negotiable instrument, where it has parted with value on the faith of it, becomes, under the Negotiable Instruments Law, a holder for value to the amount of the proceeds actually drawn from the indorser's deposit before notice of the infirmities in the paper. And see VI. *infra*; *National Bank v. Bonsor* (1909) 38 Pa. Super. Ct. 275; *STATE v. EMERY* (reported herewith) ante, 234.

V. Where deposit is a check or draft as distinguished from time notes, etc.

In discussing the question raised by the subject of the note when the negotiable instrument in question is a check, draft, or other instrument payable on demand, it must be assumed that the bank received the paper "before its presumptive dishonor" in the regular course of business in order to bring the bank within the law applicable to all indorsees of negotiable paper, just as it has been assumed that

it received a time note before the apparent maturity thereof. See statement under *I. supra*.

That the same rules applicable to negotiable instruments generally regarding the points discussed in the note apply where the instrument is a check or draft appears from the fact that many of the cases cited throughout the note involved checks or drafts and no distinction was made by the courts. Such was the kind of instrument involved in the following cases already cited:

United States.—*Thompson v. Sioux Falls Nat. Bank* (1893) 150 U. S. 231, 37 L. ed. 1063, 14 Sup. Ct. Rep. 94 (check); *Amalgamated Sugar Co. v. United States Nat. Bank* (1911) 109 C. C. A. 494, 187 Fed. 746 (check); *Standard Trust Co. v. Commercial Nat. Bank* (1917) 153 C. C. A. 229, 240 Fed. 303 (check).

Alabama.—*First Nat. Bank v. Nelson* (1894) 105 Ala. 180, 16 So. 707 (check); *Alabama Grocery Co. v. First Nat. Bank* (1908) 158 Ala. 143, 132 Am. St. Rep. 18, 48 So. 340 (an accepted bill of exchange).

Arkansas.—*Southern Sand & Material Co. v. People's Sav. Bank & T. Co.* (1911) 101 Ark. 266, 142 S. W. 178 (check); *Merchants' & P. Bank v. New First Nat. Bank* (1914) 116 Ark. 1, 170 S. W. 852, Ann. Cas. 1917A, 944 (a certified check).

Colorado.—*Citizens' Nat. Bank v. First Nat. Bank* (1919) — Colo. —, 182 Pac. 12 (a certified check).

Kentucky.—*Boswell v. Citizens' Sav. Bank* (1906) 123 Ky. 485, 96 S. W. 797 (check); *Choteau Trust & Bkg. Co. v. Smith* (1909) 133 Ky. 418, 118 S. W. 279 (check).

Maryland.—*Merchants' Bank v. Marine Bank* (1845) 3 Gill, 96, 43 Am. Dec. 300 (deposit certificate).

Massachusetts.—*Shamut Nat. Bank v. Manson* (1897) 168 Mass. 425, 47 N. E. 196 (check); *Symonds v. Riley* (1905) 138 Mass. 470, 74 N. E. 926 (check).

Michigan.—*First Nat. Bank v. Wills Creek Coal Co.* (1896) 110 Mich. 447, 68 N. W. 232 (draft); *People's State Bank v. Miller* (1915) 185 Mich. 565, 152 N. W. 257 (check).

Missouri.—*Jefferson Bank v. Merchants' Refrigerating Co.* (1911) 236 Mo. 407, 139 S. W. 545 (check); *Dymock v. Midland Nat. Bank* (1896) 67 Mo. App. 97 (draft with bill of lading attached).

Nebraska.—*National Bank v. Bossemeyer* (1917) 101 Neb. 96, L.R.A. 1917E, 374, 162 N. W. 503 (draft with bill of lading attached).

New York.—*Justh v. National Bank* (1874) 56 N. Y. 478 (certified check); *Citizens' State Bank v. Cowles* (1905) 180 N. Y. 346, 105 Am. St. Rep. 765, 73 N. E. 33 (check); *Spring Brook Chemical Co. v. Dunn* (1899) 39 App. Div. 130, 57 N. Y. Supp. 100 (draft); *Market Bank v. Hartshorne* (1866) 3 Abb. App. Dec. 173, 3 Keyes, 137 (check); *First Nat. Bank v. Stengel* (1918) 169 N. Y. Supp. 217 (draft with bill of lading attached).

North Carolina.—*Latham v. Spragins* (1913) 162 N. C. 404, 78 S. E. 282 (check).

Oklahoma.—*Morrison v. Farmers' & M. Bank* (1900) 9 Okla. 697, 60 Pac. 278 (draft with bill of lading attached).

Pennsylvania.—*National Bank v. Bonsor* (1909) 38 Pa. Super. Ct. 275 (check).

Virginia.—*Fayette Nat. Bank v. Summers* (1906) 105 Va. 689, 7 L.R.A. (N.S.) 694, 54 S. E. 862 (check); *Miller v. Norton* (1913) 114 Va. 609, 77 S. E. 452 (check).

England.—*Ex parte Richdale* (1881) L. R. 19 Ch. Div. 409, 51 L. J. Ch. N. S. 462, 46 L. T. N. S. 116, 30 Week. Rep. 262 (a postdated check).

But where a bank takes a draft with a bill of lading attached and gives the holder credit as a depositor for the proceeds, and the draft is accepted by the drawee, the bank is a holder in due course even if there was none of the deposit drawn at the time of the drawee's acceptance. *Tapee v. Varley-Wolter Co.* (1914) 184 Mo. App. 470, 171 S. W. 19. And in *Lewis v. Small* (1906) 117 Tenn. 153, 6 L.R.A. (N.S.) 887, 119 Am. St. Rep. 994, 96 S. W. 1051, the court said: "It is a fact of common knowledge that a large part of the commercial business of the country is carried on through the

medium of drafts, and that the immense crops of the South and West are marketed under contracts to draw for the purchase price with bills of lading attached. If the courts shall adopt the rule insisted upon by the complainants, and enforced by the decree of the court of chancery appeals, it will result in destroying this convenient method of handling, moving, and paying for the crops of the country, for the banks will necessarily be compelled to refuse to buy drafts with bills of lading attached, or to handle them as collateral security or otherwise. Banks have neither the time nor the facilities to investigate the genuineness of bills of lading, or the contracts made between their customers with parties residing in other states, and to hold them responsible for the frauds and mistakes of shippers would utterly destroy the negotiability of drafts with bills of lading attached." But this case involved only the liability of a bank that had purchased a draft with a bill of lading attached and collected the amount from the consignee, for loss sustained by reason of the fact that goods did not meet specifications in the contract, which question is not within the scope of the note.

VI. Effect of Negotiable Instruments Law.

On the effect of legislation in England and Canada upon the rule adopted in those jurisdictions, see quotation from *Bank of British N. A. v. Warren*, under II. b, *supra*.

The Negotiable Instruments Law as now enacted with slight variations in the several states provides in general terms what is required to constitute an indorsee a holder in due course. The provision in regard to consideration or value that must be given is in terms sufficiently general to permit the courts to decide what particular facts bring the indorsee within the law as enacted, and it is safe to say that the general rules and principles adopted by the courts as already set out in the note have not been changed. In one respect, however, that is, under one particular situation, the statute has perhaps worked a

6 A.L.R.—18.

change. See *National Bank v. Bonsor* (1909) 38 Pa. Super. Ct. 275, discussed *infra*. Also see *STATE v. EMERY* (reported herewith) ante, 234. In both of these cases it is held that under the statute the bank becomes a holder in due course only to the amount paid out on the faith of the instrument when the bank received notice of infirmities.

That the enactment of the Negotiable Instruments Law has not changed the law in respect to the most of the points discussed in this note appears in a negative way in many of the cases cited above; that is, many cases have been decided since its enactment and the courts say nothing about the statute. And the Negotiable Instruments Law has been referred to directly in the following cases already cited in the note:

United States.—*Standard Trust Co. v. Commercial Nat. Bank* (1917) 153 C. C. A. 229, 240 Fed. 303.

Kentucky.—*Choteau Trust & Bkg. Co. v. Smith* (1909) 133 Ky. 418, 118 S. W. 279.

Michigan.—*Central Sav. Bank v. Stotter* (1919) 207 Mich. 329, 174 N. W. 142.

Nebraska.—*National Bank v. Bossemeyer* (1917) 101 Neb. 96, L.R.A. 1917E, 374, 162 N. W. 503.

New York.—*Citizens' State Bank v. Cowles* (1905) 180 N. Y. 346, 105 Am. St. Rep. 765, 73 N. E. 33; *Bank of America v. Waydell* (1907) 187 N. Y. 115, 79 N. E. 857; *Albany County Bank v. People's Co-op. Ice Co.* (1904) 92 App. Div. 47, 86 N. Y. Supp. 773; *Consolidation Nat. Bank v. Kirkland* (1904) 99 App. Div. 121, 91 N. Y. Supp. 353; *Wallabout Bank v. Peyton* (1908) 123 App. Div. 727, 108 N. Y. Supp. 42; *National Bank v. Foley* (1907) 54 Misc. 126, 103 N. Y. Supp. 553.

North Carolina.—*Standing Stone Nat. Bank v. Walser* (1913) 162 N. C. 53, 77 S. E. 1006.

Oklahoma.—*STATE v. EMERY* (reported herewith) ante, 234 (noting a change effected by the statute).

Pennsylvania.—*National Bank v. Bonsor* (1909) 38 Pa. Super. Ct. 275

(noting a change made by the statute).

Tennessee.—*Elgin City Bkg. Co. v. Hall* (1907) 119 Tenn. 548, 108 S. W. 1068.

West Virginia.—*MARION NAT. BANK v. HARDEN* (reported herewith) ante, 240.

Wisconsin.—*Hodge v. Smith* (1907) 130 Wis. 326, 110 N. W. 192.

So, under the statute as well as under the common law, a bank that took a negotiable instrument, paying partly in cash and crediting the balance upon the holder's checking account, was a holder in due course. *Choteau Trust & Bkg. Co. v. Smith* (1909) (Ky.) *supra*.

And under the sections of the statute providing that a transferee who receives notice of any infirmity in the instrument before he has paid the full amount agreed to be paid therefor will be a holder in due course only to the amount that he has actually paid at the time, and that a holder in due course takes the paper free from infirmities that might affect the parties to the instrument, a bank that merely credits the proceeds to the holder's account is not a holder in due course. *Albany County Bank v. People's Co-op. Ice Co.* (1904) 92 App. Div. 47, 86 N. Y. Supp. 773.

And the Negotiable Instruments Law does not affect the rule that a bank is a holder in due course when the proceeds of the instrument have been credited to the holder's account to make good the account against a note that was charged to the account by the bank, the note being due at the time and the account being insufficient, without the credit, to meet its payment. *Wallabout Bank v. Peyton* (1908) 123 App. Div. 727, 108 N. Y. Supp. 42.

And, notwithstanding the provisions that an indorsee is presumed to be a holder in due course, a mere showing that a bank credited the proceeds of the instrument to the deposit account of the indorser is not sufficient to prevent the maker from setting up against the bank any counterclaims that he may have had against the note in the hands of the original holder. Stand-

ing *Stone Nat. Bank v. Walser* (1913) 162 N. C. 53, 77 S. E. 1006.

And where the statute provides that "value is any consideration sufficient to support a simple contract," the court, in *Elgin City Bkg. Co. v. Hall* (1907) 119 Tenn. 548, 108 S. W. 1068, held that a bank was not a holder in due course where it had secured credit for the indorser at another bank, but failed to show either that the credit had been used or the precise nature of the transaction, to enable the court to judge if value had in fact been given.

In *Citizens' State Bank v. Cowles* (1905) 180 N. Y. 346, 105 Am. St. Rep. 765, 73 N. E. 33, the court said: "Under the Negotiable Instruments Law four elements must concur to constitute such a title. 1. The instrument must be complete and regular on its face. 2. The holder must receive it before it is overdue and without notice that it has been previously dishonored, if that is the fact. 3. It must have been taken in good faith and for value. 4. It must have been taken without notice of any infirmity in the instrument or defect in the title of the person negotiating it. Negotiable Instruments Law, § 91. If the plaintiff had not actually parted with value before it received notice of the dishonor of this check, it is apparent that at least one of these elements is lacking in the plaintiff's title. The authorities hold that the mere crediting to a depositor's account, on the books of a bank, of the amount of a check drawn upon another bank, where the depositor's account continues to be sufficient to pay the check in case it is dishonored, does not constitute the bank a holder in due course."

The court in *Hodge v. Smith* (1907) 130 Wis. 326, 110 N. W. 192, said: "Such circumstances as we have here, that is, the sale of a note before due and placing the consideration to the credit of the vendor upon the books of the purchaser, subject to the former's check, have been held not to be a taking for value, so as to render the new holder a purchaser in due course, except to the extent of the money actually drawn and charged against such

credit. This court so held in *Manufacturers' Nat. Bank v. Newell* (1888) 71 Wis. 309, 37 N. W. 420. The principle there and in many cases declared was incorporated into the Negotiable Instruments Law at § 1676-24 in these words: 'Where the transferee receives notice of any infirmity in the instrument or defect in the title of the person negotiating the same before he has paid therefor the full amount agreed to be paid, he will be deemed a holder in due course only to the extent of the amount theretofore paid by him.'

In *Standard Trust Co. v. Commercial Nat. Bank* (1917) 153 C. C. A. 229, 240 Fcd. 303, the court, after holding that the bank permitting the indorsee of a note to draw out the proceeds on check was a holder in due course, said: "The rights of 'a holder in due course' are defined in § 2206 of the *Revisal of North Carolina* as follows: 'A holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon.' We are therefore of opinion, as

the case is now presented, that the Standard Trust Company became the beneficial owner of the check for value and without notice, and that it or its successor in title, the Guaranty Trust Company, can maintain this action 'free from defenses available to prior parties.'"

But the last paragraph of the Negotiable Instruments Law quoted by the court in *OLD NAT. BANK v. GIBSON* (reported herewith) ante, 247, which provides that "where the holder has a lien on the instrument, arising either from contract or by implication of law, he is deemed a holder for value to the extent of his lien," modifies the old rule as stated under IV. *supra*, by limiting the amount of the bank's recovery to the amount of proceeds the indorser has been permitted to draw from the deposit on the faith of the instrument, when the bank gets notice that there is a defense. It was so held in *National Bank v. Bonsor* (1909) 38 Pa. Super. Ct. 275. See holding of this case as stated under III. c, *supra*. Also see *STATE v. EMERY* (reported herewith) ante, 234.

J. W. M.

CHARLES BABER, Receiver of People's Bank, Appt.,

v.

ED. H. DE CAMP, Respt.

South Carolina Supreme Court—March 18, 1914.

(96 S. C. 432, 81 S. E. 155.)

Corporation — stock subscription — contract to pay in labor — effect of insolvency.

The maker of a note for an unpaid stock subscription cannot defeat liability to pay its amount in cash to a receiver upon the insolvency of the corporation by showing an agreement that it should be settled in labor, which he was ready and willing to perform, but which had become unnecessary because of the insolvency.

[See note on this question beginning on page 277.]

APPEAL by plaintiff from an order of the Common Pleas Circuit Court for Cherokee County (Prince, J.) reversing a judgment of the Magistrate Court in his favor in an action on a promissory note given as part of the subscription to the capital stock of a bank. *Reversed.*

The facts are stated in the opinion of the court.

Mr. N. W. Hardin, for appellant:

A stockholder of an insolvent bank cannot set off a debt due him by the bank against his statutory liability to creditors.

Parker v. Carolina Sav. Bank, 53 S. C. 583, 69 Am. St. Rep. 888, 31 S. E. 673; *Efrd v. Piedmont Land Improv. & Invest. Co.* 55 S. C. 79, 32 S. E. 758, 897; *Lauraglen Mills v. Ruff*, 57 S. C. 53, 49 L.R.A. 448, 35 S. E. 387; *Man v. Boykin*, 79 S. C. 1, 128 Am. St. Rep. 830, 60 S. E. 17; *Cook, Stock & Stockholders*, 2d ed. § 193; 23 Am. & Eng. Enc. Law, 846.

The certificate is merely the stockholder's evidence of title to his stock; it is not the stock itself, but only a convenient representative of it. He would be a full stockholder, with all the rights of one, even if the certificate was never issued at all.

Cook, Stock & Stockholders, 2d ed. § 192; *Sanger v. Upton*, 91 U. S. 56, 23 L. ed. 220; *Upton v. Tribilcock*, 91 U. S. 45, 23 L. ed. 203; 23 Am. & Eng. Enc. Law, 782.

Messrs. Butler & Hall, for respondent:

If the corporation accepted a note of a subscriber as cash, to be discharged by labor or services,—which was lawful for it to do,—and credited the proceeds of the note as cash, then it could not repudiate the agreement, and attempt to hold the defendant liable as a stockholder for the unpaid amount due on the stock owned by him, under the statute of this state.

Nettles v. Marco, 33 S. C. 47, 11 S. E. 595; *Pittsburgh & C. R. Co. v. Stewart*, 41 Pa. 54.

If no stock had been issued to the defendant, he could not, under the statute, be regarded as a stock owner, nor could he be held liable for any amount due and unpaid on the stock owned by him, under the statute.

26 Cyc. 874, 892, 934, 940; *McLester v. Barlow*, 95 S. C. 25, 78 S. E. 523.

Gary, Ch. J., delivered the opinion of the court:

The facts are thus stated, in the order of his Honor, the circuit judge, from which the plaintiff appealed: "This is an appeal from the judgment of the magistrate court, in favor of the plaintiff against the defendant, on a note executed by the defendant to the People's Bank on June 26, 1911, for the sum of \$60.70 payable on demand, with interest

from date at 8 per cent per annum. The action is on this note. No demand for payment was made by the bank. After the bank suspended and a receiver was appointed, demand was made by the receiver and payment refused. On the trial the defendant answered by alleging that the note was given as a part of the subscription to the capital stock of the People's Bank, four shares of the par value of \$25 each; that the note was executed and delivered upon a special contract and agreement; that it should be paid and discharged by the defendant, by doing advertising and job work for the People's Bank. Thereafter the People's Bank continued to send work to the defendant, so that up to the time of suspension by the bank the account had accumulated to the amount of \$18.25. The defendant showed by his evidence that he stood ready and willing to carry out his part of the agreement. There was no breach on the part of the defendant. Without passing upon all the points insisted upon, in the argument, I am bound to hold under the case of *Nettles v. Marco*, 33 S. C. 47, 11 S. E. 595, that the defendant was entitled to have the contract as made by him carried out according to its terms, and, in the absence of any testimony that the defendant refused or failed, after opportunity given, to perform his part of the agreement, no money judgment can be obtained against him. It is the judgment of this court that the judgment of the magistrate court be reversed, and the complaint dismissed."

The question for determination is whether the readiness and willingness of the defendant to do the advertising and job work for the bank discharged him from liability on the note, although he had not rendered such services, when the bank was placed in the hands of a receiver on account of its insolvency.

His Honor, the circuit judge, based his ruling upon the case of *Nettles v. Marco*, supra. The facts of that case were quite different from those in the present case, as

will be seen from the language of the court in *Efird v. Piedmont Land Improv. & Invest. Co.* 55 S. C. 78, 32 S. E. 758, commenting on the case just mentioned, which was as follows: "In that case the advances were made by Marco, a stockholder, with the knowledge and approval and for the benefit of the corporation, but the principal reason why he was not compelled to pay the amount he subscribed was because the directors, who were clothed with authority for that purpose, in good faith, released him from any further payments on his subscription."

In the case of *Efird v. Piedmont Land Improv. & Invest. Co.* supra, the court had under consideration the question whether there was error in refusing to allow certain stockholders to set off their claims against the corporation, in extinguishment of the amounts due upon their original subscription; and, after stating that there was no statute conferring such right, and that it was only necessary to cite an illustration to show how inequitable this rule would be, proceeded as follows: "Suppose every stockholder of an insolvent corporation had a claim

against it equal to the amount of his unpaid subscription, and that there were other creditors holding claims to a much larger amount than those held by all the stockholders. If the stockholders could set off their claims against the amounts due by them upon their unpaid subscription, no other creditor would get a cent upon his claim."

The practical effect of the circuit judge's ruling is, not only to allow the defendant to set off his claim for advertising and job work, amounting to \$18.25, but also a claim for such services sufficient in amount to extinguish the note, although the claim was never in existence, as the services were not rendered. The fact that the rendition of the services became unnecessary, by reason of the bank's insolvency, did not absolve the defendant from liability on the note, merely because he was ready and willing to render them.

Corporation—
stock subscrip-
tion—contract to
pay in labor—
effect of
insolvency.

Reversed.

Petition for rehearing denied April 6, 1914.

ANNOTATION.

Liability upon stock subscription payable in services which are rendered unnecessary by the insolvency of corporation, or other cause.

There are several questions preliminary to the one under consideration herein that have an important bearing upon this question. The first one is as to the validity, in the first instance, of a stock subscription payable in services. A stock subscription payable in labor or services is ordinarily termed a conditional subscription to stock. It has been stated that such a conditional subscription is valid. 1 Cook, Corp. § 83.

In the case of preliminary stock subscriptions it is held in New York and Pennsylvania that subscriptions taken for the purpose of complying with the statute which grants a charter only upon a certain amount of stock being subscribed cannot be con-

ditional, but must be absolute. 1 Cook, Corp. § 79. According to this authority the New York and Pennsylvania cases differ, however, in regard to the effect of a conditional subscription to stock before and for the purpose of incorporation. In New York, the whole subscription is void absolutely, and cannot be enforced either by the corporation or by the would-be subscriber; in Pennsylvania the condition is held void, but the subscription itself is treated as an absolute, unconditional subscription, and may be enforced by the corporation. 1 Cook, Corp. § 80.

It has been stated generally that a condition to a subscription for stock must be performed or complied with

before the subscriber can be compelled to pay such subscription. 1 Cook, Corp. § 86. Another authority states that where the condition is lawful, there is no contract unless it is performed or waived. 10 Cyc. 412.

Assuming that a condition attached to a stock subscription, that it shall be paid in labor or services, is valid, the further question may arise as to the liability of the subscriber when such labor or services become unnecessary because of the insolvency of the corporation or other cause. The court in the reported case (*BABER v. DE CAMP*, ante, 275) takes the position that the subscription then becomes an absolute one for the payment of money. The facts in the Baber Case detract from the holding upon the abstract proposition. In the first place, a note was given to evidence the amount due on the subscription. Further, it does not appear when the agreement as to services was made, that is, whether made at the time of subscribing and as a part of the subscription agreement, or subsequently. There seems no escape from the conclusion that if the agreement that the subscription is payable in services is made as a condition of the subscription, and as thus made is valid, that the subscriber willing to perform his contract cannot be compelled to pay in cash what he never agreed to pay in that manner. And if the condition is invalid, it seems that the entire subscription should be held invalid, although the Pennsylvania doctrine above referred to treats the condition as invalid and the remaining part of the contract as valid, and this doctrine is approved by the United States Supreme Court in *Burke v. Smith* (*Putnam v. New Albany & S. C. Junction R. Co.*) (1873) 16 Wall. (U. S.) 390, 21 L. ed. 361. This general question, however, is beyond the scope of this note.

Nettles v. Marco (1889) 33 S. C. 47, 11 S. E. 595, referred to by the court in the reported case (*BABER v. DE CAMP*), was an action by a receiver to recover of a subscriber a balance due on his stock subscription, the subscriber having made it a condition of his subscrip-

tion that part of it should be paid in lumber. Prior to the action in question, the subscriber had paid more cash than he had agreed to pay, so that the court concludes he had the right to pay the entire balance remaining unpaid in lumber, and adds that this balance could "not be recovered from him in money,—at least, until it was shown that he had been afforded a reasonable opportunity to do so, and failed to perform the contract according to its express terms, which was not done." It is true the directors had released the subscriber from his contract, and this was taken into consideration in the decision as stated in *BABER v. DE CAMP*, but the decision proceeds, in part at least, upon the theory that the condition attached to this subscription was valid and the subscriber could not be compelled to pay money.

In *Lawrence v. Fedders* (1917) 166 N. Y. Supp. 835, the trustee of a bankrupt motor truck corporation was held not entitled to recover of a manufacturer of radiators a balance remaining unpaid on a contract whereby the manufacturer of radiators agreed to subscribe for stock in the motor truck company, "it being understood that you [the motor truck company] are to take radiators for this entire sum within one year from the date the stock is issued," where the motor truck company, while a going concern, failed to demand all the radiators within the year or a reasonable time thereafter. The trustee in bankruptcy demanded either cash or the value of the undelivered radiators, and upon refusal by the manufacturer brought action in which he demanded judgment for the amount of such claimed unpaid subscription to the capital stock. In denying recovery the court says: "The sole question seems to be whether the term of one year, or into the early part of the following year, was fixed by the parties as such vital essence of the contract that the failure of the corporation to call for the radiators within that time relieved the defendant from further performance. It must be conceded that defendant did not agree to

pay for this stock in anything but radiators. He did not agree to pay for it in cash at any time. He was a manufacturer of radiators, and the corporation wanted radiators. It was not a transaction solely involving the sale of capital stock; it was securing the payment of the purchase price of radiators by delivering the stock certificate. While it is true that defendant received the stock certificate in October, 1911, it was plainly agreed that whatever the corporation would be entitled to for such stock would solely be the number of radiators it called for within the year, or during the early part of the following year. It did call for some, but failed to call for all the radiators to which it was entitled under the contract. Its failure so to do at a time when it was a going concern, and its stock had an apparent value, does not seem to be a fair ground upon which to base a claim made by its trustee, after it has become bankrupt and its stock worthless, that the defendant must do that which he has never agreed to do. He did agree to deliver radiators within the year, during which time the corporation was a live, business concern; he certainly did not agree to deliver radiators after the expiration of three years, at which time the corporation was a bankrupt. The only demand made upon defendant for the unasked-for radiators was in December, 1916, and that demand was not made by the corporation, but by plaintiff, its trustee in bankruptcy. It must be held that the reasonable time after March, 1913, in which the corporation was entitled to ask for the radiators expired long before the bankruptcy of the corporation in January, 1914. The corporation having failed to exercise its right, it could not have recovered against the defendant."

If the subscriber has refused to perform his agreement, he would, theoretically, render himself liable to an action for breach of contract, and the damages recoverable would be the value of his unperformed services, and that value might reasonably be fixed at the amount of his subscription. The courts have not followed these theoretical steps, but have treated such subscriptions as payable in money upon the failure of the subscriber to comply with his contract. Thus, in *Hayward & P. Pl. Road Co. v. Bryan* (1858) 51 N. C. (5 Jones, L.) 82, a subscription payable in property was held to become payable in money, where the subscriber first neglected and refused to avail himself of his privilege of paying it in property. In *Sperry v. Johnson* (1842) 11 Ohio, 452, an action to recover a subscription for the construction of a road, no corporation being involved, the defendant had subscribed a stated amount, payable in labor or stock, but upon request had not performed the labor or tendered the stock; the court states that, having failed to perform the labor or tender the stock, the subscription became, in law, a mere money demand.

In *Ridgefield & N. Y. R. Co. v. Brush* (1875) 43 Conn. 86, a contractor subscribed to the stock of a railroad company upon a parol understanding that 50 per cent of the subscription was to be paid by a contract for the construction of the road; subsequently a written agreement was entered into in pursuance of the previous parol agreement. This contract was regarded as a fraud upon the other subscribers, and it is stated that in an action against the contractor on his subscription the fraudulent arrangement to the prejudice of the other stockholders would be no defense.

W. A. E.

KATHERINE STIANSON et al., Respts.,

v.

STIAN K. STIANSON, Appt.

South Dakota Supreme Court — April 12, 1918.

(40 S. D. 322, 167 N. W. 237.)

Tenant in common — right to purchase under foreclosure sale.

1. One cotenant has a right to purchase the common property under an outstanding encumbrance, for his own protection.

[See note on this question beginning on page 297.]

Pleading — waiver of demurrer — filing answer.

2. Demurrer is waived by filing an answer and trial on the merits.

[See 21 R. C. L. 620.]

Appeal — waiver of demurrer — want of facts or lack of jurisdiction.

3. Waiver of a demurrer by filing an answer does not extend to error presenting the question of sufficiency of facts or want of jurisdiction, upon a proper record, on appeal from the judgment.

Fraud — purchase by cotenant.

4. The purchase by one cotenant of the entire estate at a sale under foreclosure of the ancestor's mortgage is not of itself fraudulent as against his cotenants.

[See 7 R. C. L. 857 et seq.]

Trust — purchase of ancestor's estate — character.

5. The trust which arises from the purchase by an administrator or coheir of a deceased mortgagor at the foreclosure sale is implied or constructive, not express.

Limitation of actions — against express trust — when run.

6. Laches and the Statute of Limitations begin to run in case of repudiation of an express trust, at the time the trust is openly repudiated or acts are done by the trustee which are hostile to or in fraud of the rights of the beneficiaries, of which they have actual knowledge, or of facts from which knowledge must be imputed to them.

[See 17 R. C. L. 708.]

— when right of action accrues.

7. The right of a cotenant to resort to equity to establish his title in case of the purchase by a cotenant of the entire property at a sale under foreclosure of a mortgage accrues the instant the title is acquired.

[See 7 R. C. L. 905.]

Notice — facts on public record.

8. In case a coheir acting as administrator of the ancestor's estate purchases the property at sale under foreclosure of the ancestor's mortgage, his coheir is chargeable with notice of the facts, which are of record, that the land belonged to their ancestor, that the coheir was administrator, and that he purchased under foreclosure sale when there were no funds of the estate to pay the mortgage.

[See 23 R. C. L. 157.]

— public records.

9. Public records are equivalent to actual notice of facts appearing upon them.

[See 23 R. C. L. 157.]

Tenant in common — purchase of outstanding title — exclusion of cotenant.

10. Equity will not permit a cotenant to acquire an adverse claim to common property through administration proceedings, or otherwise, for his own benefit to the exclusion of his cotenants.

[See 7 R. C. L. 857.]

— right of cotenant to participate — diligence.

11. A tenant in common must act with reasonable diligence in making his election to participate in the benefits of a purchase by his cotenant of the common property under an outstanding mortgage, and bear his proportion of the expenditures necessarily involved in the transaction.

[See 7 R. C. L. 868.]

Limitation of actions — laches — delay in attacking purchase by coheir.

12. Delay for nine years after removal of all disabilities by heirs, to question the purchase of the common property by a coheir under an outstanding mortgage by the ancestor, which was a matter of public record, and without offer to contribute toward the indebtedness, bars their right to relief.

[See 7 R. C. L. 869, 870.]

APPEAL by defendant from a judgment of the Circuit Court for Day County (Bouck, J.) in favor of plaintiffs in an action brought to establish a trust in defendant as to certain property, to quiet title in plaintiffs, and for an accounting for rents and profits. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. H. H. Potter and Anderson & Waddel, for appellant:

The complaint does not state facts sufficient to constitute a cause of action, fails to show equity, and affirmatively shows laches not excused or explained, and the record is no better than the complaint.

1 Pom. Eq. Jur. § 36; Robertson v. Burrell, 110 Cal. 568, 42 Pac. 1086; Lady Washington Consol. Co. v. Wood, 113 Cal. 482, 45 Pac. 809; Ryan v. Woodin, 9 Idaho, 525, 75 Pac. 261; Badger v. Badger, 2 Wall. 87, 17 L. ed. 836; Sullivan v. Portland & K. R. Co. 94 U. S. 806, 24 L. ed. 324; Godden v. Kimmel, 99 U. S. 201, 25 L. ed. 431; Combs v. Scott, 76 Wis. 662, 45 N. W. 532; Russell v. Fish, 149 Wis. 122, 135 N. W. 533; Likens v. Likens, 136 Wis. 321, 117 N. W. 799; Stevenson v. Boyd, 153 Cal. 630, 19 L.R.A. (N.S.) 525, 96 Pac. 234; Mandeville v. Solomon, 39 Cal. 125; 17 Am. & Eng. Enc. Law, 2d ed. 639; Stevens v. Reynolds, 143 Ind. 467, 52 Am. St. Rep. 422, 41 N. E. 931; Reed v. Reed, 122 Mich. 77, 80 Am. St. Rep. 541, 80 N. W. 996; Buchanan v. King, 22 Gratt. 414; Morris v. Roseberry, 46 W. Va. 24, 32 S. E. 1019; McFarlin v. Leaman, — Tex. Civ. App. —, 29 S. W. 44; Savage v. Bradley, 149 Ala. 169, 123 Am. St. Rep. 30, 43 So. 20; Freeman, Cotenancy & Partition, § 156; Craven v. Craven, 68 Neb. 459, 94 N. W. 604; Doe ex dem. Newton v. Roe, 33 Ga. 163; Fuller v. Little, 59 Ga. 338; Williams v. Rhodes, 81 Ill. 571; Sloan v. Graham, 85 Ill. 26; Geyer v. Snyder, 69 Hun, 115, 23 N. Y. Supp. 200; Miles v. Wheeler, 43 Ill. 123; Boyd v. Blankman, 29 Cal. 19, 87 Am. Dec. 146; Burr v. Mueller, 65 Ill. 258.

The action is barred by the six-year Statute of Limitations.

Bills v. Silver King Min. Co. 106 Cal. 9, 39 Pac. 43; Hecht v. Slaney, 72 Cal. 363, 14 Pac. 88; Lee v. McClelland, 120 Cal. 147, 52 Pac. 300; Nash v. Stevens, 96 Iowa, 616, 65 N. W. 825; Laird v. Kilbourne, 70 Iowa, 83, 30 N. W. 9; Hawley v. Page, 77 Iowa, 239, 14 Am. St. Rep. 275, 42 N. W. 193; Sims v. Gray, 93 Iowa, 38, 61 N. W. 171; 1 Pom. Eq. Jur. § 27; Garfield County v. Renshaw, 28 Okla. 56, 22 L.R.A. (N.S.) 208, 99 Pac. 638; Broder v. Conklin, 121 Cal.

282, 53 Pac. 699; Price v. Mulford, 107 N. Y. 308, 14 N. E. 298; Lammer v. Stoddard, 103 N. Y. 672, 9 N. E. 328; Cone v. Dunham, 59 Conn. 145, 8 L.R.A. 647, 20 Atl. 311; Hughes v. Brown, 88 Tenn. 573, 8 L.R.A. 480, 13 S. W. 286; 25 Cyc. 1155-1157; Stillwater & St. P. R. Co. v. Stillwater, 66 Minn. 176, 68 N. W. 836; Centerville v. Turner County, 25 S. D. 300, 126 N. W. 605; Hecht v. Slaney, 72 Cal. 363, 14 Pac. 88; Boyd v. Mutual Fire Asso. 116 Wis. 155, 61 L.R.A. 918, 96 Am. St. Rep. 948, 90 N. W. 1086, 94 N. W. 171; Donaldson v. Jacobitz, 67 Kan. 244, 72 Pac. 846; Ames v. Howes, 13 Idaho, 756, 93 Pac. 35; Smith v. Martin, 135 Cal. 247, 67 Pac. 779; Clark v. Van Loon, 108 Iowa, 250, 75 Am. St. Rep. 219, 79 N. W. 88; Boyd v. Blankman, 29 Cal. 19, 87 Am. Dec. 146; Nougues v. Newlands, 118 Cal. 102, 50 Pac. 386; Speidel v. Henrici, 120 U. S. 377, 30 L. ed. 718, 7 Sup. Ct. Rep. 610.

A cotenant cannot recover for rents and profits from his cotenant.

17 Am. & Eng. Enc. Law, 2d ed. 690; Hamby v. Wall, 48 Ark. 135, 3 Am. St. Rep. 218, 22 S. W. 705; Pico v. Columbet, 12 Cal. 414, 73 Am. Dec. 550; Crane v. Waggoner, 27 Ind. 52, 89 Am. Dec. 493; Reynolds v. Wilmeth, 45 Iowa, 693; Van Ormer v. Harley, 102 Iowa, 150, 71 N. W. 241; Hixon v. Bridges, 18 Ky. L. Rep. 1068, 38 S. W. 1046; Gowen v. Shaw, 40 Me. 56; Badger v. Holmes, 6 Gray, 118; Brown v. Wellington, 106 Mass. 318, 8 Am. Rep. 330; Everts v. Beach, 31 Mich. 136, 18 Am. Rep. 169; Ragan v. McCoy, 26 Mo. 166; Kline v. Jacobs, 68 Pa. 57; Brown v. Thurstin, 83 Kan. 125, 29 L.R.A. (N.S.) 238, 109 Pac. 784; Owings v. Owings, 150 Mich. 609, 114 N. W. 393; McCaw v. Barker, 115 Ala. 543, 22 So. 131; Ryason v. Dunten, 164 Ind. 85, 73 N. E. 74; McLaughlin v. McLaughlin, 80 Md. 115, 30 Atl. 607; Kirchgassner v. Rodick, 170 Mass. 543, 49 N. E. 1015; Biglow v. Biglow, 75 App. Div. 98, 77 N. Y. Supp. 716; Ayotte v. Nadeau, 32 Mont. 498, 81 Pac. 145; Ela v. Ela, 70 N. H. 163, 47 Atl. 414; Janes v. Brown, 48 Iowa, 568; O'Connor v. Delaney, 53 Minn. 247, 39 Am. St. Rep. 601, 54 N. W. 1108; LeBarron v. Babcock, 122 N.

Y. 153, 9 L.R.A. 625, 19 Am. St. Rep. 488, 25 N. E. 253.

The judgment for rents and profits is not based on proper measure of damages and is unsupported by evidence.

Olson v. Huntamer, 6 S. D. 364, 61 N. W. 479, 8 S. D. 220, 66 N. W. 313; Parkinson v. Shew, 12 S. D. 171, 80 N. W. 189; Hegar v. De Groat, 3 N. D. 353, 56 N. W. 150.

Plaintiffs are estopped by acquiescence and laches.

1 Pom. Eq. Jur. pp. 40-42; Lutjen v. Lutjen, 64 N. J. Eq. 773, 53 Atl. 625; Doane v. Preston, 183 Mass. 569, 67 N. E. 867; Abraham v. Ordway, 158 U. S. 417, 39 L. ed. 1037, 15 Sup. Ct. Rep. 894; Lemoine v. Dunklin County, 2 C. C. A. 343, 10 U. S. App. 227, 51 Fed. 487; Wood v. Perkins, 64 Fed. 817; Jones v. Perkins, 76 Fed. 82; Anderson v. Northrop, 30 Fla. 612, 12 So. 318; Patterson v. Hewitt, 11 N. M. 1, 55 L.R.A. 658, 66 Pac. 552; Townsend v. Vanderwerker, 160 U. S. 171, 40 L. ed. 383, 16 Sup. Ct. Rep. 258; Hayward v. Eliot Nat. Bank, 96 U. S. 611, 24 L. ed. 855; Brown v. Buena Vista County, 95 U. S. 159, 24 L. ed. 423; 2 Story, Eq. Jur. § 1520; Galliher v. Cadwell, 145 U. S. 368, 36 L. ed. 738, 12 Sup. Ct. Rep. 873; Hammond v. Hopkins, 143 U. S. 224, 36 L. ed. 134, 12 Sup. Ct. Rep. 418; Willard v. Wood, 164 U. S. 502, 41 L. ed. 531, 17 Sup. Ct. Rep. 176; Sullivan v. Portland & K. R. Co. 94 U. S. 806, 24 L. ed. 324; Lansdale v. Smith, 106 U. S. 391, 27 L. ed. 219, 1 Sup. Ct. Rep. 350; Whitney v. Fox, 166 U. S. 637, 41 L. ed. 1145, 17 Sup. Ct. Rep. 718; Richards v. Mackall, 124 U. S. 183, 31 L. ed. 396, 8 Sup. Ct. Rep. 437; Calhoun v. Millard (Calhoun v. Delhi & M. R. Co.) 121 N. Y. 69, 8 L.R.A. 243, 24 N. E. 27; Mason v. Sanford, 137 N. Y. 497, 33 N. E. 546; Boyer v. East, 161 N. Y. 580, 76 Am. St. Rep. 290, 56 N. E. 114; Graff v. Portland Town & Mineral Co. 12 Colo. App. 106, 54 Pac. 854; Hoyt v. Pawtucket Inst. 110 Ill. 390; Chapman v. Bank of California, 97 Cal. 155, 31 Pac. 896; Sheldon v. Rockwell, 9 Wis. 166, 76 Am. Dec. 269; Davis v. Fox, 59 Mo. 127.

Messrs. Lewis W. Bicknell and Campbell & Walton, for respondents:

Defendant was forbidden as a matter of law to become the owner in his own right of the property belonging to his trust.

Rogers v. Rogers, 1 Hopk. Ch. 515, affirmed in 3 Wend. 503, 20 Am. Dec. 716; Evertson v. Tappen, 5 Johns. Ch.

497; Van Horne v. Fonda, 5 Johns. Ch. 388; Turner v. Fryberger, 94 Minn. 433, 110 Am. St. Rep. 375, 103 N. W. 217; Arnold v. Smith, 121 Minn. 116, 140 N. W. 748; 39 Cyc. 298; 1 Perry, Trusts, 5th ed. 205.

No lapse of time is a bar to an action on a direct or express trust as between the trustee and the beneficiary.

Bostwick v. Dickson, 65 Wis. 593, 26 N. W. 549; White v. Fitzgerald, 19 Wis. 480; Williams v. Williams, 82 Wis. 393, 52 N. W. 429; Powers v. Powers, 28 Wis. 659; Centerville v. Turner County, 25 S. D. 300, 126 N. W. 605; 2 Perry, Trusts, § 863; Speidel v. Henrici, 120 U. S. 377, 30 L. ed. 718, 7 Sup. Ct. Rep. 610; Lamberton v. Youmans, 84 Minn. 109, 86 N. W. 894; Smith v. Glover, 44 Minn. 260, 46 N. W. 406; Cone v. Dunham, 59 Conn. 145, 8 L.R.A. 647, 20 Atl. 311; Rubey v. Barnett, 12 Mo. 3, 49 Am. Dec. 112; Wilson v. Welles, 79 Minn. 53, 81 N. W. 549; Reynolds v. Sumner, 126 Ill. 53, 1 L.R.A. 327, 9 Am. St. Rep. 523, 18 N. E. 334; Gisborn v. Charter Oak L. Ins. Co. 142 U. S. 326, 35 L. ed. 1029, 12 Sup. Ct. Rep. 297; Miles v. Thorne, 38 Cal. 335, 99 Am. Dec. 384; Bacon v. Rives, 106 U. S. 99, 27 L. ed. 69, 1 Sup. Ct. Rep. 3; Hearst v. Pujol, 44 Cal. 230; Parker v. Bethel Hotel Co. 96 Tenn. 252, 31 L.R.A. 706, 34 S. W. 209; Loring v. Palmer, 118 U. S. 321, 30 L. ed. 211, 6 Sup. Ct. Rep. 1073; Oliver v. Piatt, 3 How. 333, 11 L. ed. 622; Hovey v. Bradbury, 112 Cal. 620, 44 Pac. 1077.

When one betrays a trust and appropriates trust property to his own use it is called a fraud.

Lightner Min. Co. v. Lane, 161 Cal. 689, 120 Pac. 771, Ann. Cas. 1913C, 1093.

The statute did not begin to run nor were any laches imputable to the plaintiffs until a discovery by them that a fraud had been perpetrated against them by defendant.

Lewis v. Welch, 47 Minn. 193, 48 N. W. 608, 49 N. W. 665; Cock v. Van Eten, 12 Minn. 22, Gil. 431; Larsen v. Utah Loan & T. Co. 23 Utah, 449, 65 Pac. 208; 25 Cyc. 1189, note 68; Bailey v. Glover, 21 Wall. 342, 22 L. ed. 636; Dorsey Mach. Co. v. McCaffrey, 139 Ind. 545, 47 Am. St. Rep. 290, 38 N. E. 208; Waer v. Skinner, 46 Md. 257, 24 Am. Rep. 517; Way v. Cutting, 20 N. H. 187; Comfort v. Robinson, 155 Mich. 143, 118 N. W. 943; Faust v. Hosford, 119 Iowa, 97, 93 N. W. 58; O'Dell v. Burnham, 61 Wis. 562, 21 N. W. 635;

Higgins v. Crouse, 147 N. Y. 411, 42 N. E. 6; Ferris v. Henderson, 12 Pa. 49, 51 Am. Dec. 580; Stearns v. Hochbrunn, 24 Wash. 206, 64 Pac. 165; La-taillade v. Orena, 91 Cal. 563, 25 Am. St. Rep. 219, 27 Pac. 924; Wilder v. Secor, 72 Iowa, 161, 2 Am. St. Rep. 236, 33 N. W. 448; Forsyth v. Easter-day, 63 Neb. 887, 89 N. W. 407; Raymond v. Schriever Bros. 63 Neb. 719, 89 N. W. 308; McMahon v. McGraw, 26 Wis. 614.

Infancy is not only a disability which prevents the running of the statute, but evidence of infancy, coupled with the statement of ignorance of the cause of action, may excuse a plaintiff from having asserted a right.

16 Cyc. 168; Carter v. Chattanooga, — Tenn. —, 48 S. W. 117; Copen v. Flesher, 1 Bond, 440, Fed. Cas. No. 3211; Goss v. Herman, 20 N. D. 295, 127 N. W. 78; Lind v. Webber, 36 Nev. 623, 50 L.R.A.(N.S.) 1046, 134 Pac. 461, 135 Pac. 139, 141 Pac. 458, Ann. Cas. 1916A, 1202; Dusenbery v. Bidwell, 86 Kan. 666, 121 Pac. 1098; Murphy v. Cady, 145 Mich. 33, 108 N. W. 493; Chase v. Boughton, 93 Mich. 285, 54 N. W. 44; Wills v. Nehalem Coal Co. 52 Or. 70, 96 Pac. 528; Wall v. Meilke, 89 Minn. 232, 94 N. W. 688; Campbell v. Spears, 120 Iowa, 670, 94 N. W. 1126; Nicholson v. Nicholson, 83 Kan. 223, 109 Pac. 1086; Holterhoff v. Mead, 36 Minn. 42, 29 N. W. 675; American Nat. Bank v. Fidelity & D. Co. 21 L.R.A.(N.S.) 963, note.

The possession of one cotenant is the possession of all, and the Statute of Limitations does not even begin to run until there has been an ouster of the cotenant complaining.

23 Cyc. 23; McPheeters v. Wright, 124 Ind. 560, 9 L.R.A. 176, 24 N. E. 734; Moy v. Moy, 89 Iowa, 511, 56 N. W. 668; Van Horne v. Fonda, 5 Johns. Ch. 388; Lewis v. Jacobs, 153 Mich. 664, 117 N. W. 325; Conner v. Craig, 132 C. C. A. 639, 216 Fed. 729; Yarwood v. Johnson, 29 Wash. 643, 70 Pac. 123, 22 Mor. Min. Rep. 398; Cook v. Webb, 21 Minn. 428; Schuster v. Schuster, 84 Neb. 98, 29 L.R.A.(N.S.) 224, 120 N. W. 948, 18 Ann. Cas. 1078; Names v. Names, 48 Neb. 701, 67 N. W. 751.

When a cotenant, in violation of his duty, becomes the owner of the out-standing title to the property, the sub-ject of the cotenancy, he becomes a trustee of a constructive trust by reason of his violation of his fiduciary respon-sibility to his cotenants.

Van Horne v. Fonda, 5 Johns. Ch. 388; Starkweather v. Jenner, 216 U. S. 524, 54 L. ed. 602, 30 Sup. Ct. Rep. 382, 17 Ann. Cas. 1167.

By paying taxes defendant acquired no rights against his cotenants except the right to be reimbursed.

38 Cyc. 51; Rothwell v. Dewees, 2 Black, 613, 17 L. ed. 309; Venable v. Beauchamp, 3 Dana, 321, 28 Am. Dec. 74.

Plaintiffs are not estopped nor guilty of laches.

Sanborn v. Eads, 38 Minn. 211, 36 N. W. 338; Fitzgerald v. Fitzgerald & M. Constr. Co. 44 Neb. 463, 62 N. W. 899; Wall v. Meilke, 89 Minn. 232, 94 N. W. 688.

A new trial will not be granted on the ground of newly discovered evidence if it appears that the evidence is false, improbable, or unworthy of credence.

29 Cyc. 905; Simonson v. Aney, 26 S. D. 121, 128 N. W. 319; Wherry v. Duluth, M. & N. R. Co. 64 Minn. 415, 67 N. W. 223, 12 Am. Neg. Cas. 163; Upton v. Levy, 39 Neb. 331, 58 N. W. 95; Knox v. Bigelow, 15 Wis. 415; Kellog v. Ballard, 10 Wis. 440; 29 Cyc. 873; Fisk v. Fehrs, 32 N. D. 119, 155 N. W. 676; Damon v. Mullen, 6 S. D. 554, 62 N. W. 380; Ochsenreiter v. George C. Bagley Elevator Co. 11 S. D. 91, 75 N. W. 822; Rieger v. Schaible, 85 Neb. 221, 122 N. W. 860; Ernster v. Christianson, 24 S. D. 103, 123 N. W. 711; Goose River Bank v. Gilmore, 3 N. D. 188, 54 N. W. 1032; Upton v. Levy, 39 Neb. 331, 58 N. W. 95.

Smith, J., delivered the opinion of the court:

Action by plaintiffs, claiming as cotenants with defendant, to estab-lish a trust in defendant as to real property, to quiet title in plaintiffs, and for an accounting for rents and profits. Defendant filed a demurrer to the complaint for want of facts, which was overruled, and this rul-ing is assigned as error. Thereaft-er defendant answered, and the cause was tried by the court upon the merits, resulting adversely to defendant. It is settled in this jur-isdiction that the filing of an answer and a trial on the merits after a demurrer waives the demurrer and the right of appeal from an adverse

Pleading—
waiver of de-
murrer—filing
answer.

decision thereon. *Pierson v. Minnehaha County*, 26 S. D. 462, 128 N. W. 616, Ann. Cas. 1913B, 386. This waiver, however, does not extend to an alleged error presenting a like question as to the sufficiency of facts, or want of jurisdiction upon a proper record on appeal from the judgment. *Pierson v. Minnehaha County*, 28 S. D. 534, 38 L.R.A. (N.S.) 261, 134 N. W. 212.

Appeal—waiver
of demurrer—
want of facts or
lack of
jurisdiction.

It is not the theory of our system of appellate procedure to permit the reversal of judgments after a trial upon the merits, for defects in pleadings which might have been remedied by amendment prior to or at the trial. But the sufficiency or insufficiency of the facts proved at the trial, or want of jurisdiction of the person or subject-matter, apparent from the trial record, may always be reviewed upon proper exceptions and assignments of error. Questions as to the sufficiency or insufficiency of the facts proved are controlled by the rules governing the review of findings of fact by the trial court. Any questions raised by the demurrer as to the sufficiency of the facts pleaded have become immaterial, and are not subject to review upon this appeal. But it is proper, regardless of the insufficiency of the pleadings, to review assignments of error which challenge the sufficiency of the evidence to sustain the findings and judgment. The assignments of error in this case present no question as to the competency or relevancy of evidence. The following facts are undisputed: One John K. Stianson died intestate in Day county, on November 29, 1895. The decedent, at the time of his death, was owner of the real property in dispute. The plaintiffs and defendant are heirs at law of the decedent, each entitled to an undivided one-fifth interest in said real property. On January 10, 1896, the defendant, on his own petition, was appointed administrator, and qualified and acted until January 19, 1898, when administration

proceedings were closed and he was discharged by order of the county court. When John K. Stianson died, there was a mortgage on the real property in the sum of \$350, which became due shortly after defendant was appointed administrator, remained unpaid, and was foreclosed on March 27, 1897. Defendant purchased the land at the foreclosure sale in his own name for \$433, the amount due on the mortgage, and on March 27, 1898, received the sheriff's deed therefor in his own name. The deed was duly recorded the day it was issued. Prior to receiving said deed, defendant was in possession of the premises as administrator. When he took possession of the property as administrator, in January, 1896, the plaintiffs Katherine Stianson and Sam K. Stianson were of adult age, and plaintiffs Laura and Carrie Stianson, twin sisters, were about ten years of age.

It will be noted that the sheriff's deed was issued to defendant about two months after his discharge as administrator. From that time he remained in the exclusive possession, occupancy, and use of the land until the beginning of this action, on September 27, 1914. The plaintiffs Laura Stianson and Carrie Stianson became of adult age more than nine years prior to the commencement of this action. The mortgage and the proceedings on foreclosure were all made matters of public record as they transpired. On February 29, 1916, after the entry of judgment in the action awarding plaintiffs and defendant each a one-fifth interest in the real estate as heirs and cotenants, the plaintiff Sam K. Stianson filed a disclaimer of any right or title thereto, and the judgment was modified to adjudge a dismissal of the action on its merits as to him. The effect of the modified judgment was to award to Katherine, Laura, and Carrie Stianson each a one-fifth interest in the land, the other two-fifths interest remaining in the defendant. Defendant denied plain-

tiffs' allegations of fraud in suffering foreclosure proceedings, and in his purchase of the land at the foreclosure sale; alleged that both the estate and the plaintiff heirs were without funds or resources to pay the mortgage indebtedness; that plaintiffs Katherine Stianson and Laura and Carrie Stianson consented to his becoming purchaser of their interests at the foreclosure sale; that he had been in open, notorious, and adverse possession since the date of the sheriff's deed, with full knowledge and acquiescence of all the plaintiffs; pleaded both the six and ten year Statutes of Limitation; and that plaintiffs had been guilty of laches which should estop them from maintaining this action.

The trial court found, in substance, that the defendant, while acting as administrator, permitted the mortgage to be foreclosed, and purchased the land with intent to defraud plaintiffs and deprive them of their interest in the estate; that none of the plaintiffs had any knowledge of the wrongful acts of the defendant in thus acquiring title to their interests in the property, and did not know of their rights until shortly before this action was commenced; that they had proceeded with due diligence in seeking to enforce their rights, and that plaintiffs never knew of and never consented to or acquiesced in the purchase by defendant of their interests.

Appellant assigns as error the finding of the trial court that he suffered the mortgage to be foreclosed and purchased the land with intent to defraud plaintiffs and deprive them of their interest therein, contending that there is no evidence in the record to sustain such a finding. Appellant also assigns as error the finding of the trial court that plaintiffs had no knowledge of defendant's acts in acquiring title to the property, for the reason that such finding is against the preponderance of the evidence and wholly unsupported thereby. Appellant further assigns as error the finding

of the trial court that the plaintiffs never acquiesced in his purchase and possession of the land, alleging that such finding is contrary to the clear preponderance of the evidence. A careful scrutiny of the evidence and of the entire record fails to show any act or any conduct on the part of defendant from which an actual fraudulent intent might be inferred. So far as the record discloses he never attempted to conceal his acts, or by word or deed to deceive or mislead plaintiffs, or any of them, in his dealings with them or with the estate, or with the real property. It stands undisputed that the estate was insolvent, and that the general creditors received only about 75 cents on the dollar from the estate. It is shown by the testimony of the plaintiffs themselves that they were wholly without means to redeem or protect their interests from the foreclosure sale. The undisputed evidence shows that during the period of administration the rents and profits from the land were accounted for and turned into the estate in full. The trial court found, in substance, that, from the date of the sheriff's deed, the defendant excluded plaintiffs from possession of the land, continued in uninterrupted possession thereof, received the rents and profits arising therefrom during all the years from 1898, and paid the taxes on the land each year down to the time of the trial. The purchase of the entire estate at the mortgage sale by the respondent as

Fraud—purchase by cotenant.

cotenant was not in itself a fraudulent act. The trust relation as to his cotenants would arise only after he had acquired title at such sale, and fraud in that relation would have its inception only when he intended and attempted wrongfully to appropriate to his own use the interests of his cotenants. *Mandeville v. Solomon*, 39 Cal. 125. His relation to the property as cotenant and his relation to the same property as administrator of the estate to which it belonged are distinct. The conse-

quences which flow from his acquisition of the title of his cotenants and those which flow from his purchase of property belonging to the estate of which he was administrator are not controlled by the same presumptions and rules. But the trust which would arise in either case is not an express, but a constructive or implied, trust. The relation of one acting as administrator to real property which belongs to the estate must be considered separately.

Respondents' counsel contend that an administrator, as such, becomes the trustee of an express trust as to the title to real property belonging to the estate. The fallacy of his assumption is apparent from the fact that the title descends to and becomes vested in the heirs upon the death of the decedent, subject only to its disposition for payment of creditors, and never becomes vested in the administrator in the course of administration proceedings. Under our statute this is true also of the title to personal property. Civil Code, § 1093. The administrator is vested, not with the title, but with certain powers and duties as a trustee, and where, through a wrongful act constituting a violation of his duties as such trustee, he acquires the title to property, either real or personal, belonging to the estate, he holds such title as trustee of a resulting trust, but not as trustee of an express trust. This is made entirely clear by § 1616, Civil Code, which declares that "one who gains a thing by . . . the violation of a trust or other wrongful act is . . . an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it," and by § 1609: "An involuntary trust is one which is created by operation of law."

It follows that Stianson, even if it be held that he violated his duty as administrator in acquiring title to the land, which we do not concede, holds it as trustee of a result-

ing or involuntary trust, and not as trustee of an express trust. *Dillinger v. Kelley*, 84 Mo. 561; *Earl v. Halsey*, 14 N. J. Eq. 332; *Johns v. Norris*, 22 N. J. Eq. 102; *Meanor v. Hamilton*, 27 Pa. 137; *Hollingsworth v. Spaulding*, 54 N. Y. 636; *Re Monroe*, 142 N. Y. 490, 37 N. E. 517. For the purposes of this appeal, the character and inception of the alleged trust title are material to a consideration of the defenses of laches and the Statutes of Limitation, in determining the time from which such statutes begin to run, or from which laches may be imputed.

Whether appellant's relation to the property be such as would arise out of wrongful dealings with the property of his cotenants, or his relation to the property be that of administrator fraudulently seeking to misappropriate property belonging to the estate, a constructive trust only could arise out of his acts maleficio. As to an express trust, the

Limitation of actions—against express trust—when run.

rule is well settled that the running of Statutes of Limitation and laches begins at the time such trust is openly repudiated, or acts are done by the trustee which are hostile to, or in fraud of, the rights of the beneficiaries, and of which they have actual knowledge, or of facts from which knowledge must be imputed to them. This case belongs in the class of constructive or involuntary trusts arising from alleged wrongful acts. So far as the results which flow from the existence of such a trust are concerned, it is wholly immaterial whether such acts are found to be fraudulent in fact, or be deemed fraudulent in law. The intent with which the acts were done becomes wholly immaterial. The trust arises with the same effect regardless of the intent. As to the title to this real estate, the defendant, prior to his purchase of the land, occupied no position of trust toward these plaintiffs, other than a duty to account, as administrator, for the rents and profits during and

for the purposes of administration. Assuming for the purposes of this appeal that defendant by his purchase of the land became the trustee of an involuntary trust as to his cotenants, the bar of the Statute of Limitations and the effect of laches remain to be considered, and are decisive of this case. Appellant cites numerous authorities to the effect that neither laches nor Statutes of Limitation may be invoked by the trustee of an express trust in an action by the cestui que trust to enforce his rights. *Perry, Trusts*, § 863; *Speidel v. Henrici*, 120 U. S. 377, 30 L. ed. 718, 7 Sup. Ct. Rep. 610; *Lamberton v. Youmans*, 84 Minn. 109, 86 N. W. 894.

The doctrine announced in these authorities is applicable only to express trusts, and has no application to constructive or involuntary trusts. *Newsom v. Bartholomew County*, 103 Ind. 526, 3 N. E. 163; *Hecht v. Slaney*, 72 Cal. 363, 14 Pac. 88; *Matthews v. Simmons*, 49 Ark. 468, 5 S. W. 797; *Speidel v. Henrici*, 120 U. S. 377, 30 L. ed. 718, 7 Sup. Ct. Rep. 610. In *Broder v. Conklin*, 121 Cal. 282, 53 Pac. 699, that court says: "No repudiation of a constructive trust by the trustee is required in order to set the Statute of Limitations in motion. A cause of action is created in favor of the beneficiary at the very moment the law creates the trust." *Lammer v. Stoddard*, 103 N. Y. 672, 9 N. E. 328.

As we have seen, no express trust was created by appellant's purchase and acquisition of the title. It is

clear that plaintiff's

right to an action accrues.

in equity to establish an involuntary trust accrued the instant appellant acquired such title. To meet this proposition, respondents contend that appellant's acquisition of the title of his cotenants was fraudulent in law, and that under § 60, Code Civil Procedure, a cause of action will not be deemed to have accrued until the discovery by the aggrieved parties "of the facts constituting the fraud." The finding of the trial court as to plain-

tiffs' discovery of the fraud is not sustained by the evidence or the law. In this case every fact essential to disclose and to constitute a constructive trust in appellant was matter of public record for more than seventeen years before this action was begun, and for at least nine years after the minors became of age. Plaintiffs must be held to have known that the land had belonged to the deceased, and that they had interests therein as his heirs; that defendant was acting as administrator of the estate; that the land was mortgaged, and

that the estate was without money or resources to pay the mortgage; that the mortgage was foreclosed and the land bought in by defendant while acting as administrator.

Notice—facts on public record.

Briefly stated, the following facts are undisputed: On the 19th day of January, 1898, the defendant was discharged as administrator of the estate of John K. Stianson. He purchased the land at foreclosure sale on March 27, 1897. The sheriff's deed was issued on the 27th day of March, 1898, and on that date was duly recorded in the office of the register of deeds of Day county, something more than two months after his discharge as such administrator. Since that time and up to the beginning of this action, on September 27, 1914, as found by the trial court, the defendant remained in the exclusive possession, occupancy, and use of the land. It is undisputed that Katherine Stianson and Laura and Carrie Stianson at all times lived in the immediate vicinity of, and sometimes visited, the land. Plaintiff Sam K. Stianson is no longer a party to this action. None of the plaintiffs was under any legal disability for over nine years of this time. This action was begun at least nine years after the disability of minority of two of the plaintiffs had ceased. During all this time the defendant was in sole possession, claiming title, paid the taxes, and received and appropriated to his own use rents and profits

from the land, and was never called upon to account therefor by plaintiffs, nor did plaintiffs at any time offer to contribute to the payment of the mortgage indebtedness or taxes, or make any claim to the land as tenants in common or otherwise. During all this time the foreclosure proceedings and the sheriff's deed to defendant were of public record, as were all matters relating to the administration of the estate. There is absolutely nothing in the record tending to show that defendant ever sought to or did mislead plaintiffs as to their legal rights, or sought to conceal, or attempt to conceal, from them any act on his part relative to this land, either as administrator or as cotenant.

Defendant had the right, as cotenant, to purchase the property under an outstanding encumbrance, for his own protection. *Mandeville v. Solomon*, 39 Cal. 125; *Stevens v. Reynolds*, 143 Ind. 467, 52 Am. St. Rep. 422, 41 N. E. 931; *Reed v. Reed*, 122 Mich. 77, 80 Am. St. Rep. 541, 80 N. W. 996; *Morris v. Roseberry*, 46 W. Va. 24, 32 S. E. 1019; *McFarlin v. Leaman*, — Tex. Civ. App. —, 29 S. W. 44; 17 Am. & Eng. Enc. Law, 2d ed. 639.

For more than nine years these plaintiffs, with knowledge of all the facts, have slept upon their rights without seeking to participate in the benefits of the purchase by defendant of this property at the foreclosure sale, and without at any time offering to pay any share of the encumbrance on the land, or any of the taxes accruing thereon, for more than seventeen years. Plaintiffs are in no position to allege that they were without knowledge, during at least nine years, of every fact

essential to the assertion of their legal rights. Public records are equivalent to actual knowledge of facts there appearing. *Ft. Pierre v. Hall*, 19 S. D. 663, 117 Am. St. Rep. 972, 104 N. W. 470; *Coe v. Sloan*, 16 Idaho, 49, 100 Pac.

354; *Garfield County v. Renshaw*, 22 L.R.A. (N.S.) 207, with monograph note (23 Okla. 56, 99 Pac. 638); *Lewis v. Welch*, 47 Minn. 193, 48 N. W. 608, 49 N. W. 665, is a case largely relied upon by respondent. An administrator foreclosed a mortgage belonging to the estate and employed a third person to bid in the property for his benefit. The fact that the administrator was the real purchaser was concealed from the heirs, and did not appear of record. The administrator was held to be the trustee of an express trust because the mortgage itself was property of the estate; and, the land being proceeds of the mortgage, he was charged as trustee as though money had been received instead of land. It was held that because the plaintiff had no notice, actual or constructive, that the purchase was for the benefit of the administrator, he was not guilty of laches, and that the Statute of Limitations did not run until the discovery of that fact. But the court reserved a decision as to what might have been the rights of the parties had the administrator himself openly bid in the property, paid the purchase price, and accounted for the same as administrator of the estate.

It is suggested that the decision of this court in *Bidwell v. Smith*, 23 S. D. 120, 120 N. W. 880, should rule this case. That case involved a breach of trust by an administrator, but did not involve any question of title to either real or personal property. *Bidwell*, while acting as administrator, was authorized by the county court to compromise a claim for \$1,964 against the estate by paying \$425. He thereupon bought and took an assignment of the claim to himself, and sued the heirs for \$1,964. This court held him guilty of a breach of duty, and that the estate should be given the benefit of the transaction. That case did not hold that the acquisition by the trustee of an express trust, of a title to trust property, where the title had not been placed in him by the terms of the express

Tenant in common—right to purchase under foreclosure sale.

Notice—public records.

trust, would result in the creation of an express trust as to such title, which appears to be the view of some of our associates.

While the rule is well settled that equity will not permit a cotenant to acquire an adverse claim to common property

Tenant in common—purchase of outstanding title—exclusion of cotenant.

through administration proceedings, or otherwise, for his own benefit, to the exclusion of his cotenants, it requires the exercise of reasonable diligence on the part of a cotenant having or charged with knowledge of all the facts, in making an election to participate in the benefits of such transaction,

—right of cotenant to participate—diligence.

and within a reasonable time to bear his portion of the expenditures necessarily involved therein. He will not be permitted to make such election a means of speculation by delaying until some circumstance, such as an increase in value of the land, may determine his course. We are clearly of the view that this case falls within the rule announced in *Savage v. Bradley*, 149 Ala. 169, 123 Am. St. Rep. 30, 43 So. 20. Plaintiffs, with full knowledge, actual and implied, of all the material facts affecting their legal rights, have so long acquiesced in the acts of the

Limitation of actions—laches—delay in attacking purchase by coheir.

defendant as to render the granting of relief inequitable and to charge them with laches such as will bar the assertion of their rights. *Stevenson v. Boyd*, 153 Cal. 630, 19 L.R.A. (N.S.) 525, 96 Pac. 284; *Mandeville v. Solomon*, 39 Cal. 125; *Craven v. Craven*, 68 Neb. 459, 94 N. W. 604.

The order and judgment of the trial court are reversed.

Gates, J., concurring in result:

I think that my respected colleague has arrived at the correct result. I arrive at the same result, but by a somewhat different route.

A trust relation concerning the property of an estate arises between an administrator and the heirs of a

6 R.L.R.—19.

deceased person, regardless of the fact that title to the property may not be lodged in the administrator. Pom. Eq. Jur. § 1077.

Section 1618, Civ. Code, provides:

"A trustee may not use or deal with the trust property for his own profit, or for any other purpose unconnected with the trust, in any manner."

It is undisputed that the administrator dealt with property under his control as administrator for a purpose unconnected with the trust; therefore he violated that section of the Civil Code. *Bidwell v. Smith*, 23 S. D. 120, 120 N. W. 880. It will not do to say (or intimate by declining to concede) that he violated no duty in purchasing the land at foreclosure sale, inasmuch as there were no funds available to pay off the mortgage. In bidding at the foreclosure sale it was to his own personal interest to stifle competition. As administrator it was his duty to encourage competition. In *Fulton v. Whitney*, 66 N. Y. 548, the court well said: "They were not bound to buy in the property for the benefit of the trust estate, having no trust funds applicable to that purpose; but they had no right, by undertaking to purchase for their own benefit, to create an interest in themselves hostile to their duty as trustees. As purchasers for their own benefit, it was to their interest to prevent competition at the sale, and to so manage that they could bid in the property at the lowest price, and this was directly in conflict with their duty as trustees."

. . . No actual fraud on the part of the defendants is alleged or found, nor is it necessary that there should be. The object of the rule which precludes trustees from dealing for their own benefit, in matters to which their trust relates, is to prevent secret frauds by removing all inducement to attempt them.

. . . It is urged, on the part of the appellants, that this rule is not applicable to the present case, because the mortgaged premises formed no part of the trust estate. This objec-

tion was answered by Chancellor Walworth, in the case of *Van Epps v. Van Epps*, 9 Paige, 241, by saying that the rule is not confined to trustees or others who hold the legal title to the property to be sold, but applies universally to all who come within its principle, which is that no party can be permitted to purchase an interest in property, and hold it for his own benefit, where he has a duty to perform in relation to such property, which is inconsistent with the character of a purchaser on his own account."

Section 1623, Civ. Code, provides: "Every violation of the provisions of the preceding sections of this article is a fraud against the beneficiary of the trust."

This section makes the above violation a fraud regardless of the absence of intentional fraud. Section 60, subd. 6, Code Civ. Proc., declares that the following kind of action must be begun within six years: "An action for relief on the ground of fraud, in cases which heretofore were solely cognizable by the court of chancery, the cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud."

This is the kind of action that at common law was cognizable solely by a court of chancery. Therefore that section applies. I think it is entirely unnecessary to enter upon a lengthy discussion in regard to express trusts and resulting trusts. To my mind the above-quoted sections of statute dispose of the matter.

However, there was an entire failure of proof that the facts constituting the fraud were not discovered by respondents until a date within six years prior to beginning the action. What the proof did tend to show was that the respondents did not discover their supposed legal rights based upon such facts until shortly before the action was begun.

For the foregoing reason, and also because of newly discovered

evidence, I concur in a reversal of the judgment and order denying a new trial.

Whiting, P. J., concurring specially:

Appellants contend that defendant was the trustee of a resulting trust. The trial court was apparently of the theory that appellant was originally the trustee of an express trust; that he remained such trustee until notice of his renunciation of such express trust was brought home to respondents; and that such renunciation was brought home to respondents, not at the time they received knowledge of the facts showing that appellant was claiming adversely to them, but at the time that they received advice as to the legal effect of the facts of which they had received knowledge. I am of the opinion that appellant was a trustee of this property under an express trust at the time of his purchase at the foreclosure sale; that, as against his *cestuis que trustent*, he cannot claim that he renounced the express trust and became the trustee of a resulting trust by a wrongful purchase, and thus started running a period of adverse possession under which he could claim title; that he remained, as to the respondents, the trustee of an express trust, holding title for their benefit up to such time as they received knowledge of facts showing that he had renounced such trust and was claiming adversely to them; that the placing of record by appellant of his sheriff's deed was not constructive notice to respondents, the *cestuis que trustent* of an express trust (see numerous cases cited pages 215 and 216, note, of 22 L.R.A. (N.S.)), but that respondents could and did receive constructive notice that appellant was claiming adversely, through actual notice of such facts as should have put them upon inquiry, which inquiry, if followed, would have revealed the fact of appellant's adverse claim (Civ. Code § 2452); that the trial court erred in dating such constructive notice from the date

when respondents were advised of the legal effect of what had transpired, instead of from the date of the knowledge of the facts constituting constructive notice, and that such error was prejudicial requiring a reversal of the cause. I am also of the opinion that a new trial should be granted on the ground of newly discovered evidence.

NOTE.

The effect of the purchase by a cotenant in possession of common property at a foreclosure sale thereof, including the condition of the cotenant's right to avail himself of an implied trust, is treated in the annotation following *GEARHART v. GEARHART*, post, 297.

ROBERT L. GEARHART, Appt.,
v.
ELMER H. GEARHART et al., Respts.

Missouri Supreme Court (Division No. 1) — June 2, 1919.

(— Mo. —, 213 S. W. 31.)

Cotenant — purchase of outstanding title — effect.

1. The purchase by one tenant in common of an outstanding title will be deemed to have been made for the benefit of all the cotenants, the others being bound to contribute their respective proportions of the consideration paid.

[See note on this question beginning on page 297.]

— duty of tenant in possession.

2. A cotenant in sole possession is bound to pay the interest on subsisting encumbrances on the property from rents and profits if they are sufficient; if not, he must make payment and look to his cotenants for contribution.

[See 7 R. C. L. 824.]

— purchase for benefit of cotenant.

3. A purchase by a tenant in com-

mon in possession at foreclosure sale will be held to be for the benefit of both cotenants if he failed to keep up the interest, which was not too great for the land to bear, permitted a sale without notice to the cotenant, and purchased the land at less than its value with funds raised by security on the property.

[See 7 R. C. L. 860, 861.]

APPEAL by plaintiff from a judgment of the Circuit Court for Atchison County (Ellison, J.) in favor of defendants in a suit to determine the respective rights of the parties as cotenants, and for other relief. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Hunt & Bailey and John A. Gerlash, for appellant:

A cotenant who buys an outstanding title under foreclosure of a trust deed placed upon the common property by the joint acts of the cotenants must act in the utmost good faith; and if his transaction is tainted the least in fraud the court will set it aside or declare him a trustee holding the property for himself and the other cotenants.

Hinters v. Hinters, 114 Mo. 26, 21 S. W. 456; Kohle v. Hobson, 215 Mo. 213, 114 S. W. 952; Mahoney v. Nevins,

190 Mo. 360, 88 S. W. 731; Howard v. Brown, 197 Mo. 36, 95 S. W. 191; Nalle v. Parks, 173 Mo. 616, 73 S. W. 596; Peak v. Peak, 228 Mo. 536, 137 Am. St. Rep. 638, 128 S. W. 981; Funk v. Seehorn, 99 Mo. App. 587, 74 S. W. 445; Brown v. Howard, 264 Mo. 466, 175 S. W. 52; Jones v. Stanton, 11 Mo. 433.

The court will not allow one tenant in common to take advantage of his cotenant, and reap a reward through his own fraudulent act.

Dillinger v. Kelley, 84 Mo. 568; 1

Washb. Real Prop. 5th ed. p. 720; Bispham, Eq. 4th ed. § 93; Siela v. Knieb, — Mo. —, 176 S. W. 1055.

Generally, a purchase by a cotenant of an outstanding title, being presumed to be for the benefit of all parties in interest, is not void, passing title subject to the right of the other cotenant.

Morrison v. Roehl, 215 Mo. 545, 114 S. W. 981.

The purchase or extinguishment of an outstanding title to encumbrance upon or claim against the common property by one tenant in common inures to the benefit of all co-owners who may, within a reasonable time, elect to avail themselves of the benefit of the purchase or outstanding interest or conflicting claim or the removal of encumbrance from the common property, or may repudiate the sale.

Kohle v. Hobson, 215 Mo. 213, 114 S. W. 952; Dillinger v. Kelley, 84 Mo. 561; Paul v. Fulton, 25 Mo. 156; Nalle v. Parks, 173 Mo. 616, 73 S. W. 596; Potter v. Herring, 57 Mo. 184; Picot v. Page, 26 Mo. 398; 38 Cyc. 40-D; Brown v. Howard, 264 Mo. 466, 175 S. W. 52.

Equity will decree that the cotenant thus disavowing any interest and refusing to contribute to the discharge of the encumbrance is estopped from asserting any interest in and to said property, and decree the title in the other cotenants.

Becker v. Becker, 254 Mo. 668, 163 S. W. 865; Nalle v. Thompson, 173 Mo. 595, 73 S. W. 599; Howard v. Scott, 225 Mo. 718, 125 S. W. 1158; Peak v. Peak, 228 Mo. 551, 187 Am. St. Rep. 638, 128 S. W. 981.

It was error to allow the defendant, Elmer Gearhart, for the improvements he had placed on the land.

Kansas City Hydraulic Press Brick Co. v. Pratt, 114 Mo. App. 649, 93 S. W. 300; Armor v. Frey, 253 Mo. 477, 161 S. W. 829; 38 Cyc. 52, 53; Picot v. Page, 26 Mo. 398.

The respondent, Elmer H. Gearhart, cunningly devised and took advantage of his brother under the confidential relationship existing between them, to perpetrate a fraud on him.

Kohle v. Hobson, 215 Mo. 217, 114 S. W. 952; Judd v. Walker, 215 Mo. 337, 114 S. W. 979; National Bank v. Brunswick Tobacco Works Co. 155 Mo. 609, 56 S. W. 283; Hinters v. Hinters, 114 Mo. 29, 21 S. W. 456; Kehoe v. Taylor, 31 Mo. App. 597; Clarkson v. Creely, 40 Mo. 116.

Mr. W. R. Littell, for respondents:

Defendant did not and has not offered to make restitution to respondent Gearhart for appellant's half of the \$450 Stevenson loan and interest paid by respondent Gearhart in protecting appellant's title in this land, and for that reason he cannot recover.

Southworth v. Hopkins, 11 Mo. 331; Kline v. Vogel, 90 Mo. 247, 1 S. W. 733, 2 S. W. 408; Deichmann v. Deichmann, 49 Mo. 109; Girard v. St. Louis Car Wheel Co. 123 Mo. 371, 25 L.R.A. 514, 45 Am. St. Rep. 556, 27 S. W. 648; Becker v. Becker, 254 Mo. 685, 163 S. W. 865; Morrison v. Roehl, 215 Mo. 556, 114 S. W. 981.

Respondent Gearhart did not deny appellant's right to a part of said lands, or his interest therein, and appellant never at any time demanded the use of any part of such land.

Stark v. Kirchgraber, 186 Mo. 633, 105 Am. St. Rep. 629, 85 S. W. 868; Bates v. Hamilton, 144 Mo. 13, 66 Am. St. Rep. 407, 45 S. W. 641; Crowley v. Crowley, 167 Mo. App. 422, 151 S. W. 512; Lily v. Menke, 126 Mo. 190, 28 S. W. 643, 994.

Appellant lost his title to the land in suit by virtue of the trustees' sale under the Stevenson trust deed.

McMichaels v. Reece, 194 Mo. App. 365, 190 S. W. 51; Becker v. Becker, 254 Mo. 683, 163 S. W. 865; Starkweather v. Jenner, 216 U. S. 524, 54 L. ed. 602, 30 Sup. Ct. Rep. 382, 17 Ann. Cas. 1167; Dudgeon v. Hackley, — Mo. App. —, 182 S. W. 1007.

Cases in which cotenants have been held to become trustees for other cotenants upon the purchase of common property will be found, upon examination, to present other features than mere cotenancy to create the trust relation.

Becker v. Becker, 254 Mo. 682, 163 S. W. 865; Peak v. Peak, 228 Mo. 536, 137 Am. St. Rep. 638, 128 S. W. 981; Howard v. Scott, 225 Mo. 718, 125 S. W. 1158; Kohle v. Hobson, 215 Mo. 213, 114 S. W. 952; Nalle v. Thompson, 173 Mo. 595, 73 S. W. 599; Hinters v. Hinters, 114 Mo. 26, 21 S. W. 456.

Appellant having no title in the land at the time of filing his suit, his partition suit must fail.

Troll v. St. Louis, 257 Mo. 626, 163 S. W. 167; Snyder v. Arn, 187 Mo. 176, 86 S. W. 197; Chamberlain v. Waples, 193 Mo. 109, 91 S. W. 934.

Tenants in common are liable for improvements and expenditures upon the common property, to which they agree.

38 Cyc. 2d ed. 56; Picot v. Page, 26

Mo. 402; Dillinger v. Kelley, 84 Mo. 568.

Appellant cannot have his alleged one-half interest in the land in controversy freed from the lien of the \$2,000 Rankin Land & Loan Company deed of trust.

Morrison v. Roehl, 215 Mo. 556, 114 S. W. 981; Jones v. Stanton, 11 Mo. 433.

Brown, C., filed the following opinion:

The petition was filed in the Atchison circuit court January 19, 1914, and summons issued thereon the same day. It charges, in substance, that the plaintiff and the defendant Elmer H. Gearhart are, and have been ever since September 9, 1893, the owners, as tenants in common, of the northeast quarter of the northeast quarter of section No. 1, township No. 65, of range No. 40 in said county, and that on June 3, 1913, said defendant, then in possession of the land, caused and permitted it to be sold under a deed of trust in which both had joined, purchasing it at said sale for less than its true value, taking the trustee's deed to himself, and that, being in possession, he claimed the entire title under said deed.

It also charged that the purchase price at the trustee's sale was procured by the execution of a deed of trust on the same land. It stated with much particularity the facts and circumstances upon which plaintiff relies for recovery, and no question is made as to its sufficiency in that respect. The prayer for relief asks with similar detail that the court by its judgment determine and fix the interests of the parties; that the purchase at the trustee's sale be declared and adjudged to be for the benefit of both said parties, and that said defendant holds the title in trust for himself and plaintiff as tenants in common; that the land be sold and the proceeds divided between them according to their respective interests, for an accounting to be taken for the purpose of ascertaining the same, and for general relief.

The answer of Elmer H. Gearhart

sufficiently states, in addition to a general denial, his case made at the trial. Issue is joined by replication. The Rankin Land & Loan Company did not answer.

The following facts were admitted or proven at the trial.

George Gearhart, the father of the plaintiff and defendant Elmer H. Gearhart, was the owner of the land in question, and in 1884 he and his wife Amy mortgaged the same to secure a loan from one Maude Maxtin of \$300, payable in five years, with interest at 8 per cent.

In 1893 they conveyed the land by warranty deed, reciting a consideration of \$1,500 and the assumption of the Maxtin mortgage, to the plaintiff Robert L. and Elmer, his sons. No money was paid by the grantees, but it was understood at the time that the father, then aged eighty-seven, and the mother, twenty years younger, should have a home on the farm during their lives. Both these sons were then unmarried. Elmer was a schoolteacher, and farmed in the intervals of employment as such, while Robert was a farmer. An older sister, Lillie, was a member of the family, and is shown by the evidence to have assisted in all its activities.

The father died in March following the execution of this deed. These two sons lived with the family on the land until 1897, when the plaintiff married, and from that time made his own home, while the defendant Elmer continued to make his home on the farm, teaching and farming, according to the season, up to the time of the trial.

During the lifetime of the father the Maxtin debt had been cut down one half. From the time of his marriage until 1902 Robert does not seem to have interfered in the management or work of the farm. The mother had, at some time not stated, received \$490 from her father's estate, which she invested, to some extent at least, in improvements, and in September, 1902, Robert and his wife joined with Elmer in a deed of trust to R. M. Stevenson, trustee, to

secure a loan of \$450 from George J. Stevenson, who were bankers and neighbors. The note was payable in five years, with interest at 5 per cent. One hundred and sixty-two dollars of this money was used to pay the Maxtin debt, and the remaining \$288 was received by Elmer and used by him in repairs to the buildings on the farm.

This loan became due in 1907. At that time the defendant Elmer H. spoke to Mr. R. M. Stevenson about renewing the loan and securing it by a mortgage of his undivided half interest in the land, to which Stevenson agreed; the papers were made by him for that purpose, and the plaintiff made and delivered to Stevenson his check for the amount of one half the \$150 paid by them in satisfaction of the Maxtin debt. Elmer changed his mind and did not sign the papers, so that the Stevenson debt was left running in the original form. There was at that time two years' interest due on the Stevenson note, and no further payment was made until the foreclosure in 1913. Stevenson became restive and threatened to foreclose the deed of trust. R. M. Stevenson, the trustee, who seems from the evidence to have handled the transaction, refused to make the sale, and the sheriff of the county, the substitute provided by the deed, was called in and acted under the power. The sale occurred on June 3, 1913, and the defendant Elmer H. Gearhart became the purchaser for the sum of \$3,100, that being the highest amount bid, and received a trustee's deed therefor.

With respect to the sale, George R. Ellison, Esq., the referee, made the following finding, which is fully sustained by the evidence: "The plaintiff did not know the land was being foreclosed; that he was prevented from attending the foreclosure sale because he did not know of it; that the defendant Elmer H. Gearhart, knowing of the sale, failed to advise his brother that it was pending; that there was no contract or agreement by which the defend-

ant Elmer H. Gearhart was bound to advise his brother of the sale."

At the time of the sale the farm was worth \$4,000, and the rental value of the land was from \$5 to \$7 per acre.

On the date of the sale the amount of the principal and interest on the Stevenson note was \$792.05 and the costs of the sale \$71.50, making a total of \$863.55. This sum, deducted from the purchase price, leaves \$2,236.45. The sheriff who made the sale deposited one half the amount of this balance in the Farmers' Bank at Rockport, and sent his check for same to the plaintiff, who received it on the following Saturday, which was his first information of the sale. He refused to accept it, and brought it into the trial court, where it remains.

To finance this transaction Elmer borrowed temporarily on the day of the sale, from the defendant Rankin Land & Loan Company, \$2,000, to secure which he executed a mortgage on the same land. This was afterward closed in the form of a loan of the same amount for five years at 6 per cent interest, secured by mortgage executed by him on the same land.

The mother died February 10, 1913.

Further details will be noticed as necessary in the opinion.

1. For twenty years the two brothers, who are the substantial parties to this suit, had been owners, as tenants in common, of the little farm which is the subject of the controversy. At the end of that time it was sold under a deed of trust in the nature of a mortgage, insignificant in amount in comparison with the value of the estate, and the one in possession became the purchaser, and now claims and seeks to hold the entire life to the exclusion of his brother. The other, as plaintiff in this case, out of possession, seeks a declaration of this court that the purchase, in equity, inured equally to the benefit of both. This is the controlling question here.

In *Hinters v. Hinters*, 114 Mo. 26,

21 S. W. 456, we stated the following rule: "Tenants in common occupy a confidential relation to each other, and because of this relation there is an implied obligation on the part of each to sustain and protect the common title. It is therefore a general rule that if a tenant in common buy up an outstanding title or

Cotenant—
purchase of
outstanding
title—effect.

encumbrance, the purchase will be deemed to have been made for the benefit

of all the cotenants, the other cotenants being bound, however, to contribute their respective proportions of the consideration paid for the outstanding title or encumbrance."

This rule has been approved by this court in many cases both before and since the one from which we have quoted it. *Jones v. Stanton*, 11 Mo. 433; *Nalle v. Thompson*, 173 Mo. 595, 73 S. W. 599; *Nalle v. Parks*, 173 Mo. 616, 73 S. W. 596; *Mahoney v. Nevins*, 190 Mo. 360, loc. cit. 366, 88 S. W. 731; *Kohle v. Hobson*, 215 Mo. 213, 114 S. W. 952; *Howard v. Scott*, 225 Mo. loc. cit. 718, 125 S. W. 1158; *Becker v. Becker*, 254 Mo. 668, 163 S. W. 865. In the case last cited we said: "The foundation of this rule is the good faith and duty required of persons sustaining such relations of trust as should exist between tenants in common. Their rights in the property being severable, the interest of each may be sold by the owner's voluntary act or under process of law, yet all are entitled to joint possession and control, and good faith forbids either by any act of his own, to dispossess or dispossess another."

In that case we declined to enforce this resulting trust against a cotenant who purchased at a trustee's sale, on the ground that the debt secured was contracted for the sole benefit of the plaintiff, who had, when repeatedly notified by the defendant that the deed of trust would be foreclosed and asked to assist either in selling the property at private sale or securing a loan to remove the encumbrance, absolutely

refused to render such assistance, saying that defendant should go ahead and do as he pleased, that he (plaintiff) had gotten his interest out of the property, and defendant could now get his; that he received from defendant the surplus realized from the sale, and was afterward employed and paid by defendant for making repairs upon the property. Under these circumstances it is evident that the plaintiff was entitled to no relief from a situation in which he had been placed at his own instigation. Even had the debt been contracted for the benefit of both, the parties were at liberty, by their voluntary action, to determine their mutual and reciprocal rights and interests in the transaction. We must therefore consider the general rule we have so often stated, in its application to the foregoing particular circumstances of this case.

The cotenant in sole possession and enjoyment of the common property occupies a different position by reason of that possession. It is said by an excellent author that he "is —duty of tenant in possession. deemed to have undertaken the discharge of certain duties to his cotenants, such as that of preserving the property by making needful ordinary repairs, payment of interest on a subsisting mortgage, and payment of taxes and other annually maturing liens, and where such payments are made by a cotenant they are deemed to be the joint act of all." 7 R. C. L. p. 824, title Cotenancy, § 19. Nothing can be clearer than that the sole possession and use of the premises which constitute the primary fund upon which these things are directly charged involves a trust for the application of the rents and profits resulting therefrom. The entire value of the use may not be sufficient for that purpose. In such case the tenant in possession may require reimbursement, but only for the purpose of equalizing him with his cotenants. It may also happen, as in *Becker v. Becker*, *supra*, that the premises

may be encumbered for the sole use of a cotenant, out of possession. In such case it is clear that the beneficiary should be required to include in his contribution all that part of the charge which inures to his sole benefit. All these questions may arise upon the circumstances of the particular case. Our present duty is to determine whether there is anything in the circumstances of this case which renders inequitable the application of the general rule by which the purchase of the common property by a cotenant in possession under an encumbrance for which all are equally liable to the mortgage inures equally to all.

2. These cotenants acquired the property in question under a single conveyance by their father in 1892, subject to a mortgage to secure \$300. In addition to this a consideration of \$1,500 was named in the deed, and it appears from the evidence that \$1,800 was the true value of the property assumed by all the parties. It also appears that it was understood that the father and mother were to have a home there as long as they should live. The father died within a few months, having reduced the encumbrance to \$150. The family, including the plaintiff and defendant, were living on the premises. They continued to live there with their mother and an older sister until 1897, when Robert married and left, while Elmer always remained. At the time Robert left the interest was paid on the \$150 indebtedness, so that there was no charge upon the premises except the \$12 per year of interest on this indebtedness. In 1902, five years after Robert left, he joined Elmer in the execution of a mortgage for the payment of the debt of \$150, with interest, and to enable Elmer to obtain a little money to repair the dwelling which sheltered him, and in which for twenty years he enjoyed, with his mother and sister who did their part, the comfort and companionship of home, to make which all did their part. The amount of the new

mortgage was \$450, the interest 5 per cent, and the amount paid to Elmer after satisfying the old mortgage was \$288, with which he built a porch and water-closet, walled his well, and made other improvements.

This transaction involved an annual interest charge of \$22.50, the nonpayment of which resulted in the trustee's sale, the effect of which we are now called upon to determine. When the note became due in 1907, Elmer proposed to the creditor, Mr. Stevenson, and the plaintiff, his brother, that the original debt of \$150 be paid, and the remainder renewed by a new note and mortgage, to which both agreed. Robert gave his check to Mr. Stevenson for \$75, and Stevenson made out the papers for the renewal, but Elmer changed his mind, would not sign them, the check was returned to Robert, the old debt continued to run on, and Elmer remained in the shelter of the homestead, which increased greatly in value, running the farm and teaching school in the country until his mother died February 19, 1913, aged eighty-six years. Within three and one-half months from the time her influence ceased with her death the trustee's sale was completed, without notice to the plaintiff otherwise than by publication in a newspaper, which he did not take nor see. In finding that he did not know of the sale, the referee is amply sustained by the evidence.

We can find nothing in the circumstances of this case which tends, even in the slightest degree, to justify a departure from the general rule that a cotenant in possession holds in trust for all. The defendant has not invested a dollar of his own in the transaction, for the entire purchase price has been charged upon the common property, upon which the original indebtedness was charged. He cannot say that the interest charge of \$22.50 per year which he defaulted to bring about the sale was a burden too great for the land

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cotenant.

to bear, for he has voluntarily increased that burden to \$120 per year for the sole purpose of extinguishing his brother's interest, and is here contending, among other things, for the privilege of paying it for the same possession he has enjoyed for more than twenty-five years. He cannot plead the weight of the moral burden of his mother and sister, for the record amply shows that they have made him a home and helped him in his work.

Even the argument of counsel, which we have read with interest, suggests no failure of duty as a cotenant or as a brother on the part of plaintiff. When the matter was suggested in 1907, he promptly offered to pay one half of all the little indebtedness which existed at the time he surrendered his own posses-

sion and to join in security for the remainder. Equity could ask him to go no further.

Having determined the respective rights of the parties as cotenants in equity of the title as it now exists, we think the trial court will have no difficulty in arriving at a just and satisfactory judgment. We reverse the judgment and remand the cause to the Circuit Court for Atchison County for further proceedings in accordance with the views here expressed.

Bailey, C., concurs.

Per Curiam:

The foregoing opinion of Brown, C., is adopted as the opinion of the court.

Blair, P. J., and Bond and Graves, JJ., concur.

ANNOTATION.

Effect of purchase by cotenant in possession of common property at foreclosure sale thereof.

- I. Introductory, 297.
- II. Majority rule, 297.
- III. Minority rule, 305.

I. Introductory.

It is the purpose of this note to review the decisions discussing the right of a cotenant in possession of the common property to purchase the property at a sale under foreclosure of a mortgage or deed of trust. It does not deal with those cases which discuss the right of a cotenant to purchase the common property at a tax sale, or a partition sale, or a sale under execution to satisfy a judgment debt. For a discussion of the whole subject of the right of a cotenant to purchase encumbrances, liens, and outstanding titles, see 7 R. C. L. 857 et seq.

II. Majority rule.

A tenant in common in possession and enjoyment of the common property occupies a confidential relation to his cotenants, and because of this relation there is an implied obligation on his part to sustain and protect the

common title. It is, therefore, a general rule that if a cotenant in possession of common property purchases that property, either directly or indirectly, at a sale under foreclosure of a mortgage or deed of trust, the purchase will be deemed to have been made for the benefit of all the cotenants; provided, however, the other cotenants elect within a reasonable time so to consider the purchase, and offer to contribute their respective proportions of the purchase price.

Alabama.—Caldwell v. Caldwell (1911) 173 Ala. 216, 55 So. 515; Randolph v. Vails (1912) 180 Ala. 82, 60 So. 159.

Illinois.—Burr v. Mueller (1872) 65 Ill. 258; Kent v. Barger (1914) 264 Ill. 59, 105 N. E. 741.

Indiana.—Ladd v. Kuhn (1901) 27 Ind. App. 535, 61 N. E. 747; Ryason v. Dunten (1905) 164 Ind. 85, 73 N. E. 74.

Iowa.—Moy v. Moy (1893) 89 Iowa, 511, 56 N. W. 668.

Minnesota.—Oliver v. Hedderly (1884) 32 Minn. 455, 21 N. W. 478

Mississippi.—*Smith v. McWhorter* (1896) 74 Miss. 400, 20 So. 870; *Wyatt v. Wyatt* (1902) 81 Miss. 219, 32 So. 317; *Walker v. Williams* (1904) 84 Miss. 392, 36 So. 450; *Beaman v. Beaman* (1907) 90 Miss. 762, 44 So. 987; *Watson v. Vinson* (1914) 108 Miss. 600, 67 So. 61; *Barksdale v. Learnard* (1917) 112 Miss. 861, 73 So. 736.

Missouri.—*Hinters v. Hinters* (1893) 114 Mo. 26, 21 S. W. 456; *Nalle v. Parks* (1902) 173 Mo. 616, 73 S. W. 596. And see *GEARHART v. GEARHART* (reported herewith) ante, 291.

New York.—*Knolls v. Barnhart* (1877) 71 N. Y. 474; *Collins v. Collins* (1891) 59 Hun, 620, 36 N. Y. S. R. 591, 13 N. Y. Supp. 28, affirmed in (1892) 131 N. Y. 648, 30 N. E. 863; *Carpenter v. Carpenter* (1892) 131 N. Y. 101, 27 Am. St. Rep. 569, 29 N. E. 1013.

Pennsylvania.—*Duff v. Wilson* (1872) 72 Pa. 442.

South Dakota.—*STIANSON v. STIANSON* (reported herewith) ante, 280.

Tennessee.—*Tisdale v. Tisdale* (1855) 2 Sneed, 596, 64 Am. Dec. 775.

Washington.—*Eckert v. Schmitt* (1910) 60 Wash. 23, 110 Pac. 635.

West Virginia.—*Gilchrist v. Beswick* (1889) 33 W. Va. 168, 10 S. E. 371; *Reed v. Bachman* (1907) 61 W. Va. 452, 123 Am. St. Rep. 996, 57 S. E. 769.

In *Caldwell v. Caldwell* (1911) 173 Ala. 216, 55 So. 515, it appeared that the defendant, a tenant in common of land on which there was a mortgage, made a parol agreement with his cotenants by which they were to refrain from bidding at a sale under the mortgage, and he was to purchase the land and give them five years in which to redeem. The land was actually purchased by the mortgagee, who a few days later conveyed it to the defendant. The court held that, although the parol agreement was not binding, yet the defendant sustained a confidential relation to his cotenants, and that his purchase of the land, although not directly at the sale, should inure to their benefit, and that they were entitled to redeem the land within a reasonable time.

In *Randolph v. Vails* (1912) 180 Ala. 82, 60 So. 159, it appeared that the complainants and the defendants were tenants in common of certain lands covered by a mortgage. The lands were sold under a power of sale contained in the mortgage, and were purchased by the mortgagee, which was expressly permitted by the provisions of the mortgage. The mortgagee's purchase was for the benefit of the defendants, and the lands were subsequently conveyed to them. The court held that the purchase on behalf of the defendants inured to the benefit of all the tenants in common, provided they, within a reasonable time, elected so to treat the purchase.

In *Burr v. Mueller* (1872) 65 Ill. 258, it appeared that a purchaser of land, after executing to a trustee a deed of trust covering the land with power of sale in case of default in payment of purchase price, conveyed an undivided half interest in the property to one Dudley. Default having been made in the payment of the purchase money, the land was sold by the trustee and purchased by and conveyed to Dudley, the cotenant of the original purchaser. The court held that the purchase by Dudley at the trustee's sale was valid, but suggested that the other cotenant might avail himself of the benefit of the purchase by offering to contribute, within a reasonable time, his due proportion of the sum expended in the purchase. The court said: "This case, therefore, is devoid of all special circumstances imposing a duty to be performed by Dudley inconsistent with his character as purchaser at the trustee's sale. Then the real question is, Did such a duty arise from the relation alone of tenant in common? Under the circumstances here disclosed, we think not. The interests of Brand and Dudley, as tenants in common, did not occur under the same instrument, act of the parties, or of the law. In the absence of any engagement or understanding with one another, they did not stand in such confidential relations in regard to each other's interest that one of them would not be permitted, in equity, to

purchase the estate of the other at a sale under a power which the latter had given to an agent. . . . But even conceding that this case falls within the principle of *Van Horne v. Fonda* (1821) 5 Johns. Ch. (N. Y.) 388, still the purchase by Dudley was not void. It simply gave rise to an equity in Brand's favor to elect within a reasonable time to avail himself of the benefit of the purchase by offering to contribute his due proportion of the sum expended in the purchase. This was a personal option, and not a right attaching to the estate."

In *Kent v. Barger* (1914) 264 Ill. 59, 105 N. E. 741, wherein it appeared that a cotenant in possession of the common property covered by a mortgage purchased the certificate of sale from the mortgagees, who had bid in the property at the foreclosure sale, paying them the same amount they had paid at the sale and taking a master's deed for the land, it was held that the title so acquired inured to the benefit of the other cotenants.

In *Ladd v. Kuhn* (1901) 27 Ind. App. 535, 61 N. E. 741, it appeared that a surviving husband was in possession of his deceased wife's land as tenant in common with his two children. The husband and wife during the latter's lifetime had executed a mortgage on the land in question to secure the loan. On the foreclosure of the mortgage the land was sold, and the husband became the purchaser, and, after the period of redemption had expired, took a sheriff's deed to the property. It was held that the title thus acquired by the husband inured to the benefit of the other cotenants, and the rule would be applied against a remote grantee of the property who had full knowledge of the facts.

In *Ryason v. Dunten* (1905) 164 Ind. 85, 73 N. E. 74, it appeared that a widow and her son had inherited lands of her deceased husband, covered by a mortgage which the husband had executed in his lifetime. While the widow and her son were in possession of the lands as tenants in common the mortgage was foreclosed and the lands sold under the foreclos-

ure decree. During the year permitted for redemption the widow became the owner of the certificate of sale by assignment, and, on the expiration of the year, took a sheriff's deed, which was duly recorded. The widow then gave a mortgage on the lands to secure a loan from the school fund. This mortgage was subsequently foreclosed, and the auditor of the fund purchased the lands, and later the defendant purchased the lands of him. The court held that the title acquired by the widow at the foreclosure sale was held in trust for the benefit of herself and her cotenant, but that the latter could not urge his rights against the defendant, who had purchased for full value and without notice, when he (the cotenant) had slept on his rights for twenty-four years with full knowledge of the facts.

In *Moy v. Moy* (1893) 89 Iowa, 511, 56 N. W. 668, it appeared that the appellant and appellee were tenants in common of property subject to a mortgage. On the foreclosure of the mortgage the property was bid in by the appellant at the foreclosure sale. It was held that appellant could not, on acquiring a sheriff's deed under the sale, claim absolute title to the property to the exclusion of his cotenant, but would have his interest therein increased to the extent of the amount necessary for the cotenant to redeem his undivided share.

In *Oliver v. Hedderly* (1884) 32 Minn. 455, 21 N. W. 478, it appeared that the defendant, who was a cotenant in possession of common property subject to a mortgage, entered into a written agreement with the mortgagee by which the latter agreed at once to foreclose the mortgage, bid in the property himself, and, after the time to redeem expired, if the property was not redeemed, to convey it to the defendant. The mortgage was, accordingly, foreclosed, and the property was conveyed to the defendant, the latter paying the amount of the mortgage with interest and costs. The court held that the other cotenants were entitled to share in the benefits of the sale.

In *Smith v. McWhorter* (1896) 74 Miss. 400, 20 So. 870, wherein it appeared that a cotenant residing on the common property purchased the same at a sale under a deed of trust, it was held that the cotenant would be regarded as a trustee of the title for the other cotenants on their electing within a reasonable time so to consider her, but that they were precluded from asserting their right against a subsequent bona fide encumbrancer of the land.

In *Wyatt v. Wyatt* (1902) 81 Miss. 219, 32 So. 317, it appeared that a father and his children were cotenants of an estate which was then subject to a deed of trust to secure a large sum of money. The father secured a foreclosure of the deed of trust and at the sale became the purchaser, and the title was made to him. The court held that the purchase by the father at the foreclosure sale gave him no greater rights than he had before the sale, and that he would be regarded as a trustee for the other cotenants.

In *Walker v. Williams* (1904) 84 Miss. 392, 36 So. 450, it appeared that real property owned by tenants in common had been by them encumbered by a deed of trust to secure a loan. Later, at the foreclosure sale under the deed of trust, the property was purchased by the cotenant in possession, the latter having concealed all knowledge of the time and place of the sale from the other cotenant, who was living in another state. The court held that the title thus acquired inured to the benefit of all the cotenants, saying: "It is an established principle of equity that tenants in common sustain towards each other such a relation of trust as forbids one to do any act hostile to the interest of the others, or to acquire by any means any title to the common property adverse to the claim of his cotenants. Hence it was proper for the court to annul and hold for naught the sale under the Kamper trust deed, whereby appellee, E. B. Williams, sought to acquire title to the common property. This title, so acquired, inured to the benefit of all those who

were jointly interested in the property. However, as the Kamper trust deed constituted a lien on the entire property sought to be partitioned, and rested equally on the interest of each cotenant, it was proper to charge the common estate with the money expended in payment of this debt. While it is true that one cotenant cannot fraudulently pay off a lien or purchase at a sale thereunder, so as to obtain any title adverse to his cotenants, yet he is entitled to be reimbursed the money advanced to discharge the common burden, because the payment thereof was necessary for the protection of the common estate."

In *Beaman v. Beaman* (1907) 90 Miss. 762, 44 So. 987, it appeared that certain property on which a deed of trust had been given by a common ancestor to secure an indebtedness was owned by his heirs at law as cotenants. The lands in question were sold by the trustee, and at the sale the cotenant in possession purchased the said property and had the trustee execute a trustee's deed to his wife. The other cotenants had no knowledge of this sale. It was held that the purchase inured to the benefit of all the cotenants.

In *Watson v. Vinson* (1914) 108 Miss. 600, 67 So. 61, it appeared that a husband and infant children were in possession as tenants in common of lands left them by the deceased wife. Before the wife's death she and her husband had executed a deed of trust on the lands to secure a loan. There was a sale of the land on foreclosure of the deed of trust, and it was purchased by the husband who took title in his own name. It was held that the husband's purchase of the land would be regarded as for the benefit of all the cotenants.

In *Barksdale v. Learnard* (1917) 112 Miss. 861, 78 So. 736, it appeared that a father and son were in possession, as tenants in common, of land subject to a deed of trust to secure a sum of money. The deed of trust was foreclosed and the land purchased by the father. The court held that the father acquired the legal title to

the whole of the property, but held the title in trust for the benefit of the son who might avail himself of it by contributing his proportion of the purchase money. It was said further that this right is not barred by mere lapse of time, but only when the delay to assert it is accompanied by circumstances which give rise to an estoppel.

In *Hinters v. Hinters* (1893) 114 Mo. 26, 21 S. W. 456, it appeared that children were in possession as cotenants of the common property which was encumbered by a deed of trust executed by their ancestor in his lifetime to secure a debt. The property was sold under the deed of trust, and was purchased at the request of one of the cotenants by the holder of the note representing the debt, to the end that the cotenant might acquire the property. The next day after the sale the deed was made conveying the property to the cotenant. It was held that the title thus acquired inured to the benefit of the other cotenants, the latter being bound, however, to contribute their respective proportions of the consideration paid for the outstanding encumbrance.

In *Nalle v. Parks* (1902) 173 Mo. 616, 73 S. W. 596, it appeared that plaintiff and one Cahoon, through whom defendant claimed, were tenants in common of certain lands covered by several deeds of trust. At the several sales under the deeds of trust Cahoon became the purchaser of the lands in question. It was held that the purchase by Cahoon inured to the benefit of his cotenant, if the latter elected within a reasonable time to contribute his just proportion of the amount expended in the acquisition of the title, but that if he did not make an election within a reasonable time he would be deemed to have repudiated the transaction and abandoned its benefits. The court said: "Plaintiff claims that he and Cahoon were cotenants under the deed for the land to them by Mary J. Gray, executed on July 16, 1891, and that the court erred in holding that plaintiff was ousted of all ownership and title by Cahoon's purchase of the

land at the sale made by the trustee Anthony, under deed of trust executed to him by Robert B. Gray in his lifetime to secure the payment of part of the purchase money for said land. There is no doubt of the general principle that when land is conveyed to two or more persons by the same deed they are tenants in common, and that they occupy such relation to each other that one will not be permitted to buy up an outstanding title to or encumbrance on the land for his exclusive benefit, but such purchase will inure to all such tenants as are willing to contribute their just proportion of the amount necessarily expended in the acquisition of the title or encumbrance."

In *Knolls v. Barnhart* (1877) 71 N. Y. 474, it appeared that a widow and her children were in possession of lands inherited from the deceased husband as tenants in common. The lands in question had been mortgaged by the husband before his death. The mortgage was foreclosed and the lands purchased by the widow at the sale thereof. The court held that the title thus acquired by the widow was held for the benefit of all the cotenants.

In *Collins v. Collins* (1891) 59 Hun, 620, 38 N. Y. S. R. 591, 13 N. Y. Supp. 28, it appeared that the plaintiff and the defendant and his brother as heirs of their deceased father were tenants in common of a certain lot of land, subject to a mortgage and their mother's right of dower. The mortgage was foreclosed, and the defendant, who was in possession of the lot at the time, purchased the property at the foreclosure sale. He paid only a small sum in cash and gave back a mortgage for the residue of the mortgage debt. The defendant did not disclose his purchase, and the other cotenants were entirely ignorant of the foreclosure and sale. It was held that the defendant acquired the title subject to a trust in favor of plaintiff to the extent of his one-third interest. The court said: "If the tenants in common come into joint possession as coheirs or codevisees, special obligations are said to exist, for-

bidding either to do any act which would be unlawful or improper if done by a trustee charged with the care and preservation of a trust estate. *Freeman, Co-Tenacy*, § 151. In the present case the plaintiff was a minor at the time of the foreclosure; and his mother, being his guardian in socage, paid no attention to it. She left the matter entirely to George K., assuming very likely that he would see that the rights of his brothers would be preserved. There seems to have been no real occasion for any foreclosure. Less than a year's interest was unpaid. The interest had been kept up previously, as it may be inferred, from the rents; and these were improving. The holder of the mortgage did not desire the principal, for he took back a new mortgage for that. The property that was bid in for \$2,610 was worth \$18,000. We think the court below did not err in holding that the purchaser on foreclosure should be deemed to have purchased for the benefit of his coheirs as well as himself, and that he only nominally held the title of plaintiff's third."

In *Carpenter v. Carpenter* (1892) 181 N. Y. 101, 27 Am. St. Rep. 569, 29 N. E. 1018, it appeared that there were a number of tenants in common of mortgaged land, some of whom were in possession. Those in possession contrived to have the holders of the mortgages commence foreclosure, and under judgments obtained in the foreclosure actions the land was sold and was bid in by one of the cotenants in possession for the amount due on the mortgages. The purchaser at once conveyed by deed to each of the other cotenants in possession an interest in the land. The court held that the title thus acquired by the cotenants in possession under the foreclosure and the deeds in severalty subsequently made was held subject to a trust in favor of the cotenants who were not in possession, to the extent of their interest in the property. The court said: "The defendants and the plaintiffs had a community of interest in a common title, arising under the devise. The defendants, or

some of them, were in the actual possession and control of the common property. They were bound to do nothing with a view to prejudice the interests of the plaintiffs. They could not buy in an outstanding title to defeat the right of their cotenants. If the foreclosure of the mortgages was a proceeding hostile to the defendants, and they had not been in default, and their purchase was made of necessity to protect their own rights, with full knowledge of the situation on the part of the plaintiffs, the moral, and perhaps the legal, aspect of the case would be altered. But to permit the plaintiffs, all but two of whom were infants, to be cut off by a proceeding instigated by the defendants for that very purpose, and in the absence of any effort on their part to avert the danger, and when they were in actual possession of the common property, receiving the rents and profits, is not a mere ethical grievance, but one which the law will recognize and redress."

But see *Streeter v. Shultz* (1887) 45 Hun (N. Y.) 406, wherein it appeared that the plaintiff and the defendant were tenants in common of land subject to a purchase-money mortgage. The mortgage was foreclosed and at the sale the premises were bid in by a stranger, acting for the defendant, and the deed was executed to the defendant by the referee. There was no fraud, and the price paid was the fair value of the property at that time. On these facts the court held that the defendant owned the property in his own right, and not subject to any claim or right of his former cotenant. But while in that case the court expressly declared that a tenant in common, having no duties toward his cotenant other than such as necessarily arise from the cotenancy, may purchase for his own benefit at a sale under a mortgage which covers the common estate, it would seem that the decision really rested on the ground of estoppel of the plaintiff to assert his rights because of the latter's long acquiescence in the purchase by the defendant. But, however, the decision seems clearly overruled

by the later New York cases of *Collins v. Collins*, and *Carpenter v. Carpenter*, *supra*.

In *Duff v. Wilson* (1872) 72 Pa. 442, it appeared that the plaintiff and the defendant were tenants in common of a certain tract of land covered by a mortgage. The defendant, being in possession, procured an assignment of the mortgage to his brother-in-law, by whom the proceedings on the mortgage were instituted and carried on. The brother-in-law became the purchaser at the sheriff's sale, and afterwards, by deed, conveyed the title thus acquired to the defendant. It was clear that the brother-in-law was acting as agent for the defendant. On these facts it was held that the defendant was deemed to hold the title in trust for his cotenant to the extent of the latter's interest.

In *Tisdale v. Tisdale* (1855) 2 Sneed (Tenn.) 596, 64 Am. Dec. 775, it appeared that the complainants and defendants were tenants in common of a large quantity of lands which had been encumbered by their ancestor with a mortgage. At foreclosure sales under the mortgage the defendant purchased the lands in question. These sales were confirmed and title vested in the defendant. It was held that the defendant held the title to the lands in trust for the benefit of the other cotenants. The court said: "Tenants in common by descent are placed in a confidential relation to each other by operation of law as to the joint property, and the same duties are imposed as if a joint trust were created by contract between them, or the act of a third party. It may be different where they claim title by distinct purchases, even of the same original title, but that is not the case before us. Being, then, interested with and for each other in the property, each one is prohibited from acquiring rights in it antagonistic to the others. *Keech v. Sandford* (1726) 1 White & T. Lead. Cas. in Eq. (Eng.) 53. Being associated in interest as tenants in common by descent, an implied obligation exists to sustain the common interest. This reciprocal obligation will be vindic-

cated and enforced in a court of equity, as a trust. These relations of trust and confidence bind all to put forth their best exertions and to embrace every opportunity to protect and secure the common interest, and forbid the assumption of a hostile attitude by either; and therefore the purchase by one of an outstanding title or an encumbrance upon the joint estate, in his own name, will inure to the equal benefit of all, but they will be compelled to contribute their respective ratios of the consideration actually given."

In *STIANSON v. STIANSON* (reported herewith) ante, 280, it appeared that the plaintiffs and defendant were tenants in common of real estate covered by a mortgage to secure a debt. The mortgage was foreclosed, and the defendant became the purchaser at the foreclosure sale and received the sheriff's deed therefor in his own name. There was no evidence of fraud, and for nine years the plaintiffs had full knowledge of every fact essential to the assertion of their legal rights. The court held that the title thus acquired was held in trust for the benefit of all the cotenants, but that the latter were estopped to assert their rights, since they did not elect to do so within a reasonable time and offer to contribute their proportion of the expenditures necessarily involved.

In *Eckert v. Schmitt* (1910) 60 Wash. 23, 110 Pac. 635, it appeared that a father and children were tenants in common of land subject to a mortgage. On a decree foreclosing the mortgage, an order of sale was issued and the land sold and conveyed by sheriff's deed to the mortgagee. Later the purchaser, in accordance with a contract made with the father before the sale, conveyed the land to the father. It was held that the purchase of the common property by the father, through the mortgagee, inured to the benefit of his cotenants.

In *Gilchrist v. Beswick* (1889) 33 W. Va. 168, 10 S. E. 371, it appeared that several persons who owned land subject to a mortgage as tenants in common entered into an agreement

by which one of them with other persons, agreed to pay off the mortgage and hold the land subject to redemption by the other owners. The arrangement was not complied with, but the owner selected to pay off the mortgage, without notice to the co-owners that he was not acting under the agreement, purchased the property at the sale under the mortgage, for a sum less than one tenth of its value. The court held that the purchase was for the benefit of all the owners, saying: "According to the doctrine here announced, if Beswick, who was a joint owner or partner in the lands sold, had purchased without any attempt at an understanding that he was to purchase for the common benefit of all the owners, he would nevertheless be held in good conscience and equity to have purchased for the common benefit of all; and therefore, a fortiori, will a court of equity hold him bound to hold the property for his co-owners as well as himself, when it is shown that he made the purchase under an agreement to that effect, which his co-owners, at least, believed still existed, and which he failed to notify them he considered to be at an end, even if he did so consider it,—a matter that the testimony, to say the most of it, leaves in doubt."

In *Reed v. Bachman* (1907) 61 W. Va. 452, 123 Am. St. Rep. 996, 57 S. E. 769, it appeared that land owned by two tenants in common was covered by deeds of trust given to secure the purchase money. The deeds of trust were foreclosed, and at the sales under the decree of foreclosure the lands in question were purchased by strangers, who a few days later, according to an agreement, conveyed the land to the cotenant in possession and control of the property. The other cotenant was absent from the state and had no knowledge of the foreclosure and sale thereunder until told by his cotenant that the sales had been made and that he had purchased for their joint benefit. The court held that the title thus acquired by the cotenant in possession was held by the latter for their mutual benefit.

But the rule that the purchase by

a tenant in common of the common property at a foreclosure sale will be deemed to have been made for the benefit of all the cotenants is one of implication, and has no application in the case of an express agreement between the parties. *Watson v. Watson* (1901) 198 Pa. 234, 47 Atl. 1096. In that case it appeared that all the tenants in common of a tract of mortgaged land, except the defendant, presented a paper to the mortgagee containing the following request: "In case said lands are purchased at sheriff's sale by you, that the same may be conveyed by you absolutely to Samuel Watson upon his securing to be paid, in such manner as shall be satisfactory to you, the debt now due to you and secured upon said lands or interests therein." The mortgagee purchased the property at the foreclosure sale and conveyed it to the defendant, Samuel Watson, and took from him a bond and mortgage for the debt due mortgagee and secured upon the land. It was held that the defendant's title to the land was absolute and divested of any interest or claim which his former cotenants might have had herein. The court said: "With a full knowledge of all the facts necessary to protect their interests in the property, Samuel Watson's cotenants directed the lands to be conveyed to him absolutely, on the condition that he pay the indebtedness against them. This was an approval of and full authority to the grantor to make the sale and conveyance of the land to Samuel Watson, and when in pursuance of this authority the sale was consummated by the deed of August 25, 1888, the title to the premises passed to him, divested of any interest or claim which his former cotenants might have had therein. Why, therefore, should the defendant not hold the land for his own use? In doing so there is certainly nothing 'repugnant to a sense of refined and accurate justice,' nor inconsistent with the title acquired by him. His former cotenants were presumed to know that if Samuel acquired the title to the property without their acquiescence, he

would, under the law, hold it for them as well as for himself, and hence their interests would thereby be protected. Their knowledge of this fact directs attention to the further fact that there must have been some purpose in the execution and delivery of the paper of June 30, 1888, and that that purpose was to relieve the title acquired by Samuel from any interests the parties might have in the land by reason of his being their cotenant. When, therefore, they directed the lands to be conveyed to Samuel absolutely, and thus assented to a sale to him in fee simple, the inference is that in taking the title he was acting for himself, and that it was the intention of all the parties that the title should be held by Samuel, discharged of any trust for, or claim of, his former cotenants."

III. *Minority rule.*

In a few jurisdictions, the mere relation of cotenancy is not considered to be of such a confidential nature as to forbid the purchase by one cotenant of the common property at a foreclosure sale, for his own benefit. It is the rule, therefore, in those jurisdictions that if a cotenant in possession of the common property purchases the property at a foreclosure sale, he acquires the absolute title, divested of any claim or right of his former cotenants, provided the sale was properly advertised and entirely free from fraud. *Starkweather v. Jenner* (1910) 216 U. S. 524, 54 L. ed. 602, 30 Sup. Ct. Rep. 382, 17 Ann. Cas. 1167; *Jackson v. Baird* (1908) 148 N. C. 29, 19 L.R.A.(N.S.) 591, 61 S. E. 632; *Troxler v. Gant* (1917) 173 N. C. 422, 92 S. E. 152; *Kennedy v. De Trafford* [1897] A. C. (Eng.) 180, 66 L. J. Ch. N. S. 418, 76 L. T. N. S. 427, 45 Week. Rep. 671.

In *Jackson v. Baird* (1908) 148 N. C. 29, 19 L.R.A.(N.S.) 591, 61 S. E. 632, it appeared that plaintiffs and defendant were tenants in common of land covered by a deed of trust executed by their common ancestor, in the latter's lifetime, to secure a debt to the trustee. The deed of trust was foreclosed, and at the trustee's sale

the land was purchased by a stranger, who was acting in the interest of the defendant. The stranger later conveyed the property to the defendant's wife. It was held that the title thus acquired was absolute, and not subject to any trust in favor of the other cotenants. The court said: "The contention of plaintiffs that John Baird could not acquire the exclusive title at the sale is founded upon a misapprehension of the law. The general rule is well settled that one cotenant cannot purchase an outstanding title or encumbrance affecting the common estate for his own exclusive benefit, and assert such right against his cotenants. But that rule does not apply under the facts of this case. The title which was acquired by Shuford, assuming that he acquired it for Baird, was not an outstanding title adverse to the title of Robert Baird. It was the title of Robert Baird himself, the common ancestor under whom all claimed, and the sale was being made under a deed executed by such ancestor and to pay his debts, which were an encumbrance on the land when it descended to plaintiffs and their coheir. It is held in this state that one cotenant lawfully may purchase his cotenant's share of the common property, under execution sale to pay the debt of such cotenant. Likewise it is held that one of the cotenants may purchase the entire property at a sale to pay the common ancestor's debt. . . . When the land in controversy descended upon these plaintiffs and upon their coheir, John Baird, it was encumbered with the mortgage to Reid made by their ancestor. When that mortgage was foreclosed in the manner allowed by law, any one of the heirs had a right to purchase the entire estate to protect his own interest, and he would acquire the title, discharged of any trust to his coheirs. There is no evidence that John Baird agreed to purchase for the benefit of the other heirs, or endeavored to suppress bidding, or practised any other fraud upon his cotenants. So far as the record discloses, the sale appears to have been fairly made by the trustee,

and it was open to the plaintiffs, or any of them, to attend and purchase if they so desired."

In *Troxler v. Gant* (1917) 173 N. C. 422, 92 S. E. 152, it appeared that a tenant in common had purchased the common property at a sale under a mortgage executed by the ancestor of the cotenants. It was held that the cotenant had a right to buy the common property at the foreclosure sale, and that he acquired absolute title to the land if the sale was regular and properly advertised.

In *Starkweather v. Jenner* (1910) 216 U. S. 524, 54 L. ed. 602, 80 Sup. Ct. Rep. 382, 17 Ann. Cas. 1167, it appeared that the appellant and the appellee were tenants in common of certain lands covered by a deed of trust to secure an obligation created by the appellant when the latter was sole owner of the land in question. At the sale of the property under the power in the deed of trust the appellee became the purchaser, complied with the terms of sale, and accepted a deed from the trustees. The court held that the appellee took absolute title to the premises, free from any interest of the other cotenants, saying: "But it is said that Jenner's relation as tenant in common to appellant and those associated with him as owner of the property sold to pay off this paramount lien forbids his purchase. That there is such a community of interest between those who hold a common title as to forbid one such cotenant from acquiring any benefit from the acquisition of an outstanding superior title is undeniable. That a court of equity, upon timely application, will convert such a purchasing tenant into a trustee for the common benefit, is true. . . . But it is plain that the principle which turns a cotenant into a trustee, who buys for himself a hostile outstanding title, can have no proper application to a public sale of the common property, either under legal process or a power in the trust deed. In such a situation, the sale not being in any wise the result of collusion nor subject to the control of such a bidder, he is as free, all deceit and fraud out of the

way, as any one of the general public."

In *Kennedy v. De Trafford* [1897] A. C. (Eng.) 180, it appeared that two tenants in common gave a mortgage on the common property, with provisions in the mortgage for redemption by the cotenants, and also the usual power of sale by the mortgagees in case of default in the payment of the mortgage debt. One of the tenants in common was adjudicated a bankrupt, and the appellant was subsequently appointed trustee for him. The mortgagees gave notice to appellant and the other cotenant to pay off the mortgage, and threatened foreclosure. The appellant having declined to redeem, the mortgagees gave notice of their intention to sell if they could obtain principal, interest, and costs, and advertised for offers. The other cotenant who had been left in possession of the property became the purchaser on these terms. The House of Lords held that the sale was valid for all purposes, giving rise to no claim on the part of the bankrupt's estate either against the mortgagees or against the purchaser. Lord Herschell said: "But then it is said the mere fact that Kennedy was co-owner with Dodson of this property creates such a relationship between them that the one co-owner could not take this property and hold it for himself, but that the other co-owner is entitled, on equitable grounds, to have it declared that the benefit of one half of that purchase should be his. My Lords, no authority has been cited in support of such a proposition. Cases have been referred to of a very different description, where the owner of an estate under a settlement,—a tenant for life, for example,—has been held incapable of obtaining an enlargement of that estate for himself alone. It has been said that whatever benefit he gets must inure to the benefit of all taking under the settlement. That is a totally different case from this case. The only authority, if it can be so called, which has been cited, is the case before Chancellor Kent; but he commences his observations by saying that he is

not going to lay down a general rule which would be applicable to such a case as this. He deals with the particular case, the circumstances of which were peculiar and of immense

complication, and he certainly does not lay down any rule or doctrine of law which supports the argument which has been addressed to your Lordships." B. R.

N. C. LLOYD, Respt.,
v.
NORTHERN PACIFIC RAILWAY COMPANY, Appt.

Washington Supreme Court (Dept. No. 2)—May 13, 1919.

(— Wash. —, 181 Pac. 29.)

Automobile — negligence of bailee — imputing to owner.

1. The negligence of a bailee using another's automobile for his own pleasure is not imputable to the owner, so as to prevent the latter's holding another liable for negligently injuring the car.

[See note on this question beginning on page 316.]

Trial — question for jury — servant's use of automobile.

2. Whether or not an employee who, as part of his compensation, was entitled to the use of his employer's automobile, was acting in the employer's business at the time he negligently brought the car into collision with a railroad train, so as to prevent the owner from holding the railroad company liable for its negligence, is for the jury, where, having taken the car

for a pleasure drive of his own, he stops on the way home to carry an express package for his employer without the latter's instructions to do so.

[See 2 R. C. L. 1198.]

Bailment — use of automobile.

3. An employee who is entitled, as part of his compensation, to the use of his employer's automobile for his own pleasure, is, while so using the car, a mere bailee.

[See 3 R. C. L. 72.]

(Chadwick, Ch. J., dissents.)

APPEAL by defendant from a judgment of the Superior Court for Franklin County (Truax, J.), denying motions for judgment notwithstanding a verdict for plaintiff, or for new trial, in an action brought to recover damages for injury to plaintiff's automobile, alleged to have been caused by the negligent operation of defendant's train. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Cannon & Ferris and Edward A. Davis, for appellant:

The evidence established that Cooley, the driver of the automobile, was plaintiff's agent either because of the conduct and dealings between the two, or because plaintiff ratified his acts.

34 Cyc. 1219; Mechem, Agency, 2d ed. § 263; McLeod v. Morrison, 66 Wash. 683, 38 L.R.A.(N.S.) 783, 120 Pac. 528; Ankeny v. Young Bros. 52 Wash. 235, 100 Pac. 736; Tummonds v. Moody, 20 N. Y. S. R. 812, 3 N. Y. Supp. 714; Brown v. Wilson, 45 S. C.

519, 55 Am. St. Rep. 779, 23 S. E. 630; 31 Cyc. 1263.

In driving the car at the time in question, Cooley was only carrying out the general purpose for which the machine was owned and kept by plaintiff.

Birch v. Abercrombie, 74 Wash. 486, 50 L.R.A.(N.S.) 59, 133 Pac. 1020; Marshall v. Taylor, 168 Mo. App. 240, 153 S. W. 527, 6 N. C. C. A. 313.

In a case where the bailee could not recover on account of his contributory negligence, the bailor cannot recover.

Illinois C. R. Co. v. Sims, 77 Miss.

325, 49 L.R.A. 322, 27 So. 527; *Welty v. Indianapolis & V. R. Co.* 105 Ind. 55, 4 N. E. 410; *Puterbaugh v. Reasor*, 9 Ohio St. 484; *Forks Twp. v. King*, 84 Pa. 230.

Mr. M. L. Driscoll, for respondent:

The negligence of a bailee is not imputable to the bailor.

Spelman v. Delano, 177 Mo. App. 42, 163 S. W. 300; *Gibson v. Bessemer & L. E. R. Co.* 226 Pa. 198, 27 L.R.A. (N.S.) 689, 75 Atl. 194, 18 Ann. Cas. 535; *Kellar v. Shippee*, 45 Ill. App. 377; *New York, L. E. & W. R. Co. v. New Jersey Electric R. Co.* 60 N. J. L. 338, 43 L.R.A. 849, 38 Atl. 828; *Sea Ins. Co. v. Vicksburg, S. & P. R. Co.* 17 L.R.A. (N.S.) 925, 86 C. C. A. 544, 159 Fed. 676; *Alabama G. S. R. Co. v. Clarke*, 145 Ala. 459, 39 So. 816; *Currie v. Consolidated R. Co.* 81 Conn. 383, 71 Atl. 356; *Henderson v. Chicago R. Co.* 170 Ill. App. 616; *Bastien v. Ford Motor Co.* 189 Ill. App. 367; *Aldrich v. Boston & M. R. Co.* 91 Vt. 379, 100 Atl. 765; *Goldsmith v. Chicago, M. & St. P. R. Co.* 176 Ill. App. 336; 3 R. C. L. 146; *Shearer v. Buckley*, 31 Wash. 378, 72 Pac. 76, 14 Am. Neg. Rep. 218; *Wilson v. Puget Sound Electric R. Co.* 52 Wash. 522, 132 Am. St. Rep. 1044, 101 Pac. 50; *Cathey v. Seattle Electric Co.* 58 Wash. 176, 108 Pac. 443; *Beach v. Seattle*, 85 Wash. 379, 148 Pac. 39.

From the time Cooley left plaintiff's place to the time of the injury, his possession of the car was his own,—not that of a servant or agent, but that of bailee.

Bennett v. New Jersey R. & Transp. Co. 36 N. J. L. 225, 13 Am. Rep. 435; *Birch v. Abercrombie*, 74 Wash. 486, 50 L.R.A. (N.S.) 59, 133 Pac. 1020; *Warren v. Norguard*, 103 Wash. 284, 174 Pac. 7.

The question whether the relation of principal and agent, or of master and servant, did exist, or whether there was a ratification, is one for the jury. And the burden of proving such relation or ratification rested upon defendant.

Hammons v. Setzer, 72 Wash. 550, 130 Pac. 1141; *Allen v. Walla Walla Valley R. Co.* 96 Wash. 397, 165 Pac. 99; *Moon v. St. Louis Transit Co.* 237 Mo. 425, 141 S. W. 870, Ann. Cas. 1918A, 183.

Parker, J., delivered the opinion of the court:

The plaintiff, Lloyd, seeks recovery of damages for injury to his automobile, claimed to have been

caused by the negligent operation of one of the trains of the defendant railway company, at a public crossing in the village of Eltopia, in Franklin county. Trial in the superior court for that county, sitting with a jury, resulted in verdict and judgment in favor of the plaintiff, from which the defendant has appealed to this court.

Respondent's automobile was being driven by Richard Colley on Sunday, June 24, 1917, when it was struck by one of appellant's trains, causing the injury thereto for which recovery is sought. For a period of some three months prior thereto Colley had been working for respondent upon his farm, situated some 2 miles distant from Eltopia, under an employment agreement by which Colley was to receive a certain sum per month, and the use of the automobile for his own pleasure, from time to time, as occasion therefor might arise. During the afternoon of the Sunday in question Colley took a young lady for a pleasure ride in the automobile. Just what their destination was is not clear; but upon their return they went a short distance out of their way, with a view on the part of Colley of going through Eltopia and calling upon the railway company's agent there and procuring an express package which he thought might be there for respondent. He had not been instructed by respondent to call for any such package, nor is there anything in the record to show that either he or respondent thought of his calling upon the agent of the railway company for any such package when he started with the automobile. He had, however, on some previous occasions, brought packages from the agent of the railway company, which had been shipped to Eltopia in respondent's name. This he had done without any special instructions from respondent. Upon this occasion Colley received from the agent a package addressed to respondent, and placed it in the automobile, when he and the young lady proceeded in the automobile on their

way towards respondent's farm, which rendered it necessary for them to cross appellant's track in Eltopia; and it was while so crossing the track that the automobile was injured by being struck by one of appellant's trains. While the jury returned a general verdict in favor of respondent, awarding him damages in the sum of \$450, the jury were also asked and answered special interrogatories submitted by the court as follows:

"Interrogatory 1. Was there negligence on the part of the Northern Pacific Railway Company, which negligence was the proximate cause of the damage to plaintiff's automobile? Answer: Yes.

"Interrogatory 2. Was there negligence on the part of Richard F. Colley the driver of the automobile, contributing to the damage to the plaintiff's automobile? Answer: Yes.

"Interrogatory 3. At the time of the collision was Richard F. Colley driving or using the automobile for or on behalf of the plaintiff, N. C. Lloyd, or in connection with the plaintiff's business, or in the course of his employment as an employee of the plaintiff? Answer: No.

"Interrogatory 4. At the time of the collision, was Richard F. Colley driving the automobile for private purposes or for his own pleasure? Answer: Yes."

A motion for judgment in appellant's favor, notwithstanding the verdict, was timely made by its counsel, the denial of which by the trial court is assigned as error.

The first contention made in appellant's behalf is, in substance, that the evidence conclusively shows that Colley was, at the time of the injury of the automobile, acting in the course of his employment for respondent, so that his contributory negligence thereby became the contributory negligence of respondent, preventing his recovery, and that the trial court should have so decided as a matter of law. It seems to us that, under the circumstances here shown, the question whether

or not the driving of the automobile at the time it was injured was being done by Colley as the agent and employee of respondent, or was being done by him for his own private purpose and pleasure, was a question for the jury

Trial-question for jury—servant's use of automobile.

to decide. Aside from the fact that Colley procured from the railway company's agent the package for respondent, and had it in the automobile when it was injured, there seems to be but little room for arguing that he was at that time doing anything other than for himself. And we think the mere fact that he had procured the package just before the automobile was injured, and then had it with him in the automobile, did not so plainly render his driving the automobile at the time it was injured the performance of his duties as respondent's employee that it could be so decided as a matter of law. The jury, we think, might, under all the circumstances, have well concluded that Colley's procuring of the package was a mere matter of accommodation, as if such act had been performed by a neighbor. Our conclusion upon this branch of the case finds support in our decisions in *Hammons v. Setzer*, 72 Wash. 550, 130 Pac. 1141, *George v. Carstens Packing Co.* 91 Wash. 637, 158 Pac. 529, and *Warren v. Norguard*, 103 Wash. 284, 174 Pac. 7.

It is further contended in appellant's behalf that the contributory negligence of Colley, as found by the jury, was in any event imputable to respondent, preventing his recovery, and that the trial court should have so decided as a matter of law. This contention is rested upon the theory that because of the relationship between Colley and respondent with reference to the automobile, though it only be that of bailor and bailee, respondent cannot recover for the injury to the automobile, because Colley's contributory negligence would prevent his recovery for injury to the automobile. There was a time when the

decisions of the courts seemed to support this view of the law; but in recent years the weight of authority is, we think, decidedly to the contrary.

In view of the special finding of the jury that Colley was, at the time the injury to the automobile occurred, driving it for his own pleasure, and not in the course of his employment as respondent's employee, which finding we think the evidence fully supports, it seems plain that the relation then existing between him and respondent with reference to the automobile was

merely that of bailor and bailee. Van Zile, *Bailments*, 2d ed. §§ 3 and 4; 6 C. J. 1101; 3 R. C. L. 72. Whether the automobile was in legal effect hired to Colley or gratuitously loaned to him we think is of no moment here, since Colley would be no more the agent of respondent in one case than in the other.

In *Gibson v. Bessemer & L. E. R. Co.* 226 Pa. 198, 27 L.R.A. (N.S.) 689, 75 Atl. 194, 18 Ann. Cas. 535, there was involved the hiring of a horse from a livery-stable keeper and the killing of the horse by the railroad company while being driven by the bailee. The railroad company resisted the claim of damage made by the owner for the killing of the horse upon the ground of the bailee's contributory negligence in driving upon the track. Holding that the negligence of the bailee was not attributable to the bailor, the owner of the horse, preventing his recovery, Justice Potter, speaking for the court, observed:

"And in *Edwards on Bailments*, 3d ed. 1893, § 392, it is said: 'The hirer of wagons, or carriages and horses, receiving them into his custody to be used by him at his pleasure, becomes a bailee, and is in no sense a servant of the owner. He is responsible to the owner for the reasonable care of them, and to third persons for any negligence of his servants in the use of them. He is liable to third persons to the same

extent as if he were the actual owner of the vehicles and teams used by him.' And again, in 1 *Thompson on Negligence*, 1901, § 512, it is said: 'Unless the principles upon which the courts have at last settled have been grossly misconceived, the negligence of a bailee or his servants is not imputable to his bailor.' As far back as the case of *Bard v. Yohn*, 26 Pa. 482, Justice Knox stated the law as follows (p 489): 'If one lets or hires to another a horse to be used exclusively for the purposes of the latter, the owner of the horse is in no wise responsible for the negligent manner in which the horse may be used.'

"There is a difference where the owner sends a driver to manage and control the team and vehicle; for in so doing the owner retains the control, and may well be held accountable for the action of the driver, his servant and agent. But in the present case no driver was furnished, and the hirer assumed the care and control of the horse. There was no relation of master and servant or of principal and agent between the hirer and the liveryman, and the latter cannot be held responsible for the negligence of the former. Each must recover in his own right, if at all, and each must stand upon his own ground. Had Lantz, the hirer, brought suit and shown negligence by the defendant, and no negligence upon his own part, he could have recovered for damage to himself, but not for damage to the horse or vehicle. His right of action depended in no way upon that of the present plaintiff, nor does the right of recovery in the present action depend upon the right of the bailee to recover."

In *New York, L. E. & W. R. Co. v. New Jersey Electric R. Co.* 60 N. J. L. 338, 43 L.R.A. 849, 38 Atl. 828, there was involved a bailment arising out of the hiring of cars which were injured in a collision resulting from the concurring negligence of the bailee and the defendant company. It was sought by the defendant company to escape liability to

the bailor, the owner of the cars, upon the ground of the bailee's contributory negligence being in law imputed to the bailor. In concluding an exhaustive and well-considered opinion, Justice Lippincott, speaking for the New Jersey court of appeals, said: "I cannot perceive that whether, in respect to this action, the duty of the defendant and the bailee were joint or separate, can make any difference. If the same duty of care was due and owing to the plaintiff, then a common neglect of that duty would render them both liable as joint tort-feasors. If the duty to plaintiff was a separate one which was neglected to be performed by each of them, although the duties were diverse and disconnected, and the negligence of each was without concert, if such neglects concurred and united in causing the injury, the tort still is equally joint, and the tort-feasors are subject to a like liability. *Matthews v. Delaware, L. & W. R. Co.* 56 N. J. L. 34, 22 L.R.A. 261, 27 Atl. 919, 12 Am. Neg. Cas. 285. The bailee was bound to use reasonable care and diligence in the preservation of the property from injury. The defendant, in the operation of the electric car, was bound to exercise reasonable care in avoiding injury to the property of which the plaintiff was the owner. It would seem that the intervention of the negligence of the bailee could not shield the defendant from the injury caused by its own negligence. Both might have been selected as joint tortfeasors, or the action could be maintained against either. The conclusion reached is that the plaintiff had the right to sue either or both of these companies for the injuries arising from their negligence to the locomotive and cars of the plaintiff, and it is not a defense to the action that the accident was contributed to by the negligence of the other. Each is liable upon its own negligence, and the negligence of the bailee is not imputable to the plaintiff as a shield to the defendant against recovery."

In Sea Ins. Co. v. Vicksburg, S. & P. R. Co. 17 L.R.A. (N.S.) 925, 86 C. C. A. 544, 159 Fed. 676, the Federal circuit court of appeals for the fifth circuit had under consideration a bailment consisting of the leaving of cotton with a compress company to be bailed. In holding that the loss of the cotton by fire resulting from the negligence of the railway company, contributed to by the negligence of the bailee, would not prevent recovery by the insurance company as assignee of the bailor. Judge Shelby, speaking for the court, said in part: "A plaintiff cannot recover damages for an injury to which he has directly contributed by his own negligence. If the plaintiff's own fault, whether of commission or omission, has materially contributed to the injury, the plaintiff is without remedy against one also in the wrong. The converse of this doctrine ought to follow as a necessary corollary,—that when one has been injured by the wrongful act of another, to which he has in no way contributed, he should be entitled to compensation from the wrongdoer, unless the negligence of someone towards whom he stands in the relation of principal or master has materially contributed to the injury. The bailor, we hold, is not the principal or master of the bailee."

In *Spelman v. Delano*, 177 Mo. App. 28, 163 S. W. 300, the court had under consideration a bailment in substance the same as that which is here involved; that is, it was the case of a farm hand having the use for his own pleasure of a horse belonging to his employer. While he was riding the horse it was killed by the railway company of which the defendant was receiver; the death of the horse being the result of the negligence of the railway servants and the contributory negligence of the farm hand, the bailee. Holding that his contributory negligence was not imputable to the bailor, his employer, Judge Trimble, speaking for the court, made the following pertinent observations: "It must be remembered that the question in

the case at bar does not involve a bailment in which the bailee is the agent or servant of the bailor, nor is there any privity of contract between them, unless, indeed, it can be said that the bailor, merely by lending the horse, makes the bailee his agent to care for the horse, and thereby creates such a relation as will make the bailor responsible for the acts of the bailee. Now, it cannot be said that, if the bailee had, after borrowing the animal for his own purpose, negligently ridden against another and injured him, the injured person could have any right of recovery against the bailor. If it be said that the bailor, by lending the horse, makes the bailee an agent for the care thereof, and is thereby impliedly responsible for the latter's conduct in reference thereto, and also makes it possible for the injury to occur, the answer is that the bailee is not the bailor's agent in caring for the horse, else the bailor would be responsible for a negligent injury committed by the bailee in using the horse, and this has never been held to be so. If the bailee failed to exercise the proper care, the bailor would have a right of action against him; and he would also have a right of action against a third party for negligently injuring him. And, when the negligence of the two concurs, he can sue both jointly or sue either one, as he chooses. And if lending the horse can be said to render it possible for the injury to occur, the act of lending was not such as to render plaintiff blameworthy in any degree. So that we have a case where a plaintiff, without fault or negligence of his own, is suing for a loss occasioned by the concurrent negligence of two others. In such case can one of the persons in fault set up in defense the fault of the other, as against the owner, who is wholly without fault? We think not, and, while at first blush the rule that the contributory negligence of a bailee cannot be imputed to a bailor when suing a third person for injuries to property may seem unjust, yet, when

the rule is confined to those bailments which do not involve any privity of contract or agency between the bailor and bailee, it will not appear to be so harsh and unreasonable as might be supposed."

That decision contains one of the best reviews of the cases upon this subject to be found in the books. The following decisions are also in harmony with and support this view of the law: *Alabama G. S. R. Co. v. Clarke*, 145 Ala. 459, 39 So. 816; *Currie v. Consolidated R. Co.* 81 Conn. 383, 71 Atl. 356; *Henderson v. Chicago R. Co.* 170 Ill. App. 616; *Goldsmith v. Chicago, M. & St. P. R. Co.* 176 Ill. App. 336.

Our own decisions are quite in harmony with this view of the law, though they deal only with the question of the contributory negligence of the drivers of vehicles, resulting in injuries to passengers therein, both for hire and as an accommodation. See *Allen v. Walla Walla Valley R. Co.* 96 Wash. 397, 165 Pac. 99, and our previous decisions therein cited. All of the decisions above noticed were rendered, since the year 1897. In the late work of Van Zile, *Bailments*, § 128, that learned author states the law to be as above indicated.

The only decisions called to our attention which may be considered as lending support to the contrary view are the following: *Puterbaugh v. Reasor*, 9 Ohio St. 484, decided in 1859; *Forks Twp. v. King*, 84 Pa. 230, decided in 1876, which decision, in so far as it may be regarded as authority upon this question, is, in effect, overruled by the later decision of that court in *Gibson v. Bessemer & L. E. R. Co.* 226 Pa. 198, 27 L.R.A. (N.S.) 689, 75 Atl. 194, 18 Ann. Cas. 535; *Welty v. Indianapolis & V. R. Co.* 105 Ind. 55, 4 N. E. 410, decided in 1886, a critical reading of which case we think will show that it is in at least some measure distinguishable from the one before us; and *Illinois C. R. Co. v. Sims*, 77 Miss. 325, 49 L.R.A. 322, 27 So. 527, decided in the year 1900.

We are quite convinced that the

decided weight of authority at the present time, and also the better reason, support the view that the contributory negligence of Colley was not imputable to respondent, under the facts of this case as found by the jury.

Automobile—
negligence of
bailee—
imputing to
owner.

The judgment is affirmed.

Holcomb, Mount, and Fullerton, JJ., concur.

Chadwick, Ch. J., dissenting:

I do not agree with my esteemed associates. They have, as I believe, reasoned from a false premise. It is that Colley was a mere borrower or a gratuitous bailee, and was not engaged in his employer's (respondent's) business; and although there be some authority holding that the negligence of a gratuitous bailee may be imputed to the bailor, the later and better authority is to the contrary. I am willing to admit for the purpose of this argument that the holding of the court is sound, and that the conclusion reached by the majority is sustained by later authority (3 R. C. L. 147), although the rule is otherwise laid down in 29 Cyc. 546, and the annotator of the L.R.A. Reports says of *Sea Ins. Co. v. Vicksburg, S. & P. R. Co.*, cited in 17 L.R.A. (N.S.) 925, that "the only case found supporting the conclusion reached . . . is *New York, L. E. & W. R. Co. v. New Jersey Electric R. Co.* 60 N. J. L. 338, 43 L.R.A. 849, 38 Atl. 828."

In the later annotation of *Gibson v. Bessemer & L. E. R. Co.* 27 L.R.A. (N.S.) 689, it is said: "Perhaps *Gibson v. Bessemer & L. E. R. Co.* which is in harmony with the *Sea Ins. Co. Case* and *New York, L. E. & W. R. Co. v. New Jersey Electric R. Co.* . . . may be regarded as sufficient to turn the scale in favor of the other side of the proposition."

But the law relied on does not reach or control the undisputed facts in this case, nor do any of the cases cited deny the principle for which I shall contend; it is, where property is not merely loaned to the user, but

is turned over to him under a contract of use and as a part consideration for services rendered, the owner may not recover if the party to whom he has given the use of his property has been guilty of contributory negligence. It must be borne in mind that Colley did not hire the machine, nor was he using it as a mere gratuity. He had the use of it as part payment of a debt due from the owner, and as to third persons he was in legal effect and to all intents and purposes the owner of the machine. The machine had been bought by respondent and Colley, and was owned jointly by them for a time. Respondent, after two or three months, bought Colley's interest. Respondent testifies that Colley, who had worked for him for about three years, continued in his employment after the purchase of the machine under an arrangement whereby Colley was to get "so much a month and had the use of the car," and that this arrangement had been in effect from November, 1916, up until the time of the accident.

He further testifies that from the time of the purchase of his interest Colley "was to have the use of the car and so much per month," and:

Q. When you bought back the half interest, it was the understanding that he at all times should have the use of the car in addition to his wages, and whenever he wanted to go anywhere he could take the car?

A. Yes, sir.

Q. In other words, the car was furnished you as part payment for your employment there?

A. Yes, sir.

Q. And you had been using the car that way for several months before the accident?

A. Yes, sir; I had.

It is unnecessary to review the authorities cited by the majority. A brief reference to the case of *Spelman v. Delano*, 177 Mo. App. 28, 42, 163 S. W. 300, so strongly relied on by the writer of the opinion, will sufficiently illustrate my thought.

The proper distinction is noted: "The weight of authority seems to be clearly in favor of the rule that in a case where the circumstances show that the relation between the owner of the property and the one in possession of it at the time of its destruction is simply that of bailor and bailee, and does not involve any element of partnership, principal and agent, or master and servant existing between them, then the contributory negligence of the bailee is not imputable to the bailor in an action by the bailor against a third party for negligently destroying the bailor's property."

In *Sea Ins. Co. v. Vicksburg, S. & P. R. Co.* 17 L.R.A. (N.S.) 925, 86 C. C. A. 544, 159 Fed. 676, the court qualifies the rule: "When one has been injured by the wrongful act of another, to which he has in no way contributed, he should be entitled to compensation from the wrongdoer, unless the negligence of someone towards whom he stands in the relation of principal or master has materially contributed to the injury."

The case of *Spelman v. Delano* was one of gratuitous bailment. The party in whose hands the property was at the time of the injury was a mere borrower. "Plaintiff was under no obligation to transport Cook to and from his place of labor. His lending the horse to Cook was no part of the contract between them."

The case is distinguished from a case such as we have at bar upon that ground. Here the use of the automobile was a part of the contract of employment, and when respondent gave Colley the use of his machine in payment of his wages instead of money, he vouched for and became a guarantor of his competency to handle the machine, and answerable for his due care in driving it just as much as if he had employed him to drive the machine as a stage or as a delivery wagon. If Colley had negligently injured a third party, a court or jury would have surely held respondent to answer in damages upon the theory of

agency or master and servant. He would not in such case be heard to repudiate his contract; then why in this? The falsity of the premise of the majority is therefore disclosed in the first line of the quotation from the *Spelman Case*: "It must be remembered that the question in the case at bar does not involve a bailment in which the bailee is the agent or servant of the bailor, nor is there any privity of contract between them." 177 Mo. App. 38.

If there be not privity of contract between the respondent and Colley, I would be at a loss to contrive a state of facts out of which such relation might arise. Had the quotation begun in the preceding paragraph, the majority would have sounded the bottom upon which this case should be made to rest. "Of course, if by reason of the circumstances of the bailment, there is a privity of contract between the bailor and the bailee so that the bailee can be regarded as the agent of the bailor, then the negligence of the former should be and is imputed to the latter, the same as when the relation of master and servant exists between them." 177 Mo. App. 38.

Now in the case at bar it will not be disputed that the relation of master and servant existed at the time the contract was entered into, and that the right to use the automobile as part remuneration for services rested in that relation. So, if the parties were master and servant at the time the contract was made, they must of necessity remain in that relation so long as the property was used under the terms and in the manner provided in the contract; that is to say, if they are master and servant as between themselves, they must, under all authority, remain master and servant as to third parties.

The harshness of the rule asserted by the majority even in cases where it might be held to apply is apologized for by the writer of the opinion in the *Spelman Case*: "While at first blush the rule that the contribu-

tory negligence of a bailee cannot be imputed to a bailor when suing a third person for injuries to property may seem unjust, yet when the rule is confined to those bailments which do not involve any privity of contract or agency between the bailor and bailee, it will not appear to be so harsh and unreasonable as might be supposed." 177 Mo. App. 39.

So much for the law of the case as it arises out of the contract made by the parties, and under which the machine was used at the time of the accident.

As I read the record, the facts will not sustain the holding of the majority or the verdict of the jury that Colley was not engaged in the prosecution of respondent's business, or that he was not his agent or his servant, and that he was using the car merely for his own pleasure, and was therefore a gratuitous bailee.

Colley, having the use of the machine as against any right to interfere on the part of the respondent, drove out on a Sunday afternoon in company with a young lady, whom he intended to take to her home. While traveling over the country it occurred to him that a shipment of liquor, which, as the law then was, must be obtained on a permit, and then only at stated intervals, was about due. The liquor had been ordered by the respondent and was shipped in his name. Colley went out of his way, out of the path of pleasure, to go to the station. He had on other occasions gone to the same place to receive like shipments for respondent. He inquired of the agent whether a package had been received for respondent. Being notified that the package was at the depot, he receipted for it in respondent's name and undertook to carry it home. There was no express direction on the part of respondent to Colley to bring this particular shipment, but it was Colley's habit and his custom to go to the depot without specific direction and receive such shipments for respondent from time to time.

Respondent himself testifies:

Q. He had on other occasions stopped at the station and got packages of this character for you? So it was understood that there was no objection on your part to his getting it out and bringing it home?

A. No, sir; I didn't object.

Q. It was perfectly agreeable with you that he stop and bring the package home, if he happened to be there?

A. It was all right.

Q. In fact, it would save you the trip if it was there, and he could bring it out for you? Is that the idea?

A. Not necessarily the trip; no sir.

Q. What distance is it from your place to the station?

A. About 2 miles.

Q. He had to go for it if you didn't bring it out? Somebody has to get it?

A. Yes, sir.

Q. And after you had found out on this particular day he had received this package for you and signed for it in your name you made no objection at all?

A. No, sir.

Q. It was perfectly satisfactory to you?

A. Yes, sir.

Q. When you found out that he received your package and was taking it out, you made no objection, and it was perfectly satisfactory to you that he might bring it out?

A. Yes.

Q. While you had not instructed Mr. Colley to get any packages for you, he had from time to time brought packages out for you, and it was agreeable to you that he should do that?

A. I had no objection to anybody bringing them out to me.

Q. And he had done it before?

A. He had probably, but I don't remember it.

Q. And it was perfectly agreeable that he should get this particular package and bring it out?

A. I had no objection.

Q. You made no objection after you found out that he had the package on that particular day? That was perfectly satisfactory to you that he should bring it out?

A. I didn't make any objection.

This testimony clearly discloses that, aside from all other questions in the case, Colley was engaged in his master's business, and, whether under an implied or express authority, his act was ratified so as to put it beyond the power of the respondent

to disaffirm his negligence and recover in this case. The liquor was received by Colley, who signed the name of respondent, and respondent says that his act was "perfectly satisfactory" to him. The testimony of the respondent is corroborated by that of Colley, the driver of the machine.

For these reasons, I believe that the judgment should be reversed, and the cause dismissed.

Petition for rehearing denied.

ANNOTATION.

Imputing negligence of bailee to bailor where subject of bailment is damaged by third person.

This note excludes injuries to goods in the hands of carriers as involving peculiar features characteristic of the relations between carriers and consignors or consignees.

There has been a change in the weight of authority on this question. Excluding carrier cases, the majority of the earlier cases held that the contributory negligence of the bailee was imputable to the bailor where the subject of bailment was damaged by a third person. *Smith v. Smith* (1824) 2 Pick. (Mass.) 621, 13 Am. Dec. 464; *Illinois C. R. Co. v. Sims* (1900) 77 Miss. 325, 49 L.R.A. 323, 27 So. 527; *Puterbaugh v. Reasor* (1859) 9 Ohio St. 484; *Forks Twp. v. Kink* (1877) 84 Pa. 230; *Texas & P. R. Co. v. Tankersley* (1885) 63 Tex. 57.

Similarly, in *Welty v. Indianapolis & V. R. Co.* (1885) 105 Ind. 55, 4 N. E. 410, where the borrower of a horse, while drunk, rode on a railroad track, which was unfenced, in violation of the statute, it was held that while mere contributory negligence would have been no defense under the statute, there was here a trespass, and the borrower stood in the position of the owner, who could not recover.

So, in *Smith v. Smith* (1824) 2 Pick. (Mass.) 621, supra, the contributory negligence of the hirer of a horse was imputed to the owner.

So, in *Illinois C. R. Co. v. Sims* (1900) 77 Miss. 325, 49 L.R.A. 323, 27

So. 527, supra, it was held that the negligence of a gratuitous bailee of a mule, while using the animal for the very purpose for which it was loaned, is imputable to the owner, so as to prevent recovery against a railroad company whose negligence, combined with that of the bailee, caused the mule's injury.

So, where a horse driven by its borrower was killed through the bad condition of the road, it was held error to exclude evidence that the borrower knew of another road which he could have taken. *Forks Twp. v. King* (1877) 84 Pa. 230, supra.

So, in *Puterbaugh v. Reasor* (1859) 9 Ohio St. 484, supra, the court, after saying that it was, perhaps, not essential to determine whether the parties in this case sustained the relation to each other of bailor and bailee or master and servant, held that the negligence of one to whom a team had been furnished by a landowner for the purpose of farming upon shares upon the latter's land, in leaving the team unfastened while engaging in a fight with a third person, was imputable to the owner of the team, who sought to recover from the third person for the death of one of the horses, caused by their taking fright at the noise, and running away.

In *Texas & P. R. Co. v. Tankersley* (1885) 63 Tex. 57, supra, where cotton which had been stored with the bailee

was destroyed by fire caused by the joint negligence of the bailee and the railroad company, it was held that the negligence of the bailee was imputable to the owner, so as to prevent a recovery against the railroad for damages.

In *Illinois C. R. Co. v. Sims* (1899) 77 Miss. 325, 49 L.R.A. 323, 27 So. 527, supra, the court said: "Acting within the scope of his employment, the negligence of the agent is imputed to his principal, that of the servant to his master, and that of a bailee for hire to the bailor. Why the contributory negligence of a gratuitous bailee, while using the property for the very purpose for which it was loaned, should not be imputed to the bailor, who intrusted it to the bailee to be thus used, we are unable to see. There is the same privity of contract, in all essential features, as in bailment for hire, and as in engagements between principal and agent, and between master and servant. This view is reinforced by the consideration of another question, viz.: Could a gratuitous bailee who was guilty of contributory negligence recover in his own name against a stranger for an injury to property loaned? Clearly not, for the defense to his complaint would be upon the surface. But the bailor and the bailee must recover, if at all, on the same facts and under the same circumstances. . . . Whatever entitles to a recovery entitles either bailor or bailee to such recovery. E converso, whatever forbids a recovery to the bailee will also defeat the bailor's action."

But at this time the weight of authority is decidedly in favor of the rule that in bailments other than for carriage the contributory negligence of the bailee is not imputable to the bailor where the subject of the bailment is damaged by a third person.

United States.—*Sea Ins. Co. v. Vicksburg, S. & P. R. Co.* (1908) 17 L.R.A.(N.S.) 925, 86 C. C. A. 544, 159 Fed. 676.

Alabama.—*Alabama G. S. R. Co. v. Clarke* (1906) 145 Ala. 459, 39 So. 816.

Connecticut.—*Currie v. Consolidated R. Co.* (1908) 81 Conn. 383, 71 Atl. 356.

Illinois.—*Kellar v. Shippee* (1892) 45 Ill. App. 377.

Missouri.—*Spelman v. Delano* (1913) 177 Mo. App. 28, 163 S. W. 300.

New Jersey.—*New York, L. E. & W. R. Co. v. New Jersey Electric Co.* (1897) 60 N. J. L. 338, 43 L.R.A. 849, 38 Atl. 828, affirmed on opinion below in (1897) 61 N. J. L. 287, 43 L.R.A. 854, 41 Atl. 1116.

Pennsylvania.—*Gibson v. Bessemer & L. E. R. Co.* (1910) 226 Pa. 198, 27 L.R.A.(N.S.) 689, 75 Atl. 194, 18 Ann. Cas. 535.

Vermont.—*Aldrich v. Boston & M. R. Co.* (1917) 91 Vt. 379, 100 Atl. 765.

Washington.—The reported case (*LLOYD v. NORTHERN P. R. Co. ante*, 307).

Thus, an owner of cotton, who leaves it with a compress company to be baled, is not chargeable with the latter's negligence, which, combined with that of a railroad company, results in the destruction of the cotton by fire, so as to prevent him or the insurer of the cotton, who is subrogated to his rights, from holding the railroad company liable for the loss. *Sea Ins. Co. v. Vicksburg, S. & P. R. Co.* (1908) 17 L.R.A.(N.S.) 925, 86 C. C. A. 544, 159 Fed. 676, supra.

So, in *Alabama G. S. R. Co. v. Clarke* (1906) 145 Ala. 459, 39 So. 816, supra, the court held that the negligence of a warehouse company with whom one had stored his cotton, in leaving other cotton exposed upon an uncovered platform, and from which fire caused by an engine was communicated to the cotton in question, was not chargeable to the owner in an action against the railroad company for damages, since, as the court said, the placing of the other cotton had no necessary connection with the act of storing the plaintiff's cotton, and therefore he could not be charged with contributory negligence on that account.

It will be seen that in the reported case (*LLOYD v. NORTHERN P. R. Co. ante*, 307) it is held that the negligence of the bailee of an automobile injured by the negligence of a third person will not be imputed to the bailor.

Similarly, in *New York, L. E. & W.*

R. Co. v. New Jersey Electric R. Co. (1897) 60 N. J. L. 338, 43 L.R.A. 849, 88 Atl. 828, affirmed on opinion below in (1897) 61 N. J. L. 287, 43 L.R.A. 854, 41 Atl. 1116, *supra*, it was held that the negligence of the servants of a bailee of a locomotive and cars was not imputable to the bailor, so as to prevent a recovery from an electric railway company whose servants, by the negligent running of one of its cars, contributed to the injury of the locomotive and cars.

Where a colt, while hired, is killed by the negligence of a third person, the contributory negligence of the bailee is no defense to the third person when sued by the bailor. *Kellar v. Shippee* (1892) 45 Ill. App. 377, *supra*.

So, a livery-stable keeper is not prevented from holding a railroad company liable for negligently killing a horse, by the fact that the negligence of the hirer, in whose possession the animal was, contributed to the injury. *Gibson v. Bessemer & L. E. R. Co.* (1910) 226 Pa. 198, 27 L.R.A.(N.S.) 689, 75 Atl. 194, 18 Ann. Cas. 535, *supra*.

So, in *Currie v. Consolidated R. Co.* (1908) 81 Conn. 383, 71 Atl. 356, *supra*, it was held that the negligence of the hirer of a horse and wagon whose negligence, combined with that of a street car company, caused injury to the property, could not be imputed to the livery-stable keeper, so as to prevent him from recovering from the street car company the damages in-

curred. In this case it appeared that the bailee was in the livery-stable keeper's regular employ, but the evidence showed that he took the horse and rig away, not as a servant, but as a bailee under a contract of hire.

In *Spelman v. Delanó* (1913) 177 Mo. App. 28, 163 S. W. 800, *supra*, where the master's horse, ridden by his permission by his servant, was injured by a railroad company, it was held that the defendant could not defend on the ground of the contributory negligence of the bailee.

In *Aldrich v. Boston & M. R. Co.* (1917) 91 Vt. 379, 100 Atl. 765, it was held that the owner of a mare killed by a railroad company might recover of the company under the statute making railroad companies liable for damages to horses, etc., for failure to construct and maintain sufficient cattle guards at crossings, if the loss were occasioned by such failure, regardless of whether such horses, etc., were lawfully on such a crossing or not; and it was further held that the negligence of an agister could not prevent such recovery although a statute provided that if a horse or other animal is found going at large within the limits of a railroad after the same is opened for use, the person through whose fault or negligence such horse or animal is so at large shall forfeit not more than \$20 for every horse so going at large, and shall be liable for the damage caused thereby.

B. B. B.

C. M. STUBBS, Respt.,

v.

O. C. MOLBERGET and Wife, Appts.

Washington Supreme Court (Dept. No. 2) — August 6, 1919.

(— Wash. —, 182 Pac. 936.)

Automobile — negligence — cutting corner.

1. One turning a street corner with an automobile is negligent in failing to keep to the right of the center as required by city ordinance.

[See note on this question beginning on page 321.]

— collision with car cutting corner — liability.

2. To render negligent a driver of an automobile who collides with a machine cutting a corner on the street along which he is driving, he must have seen the position of the other car, or the circumstances must have made it his duty to see it in time to have avoided the collision.

— duty to anticipate wrong action.

3. The driver of an automobile is not bound to anticipate that a machine which he observes to be approaching

from the opposite direction will depart from the regular course and attempt to pass in front of him by cutting a corner.

[See 2 R. C. L. 1185.]

Damages — injury to automobile.

4. The damages for negligently injuring an automobile may include the cost of repairs, and compensation for the time lost while the repairs are in progress.

[See 8 R. C. L. 490; see note in 4 A.L.R. 1350.]

APPEAL by defendants from a judgment of the Superior Court for King County (Frater, J.) in favor of plaintiff in an action brought to recover damages for injury to plaintiff's automobile alleged to have been caused by defendants' negligence. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. C. M. Miller for appellants.

Mr. Glen S. Corkery for respondent.

Fullerton, J., delivered the opinion of the court:

The automobile of the respondent collided with the automobile of the appellants, and was overturned and damaged. This action was brought to recover for the damages suffered. It was tried by the court, sitting without a jury, and resulted in a judgment in favor of the respondent in the sum of \$540.39. The accident giving rise to the action occurred at the junction of Fremont avenue and Ewing street in the city of Seattle, both public streets of that city. The respondent was driving north on Fremont avenue while the appellants' driver drove south thereon to its junction with Ewing street, where he turned his automobile east into that street, colliding with the respondent's automobile after it had crossed the center of the street and was near the north side thereof.

There is not much room to question the appellants' negligence. At the time of the collision their automobile was at a place in the street where it had no right to be. On entering Ewing street the driver turned to the left of the center of the street—cut the corner, as

the common phrase expresses it—while the law of the road and the city ordinance as well required him to drive to the right of the center of the street and to keep on the right-hand side of the street. Nor was there any reason shown for violating the rule. There was no fixed obstruction in the street which prevented travel in the ordinary way. There was, it is true, a congestion of automobile traffic on the streets at that time, and a considerable number of people had congregated at the street intersection for the purpose of taking the street cars running to a public park, but this, instead of furnishing a reason for violating the ordinance, rather made it an imperative duty to obey it. It is for such occasions that rules and regulations are framed.

Whether the respondent was guilty of such contributory negligence as will prevent a recovery is a more serious question. There is a decided conflict in the evidence on it. According to the appellant driver, the respondent was greatly exceeding the speed limit at this point. His evidence, and that of certain of his witnesses also, is to the effect that he violated a provision of the ordinance by passing other automobiles headed in the same direction, which had slowed up and were wait-

Automobile—
negligence—
cutting corner.

ing to cross the intersecting street. But the respondent testifies, and in this he is corroborated by disinterested witnesses, that he passed the automobiles mentioned prior to the time they reached the street intersection, at a place where he had a right to pass them, and when he could do so without violating the rules of the road or the city ordinances, since they were not traveling at a rate of speed less than the rate permitted by the ordinances. He further testifies that he slowed down on approaching the street to a speed much below the permitted speed limit because of the people who had congregated there, and was traveling no faster than 8 miles per hour while crossing the street. There is also in his favor the very persuasive fact before mentioned; he had entered the street and crossed its center before the collision occurred. Obviously it could not have occurred, had the appellants pursued the course they were obligated by the ordinance and the rules of the road to pursue.

We have not overlooked the testimony of the appellant driver to the effect that he had stopped his car before the collision, and that the respondent ran into his car. The trial court, however, did not so find, and our perusal of the evidence leads us to believe the witness mistaken in this respect. Doubtless he attempted to stop when he saw that a collision was inevitable if he pursued his course, and perhaps he changed the course of his car in the attempt to avoid a collision, but the decided weight of the evidence is to the effect that both cars were in motion when the collision occurred. But we cannot think the fact, even if admitted, would convict the respondent of negligence. To so con-

vict him, he must either have actually seen the position of the appellants' car, or the situation must have been such as to make it his duty to see its position. Neither of these conditions is shown by the record. The respondent's testimony is that when he was about to enter the street he saw the appellants' car on Fremont avenue, beyond its intersection with Ewing street, in a position from which, if it continued on its direct course, it must pass to his left, or, if it changed its course into Ewing street and pursued the regular way in so doing, it must pass behind him, and that he gave it no further thought, but gave his entire attention to the crowd of people congregated on the corner he was approaching, that he might run none of them down. Seemingly he did all that the law required of him. He was not bound to anticipate that the appellants would depart from the regular course, and hence is not guilty of negligence under the circumstances here shown in failing so to do, even though the appellants did stop their car prior to the time of the collision.

The appellants complain of the amount of the recovery. The court allowed for the cost of repairing the automobile and for the time lost while the repairs were in progress, allowing nothing for the permanent injury to the car which could not be corrected by ordinary repairs. The amount of the recovery was well within the evidence, and we see no reason to disturb the judgment in that respect.

The judgment is affirmed.

Holcomb, Ch. J., and Mount and Parker, JJ., concur.

—collision with car cutting corner—liability.

—duty to anticipate wrong action.

Damages—
injury to automobile.

ANNOTATION.

Automobiles: cutting corners as negligence.**I. General rules, 321.****II. Application of rules:**

- a. Generally, 322.
- b. Where way is obstructed, 323.
- c. Where collision occurs after turn is made, 325.
- d. Where streets do not cross, 328.
- e. Where traffic officer is struck, 325.

III. Miscellaneous, 326.**I. General rules.**

It is generally held that a violation by an automobile of a statute forbidding the cutting of corners in turning into an intersecting street is negligence per se, or at least an element of negligence.

Arizona. — *Young v. Campbell* (1918) — *Ariz.* —, 177 *Pac.* 19.

California. — *Perez v. Hartman* (1919) — *Cal. App.* —, 179 *Pac.* 706; *Cook v. Miller* (1917) 175 *Cal.* 497, 166 *Pac.* 316.

Indiana. — *Reitz v. Hodgkins* (1916) 185 *Ind.* 163, 112 *N. E.* 386.

Iowa. — *Walterick v. Hamilton* (1917) 179 *Iowa*, 607, 161 *N. W.* 684.

Michigan. — *Everard v. Dodge Bros.* (1918) — *Mich.* —, 167 *N. W.* 953; *Wilson v. Johnson* (1917) 195 *Mich.* 94, 161 *N. W.* 924.

Missouri. — *Heryford v. Spitcaufsky* (1918) — *Mo. App.* —, 200 *S. W.* 123.

New York. — *Berckhemer v. Empire Carrying Corp.* (1916) 172 *App. Div.* 866, 158 *N. Y. Supp.* 856, affirmed in (1918) 224 *N. Y.* 725, 121 *N. E.* 856; *Jacobs v. Richard Carvel Co.* (1916) 156 *N. Y. Supp.* 766; *Mendleson v. Van Rensselaer* (1907) 118 *App. Div.* 516, 103 *N. Y. Supp.* 578.

Oregon. — *White v. East Side Mill & Lumber Co.* (1917) 84 *Or.* 233, 164 *Pac.* 736, 15 *N. C. C. A.* 848.

Washington. — *STUBBS v. MOLBERGET* (reported herewith) ante, 318.

Wisconsin. — *Calahan v. Moll* (1915) 160 *Wis.* 523, *L.R.A.* 1916A, 744, 152 *N. W.* 179.

Canada. — *Bain v. Fuller* (1916) — *N. S.* —, 29 *D. L. R.* 113.

But in *Bogdan v. Pappas* (1917) 95 *Wash.* 579, 164 *Pac.* 208, in an action 6 *A.L.R.*—21.

by a passenger in a hired automobile to recover for injuries received when the driver turned the car to the left to pass another automobile going in the same direction, near a bend in the road, and failed to make the turn and went over a bank, it was held that a failure to obey a traffic statute or ordinance requiring vehicles, when turning at a street crossing, to keep to the right of the intersection of the center of the highway, is not negligence per se unless the complaining party is one for whose benefit the statute or ordinance was enacted; and that the object of such a provision being to protect travelers and vehicles upon the highway, and to avoid collisions, it was inapplicable under the facts of the case.

It has been held that it is not the duty of one approaching a street intersection to anticipate that the driver of an automobile approaching the intersection will, in turning to the left, fail to go to the right of the center of the intersection. *Reitz v. Hodgkins* (1916) 85 *Ind.* 163, 112 *N. E.* 386; *Heryford v. Spitcaufsky* (1918) — *Mo. App.* —, 200 *S. W.* 123.

In the last case cited, where the driver of an automobile failed to drive to the right of the center of a street into which he was turning, as required by an ordinance, the court stated that it was incumbent upon him to use far more care in driving his automobile on the wrong side than if he were driving it on the proper side.

If the violation by the defendant's automobile of an ordinance requiring vehicles turning at street intersections to keep to the right of the center of the intersection did not contribute directly to a collision with a motor cycle, or if the negligent operation of the motor cycle was the sole proximate cause of the death of one riding thereon, the defendant cannot be held liable. *Karpeles v. City Ice Delivery Co.* (1916) — *Ala.* —, 73 *So.* 642.

II. Application of rules.

a. Generally.

In the reported case (*STUBBS v. MOLBERGET*, ante, 318) it will be observed that the act of the defendant in driving to the left of the center of the street in turning from one street into another, instead of driving to the right of the center of the street, as provided by an ordinance, was held negligence.

And in *Cook v. Miller* (1917) 175 Cal. 497, 166 Pac. 316, it was held legal negligence for the defendant, who collided with plaintiff's motor cycle, to drive his automobile to the left of the center of the intersection of the streets in turning the corner instead of to the right, as required by an ordinance, there being no necessity for his so cutting across the corner.

And in *Calahan v. Moll* (1915) 160 Wis. 523, L.R.A.1916A, 744, 152 N. W. 179, a finding of negligence was held warranted, there being evidence that the defendant, proceeding at a high rate of speed, at a point where the view was obstructed, turned his automobile to the left into an intersecting street without going to the center of it before turning, but in fact turning so short that he ran over a catch basin situated beyond the left-hand curb and struck plaintiff, who was approaching the intersection, riding a bicycle on the right side of the street into which defendant turned.

And in *Berckhemer v. Empire Carrying Corp.* (1916) 172 App. Div. 866, 158 N. Y. Supp. 856, affirmed in (1918) 224 N. Y. 725, 121 N. E. 856, it was held the duty of the driver of a motor vehicle to make a wide turn at a street intersection and pass to the right of the center of the intersection, and to reduce his speed to not more than 4 miles an hour; and a violation of these rules prescribed by the highway law and ordinances of New York was held sufficient to charge the driver with negligence in an action by a motor cyclist who sustained injuries because of such negligence.

And in *Jacobs v. Richard Carvel Co.* (1916) 156 N. Y. Supp. 766,

where, in an action to recover damages sustained in a collision between the plaintiff's team and the defendant's automobile truck, it appeared that the defendant's driver was proceeding on the wrong side of the street, and that in making a turn at a crossing he cut the corner, a finding of negligence was held justified. The court stated that the defendant admittedly violated the provisions of the Highway Law by turning within the intersection of the street and offered no evidence of any local ordinance changing that requirement, and said that it was a matter of common knowledge that the local regulations were to the same effect, and that, under the circumstances, it being perfectly evident that the chauffeur's course was without excuse, and, at least, one of the proximate causes of the accident, it was difficult to see how a finding of defendant's negligence could be avoided.

And a verdict for the plaintiff was held justified in *Reitz v. Hodgkins* (1916) 185 Ind. 163, 112 N. E. 386, where there was evidence that the defendant's automobile approached an intersecting street at a speed of 25 or 30 miles an hour, and in turning into the intersecting street failed to go to the right of the intersection, and cut the corner and struck the rear wheel of a motor cycle which was traveling in the opposite direction, and when stopped had passed over the right side of the intersection. The court stated that the jury might well find the defendant guilty of a culpable act of negligence in cutting the corner under the circumstances, and that this would be so aside from the existence of any rule of the road or specific traffic regulations which expressly prohibited such an act, since in any event the defendant would be held to the exercise of ordinary care to avoid collision with and injury to others in approaching and turning into the intersecting street.

And in *Heryford v. Spitcaufsky* (1918) — Mo. App. —, 200 S. W. 123, a case of negligence was held to be made out against the defendant, there being evidence that, in turning his

automobile at a street intersection, he violated an ordinance requiring vehicles turning at an intersection to the left not to turn until they have passed beyond the center of the intersecting street, and also evidence that after seeing the danger of a collision with the plaintiff's motor cycle, which had speeded up to cross the intersection, he had 34 feet within which to stop, and could have stopped within 5 or 6 feet, but proceeded 44 feet before stopping.

And in *Walterick v. Hamilton* (1917) 179 Iowa, 607, 161 N. W. 684, the evidence was held sufficient to justify a finding that the defendant did not drive his automobile, in turning to the left from one street into another, to the right of and beyond the center before turning, as required by an ordinance, and that such negligence was the proximate cause of the collision with the plaintiff's bicycle.

In *Everard v. Dodge Bros.* (1918) — Mich. —, 167 N. W. 953, where there was evidence that the defendant's motor truck, which collided with the plaintiff's automobile, failed to keep to the right of the center of the intersection of streets in making the turn, and a conflict in the evidence as to the speed of the truck, and as to which machine ran into the other, it was held that a question was presented for the jury, and that a directed verdict for the defendant was properly refused.

And the question of the defendant's negligence and the contributory negligence of the plaintiff was held to be for the jury, it appearing that the plaintiff was driving in a closed carriage along the highway approaching a road intersecting it at an acute angle; that the defendant with his automobile was traveling in the same direction; that the plaintiff's carriage, in turning from the road into the intersecting way, did not turn to the right of the center of the intersection of the two roads as required by statute, but turned to the left; and that just before the plaintiff began to turn the defendant turned to the left for the purpose of passing, and near the point of the intersec-

tion of the roads a collision took place, resulting in damage to the plaintiff. *Mendleson v. Van Rensselaer* (1907) 118 App. Div. 516, 103 N. Y. Supp. 578.

In *Hellan v. Supply Laundry Co.* (1917) 94 Wash. 683, 163 Pac. 9, where a recovery was sought for an injury sustained through being struck by the automobile of a third person, which was driven at an unlawful speed and was suddenly turned to avoid the defendant's machine, which failed to go to the right of the center of the intersection of a street in turning, it was held error to a judgment for the defendant under the facts pleaded and the plaintiff's opening statement, on the theory that the negligence of the third person was the proximate cause of the injury and that the defendant's negligence was a mere condition, the appellate court taking the view that the questions presented were for the jury.

b. Where way is obstructed.

It will be observed that in the reported case (*STUBBS v. MOLBERGET*, ante, 318) the fact that traffic at the time of the accident was congested was held no reason for violating an ordinance requiring vehicles turning to the left to go to the right of the center of the street intersection, but was rather held a reason making it imperative that the ordinance be obeyed.

And it has been held in an action for striking a traffic officer that the duty of one vehicle to pass to the left of another going in the same direction will not justify the driver of an automobile about to turn a corner going to the left of the center of the intersection in order to pass a standing wagon on the left. *Wilson v. Johnson* (1917) 195 Mich. 94, 161 N. W. 924. The court in this case said: "It is true that, ordinarily, it is the duty of one vehicle to pass to the left of another going in the same direction, but to do so and cut the corner would be a violation of another statute. There was ample room for two vehicles to pass on the right side of the street. The law is specific as

to what shall be done under such circumstances. The driver of the overtaking vehicle shall express his desire to pass, and the vehicle overtaken shall turn to the right and give the other an opportunity to pass on the left. 1 Comp. Laws 1915, § 4815. It does not appear that the defendant made any effort to comply with the statute. The adoption of the rule contended for by the defendant would result, especially in cities where traffic is heavy, necessitating delays at street intersections, in automobiles continually cutting the corners."

It has been held, however, in an action arising out of a collision with a motor cyclist, that where, by reason of its customary use for unloading freight, one side of a street is not open to ordinary traffic, there is no violation of an ordinance requiring vehicles turning at an intersection to keep to the right of the center of the intersection, if the driver of an automobile in turning keeps to the right of the center of the two currents of travel as defined and determined for practical purposes by the customary use of the street. *Karpeles v. City Ice Delivery Co.* (1916) — Ala. —, 73 So. 642. The court said: "It cannot be assumed, in the absence of evidence on the point, that the customary use of Avenue E by the railroad company and persons receiving freight from its cars was unlawful. Ordinances are to be construed according to common sense and so as to give effect to the purpose of their adoption. The evident purpose of that part of the ordinance requiring vehicles to turn to the right of the intersections of streets, like its complementary provision requiring all vehicles, except when passing a vehicle, to 'keep reasonably near the right-hand curb,' is to keep vehicles turning to the left from one street into another moving at all times, as far as practicable, with the current of travel. In the circumstances here shown by the tendencies of defendant's evidence, assuming, as the jury were authorized to find, that the automobile passed at a lawful rate of speed to the left of the center of the

intersection of the streets as laid off, but to the right of the intersection of the streets as defined by their customary use, it cannot be said that the driver of defendant's automobile, by his course, did not better serve the purpose of the ordinance and the rule of due care prescribed by it. Ordinary prudence required him to take account of the customary use of the avenue between Twenty-first and Twenty-second streets. Accurately enough for practical purposes, it may be said on the evidence in this case that Avenue E between the two streets was divided into three zones: The north given over to vehicles passing from one street to the other; the middle to the railroad; the south to wagons and drays passing to and from cars and stopping to receive freight. Motion is the general law of the road, but this law, like the rule of the ordinance, is subject to limitations imposed by reason and necessity. The driver of a vehicle may leave the prescribed route to avoid an obstacle otherwise unavoidable, and within reason he may stop and stand. By parity of reason, we think, if the south side of Avenue E had by custom and constant use been so given over to the unloading and hauling of freight from cars that stood therein as to close that part of it to ordinary traffic, substantially as hypothesized in charge R, the driver of defendant's automobile was not chargeable with negligence per se in yielding to the custom which directed his movement to that part of the avenue north of the railroad tracks. Assuming the presence of cars upon the team track of the railroad and the customary and almost constant use of the avenue, as defendant's evidence tended to show, and the general effect of these facts to close the south side to ordinary traffic granted according to the hypothesis of the charge, defendant's right and duty in the premises were not affected by the fact that at the moment there may have been no drays or wagons on the south side of the avenue. In view of the conditions generally prevailing and the custom which grew out of them, as we may

assume, it would seem reasonable to say that the turning of the automobile across the intersection in the manner approved by the charge was not in violation of the spirit and purpose of the ordinance which sought to avoid confusion and its attendant danger and inconvenience by so providing that vehicles would, as far as practicable, move along uniform and generally understood lines of travel."

And in *Hamilton v. Young* (1919) — Iowa, —, 171 N. W. 694, where there was evidence, among other things, that the defendant, who collided with the plaintiff's automobile near an intersection of highways, turned to the left instead of the right as required by the rule of the road, and also that on account of gopher mounds it was impractical to go around the center of the intersection in turning, and that the plaintiff did not do so, but followed the usual traveled portion of the highway, it was held that a motion for a directed verdict for the defendant should have been overruled.

c. Where collision occurs after turn is made.

In *Bain v. Fuller* (1916) — N. S. —, 29 D. L. R. 113, the defendant was held liable for injuries sustained by reason of a collision which occurred after the defendant had made the turn, where the primary cause of the collision between his car and that of the plaintiff was the defendant's failure, in violation of a Nova Scotia statute to keep to the left of the center of the street in turning and proceeding, although the plaintiff, to avoid the collision, turned his car to the wrong side of the street.

And in *Perez v. Hartman* (1919) — Cal. App. —, 179 Pac. 706, it was held that where a collision between the defendant's automobile and plaintiff's motor cycle would not have occurred if the defendant, in turning at the intersection of streets, had gone to a point beyond the center of the intersection as required by statute, the defendant was liable for the injuries inflicted, although the collision occurred at a point on the street

into which he turned some 15 or 20 feet from the intersection.

And in *Rice v. Lowell Buick Co.* (1918) 229 Mass. 53, 118 N. E. 185, where the car in which the plaintiff was riding failed in turning into a street to go to the right of the intersection of the ways before turning, as required by statute, it was held that although the collision with defendant's car occurred 65 feet or more from the intersection, the failure to comply with the statute in turning must be taken into consideration in determining whose negligence caused the accident, the court stating that the jury might have found that if the driver of the car in which the plaintiff was riding had gone to the right of the center of the intersection before turning, the collision would not have occurred.

d. Where streets do not cross.

It has been held that a statute forbidding the cutting of corners when turning from one street into another applies where a street does not cross another, but runs to it and stops. *Bain v. Fuller* (1916) — N. S. —, 29 D. L. R. 113. The court stated that the statute must be read as applying to such a case, as the reason for the rule was no more applicable to a street which crosses another than to one which merely runs into it.

e. Where traffic officer is struck.

In *Wilson v. Johnson* (1917) 195 Mich. 94, 161 N. W. 924, where the defendant, in driving to the left instead of the right of the center of a street intersection, struck the deceased, a traffic officer, a directed verdict for the defendant on the theory that the officer was guilty of contributory negligence because he directed the defendant in the course he took was held properly refused, the testimony being clear that the officer was not on duty at the time and made no motion with his hands, and the defendant's evidence as to direction by nod of the head was contradicted.

And it was held that the claimed signal by the deceased was no excuse for the defendant's cutting the corner, because he was already in the act

of doing it and on the wrong side of the highway when he claimed the signal was given. *Ibid.*

In *White v. East Side Mill & Lumber Co.* (1917) 84 Or. 233, 164 Pac. 736, 15 N. C. C. A. 848, requests for a nonsuit and a directed verdict were held properly refused, where there was evidence that the defendant's chauffeur did not run to and beyond the intersection of the street before turning, as required by an ordinance, but negligently ran the machine at a high rate of speed so that the front part was slightly past the street center, and turned and ran to the left, causing the machine to go over the center of the street intersection, where the plaintiff's intestate, a traffic officer, was stationed, and that a part of the machine near the left wheel struck and killed him; and this was held true although there was uncontradicted and unimpeached testimony which the defendant contended showed that it was a physical impossibility for the rear wheel to take the courses marked on the map by certain witnesses, the court stating that the jury was not bound to accept as conclusive the uncontradicted testimony of any witness, but might disregard such testimony if it was unsatisfactory to them.

III. Miscellaneous.

In *Martinelli v. Bond* (1919) — Cal. App. —, 183 Pac. 463, a finding of negligence on the part of the defendant was held supported by the evidence, when taken in connection with a provision of the Motor Vehicle Act requiring a driver of a motor vehicle turning to the left of an intersection of streets to go to the right of the center of the intersection, there being testimony that the defendant was driving his automobile on a street which intersected that on which the plaintiff was traveling on his motor cycle at an acute angle; that the defendant started down one of the streets, but, finding it rough, turned his machine and returned to the vicinity of the intersection, and, instead of returning to the corner of the two streets to make the

turn, drove over a private short cut over the small end of the triangle caused by the intersection, and that he dashed out on the street without sounding his horn, and collided with the plaintiff.

In *Opitz v. Schenck* (1918) — Cal. —, 174 Pac. 40, a finding by the jury that the fact that the defendant had been driving to the left of the center of the street in turning, instead of to the right, was the proximate cause of an injury to the plaintiff, and another finding that the proximate cause was that the defendant was exceeding the speed limit in turning the corner, were held not inconsistent, as both might have been contributing proximate causes of the accident.

And in this case, where it was merely alleged that the defendant negligently and carelessly drove his automobile against the plaintiff and injured him, it was held that the plaintiff might nevertheless show that the defendant did not pass to the right of the center of the street intersection in making a turn, as required by an ordinance. *Ibid.*

In *Heryford v. Spitcaufsky* (1918) — Mo. App. —, 200 S. W. 123, an instruction in an action involving a collision between a motor cycle and automobile at a street intersection, that if the jury believed that if the driver of the automobile had waited until he had crossed the center line of the street into which he was turning before he turned the accident would not have been avoided, then their verdict should be for the defendant, was held properly refused, as it permitted the jury to speculate as to what would have happened if the driver had crossed to the right of the center of the intersecting street.

It is stated in the abstract of the opinion in *Coonan v. Straka* (1917) 204 Ill. App. 17, that the evidence proved that the defendant's servants violated an ordinance requiring automobiles to run on the right-hand side of streets "and turn around at an intersection of two streets," and that

such negligence was the proximate cause of the plaintiff's injury. The facts of the case, however, do not ap-

pear, and there is nothing further explaining the language used.

J. T. W.

JAMES HARLOW and Wife, Appts.,

v.

ARTHUR C. KINGSTON, Respt.

Wisconsin Supreme Court — June 25, 1919.

(— Wis. —, 178 N. W. 308.)

Contract — rescission — effect of intoxication.

1. Equity will rescind a sale of real estate for an inadequate consideration by one who by reason of a prolonged debauch had such a consuming desire for liquor that his mind was dominated thereby and did not act normally, so that he had no appreciation of what he was doing, although he was sober when he executed the deed.

[See note on this question beginning on page 331.]

— unconscionable contract.

2. A sale for \$200, of land worth \$1,388, by one whose mind is so dominated by a desire for liquor that he does

not appreciate what he is doing, is so unconscionable that it will be set aside by equity.

[See 4 R. C. L. 502.]

APPEAL by defendants from a judgment of the Circuit Court for Calumet County (Burnell, J.) in favor of plaintiff in an action brought to cancel an alleged deed. *Affirmed.*

Statement by Siebecker, J.:

This action was brought by plaintiff to cancel and annul a deed made by him to defendants, by which he conveyed to defendants his interest in certain property.

Timothy Harlow, father of the plaintiff, died intestate in September, 1910. At the time of his death he was possessed of 80 acres of land in town of Rantoul, Calumet county, on which he resided; also, 80 acres of land in Oconto county. He was survived by his widow and nine children, of whom plaintiff is one. By the final order of settlement made by the county court in the estate of Timothy Harlow, plaintiff was assigned a one-ninth interest in and to the real estate of Timothy Harlow, subject to the dower and homestead rights of the widow and the lien of two mortgages, and also assigned to him an undivided one-tenth interest in and to certain farm

personal property of the value of \$68.21.

At the death of Timothy Harlow, he left two mortgage liens against the real estate in Calumet county, one for \$800 and one for \$1,000. His widow gave a renewal mortgage upon the lands of which he died seised, signed by herself, for the principal sum of \$1,900, on which, on July 31, 1916, there was \$72 accrued interest. The widow, Mary Harlow, claims that the \$800 and the \$1,000 mortgage are still a lien upon this land. The widow was sixty-six years of age when this action was prosecuted.

On July 31, 1916, plaintiff deeded his interest in the estate to defendant Kingston for \$200. He claims in this action that, at the time of the execution of the deed, as a result of intoxication he was mentally incompetent and insane from the excessive use of liquor, and was incapable of understanding or execut-

ing the deed; that defendant Kingston knew this; and that Kingston obtained the deed from him through fraud, duress, and undue influence. The answer of the defendant admits the making of the deed, but denies drunkenness or incapacity of the plaintiff, and denies all fraud or undue influence on the part of the defendant Kingston.

The case was tried before the court without a jury. The court, among its findings of fact and conclusions of law, determined the following:

(1) That for some ten days before the deed was executed, plaintiff had been on a prolonged spree and had been grossly intoxicated, although at the time of the making of the deed he was sober. That he had been out of money for several days and had exhausted his credit. That immediately upon obtaining the purchase price he started on another drunken debauch, which lasted ten days or two weeks thereafter.

(2) That while the plaintiff was not appreciably under the influence of liquor at the time of the sale, nevertheless, by reason of his debauch, he had such a consuming thirst for liquor and his mind was so dominated thereby that it did not act normally and he did not appreciate what he was doing.

(3) That the defendant did not solicit the purchase and conveyance, but was solicited by the plaintiff. That the purchase price was \$195.

(4) That the defendant was not guilty of fraud, artifice, or deceit.

(5) That the price paid was grossly inadequate and the transaction unconscionable.

(6) That before action was brought plaintiff offered defendant \$200 and interest and demanded a rescission of the contract and tendered defendant a deed to execute, all of which defendant refused, even though the plaintiff finally offered him \$250 to reconvey.

(7) That the value of plaintiff's interest in his father's estate is \$1,388, subject to the homestead and dower rights of his mother.

As a conclusion of law, the court held that, the money having been offered to defendant by plaintiff and refused by defendant, the sum might be deposited with the clerk of the circuit court for use and benefit of defendant; that the deed be declared null and void; and that the judgment of the court stand as a reconveyance of all property covered by the deed.

Judgment was entered accordingly, and the \$200 with interest paid to the circuit court clerk for the use and benefit of defendant. The defendant appealed from this judgment.

Mr. T. L. Doyle, for appellants:

Intoxication of a party which will invalidate a contract entered into by him must be such as to render him incapable of knowing what he is doing, or to deprive him of the powers of reason and understanding to such an extent that he fails entirely to comprehend the consequences of his acts.

8 Ann. Cas. 254; 1 Elliott, Contr. ¶ 441; Burnham v. Burnham, 119 Wis. 509, 100 Am. St. Rep. 895, 97 N. W. 176; Conley v. Nailor, 118 U. S. 127, 30 L. ed. 112, 6 Sup. Ct. Rep. 1001; Schramm v. O'Connor, 98 Ill. 539; Wright v. Fisher, 65 Mich. 275, 8 Am. St. Rep. 886, 32 N. W. 605; Van Wyck v. Brasher, 81 N. Y. 260.

Mere inadequacy in the price or in the subject-matter, unaccompanied by other inequitable incidents, is never of itself sufficient ground for canceling an executed or executory contract.

2 Pom. Eq. Jur. ¶ 926; Harris v. Tyson, 24 Pa. 360, 64 Am. Dec. 661, 14 Mor. Min. Rep. 634; Davidson v. Little, 22 Pa. 247, 60 Am. Dec. 81; Rust v. Fitzhugh, 132 Wis. 557, 112 N. W. 508; Wood v. Boynton, 64 Wis. 265, 54 Am. Rep. 610, 25 N. W. 42; Elliott, Contr. ¶ 209; GaNun v. Palmer, 216 N. Y. 603, 111 N. E. 223; Sellers v. Knight, 185 Ala. 96, 64 So. 329; Earl v. Peck, 64 N. Y. 596; Re Bradbury, 105 App. Div. 250, 93 N. Y. Supp. 418; Goodspeed v. Fuller, 46 Me. 141, 71 Am. Dec. 572; Eyre v. Potter, 15 How. 59, 14 L. ed. 599; Frazer v. State Sav. Bank, 18 N. M. 340, 137 Pac. 592; Cooper v. Reilly, 90 Wis. 427, 63 N. W. 885; Jacobson v. Nealand, 122 Iowa, 372, 98 N. W. 158; McKinney v. Crady, 8 Ky. L. Rep. 259, 1 S. W. 402; Lewis v. Allen, 42

Okl. 584, 142 Pac. 384; Powers v. Powers, 46 Or. 479, 80 Pac. 1058; Stamper v. Venable, 117 Tenn. 557, 97 S. W. 812; Story, Eq. Jur. ¶ 245.

There is no evidence of a proper tender.

Weed v. Page, 7 Wis. 503; Hollenback v. Shoyer, 16 Wis. 500; Tuthill v. Morris, 81 N. Y. 94; 38 Cyc. 143; Babcock v. Perry, 8 Wis. 277; Musgat v. Pumpelly, 46 Wis. 660, 1 N. W. 410; Gauche v. Milbrath, 94 Wis. 674, 69 N. W. 999; Smith v. Phillips, 47 Wis. 202, 2 N. W. 285; Hoffman v. Van Die-man, 62 Wis. 362, 21 N. W. 542.

Mr. L. P. Fox, for respondent:

Plaintiff's intoxication so affected his mind and reason that he did not know or appreciate what he was doing.

Johnson v. Phifer, 6 Neb. 401; Brusinger v. Bank of Watertown, 67 Wis. 75, 58 Am. Rep. 848, 30 N. W. 290; Black, Intoxicating Liquor, § 423; Hotchkiss v. Fortson, 7 Yerg. 67; Birdsong v. Birdsong, 2 Head, 289; Calloway v. Witherspoon, 40 N. C. (5 Ired. Eq.) 128; Wright v. Waller, 127 Ala. 557, 54 L.R.A. 453, 29 So. 57.

Courts of equity will intervene to set aside contracts entered into by intoxicated persons.

Bursinger v. Bank of Watertown, 67 Wis. 75, 58 Am. Rep. 848, 30 N. W. 290; French v. French, 8 Ohio, 214, 31 Am. Dec. 441; Hotchkiss v. Fortson, 7 Yerg. 67; Calloway v. Witherspoon, 40 N. C. (5 Ired. Eq.) 128; Reynolds v. Waller, 1 Wash. (Va.) 164; Johnson v. Phifer, 6 Neb. 401; Crane v. Conklin, 1 N. J. Eq. 346, 22 Am. Dec. 519; Warnock v. Campbell, 25 N. J. Eq. 485; Swan v. Talbot, 152 Cal. 142, 17 L.R.A. (N.S.) 1066, 94 Pac. 238; Hume v. Cooke, 16 Grant, Ch. (U. C.) 84; Whart. & S. Med. Jur. p. 25; McGregor v. Boulton, 12 Grant, Ch. (U. C.) 288; Bishop, Contr. 980; 11 Am. & Eng. Enc. Law, 773; Howard v. Howard, 87 Ky. 616, 1 L.R.A. 610, 9 S. W. 411; Miller v. Sterringer, 66 W. Va. 169, 25 L.R.A. (N.S.) 600, 66 S. E. 228; Swan v. Talbot, 152 Cal. 142, 17 L.R.A. (N.S.) 1070, 94 Pac. 238; Phelan v. Gardner, 43 Cal. 306; Moore v. Moore, 56 Cal. 92; Waldron v. Angelman, 71 N. J. Eq. 166, 58 Atl. 568.

Gross inadequacy of the consideration amounted to fraud upon the plaintiff.

2 Pom. Eq. Jur. 2d ed. §§ 923, 927; Rarick v. Womer, — Iowa, —, 169 N. W. 378; Lloyd v. Higbee, 25 Ill. 603; Wermack v. Rogers, 9 Ga. 60; Swimm

v. Bush, 23 Mich. 99; Gwynne v. Heaton, 1 Bro. Ch. 1, 28 Eng. Reprint, 949; Robinson v. Amateur Asso. 14 S. C. 148; Re Wickersham, 138 Cal. 355, 70 Pac. 1076; McClure v. Raben, 125 Ind. 139, 9 L.R.A. 477, 25 N. E. 179, 182; Read v. Mosby, 87 Tenn. 759, 5 L.R.A. 122, 11 S. W. 940; Hume v. United States, 132 U. S. 406, 33 L. ed. 393, 10 Sup. Ct. Rep. 136; Fetterer, Eq. 141; Kelly v. McGuire, 15 Ark. 555; White v. White, 89 Ill. 460; Willcox v. Jackson, 51 Iowa, 204, 1 N. W. 513; Duncan v. Butler, 47 Mich. 94, 10 N. W. 123; Cooper v. Reilly, 90 Wis. 427, 63 N. W. 885; Wood v. Boynton, 64 Wis. 265, 54 Am. Rep. 610, 25 N. W. 42.

There was a proper tender before the commencement of the action.

Hollenback v. Shoyer, 16 Wis. 500; Dunn v. Amos, 14 Wis. 107; McCormick v. Malin, 5 Blackf. 533; 38 Cyc. 135, 136.

Siebecker, J., delivered the opinion of the court:

This is an action in equity for the rescission of a deed on the ground that plaintiff, at the time he executed the deed, was legally incapacitated to make it. The incapacity of plaintiff is found by the circuit court to have been due to a prolonged debauch from intoxication immediately preceding the day of the sale of his property to the defendant, and that by reason thereof his mind, at the time of the sale, was so dominated by a consuming thirst for liquor that it did not act normally, and that he did not appreciate what he was doing. The significance the court gave to his finding in the light of the evidence presented by the record is shown by the relief awarding rescission of the deed and directing return to the defendant of the consideration he paid plaintiff. Relief in actions of this nature is based on the ground that "both minds must meet in such a transaction; and if one is so weak, unsound, and diseased that the party is incapable of understanding the nature and quality of the act to be performed, or its consequences, he is incompetent to assent to the terms and conditions of the instrument, whether that state of his mind was produced by mental or physical disease, and whether it resulted from ordinary sickness, or

from accident, or from debauchery, or from habitual and protracted intemperance." *Johnson v. Harmon*, 94 U. S. 371, 24 L. ed. 271.

This principle was relied upon in *Burnham v. Burnham*, 119 Wis. 509, 100 Am. St. Rep. 895, 97 N. W. 176. If the effect of the intoxication deprives the party of memory or judgment, or makes him incapable of comprehending or appreciating the nature and effect of the act, then equity, upon application of such party, grants relief. *Fagan v. Wiley*, 49 Or. 480, 90 Pac. 910; *Drefahl v. Security Sav. Bank*, 132 Iowa, 563, 107 N. W. 179; *J. I. Case Threshing Mach. Co. v. Meyers*, 78 Neb. 685, 9 L.R.A.(N.S.) 970, 111 N. W. 602; *Swan v. Talbot*, 152 Cal. 142, 17 L.R.A.(N.S.) 1066, 94 Pac. 238; *Moetzel v. Koch*, 122 Iowa, 196, 97 N. W. 1079.

When an unconscionable bargain has resulted from conditions due to intoxication and debauchery, equity considers the transaction an imposition on the incompetent party and awards relief. 14 Cyc. 1105. The findings of the trial court present a state of facts showing plaintiff was, at the time of this transaction, an incompetent as the result of gross intoxication and debauchery, and that the consideration defendant paid plaintiff for the property conveyed was grossly inadequate. Such a state of facts presents a case for the relief granted by the circuit court, if the evidence sustains the findings.

The defendant contends that the evidence fails to show that plaintiff was intoxicated at the time he deeded his property to defendant on July 31, 1916. The trial court is explicit in its finding that at the time the transfer was executed plaintiff was not appreciably intoxicated, but that by reason of his gross intoxication for a long period immediately before this day a consuming thirst for liquor so dominated his mind as to render it abnormal, and that he was unable to appreciate what he was doing. This in nature and effect

shows that plaintiff's intoxication produced such abnormal condition of mind as to render him incapable of comprehending and appreciating the effect of his act. We have examined the evidence and find that it sustains the trial court's findings on this issue.

The court also found that the consideration of \$200 defendant paid plaintiff for his one-ninth interest in his father's estate was grossly inadequate in the light of the fact that plaintiff's interest in the land at the time was worth \$1,388. It is manifest that such disparity between value and consideration paid shows a grossly inadequate consideration, and the facts support the inference that defendant, at the time of purchase, fully realized that he was obtaining such a bargain. He acquainted himself with the nature of the property and no doubt understood what was its actual value before the deal was consummated. But it is claimed the value found by the court is not sustained by the evidence. True, plaintiff's interest is subject to his mother's dower and homestead rights, the mother being sixty-six years of age at the time of the trial. On the record it cannot be said that the mortgage given by the mother is a lien on the interest acquired by the defendant. Allowing for the mother's interest, the value of the one-ninth interest in the land is far in excess of the consideration of \$200 paid by the defendant, and the transaction is an unconscionable bargain by which plaintiff was deprived of his property.

We are unable to say that the court's findings on this point are against the clear preponderance of the evidence. The record shows that plaintiff offered to repay the defendant the \$200 with interest before action was commenced. It is considered that the record sustains the judgment awarded by the trial court.

The judgment appealed from is affirmed.

Contract—
rescission—
effect of
intoxication.

—unconscionable
contract.

ANNOTATION.

Relief in equity from deed on ground of intoxication.

- I. Historical, 331.
- II. Partial intoxication, 331.
- III. Complete intoxication:
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- IV. Habitual intoxication:
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- V. Rule in New Jersey, 344.
- VI. Return of consideration, 346.
- VII. Defenses, 346.

I. Historical.

The rule formerly was that intoxication created no privilege or plea in avoidance of a contract; but it is now settled, according to the dictates of good sense and common justice, that a contract made by a person so destitute of reason as not to know the consequences of his contract, though his incompetence be produced by intoxication, is voidable and may be avoided by himself, though the intoxication was voluntary and not produced by circumvention of the other party. *Coody v. Coody* (1913) 39 Okla. 719, L.R.A.1915E, 465, 136 Pac. 754.

It was formerly held that, though a person was completely intoxicated, if the intoxication was voluntary, he could not set it up as a defense to a deed executed while in that state; this, because he could not stultify himself. The more modern rule considers the fact of intoxication, whether voluntary or not, as a defense to a deed. The question is now one of capacity, regardless of how the incapacity was produced. Blackstone says that the existence of the old rule was due to a misapprehension of the law by the earlier writers and judges.

The early common-law rule as to voluntary intoxication was expressed in *Johnson v. Medlicott*, 3 P. Wms. 131, note 1, 24 Eng. Reprint, 998, decided in 1734 by Sir Joseph Jekyll, who said that having been in drink is not any reason to relieve a man against any

deed or agreement gained from him when in that situation, for that were to encourage drunkenness; though it would be otherwise if, through the management or contrivance of him who gained the deed, etc., the party from whom the deed was gained was drawn into drink; and also by Lord Coke as follows: "He who is drunk is for the time non compos mentis, yet his drunkenness does not extenuate his offense, nor turn to his avail; but it is a great offense in itself, and therefore aggravates his offense, and doth not derogate from the act which he did at the time." The rule seems first to have been broadened by Lord Hardwicke in 1747 in *Cory v. Cory*, 1 Ves. Sr. 19, 27 Eng. Reprint, 864, wherein he suggested that intoxication might be a defense where an unfair advantage was taken by the other party. The old rule has gradually yielded to finer conceptions of equity. "Instead of saying to the wretched victim of intemperance that the avenues not only of law but of equity were closed to him, and that he was to be left as an outlaw in society, a prey to the cunning and cupidity of the spoiler, it extended to him the just protection of the court, not for the purpose of setting aside his contract on the ground of his infirmity or crime, but for the purpose of looking into his transactions to see whether any advantage had been taken of his unhappy situation. It would not favor ebriety, but at the same time would not permit it to be taken advantage of with impunity. The good sense of this principle has commended itself to every court, and especially to the courts of equity." *Crane v. Conklin* (1831) 1 N. J. Eq. 346, 22 Am. Dec. 519, quoted with approval in *Dahlmann v. Gaugente* (1909) 238 Ill. 224, 87 N. E. 287.

II. Partial intoxication.

A deed made by a grantor while partially intoxicated will be set aside in equity where an unfair advantage was

taken by the grantee or where intoxication was produced by the grantee.

United States.—*Johnson v. Harmon* (1877) 94 U. S. 371, 24 L. ed. 271, affirming (1873) 1 MacArth. (D. C.) 139; *Ralston v. Turpin* (1885) 25 Fed. 7, affirmed in (1889) 129 U. S. 663, 32 L. ed. 747, 9 Sup. Ct. Rep. 420. See also *Neblitt v. Macfarland* (1876) 92 U. S. 101, 23 L. ed. 471.

Alabama.—*Donelson v. Posey* (1848) 13 Ala. 752; *Oakley v. Shelley* (1900) 129 Ala. 467, 29 So. 385; *Boggs v. Halloway* (1908) 158 Ala. 286, 47 So. 1017; *Sellers v. Knight* (1913) 185 Ala. 96, 64 So. 329.

California.—*Pickett v. Sutter* (1855) 5 Cal. 412.

Idaho.—*Curtis v. Kirkpatrick* (1904) 9 Idaho, 629, 75 Pac. 760.

Illinois.—*Menkins v. Lightner* (1857) 18 Ill. 282; *Shackelton v. Seebree* (1877) 86 Ill. 616; *Dahlmann v. Gaugente* (1909) 238 Ill. 224, 87 N. E. 287.

Kentucky.—*Cruise v. Christopher* (1837) 5 Dana, 181; *Matthis v. O'Brien* (1910) 137 Ky. 651, 126 S. W. 156.

Michigan.—*Seeley v. Price* (1866) 14 Mich. 541; *Brown v. Brown* (1878) 39 Mich. 792; *Wright v. Fisher* (1887) 65 Mich. 275, 8 Am. St. Rep. 886, 32 N. W. 605; *Scanlon v. Connor* (1911) 168 Mich. 133, 133 N. W. 931. See also *Gibbons v. Dunn* (1881) 46 Mich. 146, 9 N. W. 140.

New York.—*Burns v. O'Rourke* (1866) 5 Robt. 649.

North Carolina.—*Calloway v. Witherspoon* (1847) 40 N. C. (5 Ired. Eq.) 128. See also *McCraw v. Davis* (1843) 37 N. C. (2 Ired. Eq.) 618.

North Dakota.—*Spoonheim v. Spoonheim* (1905) 14 N. D. 380, 104 N. W. 845; *Power v. King* (1909) 18 N. D. 600, 18 Am. St. Rep. 784, 120 N. W. 543, 21 Ann. Cas. 1108.

Tennessee.—*Belcher v. Belcher* (1836) 10 Yerg. 121.

Virginia.—*Harvey v. Pecks* (1810) 1 Munf. 518; *Jones v. McGruder* (1891) 87 Va. 360, 12 S. E. 792.

West Virginia.—*Miller v. Sterringer* (1909) 66 W. Va. 169, 25 L.R.A. (N.S.) 596, 66 S. E. 228. See also *Delaplain v. Grubb* (1898) 44 W. Va. 612, 67 Am. St. Rep. 738, 30 S. E. 201.

Wisconsin.—*Dunn v. Amos* (1861) 14 Wis. 115.

England.—*Cooke v. Clayworth* (1811) 18 Ves. Jr. 12, 11 Revised Rep. 137, 34 Eng. Reprint, 222.

As to the test of intoxication as partial or complete, see *infra*, III.

In *Cooke v. Clayworth* (1811) 18 Ves. Jr. 12, 34 Eng. Reprint, 222, the suit was to set aside an agreement, but in the course of the opinion, which has been much cited in cases involving deeds, the Master of the Rolls said: "I think a court of equity ought not to give its assistance to a person who has obtained an agreement or deed from another in a state of intoxication; and on the other hand ought not to assist a person to get rid of any agreement or deed merely upon the ground of his having been intoxicated at the time. . . . I say merely upon that ground, as, if there was, as Lord Hardwicke expresses it . . . any unfair advantage made of his situation, or as Sir Joseph Jekyll says . . . any contrivance or management to draw him into drink, he might be a proper object of relief in a court of equity."

Where the grantee under a deed is partially intoxicated, to such an extent that he is an easy prey for the grantor, and where he is given a deed to a life estate at the value of a fee-simple title, which he believes to be a deed in fee, then a court of equity will not rescind the deed on the ground of fraud. *Scanlon v. Connor* (1911) 168 Mich. 133, 133 N. W. 931. In that case the court said: "The decree is fully justified. In some particulars the evidence is conflicting, it is true, but material facts and circumstances glaringly appear and strongly support the decree. These facts and circumstances make the case distinctly one of fraud and imposition. It may not be a case of absolute want of mental capacity to make a deed. Though the intoxication may have been of less degree than total at the time the deed was executed, yet clearly the evidence establishes that it was the means by which the grantor was misled and deceived to his prejudice. Cases like this one do not so much involve questions of

incapacity as they involve questions of fraud and undue influence. Where it is shown that only partial intoxication has been made the means of practising a fraud in obtaining a deed or securing a fraudulent advantage, wholly against conscience, equity will interpose." See to the same effect *Calloway v. Witherspoon* (N. C.) *supra*.

In *Matthis v. O'Brien* (Ky.) *supra*, it appeared that a grantor of mature years and an habitual drunkard who would trade anything he had to get liquor made, while intoxicated, an agreement to trade his \$1,800 interest in an estate for \$500, and, while still in that condition, was taken by the grantee, his nephew, to another town, where on the following morning he executed the transfer. It was held that although the grantor was not entirely under the influence of liquor at the time he executed the transfer, and apparently understood the nature of the contract, yet his habits of trade and disposition were such, and were so known to the grantee, that the grantee took an unconscionable advantage of him, and that therefore the transfers were set aside. The court said: "To inspire and promote justice and fair dealing between man and man, there must be a place at which the courts in good conscience will interfere to protect the weak from the strong and lend aid to those whose conditions and necessities have been taken advantage of. Otherwise the unscrupulous and avaricious would prey and thrive at will upon the needs and misfortunes of the helpless, dependent, and simple-minded. . . . It is not necessary that a person of appellant's known habits and disposition should be wholly under the influence of liquor to enable him to avoid a contract made under circumstances such as we have described. It will be sufficient if his weakness and necessities are taken advantage of, as in this case, and a contract obtained that no man in his sound and sober senses would have entered into."

In *Burns v. O'Rourke* (1866) 5 Robt. (N. Y.) 649, it appeared that a deed was executed while the purchaser was

excited by liquor, but it did not appear that he was intoxicated sufficiently to be incapacitated. It also appeared that the drinking was not done at the solicitation of the grantor. The deed was held valid in a cross suit brought in an action to enforce a mortgage on the property.

In *Seeley v. Price* (1866) 14 Mich. 541, it appeared that a grantor was in very bad health and was accustomed to drinking in order to relieve his suffering. At the time the deed in question was executed he was not intoxicated, but had drunk enough to dull somewhat his already feeble perceptions. In negotiations leading up to the execution of the deed the grantee gave the grantor and his wife to understand that in exchange for the deed he would take care of both of them, and that such agreement would appear in the deed. The grantee told the grantor that he would procure someone who could draw a deed containing the condition of support. He returned next day and presented a deed which was signed by the grantor and his wife without its being read to them. The deed was an absolute one, and contained no agreement or condition. The grantee was the son of the grantor and a person standing in a relation of confidence to him. In a suit to set aside the deed, the court held that the deed was invalid, there having been an overreaching of the grantor and a breach of confidence on the part of the grantee.

In *Miller v. Sterringer* (1909) 66 W. Va. 169, 25 L.R.A. (N.S.) 596, 66 S. E. 228, it appeared that a grantor was to a certain extent an imbecile from constant use of intoxicants, and was at least partially intoxicated at the time the deed was made. Others had refused to deal with him on the day the deed was executed, because of his intoxicated condition. The grantee was a saloon keeper at whose place the grantor had been in the habit of purchasing most of his liquor, and knew that he was a slave to drink and would do anything to get it. The property deeded to the grantee for \$500, on time, without interest, had been purchased by the grantor a short time be-

fore for \$700. It was held that the deed was invalid, since the grantor was deceived and misled to his prejudice, and that under the circumstances it was not necessary that the grantor be totally incapacitated by liquor in order to set aside the deed.

In *Nielson v. Laffin* (1893) 50 N. Y. S. R. 277, 21 N. Y. Supp. 731, it appeared that the grantor was an old woman, very weak physically from disease, and also, at the time of the execution of the deed, partly under the influence of liquor and opiates, so that she could not speak, and conveyed her wishes by nods in answer to questions. The grantee had not been on good terms with the grantor. There had been no previous negotiations or conversation indicating the desire of the grantor to convey her property. The consideration paid for the deed was grossly inadequate. It also appeared that the grantor had not the benefit of advice, legal or otherwise, at the time she made the deed. The deed was rescinded on the ground of undue influence.

Where a grantor is slightly under the influence of liquor when he executes a deed, but not so as to be insensible of what he is doing, and the deed is executed in furtherance of a previous plan, and where it appears that there was no overpersuasion on the part of the grantee, the deed will be upheld in equity. *Belcher v. Belcher* (1836) 10 Yerg. (Tenn.) 121.

III. Complete intoxication.

a. General rule.

Where a deed is executed by a grantor while he is so intoxicated as to be unable to know what he is doing, or to know the consequences of his acts, the deed will be set aside in equity on the ground of intoxication alone.

Alabama.—*Lewis v. Davis* (1916) — Ala. —, 73 So. 419.

Illinois.—*Martin v. Harsh* (1907) 231 Ill. 384, 13 L.R.A. (N.S.) 1000, 83 N. E. 164; *Dahlmann v. Gaugente* (1909) 238 Ill. 224, 87 N. E. 287.

Indiana.—*Harbison v. Lemon* (1832) 3 Blackf. 51, 23 Am. Dec. 376.

Michigan.—*Wright v. Fisher* (1887)

65 Mich. 275, 8 Am. St. Rep. 886, 32 N. W. 605.

Nebraska.—*Johnson v. Phifer* (1877) 6 Neb. 401.

New York.—*Prentice v. Achorn* (1830) 2 Paige, 30.

North Dakota.—*Spoonheim v. Spoonheim* (1905) 14 N. D. 380, 104 N. W. 845; *Power v. King* (1909) 18 N. D. 600, 138 Am. St. Rep. 784, 120 N. W. 543, 21 Ann. Cas. 1108.

Ohio.—*French v. French* (1837) 8 Ohio, 215.

Oklahoma.—*Coody v. Coody* (1913) 39 Okla. 719, L.R.A.1915E, 465, 136 Pac. 754.

Pennsylvania.—*Clifton v. Davis* (1842) 1 Pars. Sel. Eq. Cas. 31.

Tennessee.—*Belcher v. Belcher* (1836) 10 Yerg. 121; *Birdsong v. Birdsong* (1859) 2 Head, 289.

Texas.—*Wells v. Houston* (1900) 23 Tex. Civ. App. 629, 57 S. W. 584.

Canada.—*Jones v. Calkin* (1876) 16 N. B. 356.

"It is not alone the influence of liquor which avoids a contract, but it must be shown to exist to such an extent as to seriously impair the reasoning faculties at the time of the contract." *Pickett v. Sutter* (1855) 5 Cal. 412.

To avoid a deed for intoxication, the grantee must have been incapable of exercising judgment, of understanding the proposed engagement, and of knowing what he was about when he entered into the contract. *Benton v. Sikyta* (1909) 84 Neb. 808, 24 L.R.A. (N.S.) 1057, 122 N. W. 61.

The grantor must be "so intoxicated as to be incapable of understanding the nature and effect of the transaction." *Spoonheim v. Spoonheim* (N. D.) supra.

See to the same effect, *Power v. King* (N. D.) supra.

In *Donelson v. Posey* (1848) 13 Ala. 752, it was found that the grantor was not in fact intoxicated, but the court said that intoxication as a defense to a deed must be such that the grantor is deprived of the use of his reason and understanding, in that he is utterly incapable of giving his serious and deliberate consent to the act.

In *Corrigan v. Corrigan* (1868) 15

Grant, Ch. (U. C.) 841, it was said that to invalidate a deed it must appear that the grantor was "in such a state of intoxication that he did not know or understand what he was doing, and that advantage was taken of him."

In **Harmon v. Johnston (1873) 1 MacArth. (D. C.) 189**, an injunction was asked to restrain the sale of certain property held in trust to secure the payment of notes, on the ground of the intoxication of the grantor at the time the deed was executed. An instruction to the effect that intoxication sufficient to render a party incapable of understanding the terms and conditions of the instrument was sufficient to set it aside, without a showing that there was an entire loss of reason or that the party was entirely demented by drink, was upheld. That decision was affirmed in (1877) **94 U. S. 371, 24 L. ed. 271**.

Where a deed is executed while the grantee is in such a state of intoxication that his mind is incapable of acting freely and voluntarily, and the grantee uses undue influence, the deed will be set aside. **French v. French (Ohio) supra**.

Where a grantor is temporarily insane from the use of intoxicants, a court of equity will set aside a deed obtained from him by the fraud or imposition of the grantee. **Johnson v. Phifer (1877) 6 Neb. 401**.

In **Harbison v. Lemon (1832) 3 Blackf. (Ind.) 51, 28 Am. Dec. 876**, it appeared that a grantor conveyed property to the grantee, and the grantee executed a bond for reconveyance on payment of purchase price. The grantee brought an action to foreclose on the property, and the grantor defended on the ground of intoxication at the time the deed was made. It was held that in order to set aside the deed on the ground of intoxication grantor must prove the drunkenness to have been so great as to produce an absolute deprivation of understanding for the time, similar to idiocy or insanity. The fact that he was unable to transact business safely is not enough.

Where a deed is executed by a person so much under the influence of

liquor that reason is absolutely destroyed by intoxication he may avoid the deed. **Clifton v. Davis (1842) 1 Pars. Sel. Eq. Cas. (Pa.) 31**.

See to the same effect **Cooke v. Clayworth (1811) 18 Ves. Jr. 12, 34 Eng. Reprint, 222, 11 Revised Rep. 137; Prentice v. Achorn (1830) 2 Paige (N. Y.) 30**.

In **Burns v. O'Rourke (1866) 5 Robt. (N. Y.) 649**, it is said that to avoid a deed, "intoxication must be so complete as to deprive the party of the use of his reason."

"Where the intoxication of a grantor is such that reasoning powers are destroyed, a deed executed at that time is void." **Birdsong v. Birdsong (1859) 2 Head (Tenn.) 289**.

In **Wells v. Houston (1900) 23 Tex. Civ. App. 629, 57 S. W. 584**, it was said that to avoid a deed on the ground of intoxication the grantor must have been so drunk that reason, memory, and judgment were dethroned and his mental faculties impaired to such an extent that he was non compos mentis for the time being, especially where there is no pretense that any party connected with the transaction aided in or procured the intoxication. It is not necessary in such a case that there be also a showing of an inadequate consideration. Where the intoxication falls short of this, a deed will not be set aside where the other party has not taken advantage of grantor's condition or produced it, though his judgment and reason were materially affected.

It must appear that "at the time of the act his understanding was clouded or his reason dethroned by actual intoxication." **Wright v. Fisher (1887) 65 Mich. 275, 8 Am. St. Rep. 886, 32 N. W. 605**.

See to the same effect **Somers v. Ferris (1914) 182 Mich. 392, 148 N. W. 782**.

In **Johnson v. Phifer (1877) 6 Neb. 401**, it was held that it is not sufficient that the grantor was under undue excitement from liquor, but that intoxication must rise to that degree which may be called excessive drunkenness, where a party is utterly deprived of his reason and understanding, in or-

der that a deed may be set aside on that ground alone.

In *Lewis v. Davis* (1916) — Ala. —, 73 So. 419, the court refused to set aside a deed on the ground that it was procured while the grantor was intoxicated, where it was not shown that the grantor was so intoxicated as to be incapacitated from exercising his judgment and understanding the nature and consequences of his act.

To render a deed invalid because of intoxication, the intoxication must be such as to prevent the grantor knowing what he is doing. The intoxication must be such as to drown memory, reason, and judgment. *Dahlmann v. Gaugente* (1909) 238 Ill. 224, 87 N. E. 287.

See to the same effect *Martin v. Harsh* (1907) 231 Ill. 384, 13 L.R.A. (N.S.) 1000, 83 N. E. 164.

b. Application of rule.

In *Prentice v. Achorn* (1830) 2 Paige (N. Y.) 30, it appeared that a deed was made in trust for the supposed wife of the grantor, the woman being already married and not divorced. The grantor was in a state of voluntary intoxication which deprived him of reason and rendered him wholly incompetent. The deed was set aside in equity.

In *Coody v. Coody* (1913) 39 Okla. 719, L.R.A.1915E, 465, 136 Pac. 754, it appeared that an Indian grantor made a deed while so much under the influence of liquor as to render him wholly unable to transact business and to understand the nature of the deed which he signed. It was held that the deed might be avoided on that ground although the intoxication was voluntary and there was no fraud, taking advantage, or procurement shown on the part of the grantee. The court said that intoxication which is absolute and complete, so that the party is for the time entirely deprived of the use of his reason and is wholly unable to comprehend the nature of the transaction and of his own acts, is necessary in order to set aside a deed on that ground.

In *Spoonheim v. Spoonheim* (1905) 14 N. D. 380, 104 N. W. 845, it ap-

peared that the grantor was a man of good business ability, but was in the habit of going on periodic drunks. He had been drinking on the night previous to the execution of the deed, and was intoxicated late in the day of its execution. Shortly before the time of the transaction it was testified that he exercised judgment and that he understood the business, which he transacted with a witness, though not as well as he would, had he not been drinking. His conduct during negotiations did not manifest the effects of intoxication. The court held that under these circumstances the grantor was not utterly deprived of reason and understanding and was not incapable of knowing the effect of what he was doing, and therefore that the deed could not be set aside on that ground.

In *Power v. King* (1909) 18 N. D. 600, 138 Am. St. Rep. 784, 120 N. W. 543, 21 Ann. Cas. 1108, it appeared that the grantor had been drunk on Saturday and up to midnight on Sunday, but had taken nothing to drink on Monday prior to the execution of the deed at about 10 o'clock. He began drinking again on Monday afternoon, and was intoxicated at that time and also on the following day. There was no claim of fraud or imposition, and the price paid for the land was adequate. It was held that the deed was valid.

In *Hotchkiss v. Fortson* (1834) 7 Yerg. (Tenn.) 67, a cross bill brought in an action to enforce a bond given for the purchase price of land, it appeared that the grantee was grossly intoxicated and that the grantor took advantage of this situation to sell the land at nearly twice its actual worth, and also that the transaction was conducted so swiftly that the grantee had no chance for sober reflection. It was held that the transaction should be set aside.

In *Wells v. Houston* (1900) 23 Tex. Civ. App. 629, 57 S. W. 584, grantor brought suit to cancel a deed on the ground of intoxication, coupled with undue influence and fraud through confidential relationship, and it was held that the facts that grantor's father and the father of the grantee

were friends and that other members of the two families were friends did not raise the presumption of fraud.

In *Hardy v. Dyas* (1903) 203 Ill. 211, 67 N. E. 852, it was held that where a grantor is addicted to liquor, is subject to delirium tremens, and is intoxicated at the time the deed is made, and where the purchase price is over a thousand dollars less than the value of the property, there is such an inadequate consideration, coupled with the condition of the grantor and the fact that a relationship of trust existed between the grantor and grantee, as to indicate that an unfair advantage has been taken of the grantor, and the deed will be set aside in equity. The court said: "Although inadequacy of consideration, in and of itself, is not a distinct ground for equitable relief, and while, when standing alone, it is ordinarily entitled to but little weight as evidence of fraud, yet when it is coupled with other circumstances showing overreaching or oppression, or it appears that undue influence was exerted over the grantor, or that through age, ignorance, sickness, or mental incapacity the grantor did not fully comprehend his acts, . . . equitable relief will be granted."

In *Dunn v. Amos* (1861) 14 Wis. 115, it appeared that an owner of land gave a power of attorney to an attorney to sell the land, with oral instructions to sell for cash only. The attorney was an old man, somewhat infirm, and was in the habit of getting intoxicated to such an extent that he could not transact business. The grantee took the attorney to another city, procured his intoxication, and while he was in that state secured a deed from him for the land. The consideration for the conveyance was a contract and mortgage, both worthless. The attorney had before definitely refused to sell to grantee for anything but cash. The grantee later promised to pay the owner the cash value of the land without mentioning the contract and mortgage he had given his agent. During the negotiations for the purchase of the land the grantee endeavored to deceive the attorney in reference to the nature of the con-

sideration he was receiving. The grantee, in an effort to keep the owner of the land from recovering it, transferred it immediately to another party. Under these facts the court held that the deed should be canceled on the ground of fraud and imposition, the fraud being found in the fact that he had induced the attorney to sell otherwise than for cash.

In a case where a grantor, who was an habitual drinker, was induced to drink by the grantee, a bartender, who was a comparative stranger, and where, while in an intoxicated condition, a deed was procured from him, it was held that the deed would be set aside in equity, especially where it was shown that the grantee had taken fraudulent advantage of the grantor, having induced him to drink so that he might obtain the deed in question. *Dahlmann v. Gaugente* (1909) 238 Ill. 224, 87 N. E. 287.

In *Scanlon v. Connor* (1911) 168 Mich. 133, 133 N. W. 931, it appeared that a grantee procured the intoxication of the grantor, and while he was in that state, with the help of a friend whom he paid \$70, induced him to deed real property worth \$1,200 and personalty worth \$1,000, for \$700. It was held that the deed was fraudulently obtained.

Where it appeared that the grantee under a deed visited the grantors, taking with him all the necessary papers ready for execution, before any negotiations had been made for the sale, and where he induced the grantors, an extremely old couple, weak and imbecile and accustomed to intoxication, to drink to excess liquor which he procured and offered them, and the consideration was £400 on a property worth £2,500 to £3,000, the deed was set aside in a court of equity. *Harvey v. Pecks* (1810) 1 Munf. (Va.) 518.

IV. *Habitual intoxication.*

a. *General rule.*

An habitual drunkard is not, as a matter of law, incapable of making a valid deed, and a deed made during a sober interval is binding, but where his mind is so impaired by intoxication that he cannot act with an under-

standing of the effect of a deed, although made in a sober interval, his deed is invalid where there is a showing that he was overreached.

United States. — *Lewis v. Baird* (1842) 3 McLean, 56, Fed. Cas. No. 8,316; *Ralston v. Turpin* (1885) 25 Fed. 7, affirmed in (1889) 129 U. S. 663, 32 L. ed. 747, 9 Sup. Ct. Rep. 420; *Conley v. Nailor* (1886) 118 U. S. 127, 30 L. ed. 112, 6 Sup. Ct. Rep. 1001.

Arkansas. — *West v. Whittle* (1907) 84 Ark. 490, 106 S. W. 955.

Idaho. — *Curtis v. Kirkpatrick* (1904) 9 Idaho, 629, 75 Pac. 760.

Illinois. — *Menkins v. Lightner* (1857) 18 Ill. 282; *Wiley v. Ewalt* (1872) 66 Ill. 26; *Martin v. Harsh* (1907) 231 Ill. 384, 13 L.R.A. (N.S.) 1000, 83 N. E. 164.

Indiana. — *Johnson v. Rockwell* (1859) 12 Ind. 76; *Ruby v. Ewing* (1912) 49 Ind. App. 520, 97 N. E. 798.

Iowa. — *Jones v. Hughes* (1907) — Iowa, —, 110 N. W. 900.

Michigan. — *Williams v. Williams* (1903) 133 Mich. 21, 94 N. W. 570; *Behrns v. Qualman* (1907) 147 Mich. 635, 111 N. W. 198; *Somers v. Ferris* (1914) 182 Mich. 392, 148 N. W. 782.

Missouri. — *Masterson v. Sheahan* (1916) — Mo. —, 186 S. W. 524.

New Jersey. — *Crane v. Conklin* (1831) 1 N. J. Eq. 346, 22 Am. Dec. 519; *Dixon v. Dixon* (1871) 22 N. J. Eq. 91; *Coombe v. Carthew* (1899) 59 N. J. Eq. 638, 43 Atl. 1057.

New York. — *Van Wyck v. Brasher* (1880) 81 N. Y. 260.

Pennsylvania. — *Clifton v. Davis* (1842) 1 Pars. Sel. Eq. Cas. 31; *Wilson v. Bigger* (1844) 7 Watts & S. 111.

Virginia. — *Jones v. McGruder* (1891) 87 Va. 360, 12 S. E. 792.

Canada. — *Clarkson v. Kitson* (1854) 4 Grant, Ch. 244; *McGregor v. Boulton* (1866) 12 Grant, Ch. 288; *Corrigan v. Corrigan* (1868) 15 Grant, Ch. 341; *Hume v. Cooke* (1869) 16 Grant, Ch. 84. See also *Conrad v. Halifax Lumber Co.* (1918) 52 N. S. 250.

Where the provisions of a deed are such that the interests of the grantor's family will be better protected by sustaining it, a different rule has been applied. *Birdsong v. Birdsong* (1859) 2 Head (Tenn.) 289, wherein it was

held that a court of equity will not set aside a deed of trust made by the grantor, a drunkard and a spendthrift, for the protection of his family, although procured by the influence of another, although under the same circumstances a deed to a stranger would be set aside.

b. Application of rule.

1. Deed made in sober interval.

In *Ruby v. Ewing* (1912) 49 Ind. App. 520, 97 N. E. 798, it appeared that a grantor was an habitual drunkard, long accustomed to getting drunk, but not affected in his mind. When he was sober he was a man of average mental ability. The grantor had received no liquor for two days preceding the signing of the deed, which was made at his suggestion, and was sober at the time of execution. In an action to set aside the deed on the ground of intoxication, the deed was sustained.

In *Lewis v. Baird* (1842) 3 McLean, 56, Fed. Cas. No. 8,316, a suit to set aside the deed by the heirs of the grantor, it appeared that the grantor was a heavy drinker, but it was not proved that he was intoxicated at the time the deed was executed. The court sustained the deed.

In *Wiley v. Ewalt* (1872) 66 Ill. 26, a deed of trust was sustained in a suit in equity to set it aside, it being shown that, though the mind of the grantor, an aged man, was somewhat impaired by the use of liquor, he was at the time of the execution of the deed possessed of sound judgment in business, that he had reserved to himself a life estate, that he had previously given other children property, while those claiming under the deed in question had received but little, and, furthermore, that the execution of a deed in the nature of the one in suit had been contemplated by him for some time.

The fact that a grantor is addicted to the excessive use of intoxicating liquor, standing by itself, in a case where at the time of the execution of the instrument the grantor understood its nature and object, is not sufficient to set aside a deed in equity. *Curtis v.*

Kirkpatrick (1904) 9 Idaho, 629, 75 Pac. 760.

Although a grantor may be addicted to the use of intoxicating liquor to such an extent as to become a drunkard, if he has intervals in which he is able to understand the nature and character of a deed, and if he, during such an interval, executes such an instrument, the deed will not be set aside in equity because of incapacity. *Martin v. Harsh* (1907) 281 Ill. 384, 18 L.R.A. (N.S.) 1000, 83 N. E. 164.

In *Conley v. Nailor* (1886) 118 U. S. 127, 30 L. ed. 112, 6 Sup. Ct. Rep. 1001, it appeared that a grantor, living apart from his wife, made a deed of property to the mother of his illegitimate child. The grantor was an habitual drunkard, but was often sober and was, at such times, competent to transact business. It was not shown either that the grantor was drunk when the deed was made or that undue influence was exercised over him. The deed was held valid.

In *Corrigan v. Corrigan* (1868) 15 Grant, Ch. (U. C.) 341, it appeared that a grantor conveyed property to his wife. In a suit to set aside the deed it appeared that he was an habitual drunkard, but at times he was sober, when he could transact business and was accustomed to drawing deeds. In the morning of the day the deed in question was made he was intoxicated, but later in the day, having slept and become comparatively sober, he took his wife's brother with him to the house of his wife to make a reconciliation. After two hours' conversation he signed the deed, both his wife and brother-in-law cautioning him as to its effect. The court holding that he was competent and that no undue influence had been exercised, the bill was dismissed.

In *Ralston v. Turpin* (1885) 25 Fed. 7, affirmed in (1889) 129 U. S. 663, 32 L. ed. 747, 9 Sup. Ct. Rep. 420, it appeared that a grantor conveyed property to a grantee in trust for the latter's children. It appeared that the grantor was a drunkard, but that he had periods of sobriety in which he was able to attend to business. Under such circumstances it was held that

the deed could not be set aside unless it was shown that the grantor was intoxicated at the time of its execution. The additional facts that the grantor was a trusted agent of the grantee, and that he was greatly under his influence, will have no effect where it is not shown that undue influence was exercised.

In *Williams v. Williams* (1908) 138 Mich. 21, 94 N. W. 370, it appeared that a grantor was a constant drinker, but, at such times as he was sober, capable of attending to business. He had conveyed his property to four sons, retaining a life estate, in order to keep himself from squandering it. One of the four sons died, and the one-quarter interest which he had received in the business returned to his father as his heir. The father lived with one of his sons and his wife, and to the latter deeded the one-quarter interest inherited from his son, reserving a life interest in himself. That is the deed in question in the instant case. He had lived with the daughter-in-law, who had taken care of him, for some time prior to the execution of the deed. He talked about executing the conveyance for some time before it was actually done. The attorney testified that the grantor was sober and competent to execute the deed at the time it was done. In a suit by the heirs of the grantor to set aside the deed, it was held that the deed was valid.

In *Johnson v. Rockwell* (1859) 12 Ind. 76, a defense of intoxication to a deed from a brother to a sister was raised in a suit for partition. It appeared that the grantor was in the habit of getting intoxicated, but there was no evidence that he was intoxicated at the time of the execution of the deed. It was held that the deed could not be avoided on the ground of intoxication.

In *Somers v. Ferris* (1914) 182 Mich. 392, 148 N. W. 782, it appeared that a grantor was an habitually heavy drinker, but, at such times as he was sober, was capable of executing such an instrument, "was mentally competent, and shrewd above the average." The grantor claimed that he was intoxicated at the time of the execution

of the deed, but of things which he claimed at one time in his testimony not to remember, at other times he had a keen recollection. It appeared that on the day of the execution of the deed he had refused to drink, saying "that he had business to attend to and was going to keep sober." In a suit to set aside the deed it was held that the grantor was capable of making a deed, and it was held valid.

Where the grantor of a deed was a constant drinker, at times to such an extent as to be unable to attend to business, and was drunk on the day before the execution of the deed in question, but on the day of execution was sober and capable of attending to business, and there was an adequate consideration, the deed was held to be valid. *Behrns v. Qualman* (1907) 147 Mich. 635, 111 N. W. 198.

In *Masterson v. Sheahon* (1916) — Mo. —, 186 S. W. 524, it appeared that a woman who on occasions drank to excess, but whose mind was not affected thereby, made a deed to a servant who had been with her for eleven years. It appeared that the grantor was in complete possession of her faculties, and in no wise under the influence of liquor when the deed was executed. The consideration for the deed was the care of the grantor by the grantee for the remainder of the former's life. In a suit to set aside the deed on the ground of incapacity and undue influence the deed was upheld.

In *Bixler v. Gilleland* (1846) 4 Pa. 156, an action at law, it was held that an instruction to the effect that an inquisition finding a person to be an habitual drunkard affects his capacity to dispose of after-acquired property as much as of property then in possession is a proper expression of the law, but that where proceedings of the inquisition had been commenced thirteen years before, but not completed until three days before the sale in question, the plaintiff having bought and sold property in the meantime without any interference from the commission, the injunction was not a good ground for setting aside the sale. The plaintiff had bought and sold the

property in question for two years after the beginning of the inquisition. The purchaser had paid the entire price, and later, being in debt, his property was sold at a sheriff's sale. The defendant bought the property at such sale, and was encouraged to do so by the plaintiff.

See to the same effect *Tozer v. Saurlee* (1855) 3 Grant, Cas. (Pa.) 162.

In *Martin v. Harsh* (1907) 231 Ill. 384, 13 L.R.A.(N.S.) 1000, 83 N. E. 164, it appeared that a grantor up to 1903 had not used intoxicating liquors and had manifested fair and ordinary ability in his business dealings. Between 1903 and 1907 he had become a drunkard, but no case was shown where in a business transaction he had manifested mental inability. There was some evidence that during this time his memory had failed him at times and that he had manifested certain peculiarities. During this period he executed the deed in question in the instant case, the consideration given for the sale being a fair one. He was able to understand the nature and character of the deed. In an action to set aside the deed on the ground of mental incapacity and fraud, it was held that the deed would not be set aside.

2. *Effect of impairment of mind.*

In *Clarkson v. Kitson* (1854) 4 Grant, Ch. (U. C.) 244, it appeared that a grantor, an old and feeble man, who was an habitual drunkard with his intellect weakened through intoxication, conveyed property to a grantee, a tavern keeper, for an inadequate consideration. Shortly before, he had refused to execute the deed in question, but since that time had gone to live in the tavern of the grantee. He had been drinking heavily for some months previous to the time of the execution of the deed. It also appeared that the grantee had supplied him with liquor at different times, though there was no proof that he had induced him to become intoxicated at the time the deed was executed. In a suit by the heirs for the purpose, the deed was set aside.

In *Hume v. Cooke* (1869) 16 Grant, Ch. (U. C.) 84, the facts and circum-

stances were much the same as in *Clarkson v. Kitson*, supra. The grantor, an old and enfeebled man and a drunkard, conveyed a tavern which he owned and the grantee ran for him, to the grantee, in whom he had great confidence, in exchange for support during the remainder of his life. Due to his circumstances, the grantor had no way of enforcing the consideration of support. The deed was set aside on a bill by one of the heirs of the grantor, brought for the purpose. The court said: "The case is very strong against such a transaction where the grantee is a tavern keeper who was dealing with a drinking lodger. I understand the rule of equity to be that a conveyance by an intemperate man of all his property, to the tavern keeper with whom he lives and at whose house he has been supplied with the drink which he prefers to all earthly objects of desire and to all hope of future happiness, is subject to the same rules as a conveyance to a person occupying towards the grantor a relation of confidence or influence. The danger, in consequence of which those rules have been laid down, exists in a much larger degree in the former case than in the latter, and needs to be guarded against with greater caution."

In *McGregor v. Boulton* (1866) 12 Grant, Ch. (U. C.) 288, another similar case, a grantor, an old man and a drunkard, conveyed lots which he had purchased from the grantee and on which the latter had a mortgage, back to the grantee in consideration of the cancelation of the mortgage. Payments on the mortgage were not due in total for two years. He was boarding at the tavern of the grantee at the time the deed was executed. It appeared that he had been drinking heavily throughout the month in which the deed was executed, and that he had never had the advantage of any counsel from anyone in reference to making the deed. The grantor brought suit to have the deed set aside, and the deed was declared invalid. The court said: "It is manifest that a man of intemperate habits, a slave to strong drink, when dealing with the tavern

keeper at whose house he lives and from whom he obtains the liquor which he craves, and with which he daily stupefies or maddens himself, is as liable to be overreached, and needs for himself and his family or heirs the protection of this court, at least as much as a client who deals with his solicitor, or as a patient who has transactions with his medical attendant. No man is more helpless than a drunkard is in the hands of those who obtain his confidence and to whom he looks day by day for the gratification of the morbid craving which has possessed him; and the modern doctrine of both law and equity is against giving up even a poor drunkard or a drunkard's property to be the prey of the rapacious and unprincipled. It has often been laid down, in cases in which a position of influence was held by a grantee, that proof of the grantor's having understood the transaction is insufficient; that in such a case the grantee must show how the impeached transaction was brought about, and that the grantor had an adviser therein; . . . and, to maintain the transaction, the court must be satisfied by this proof, in connection with such other evidence as may be necessary, that the transaction was the free and deliberate act of the grantor, and was not brought about through the influence of the grantee. These rules have been adopted . . . that they may be a check on those who, in the absence of such rules, would not refrain from dishonesty or fraud."

In *West v. Whittle* (1907) 84 Ark. 490, 106 S. W. 955, wherein it appeared that a man who was an habitual drunkard, incapable of managing his own affairs, conveyed his property to a grantee who occupied a position of trust and confidence with him, for an inadequate consideration, it was held that the deed should be set aside.

In *Parker v. Parker* (1919) — Okla. —, 182 Pac. 697, affirming a decree setting aside a deed from a son to his father, the decision rested upon the finding of the trial court, upon sufficient evidence, that the son was an habitual drunkard and mentally weak,

that a confidential and fiduciary relation existed between him and his father, and that he was under the influence of the father, and upon the latter's failure to satisfy the burden cast upon him by the premises and the beneficial character of the transaction, of showing that confidential relation had been suspended and the transaction fairly conducted.

In *Jones v. McGruder* (1891) 87 Va. 360, 12 S. E. 792, it appeared that an habitual drunkard, with his mind and will enfeebled by constant use of intoxicants, conveyed property by deed to certain grantees, one of whom was his cousin, a man whom he considered his closest friend, trusted agent, and confidant, who was a prime mover in the execution of the deed and also a man of extraordinary ability and coolness, for an apparently valid consideration, but in fact one that was never paid. It appeared that in other transactions the grantor had been made intoxicated by his cousin to get him to sell him property. The deed was set aside on the ground of fraud.

In *Menkins v. Lightner* (1857) 18 Ill. 282, it appeared that a grantor had been addicted to the use of liquor to such an extent that intoxication had been habitual with him for years, and that he was a fool and crazy when intoxicated, and was subject to delirium tremens and had been for a period of four years before the deed in question was executed, and that there was an inadequate consideration. It was held that the deed would be set aside, though it was shown that he was sober at the time he executed it. The court said: "After the defendant had established so long a continuous career of drunkenness, and craziness from it, as has been proven here, it is not enough or satisfactory to show a mere sober interval of a few hours, or even a few days. I am not prepared to believe that the mind can so resume a healthy vigor after so much and so long derangement from such besotted habits. . . . When the mind is thus broken down by a long course of dissipation, the feverish moments of a half-sober or even sober interval cannot be

called . . . a lucid interval, for the purpose of establishing the acts of the party. To lay down such a rule would be but to invite the covetous and the crafty to seize the victim in an interval of his greatest physical agony and prostration as the one in which the mind alone is clear, free, and judicious. All observation contradicts the inference of so instantaneous a mental recovery."

In *Clifton v. Davis* (1842) 1 Pars. Sel. Eq. Cas. (Pa.) 81, it appeared that a grantor was deprived of his intellectual faculties, and all his power of judgment, memory, and reflection impaired by excessive drinking. Even when he was not intoxicated his mind was a confused and disorganized wreck. The grantor executed a deed of trust to the grantee of all his property, the consideration being the payment of his debts, and a certain percentage of the income from the property for life, the remainder of the income to go to certain stepdaughters. There was no consideration for the deed. The wife of the grantor was left unprovided for, either during his life or on the disposition of the property at his death. The fact that the grantee had not influenced him in any way was **not** questioned. The grantee had never taken possession of the property or conveyed it to anyone else. On the application of the grantor in a suit in equity the deed was set aside.

In *Wilson v. Bigger* (1844) 7 Watts & S. (Pa.) 111, it appeared that the grantor in a deed was so affected by being drunk that after such intoxication he was often very weak and sick. During one of these spells, when he was so weak and debilitated that he could not raise himself in bed, he was raised in bed and his hand guided and held in making a mark to indicate his signature to a deed. It was held that the deed was invalid, the court stating that the grantor was no more competent than he would have been had he at the time been so drunk as to be unable to stand.

Where a grantor, who was a confirmed drunkard and drank to such an extent as to render him an imbecile, made a deed of gift to a cousin, dis-

inheriting his half sisters, and where there was no adequate reason shown for such an act, it was held that fraud and imposition would be inferred from the circumstances. *Samuel v. Marshall* (1832) 3 Leigh (Va.) 567.

In *Leighton v. Orr* (1876) 44 Iowa, 679, it appeared that a grantor was addicted to drink, and his mind affected thereby. The grantee, a spiritualistic medium who lived in illicit cohabitation with him, claimed that she was in touch with grantor's dead wife, for whose memory he professed the greatest love, and thus gained a great influence over him and his business affairs. It was held that a presumption of fraud was raised on which a deed of property worth about \$40,000, for a consideration of \$1 and love and affection, would be set aside.

In *Rutherford v. Ruff* (1812) 4 S. C. Eq. (4 Desauss.) 350, it appeared that a grantor was of weak mind and had been recommended to the care of his brother, the grantee, by their father, on his deathbed. The grantee did take charge of his brother, the grantor, and gave him liquor in excess of an agreement with other members of the family. The grantor drank heavily, was subject to fits, and was completely under the influence of the grantee, a shrewd business man. On the day of the grantor's marriage he secured from him a conveyance of all his property on the advice that he, the grantor, would be at the mercy of his wife's people. There was an inadequate consideration of love and affection in the deed. The court held that all these circumstances raised a presumption of fraud on the part of the grantee, and that the deed should be held to create a trust in favor of the grantor.

In *Birdsong v. Birdsong* (1859) 2 Head (Tenn.) 289, it appeared that a grantor was a man of weak mind, a drunkard, and a spendthrift. He conveyed all his interest in his father's estate, worth about \$12,500, to his brother for \$1,000, with the idea that his family would thus be protected from his, the grantor's, habits. The grantee told him that it was only a temporary arrangement, and that he would reconvey the property to the

grantor when the father's estate was adjusted. The grantor was a man of indifferent business ability and easily influenced by his brother, the grantee. In a suit to set aside the deed, the deed was held invalid and a trust established for the benefit of the grantor's family. The court said: "It is true that mere inadequacy of price, independent of other circumstances, where the parties stand on equal ground and deal with each other without any imposition or oppression, will not set aside a sale. Inadequacy of itself is only a badge of fraud; and it is clear that, if advantage be taken on either side of the ignorance or distress of the other, it affords a new and distinct ground, and a very great inadequacy may form a presumption of oppression. In equity, a conveyance will be set aside where it is obtained by undue influence over a person greatly under the power of another, if there is inadequacy of price, or clear ground of inference that a confidence reposed has been abused, or advantage has been taken of incompetency, weakness of understanding, or clouded or enfeebled faculties."

In *More v. More* (1901) 133 Cal. 489, 65 Pac. 1044, 66 Pac. 76, it appeared that the grantor was addicted to the use of intoxicating drinks to such an extent as to interfere seriously with his mental capacity to transact business, and at times to deprive him of reason and judgment, rendering him unable to properly manage his business and to take care of his property, and that he was otherwise a man of weak and pliable character, shrewd in procuring funds for present needs, but reckless as to future results, and his condition, habits, character, and susceptibility were well known to defendant, his elder brother, who for a long period had exercised great influence over him, and where it appeared that the brother, the grantee, conspired with another to transfer property by deed. It was held that the deeds so obtained were invalid, that a constructive trust arose on their execution, and that the property should be reconveyed to the grantor.

In *Lavette v. Sage* (1861) 29 Conn.

577, it appeared that the grantor was a grossly intemperate man of feeble intellect and dull of apprehension, and comprehended only the most simple of business matters. He knew nothing of the value of the land at the time the grantee sought him out to secure the deed. The grantee concealed certain facts that it was his duty to tell one of the grantor's character, and, furthermore, made direct statements which were false, in order to induce the grantor to execute the deed. The consideration was less than half the value of the property, and part of that was secured by notes of the grantee, who was a bankrupt. In a suit to set aside the deed it was held that the grantee had taken unfair advantage of the grantor's condition, which advantage amounted to fraud, and the deed was set aside.

In *Cruise v. Christopher* (1837) 5 Dana (Ky.) 181, it appeared that a grantor was in a state bordering on incapacity to contract, due to imbecility produced by constant drinking. The object of the deed was to cancel certain debts owed to the grantee. The purchase price under the deed was less than one third of the value of the property. The grantee had at different times supplied the grantor with liquor and had acquired his entire confidence. The deed, though given for the purpose of extinguishing the debt owed to grantee, contained no expression or condition to that effect. A second instrument not a deed was executed, containing this provision. The deed was set aside on the ground that the control and advantage of the grantee over the grantor was so great as to amount to fraud.

In *Miller v. Howard* (1919) — Okla. —, 184 Pac. 773, affirming a judgment for defendant in an action to set aside a deed executed by an Indian, upon the ground of mental weakness induced by excessive use of liquor, the preponderance of the evidence was that the grantor was not intoxicated at the time he executed the contract and deed, and that, while his mind had become slightly impaired by the excessive use of liquor, there was abundant evidence in the record supporting the finding of the trial court

that his mind had not become so impaired that he did not fully realize what he was doing and the consequences of his act. The court said that the showing in behalf of the plaintiffs did not measure up to the rule announced by Black in his work on Rescission and Cancellation, § 278, "that the deed or contract will be voidable if the person, at the time of its execution, was so far under the influence of intoxicants as to be unable to understand the nature and consequences of his act and unable to bring to bear upon the business in hand any degree of intelligent choice and purpose."

V. Rule in New Jersey.

In New Jersey it seems that intoxication, standing by itself, will not invalidate a deed. There is no case where the point has been the deciding one, and, as a matter of fact, in most of the cases the deed in question was set aside on other grounds. For instance, in the case of *O'Conner v. Rempt* (1878) 29 N. J. Eq. 156, it appeared that the grantor, a man of sixty years, executed a deed to the grantees of all his property in exchange for care during the remainder of his life. He had known the grantees, husband and wife, less than a week. He was drunk and delirious at the time he entered the house of the grantees, and remained so up to the night before the deed was finally executed. During this stay in the house of the grantees, a period of ten days, all knowledge of his whereabouts was kept from his relatives. Four attempts were made to get him to execute the deed in question, the last being successful. On the first two attempts he was in such a drunken stupor as to be unable to do the act. When the deed was offered for his signature the third time, he refused to sign it because it conveyed too much property. The deed finally offered to him was identical in terms with the previous one, but he was led to believe that it had been changed in accordance with his request. It was evident that the grantees had furnished him with liquor. When he left the house he had delirium tremens and was so weak he could not walk un-

assisted. The court held that the deed should be set aside on the ground that an unfair advantage had been taken of his situation. The court did not specifically charge the grantees with keeping him intoxicated to get the deed, but indicated that no clear proof to the contrary had been shown. The court said, in reference to intoxication as a defense, when standing alone: "A court of equity will hear a party who seeks relief against his own act on the ground of intoxication. To avoid a contract on the ground of intoxication it must be shown either that the intoxication was produced by the act or connivance of the person against whom the relief is sought, or that an undue advantage was taken of his situation."

In *Hutchinson v. Tindall* (1835) 3 N. J. Eq. 357, it appeared that a grantor executed a deed while intoxicated for a consideration that was never to be paid. The intoxication was not produced by inducements of the grantee, and there was no question of fraud. The grantee claimed that it was executed for the purpose of creating a trust. The court held that the trust could not be established by parol, and the deed was invalid for want of consideration, but that if such a deed was established in such a case, it could not be set aside on the ground of an undue advantage taken of the grantor. The court held the rule to be established that intoxication by itself was no defense to a deed.

In *Warnock v. Campbell* (1875) 25 N. J. Eq. 485, the facts were as follows: The grantor conveyed property worth five or six hundred dollars for \$5 while intoxicated. The grantee had knowledge that the grantor was not in a sound mental state. The deed was set aside on the ground that an undue advantage was taken of the grantor. The court said: "To avoid a contract on the ground of intoxication, it must be shown either that the intoxication was produced by the act or connivance of the person against whom relief is sought, or that an undue advantage was taken of the party's situation. If a person while in a state of intoxication, though not induced by the act or procurement of the grantee, execute an absolute con-

veyance of his property without consideration, equity will relieve against the conveyance."

In *Adams v. Ryerson* (1847) 6 N. J. Eq. 328, it appeared that a grantor was in a state of mental and physical imbecility due to long-continued and excessive drinking. He deposited the deed in question with the grantee, a liquor seller from whom he was accustomed to buy liquor, who kept it without recording it for eight years. There was no consideration paid for the deed. The court held that a deed procured under such circumstances was void.

In *Mead v. Coombs* (1875) 26 N. J. Eq. 173, it appeared that the grantor was an old and infirm man of eighty-one years, whose health had been greatly impaired by a long and excessive use of intoxicants, to such an extent as to make him yield readily to threats. The grantee secured the execution of the deed by continued threats that he would enforce claims that he had against the property, and the consideration of the deed was about one third the value of the property. The deed was set aside in equity.

In *Staats v. Freeman* (1847) 6 N. J. Eq. 490, the suit was to dissolve an injunction restraining waste. The grantor of property, the complainant in the bill, alleged that he conveyed the land to the grantee, his son-in-law, while in an intoxicated condition, and also while under the influence of statements made by grantee against grantor's wife. The deed was first left in the hands of the scrivener, from whom it was secured by grantee by means of his undue influence over the grantor while he was intoxicated. The allegations of the grantor were denied by the grantee. The court sustained the injunction without passing on the facts in dispute.

In *Crane v. Conklin* (1831) 1 N. J. Eq. 346, 22 Am. Dec. 519, the suit was instituted to set aside a deed on the ground that the grantor was intoxicated, or was so affected by previous intoxication as to be incapable of executing the deed in question. There was an inadequate consideration for the deed. The grantor was a very heavy drinker, and when not drunk

was so debilitated as to be unable to transact business. The grantee filed a demurrer denying the jurisdiction of equity on such allegations. The court held that the court did have jurisdiction, and that where there is an inadequacy of consideration, combined with intoxication, there is strong evidence of fraud. The deed was set aside.

In *Coombe v. Carthew* (1899) 59 N. J. Eq. 688, 43 Atl. 1057, it appeared that the grantor was a heavy drinker and occasionally became drunk. He was sober at the time of the execution of the deed and also during the times of negotiations leading up to its final execution. The deed was the result of a long-conceived plan. In a suit by the brother of the grantor to set aside the deed, the deed was sustained.

In *Dixon v. Dixon* (1871) 22 N. J. Eq. 91, it appeared that a grantor, an habitual drunkard, executed a deed of conveyance to his wife of one half his property in settlement of a divorce action. It was shown that he was subject to no mental derangement because of his habits, and was sober at all times during the arrangement for and the final execution of the deed. It was held that the deed could not be set aside on the ground of intoxication.

VI. Return of consideration.

Where a deed is obtained by fraud from an intoxicated grantor, and a part of the consideration paid, it is not a fatal objection to a suit in equity to cancel the deed that the grantor has not paid or tendered the grantee the amount so paid. *Dunn v. Amos* (1861) 14 Wis. 115.

An actual tender of purchase price is not necessary in an action to rescind a deed on the ground of intoxication and fraud, where the pleadings of plaintiff contain an offer to do equity. *Wells v. Houston* (1900) 23 Tex. Civ. App. 629, 57 S. W. 584.

Where a grantee has dealt with a grantor with knowledge of the fact that grantor is incapable of acting, and has taken advantage of the situation to defraud the grantor, and has in pursuance of the deed turned over property or money in payment, equity will set aside the deed without requir-

ing the consideration to be restored. *Hardy v. Dyas* (1908) 203 Ill. 211, 67 N. E. 852.

VII. Defenses.

The deed of a person made while intoxicated is voidable, and not void, and the person seeking to enforce the deed may overcome the plea of intoxication by showing such a long delay in seeking relief as to show a ratification by the grantor, or to constitute laches barring a suit by the grantor or his privies to have the deed set aside.

United States.—*Lewis v. Baird* (1842) 3 McLean, 56, Fed. Cas. No. 8,316; *Johnson v. Harmon* (1877) 94 U. S. 371, 24 L. ed. 271.

Alabama.—*Oakley v. Shelley* (1900) 129 Ala. 467, 29 So. 385. See also *Lewis v. Davis* (1916) — Ala. —, 73 So. 419 (holding a deed executed by an intoxicated person to be voidable and not void); *Sellers v. Knight* (1913) 185 Ala. 96, 64 So. 329.

California.—*More v. More* (1901) 136 Cal. 489, 65 Pac. 1044, 66 Pac. 76.

Kentucky.—*English v. Young* (1849) 10 B. Mon. 141.

Michigan.—*Wright v. Fisher* (1887) 65 Mich. 275, 8 Am. St. Rep. 886, 32 N. W. 605; *Somers v. Ferris* (1914) 182 Mich. 392, 148 N. W. 782. See also *Carpenter v. Rodgers* (1886) 61 Mich. 384, 1 Am. St. Rep. 595, 28 N. W. 156.

North Dakota.—*Spoonheim v. Spoonheim* (1905) 14 N. D. 380, 104 N. W. 845.

Tennessee.—*Hotchkiss v. Fortson* (1834) 7 Yerg. 67.

Texas.—*Wells v. Houston* (1900) 23 Tex. Civ. App. 629, 57 S. W. 584.

England.—See *Gore v. Gibson* (1845) 13 Mees. & W. 623, 153 Eng. Reprint, 260, 14 L. J. Exch. N. S. 151, 9 Jur. 140; *Molton v. Camroux* (1848) 2 Exch. 487, 154 Eng. Reprint, 584, 18 L. J. Exch. N. S. 68, 12 Jur. 800; *Matthews v. Baxter* (1873) L. R. 8 Exch. 132, 42 L. J. Exch. N. S. 73, 28 L. T. N. S. 169, 21 Week. Rep. 389.

Where a grantor seeks to rescind a deed for fraud, he must move with promptness and rescind within a reasonable time of the discovery; if grantor delays and carries into effect the contract, and receives benefits there-

under, he cannot then repudiate it. *Wells v. Houston* (Tex.) *supra*.

In *Spoonheim v. Spoonheim* (N. D.) *supra*, the court was not convinced that the defense of intoxication at the time of the execution of the deed was sufficiently made out, but based its decision on the ground of ratification. It appeared that the deed in question was executed in September, 1894, and that from the month of October in the same year to the time of the instant suit, nearly seven years later, the grantor had been sober and at all times in full possession of his mental powers. The grantee had moved onto the property sometime late in 1894, or the early part of 1895. The grantee had claimed the land as his own from the date of the deed, and informed the grantor of his claim in 1895. At different times the grantor in casual conversation made indefinite claims to the land. The court held that the long delay in instituting steps against the grantee constituted a ratification.

In *Somers v. Ferris* (Mich.) *supra*, a grantor brought suit in January, 1912, to set aside a deed executed in May, 1906, on the ground of intoxication. He acknowledged that he knew of the existence of the deed from January, 1907. The grantee had expended several hundred dollars in improvements on the land, in payments to the grantor, and in payment of encumbrances. There had been no offer of restitution on the part of the grantor. It was held that the grantor was estopped by laches to attack the deed as invalid.

In *More v. More* (Cal.) *supra*, it was acknowledged that there was fraud in the procurement of deeds, but it was sought to sustain them on the ground of laches in bringing suit to annul them. The court held the grantor not to be guilty of laches, since he was an irresponsible person and had spent all he had received, and since he was still under the influence of his brother who had caused him to be defrauded in the first instance, and because of the fact that at the time the plaintiff, the wife of the grantor, succeeded to his interest, the property had been so en-

cumbered by the grantee that there was nothing to return.

In *Wright v. Fisher* (Mich.) *supra*, it appeared that a grantee was an habitual drunkard and would commit any crime to secure liquor. In a suit to set aside a deed to his mother on the ground that he was intoxicated at the time of the execution of the instrument, and on the further ground of fraud in that a fee simple was given when he intended to give a life estate, the court found that he understood the nature of the instrument, and that he was sober at the time of the execution. Twenty years had passed since he executed the deed. The grantor was not a lunatic or an imbecile, and had plenty of sober intervals when he was in a condition to understand his rights and to move for their enforcement. He knew during this time that the grantee was conveying absolute title to third persons. It was held that he was not entitled to have the deed set aside.

In *Wells v. Houston* (Tex.) *supra*, a grantor brought suit to have his deed set aside on the ground that he was intoxicated at the time the deed was executed. As a defense the grantee pleaded ratification by subsequent conduct and delay. It was held that the grantor could not rebut such proof of delay on the ground that he had not previously had knowledge of fraud, where his lack of knowledge arose from ignorance of the law.

In *Lewis v. Baird* (1842) 3 McLean, 56, Fed. Cas. No. 8,316, it appeared that a deed of trust was executed by a grantor, which deed was abandoned later by all parties. Two years later the grantor conveyed part of the same land to the ancestor of the defendant. It was claimed that the grantee had notice of the deed of trust and also that the grantor was intoxicated. Twenty years had elapsed since the transfer in question, and the land had been reconveyed to a third person, who had made valuable improvements. No effort had been made to assert any claim to the land during this period. The court held that the intoxication had not been proved, and that in any

event the right to assert any claim to the land as heirs of the grantor had been lost by the delay.

In *Hotchkiss v. Fortson* (1834) 7 Yerg. (Tenn.) 67, on a cross bill in a suit to enforce payment of a bond given for the payment of purchase price of a piece of land, it appeared that the vendee had remained intoxicated from before the time of the transaction to his death, leaving an impoverished and helpless family. It was held that his heirs were not estopped by laches from asserting as a defense to the bond his intoxication.

In *Sellers v. Knight* (1913) 185 Ala. 96, 64 So. 329, it was held that the recovery of a judgment on a note given in payment for a deed fraudulently obtained did not constitute a ratification of the deed so as to prevent a suit

in equity to set aside the deed. The note had been wrongfully taken from the plaintiff, assignee and wife of the grantor. The property was being heavily encumbered by the grantees, and she was entitled to the security of the note until such time as her rights were determined in equity.

Where a grantor by means of a deed secured the release of certain property formerly held under a mortgage, and then, taking advantage of such release, sold the property, it was held in a suit by the grantor to set aside the deed on the ground of his incapacity, due to intoxication, at the time the deed was executed, that his action constituted an affirmation of the deed, and that the suit would not lie. *Oakley v. Shelley* (1900) 129 Ala. 467, 29 So. 385. E. R. R.

MIKE ZAJKOWSKI, Plff. in Err.,
v.

AMERICAN STEEL & WIRE COMPANY.

United States Circuit Court of Appeals, Sixth Circuit—December 5, 1918.

(258 Fed. 9.)

Master and servant — duty to warn of danger of occupational disease.

1. An employer who places and continues an employee for a substantial length of time in the regular performance of work under conditions which, in the absence of preventive means and precautions, are calculated to engender in the employee a disorder of serious and injurious character, is bound to warn and instruct the employee as to the dangers and to furnish him with reasonably effective means to avoid them.

[See note on this question beginning on page 355.]

— occupational disease — gauging sheet steel.

2. Blindness and loss of health in one employed to gauge and measure sheets of polished steel under brilliant lights and unhealthful conditions are occupational diseases for which the master is responsible.

[See 18 R. C. L. 603.]

— occupational diseases — statutory liability.

3. Employers are required to protect their employees from the contraction of occupational diseases under a statute requiring every employer to provide reasonably effective means to prevent

the contraction of illness incident to the work, although the title of the act contains a special reference to lead poisoning and there are sections in the statute dealing specially with lead poisoning.

[See 25 R. C. L. 862.]

— effect of statutory penalty.

4. The provision of a penalty for its violation in a statute requiring employers to provide means to protect employees from diseases incident to the occupation does not prevent an action by the employee to recover damages for injuries arising from breach of the statute.

Workmen's compensation — effect on liability for occupational disease.

5. Liability of an employer for failure to comply with a statute for the prevention of occupational diseases in employees is not affected by a statute providing compensation for injury or

death of employees and relieving employers who comply with its terms from further liability, unless the injury arises from the employer's failure to comply with any lawful requirement for the protection of the lives and safety of employees.

ERROR to the District Court of the United States for the Eastern Division of the Northern District of Ohio (Westenhaver, J.) to review a judgment in favor of defendant in an action brought to recover damages alleged to be due to an occupational disease incident to the performance of plaintiff's work. *Reversed.*

Statement by Warrington, Circuit Judge:

We understand the theory of this action to be that it is one to recover damages arising under conditions calculated to cause and causing an occupational disease. The case was disposed of below upon the pleadings and the opening statements of counsel. The petition, a very long one, in substance states: The plaintiff as an employee of defendant was for two years occupied in the operation of certain power-driven finishing rolls which, with certain dies, were used for pressing sheets of steel and forming them into desired sizes, and in seeing that the sheets of steel as they came from the rolls were of perfect texture and precise dimensions, and, at the same time, measuring the steel in a minute and particular way through the use of delicate measuring instruments. This was done under electric lights of high power and in substantial part maintained about 18 inches above the plane of the steel sheets. The surfaces of the sheets were "almost as bright as a mirror," and the surfaces of the rolls were bright; the sheets were long and as they came from the rolls they were continuously "waiving, shaking, and wobbling," so that there was at all times an intense glare of light, and at times flashes of light cast into plaintiff's eyes. Plaintiff was obliged to strain his eyes to the utmost in order to discover the condition of the sheets with respect to texture and dimensions, irregularities, and scratches. Defendant's foreman found it necessary to use a

magnifying glass to inspect plaintiff's work. To produce steel sheets of the quality indicated, they were put through various processes, such as dipping into chemicals and applying oils, grease, and water, before reaching the rolls, and thus plaintiff's eyes, hands, and system became saturated with these substances, so that his health and the sight of both eyes were ultimately destroyed. Meanwhile he notified defendant that his eyesight was becoming "blurred and foggy," and that he could not read the gauging instrument as freely as before. This brought about an examination on the part of defendant's physician; but plaintiff was sent back to his work, and he remained until March, 1916, when he notified defendant that he could not see to do the work; he was thereupon led by defendant's foreman from the premises and "told to go home." In the course of his work he was not provided with goggles or other devices to prevent the splashing of liquids into his eyes or to diminish the strain upon them. Defendant gave him no notice or warning of the dangers of injury to his eyesight or health, nor instructions in that behalf, and he was ignorant of these dangers. He had been in defendant's employ some four years when he was ordered to enter upon the work above described; at the time of entering upon the new work he was possessed of perfect eyesight and health. The disease so contracted was aggravated through the overheated condition of the place in which plaintiff was required to work, and also through

extra exertions caused by defects in the machinery and lack of necessary assistance; and plaintiff frequently complained to defendant concerning the defective condition of the machinery, and repeated promises were made to remedy the defects, though these promises were not kept. Damages are claimed in the sum of \$50,000.

The answer admits defendant's operation of the plant for the alleged purpose of manufacturing wire and other products, that plaintiff was in its employ as a laborer, denies the other allegations of the petition, and as a further defense avers that it had complied with the Workmen's Compensation Act of Ohio, and that by reason thereof plaintiff is not entitled to maintain the action. It was in effect admitted in the statements of opposing counsel that defendant had complied with the requirements of the Compensation Act.

At the close of the opening statements of counsel and on motion of defendant a verdict was directed in its favor, and judgment entered accordingly, upon which plaintiff below founds the writ of error.

Argued before Warrington and Knappen, Circuit Judges, and McCall, District Judge.

Messrs. Payer, Winch, Minshall, & Karch, for plaintiff in error:

Injuries arising from occupational diseases not being within the contemplation of the Workmen's Compensation Law, none of the provisions of said law apply to such cases, and there is nothing therein forbidding an action for such injuries if such actions are otherwise maintainable.

Industrial Commission v. Brown, 92 Ohio St. 309, L.R.A.1916B, 1277, 110 N. E. 744; *Industrial Commission v. Roth*, 98 Ohio St. 34, — A.L.R. —, 120 N. E. 172.

Plaintiff had a right to recover at common law.

Wiseman v. Carter White Lead Co. 100 Neb. 584, 160 N. W. 985, 13 N. C. C. A. 1083; *Thompson v. United Laboratories Co.* 221 Mass. 276, 108 N. E. 1042; *Fox v. Peninsular White Lead & Color Works*, 84 Mich. 676, 48 N. W. 203; *Wagner v. H. W. Jayne Chemical*

Co. 147 Pa. 475, 30 Am. St. Rep. 745, 23 Atl. 772; *Texas & N. O. R. Co. v. Gardner*, 29 Tex. Civ. App. 90, 69 S. W. 217; *Meany v. Standard Oil Co.* — N. J. L. —, 55 Atl. 653, 14 Am. Neg. Rep. 601; *Pigeon v. W. P. Fuller & Co.* 156 Cal. 691, 105 Pac. 976; *Kenz v. Bernheimer & S. P. Brewing Co.* 162 App. Div. 777, 147 N. Y. Supp. 1024; *Cincinnati, H. & D. R. Co. v. Frye*, 80 Ohio St. 289, 131 Am. St. Rep. 709, 88 N. E. 642.

The statute is valid and enforceable.

American Woodenware Mfg. Co. v. Schorling, 96 Ohio St. 305, 117 N. E. 366, Ann. Cas. 1918D, 318; *Neave Bldg. Co. v. Roudebush*, 96 Ohio St. 40, 117 N. E. 22; *State v. Schaeffer*, 96 Ohio St. 215, L.R.A.1918B, 945, 117 N. E. 220, Ann. Cas. 1918E, 1137; *McWeeny v. Standard Boiler & Plate Co.* 210 Fed. 507, 4 N. C. C. A. 919.

Mr. William L. Day for defendant in error.

Warrington, Circuit Judge, delivered the opinion of the court:

In the view of the learned trial judge, the Workmen's Compensation Act (102 Ohio Laws, p. 524) gave to defendant immunity from any right of action that might otherwise have accrued to plaintiff under the facts alleged in his petition. Laying that act to one side for the present, we think the petition states facts constituting a cause of action for damages due to an occupational disease which was incident to the work plaintiff was performing. Diseases of occupation have been the subjects

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of much concern and investigation, both abroad and in our own country. Such diseases, of course, signify causes and conditions, whether natural or artificial, which attend the performance of work and injuriously affect the persons exposed. They have been variously defined, such as, for instance, "the poor health which results from working under improper conditions;" again, "disease due to the employment;" and Dr. Thompson, in his recent work on Occupational Diseases, p. 1, says that such diseases "may be defined as maladies due to specific poi-

sons, mechanical irritants, physical and mental strain, or faulty environment, resulting from specific conditions of labor. . . . They arise from a great variety of poisons, irritating substances, and exposure to unusual physical conditions."

The occupation described in the petition extended over a period of more than two years, and the disease complained of developed and progressed by gradual process until it culminated at last in the loss of plaintiff's eyesight and health alike. Plaintiff's trouble was not due to causes outside of the environment of his work, nor was it one of accident or traumatism in the sense of violence; it was due to causes incident to his service, whose effects upon his eyesight and health are alleged to have been unknown to him though within knowledge reasonably imputable to defendant. The instant case is broadly distinguishable from that of *Industrial Commission v. Roth*, 98 Ohio St. 34, post, —, 120 N. E. 172, where Roth, though not a painter, was directed temporarily to do some painting, and died from inhaling poisonous fumes and vapors arising from a bucket of hot paint; and his death was held to be the result of an "accidental and unforeseen inhaling" of a "specific volatile poison or gas," and not the result of an "occupational disease;" indeed it was said by Judge Donahue in the course of the opinion: "In this case it is admitted that the deceased was a common laborer, and that the disease of lead poisoning is not incident to his regular occupation, but, on the contrary, is incident to the work in which he was employed for the two days preceding his illness."

The case set out in the petition falls well within principles of the common law. The general rule is that where an employer places and continues an employee for a substantial length of time in the regular

performance of work and under conditions which, in the absence of preventive means and precautions, are calculated to engender in the employee a disorder of serious and injurious character, regardless of the name by which the disease is known, it is the duty of the employer to warn and instruct the employee as to the dangers, and to furnish him with reasonably effective means to avoid them, and where, as the direct result of failure to perform this duty, an employee in the exercise of reasonable care suffers injury through a disorder so contracted, he is entitled to recover. *Wiseman v. Carter White Lead Co.* 100 Neb. 584, 587, 589, 160 N. W. 985, 13 N. C. C. A. 108; *Thompson v. United Laboratories Co.* 221 Mass. 276, 280, 108 N. E. 1042; *Fox v. Peninsular White Lead & Color Works*, 84 Mich. 676, 682, 48 N. W. 203; *Wagner v. H. W. Jayne Chemical Co.* 147 Pa. 475, 479, 30 Am. St. Rep. 745, 23 Atl. 772; *Meany v. Standard Oil Co.* — N. J. L. —, 55 Atl. 653, 14 Am. Neg. Rep. 601; *Pigeon v. W. P. Fuller & Co.* 156 Cal. 691, 698, 701, 105 Pac. 976.

Furthermore, recognition of the right of recovery upon facts such as are stated in the instant case is found in both constitutional and statutory provisions of Ohio. By amendment of September 3, 1912, to article 2 of the Ohio Constitution (Page's Anno. Const. 1913 ed. pp. 171 to 217, § 35), provision was made looking to the compensation of "workmen and their dependents, for death, injuries, or occupational disease, occasioned in the course of such workmen's employment," through laws to be passed by the general assembly; § 35 providing, however, that "no right of action shall be taken away from any employee when the injury, disease or death arises from failure of the employer to comply with any lawful requirement for the protection of the lives, health, and safety of employees."

—duty to warn
of danger of
occupational
disease.

On May 6, 1913, the general assembly of Ohio passed a statute entitled, "An Act for the Prevention of Occupational Diseases with Special Reference to Lead Poisoning." 103 Ohio Laws, pp. 819 to 824. Section 1 of the act (Page & A. Gen. Code Supp. (Ohio) § 6330-1) provides: "Every employer shall, without cost to the employees, provide reasonably effective devices, means and methods to prevent the contraction by his employees of illness or disease incident to the work or process in which such employees are engaged."

In distinct sections of the same act the manufacture of certain named products of lead is declared to be "especially dangerous," and employers engaged in the manufacture of these products are required to furnish devices and means of specific kinds to avoid the dangers of lead poisoning. Section 9 imposes penalties upon employers for violation of certain sections of the act, including § 1, which are applicable to the particular business in which the offending employer is engaged. Argument is not necessary to show that the purpose of this legislation was to impose upon employers duties designed for the protection of their employees. The effect of the first section, 6330-1, is to charge the employer with the duty to protect employees from the

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contraction of disease which is incident to the work they are required to perform. The intent plainly is to require the employer, where necessary, to ascertain what "devices, means, and methods" are "reasonably effective" to prevent contraction of an occupational disease; and certainly, in most instances, the employer rather than the lawmaker is qualified rightly to understand what measures are necessary. The class of business occupations thus dealt with manifestly differs from the class of manufacturers contemplated by the sections relating to lead products; since the first class would

seem to concern work and processes involving dangers not so well known as those attending the manufacture of lead products.

The purpose to impose duties upon employers embraced in the first class as well as the second is accentuated by the imposition of penalties upon both classes alike; and, while there might be greater difficulty in proving an offense under the first class than under the second, the duty is none the less positive in character in the one than in the other. These features derive emphasis in the instant case from the allegations that defendant provided no measures whatever for the protection of plaintiff's eyesight and health. It hardly is necessary to add that the legal consequence of violating § 6330-1 is not limited to the penalty prescribed in § 9 of the act; for the rule is

—effect of statutory
penalty.

that where a statute, although penal in character, plainly imposes a duty for the benefit of a class of individuals a right of action accrues to a person of that class who is injured through breach of the duty. *Variety Iron & Steel Works Co. v. Poak*, 89 Ohio St. 297, 303, 307, 106 N. E. 24; *New York, C. & St. L. R. Co. v. Lambright*, 5 Ohio C. C. 433, 434, 3 Ohio C. D. 213; *Narramore v. Cleveland, C. C. & St. L. R. Co. (C. C. A. 6th C.)* 48 L.R.A. 68, 37 C. C. A. 499, 96 Fed. 298, 300; 2 *Cooley, Torts*, 3d ed. pp. 1400, 1408, and citations.

We thus come to the ruling below. In considering the petition the district judge said: "If it does not state a cause of action under the Workmen's Compensation Law and within the exception of the Workmen's Compensation Law, it does not seem to me that the petition states any kind of cause of action."

We are, however, convinced that this act has no bearing upon the instant case. The act, as the name usually given to it indicates, provides for the collection of a state

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insurance fund and its disbursement among employees. According to the title of the act, the fund is designed "for the benefit of injured and the dependents of killed employees" (103 Ohio Laws, p. 72, approved March 14, 1913). Section 13 defines employers to whom the act is applicable. Section 22 provides for employers' payments of premiums. Section 23 is, in part, as follows: "Employers who comply with the provisions of the last preceding section shall not be liable to respond in damages at common law or by statute, save as hereinafter provided, for injury or death of any employee, wherever occurring, during the period covered by such premium so paid into the state insurance fund. . . ."

The saving clause so referred to is found in § 29 which, in substance, provides that, "where a personal injury is suffered by any employee or where death results to an employee from personal injury . . . while in the course of employment," an employer who has paid his premiums shall not be liable unless such injury or death shall have arisen from the "wilful act" of the employer, or from the employer's failure to comply with any "lawful requirement for the protection of the lives and safety of employees;" but in either of the latter events "nothing in this act contained shall affect the civil liability of such employer."

It is to be observed that the act is limited to compensation for "injury" or "death" of employees; it makes no provision in that behalf for disease. We have seen that the Constitution permits the passage of laws providing compensation for employees or their dependents in cases of "death, injuries, or occupational disease." *Industrial Commission v. Brown*, 92 Ohio St. 309, L.R.A.1916B, 1277, 110 N. E. 744, presented the question whether *Brown*, an employee who had contracted lead poisoning in the course of his employment, was entitled to participate in the fund designed for

the compensation of employees under the original Workmen's Compensation Act of May 31, 1911 (102 Ohio Laws, p. 524), which, of course, was before adoption of the constitutional amendment. *Brown* applied to the proper official board for compensation and his claim was disallowed; he appealed to the Hamilton common pleas where he recovered judgment which necessarily entitled him to be paid out of the insurance fund (§ 36, id. p. 531), and this action was affirmed by the court of appeals of the same county, though reversed by the Ohio supreme court. The Compensation Act then under consideration, like the present one, provided only for "injuries or death." Sections 20-1, 21-2, id. pp. 528, 529. In the course of the opinion, Chief Justice Nichols said (92 Ohio St. 314): "It is to be observed that the constitutional amendment differentiates between injuries and occupational disease. It clearly recognizes three distinct classes for which provision may be made: (1) Injuries resulting in death; (2) nonfatal injuries; and (3) occupational diseases; and all are to be limited to such as might be occasioned in due course of employment. The present law specifically provides for compensation for two of these classes only, and significantly omits any provision for compensation for the third class. Were this claim one that had accrued under the new law, the court could only construe the passage in dispute, in the light of the Constitution, as wholly excluding any compensation for injury by disease, whether occupational or otherwise. The legislature would have been within its constitutional rights had it included the third class, and its failure to do so, under the circumstances, makes of it a case of designed omission."

This ruling was approved in *Industrial Commission v. Roth*, supra. The case of *Roth*, like that of *Brown*, grew out of an application to the proper board for compensation to be paid out of the insurance

fund. The claim was disallowed by the board on the theory that Roth had died of an occupational disease, and this denial was in effect affirmed on appeal to the Jefferson common pleas, but was reversed in the court of appeals of that county, and the reversal was affirmed in the supreme court on the ground, as we have already pointed out, that Roth had met his death through an "accidental and unforeseen inhaling" of a "specific volatile poison or gas" and not from an "occupational disease;" but the implication is clear that if the death had resulted from that disease the right to participate in the insurance fund would have been denied; indeed it is declared both in the first paragraph of the syllabus and in the opinion that an occupational disease is "not within the contemplation of the Workmen's Compensation Law." The impelling feature of these decisions, when considered together, is that Brown's claim failed because he was affected by an occupational disease, while Roth's succeeded because his death was not the result of occupational disease, but of an accident.

It results, in view of the controlling authority of these decisions, that the Compensation Act is inapplicable, and it need not be said that the exemption from liability given by § 23 of the Compensation Act to employers who comply with the provisions of § 22, and the exceptions contained in § 29 in relation to employers who are open to the charge of wilful acts or failure to perform any lawful requirement within the meaning of that section, are not of present importance. It cannot be that the Compensation Act was designed to take away any right of action as respects a claim, like the one here involved, which the act does not purport to include or to allow to be paid out of the insurance fund. Any view to the contrary must ascribe to the general assembly at once a purpose to frustrate the power vested by the Constitution in respect of occupational disease and a lack of purpose through § 6330-1

to grant relief of any character to employees contracting such disease. That statute was passed after the Compensation Act, and, as already shown, was intended to create and preserve rights of action where the duty it imposes is violated. For similar reasons the case of *American Woodenware Co. v. Schorling*, 96 Ohio St. 305, 117 N. E. 366, Ann. Cas. 1918D, 318, 14 N. C. C. A. 1103, relied on by the company, is not, on its facts, relevant. Schorling sustained injuries through the fall of lumber from a car, which clearly brought his case within the Compensation Act; and although his employer had complied with the act, Schorling sought recovery by an ordinary action at law. Among the grounds urged was that under § 35, art. 2, of the Constitution, and § 29 of the Compensation Act, §§ 15 and 16 of the Industrial Commission Act constitute "lawful requirements" for the violation of which the action could be maintained; but it was in effect held that those sections are not self-executing and must be supplemented by special orders of the industrial board. 96 Ohio St. 320, 321. Thus the decision in that case, like the scope of the statutes it construed, does not reach the question involved in the instant case. In fact, Judge Johnson said (at page 317 of 96 Ohio St.): "There is nothing in the Industrial Commission Act which indicates an intention of the legislature to enlarge or diminish the rights of employees and employers under the Compensation Act, which had then recently been passed."

The Industrial Commission Act was approved March 18, 1913 (103 Ohio Laws, pp. 95, 110), while, as we have said before, § 6330-1 was approved the following May 6th (id. pp. 819, 824), and no reference was made in the last statute either to the Compensation Act or the Industrial Commission Act. Section 6330-1 stands alone as the latest expression of the legislative will; it is in terms both complete and imperative; it should be given effect.

When it is remembered that plaintiff's action is based upon alleged negligence of defendant and freedom from fault of his own, the conclusion must follow that it was error to deny a right of recovery,

both under the common law and § 6330-1.

Accordingly the judgment is reversed, with costs, and the case is remanded for further proceedings not inconsistent with this opinion.

ANNOTATION.

Duty of master to warn servant against occupational disease.

- I. Introductory, 355.
- II. General rule, 355.
- III. Limitation of rule, 357.

I. Introductory.

This note deals only with the common-law duty of an employer to warn his servant's against danger from occupational diseases and does not discuss compensation for occupational disease under the Workmen's Compensation Acts. It is confined to disease, excluding industrial accidents from the sudden escape of poisonous gas, or the like. It is likewise confined to occupational diseases, excluding cases of negligent exposure to ordinary contagion.

II. General rule.

The decisions of the various jurisdictions are in accord in holding that a master must warn his servant of the conditions under which he is employed which are liable to engender disease, and furnish suitable protection from such danger, provided that the master is in a position to have greater knowledge of the danger than the servant.

United States.—O'Connor v. Armour Packing Co. (1908) 15 L.R.A. (N.S.) 812, 85 C. C. A. 459, 158 Fed. 241, 14 Ann. Cas. 66. And see the reported case (ZAJKOWSKI v. AMERICAN STEEL & WIRE Co. ante, 348).

California.—Pigeon v. W. P. Fuller & Co. (1909) 156 Cal. 691, 105 Pac. 976.

Delaware.—Potter v. Richardson & R. Co. (1915) 6 Boyce, 314, 99 Atl. 540.

Illinois.—Pinkley v. Chicago & E. I. R. Co. (1910) 246 Ill. 370, 35 L.R.A. (N.S.) 679, 92 N. E. 896, 1 N. C. C. A. 480, reversing (1909) 151 Ill. App. 356.

Iowa.—Canfield v. Iowa Dairy Sep-

arator Co. (1915) 172 Iowa, 164, 154 N. W. 434.

Massachusetts.—Gould v. Slater Woolen Co. (1888) 147 Mass. 315, 17 N. E. 531; Thompson v. United Laboratories Co. (1915) 221 Mass. 276, 108 N. E. 1042.

Missouri.—Hysell v. Swift & Co. (1899) 78 Mo. App. 39; Nickel v. Columbia Paper Stock Co. (1902) 95 Mo. App. 226, 68 S. W. 955.

Nebraska.—Wiseman v. Carter White Lead Co. (1916) 100 Neb. 534, 160 N. W. 985, 13 N. C. C. A. 1083.

New York.—Span v. Ely (1876) 8 Hun, 255.

Pennsylvania.—Corcoran v. Wanamaker (1898) 185 Pa. 496, 39 Atl. 1108, 4 Am. Neg. Rep. 341.

In O'Connor v. Armour Packing Co. (1908) 15 L.R.A. (N.S.) 812, 85 C. C. A. 459, 158 Fed. 241, 14 Ann. Cas. 66, an action by an employee of a packing company, evidence was produced to show that the plaintiff, while at work, became infected with a disease known as "charbon," which he claimed was caused by handling infected meat. After laying down the well-established principle as to the duty of the master to furnish the servant a safe place to work, the court continued: "The same principle is applicable where the servant is put to work on material that is dangerous to his health or life. The duty of the master in this respect is primary and unassignable; that is, he becomes responsible for the negligence or inexperience of anyone to whom he delegates the performance of it."

In Pigeon v. W. P. Fuller & Co. (1909) 156 Cal. 691, 105 Pac. 976, it appeared that the plaintiff was employed by the defendant in the manu-

facture of white lead. On entering the defendant's employ he was not warned or instructed as to the danger connected with his duties, and as a result the plaintiff suffered from lead poisoning. The court, in sustaining a verdict for the plaintiff, said: "There was abundant testimony tending to show that the process of the manufacture of white lead, as conducted by the defendant, was dangerous to those assisting in the work, the danger arising from the inhalation of fumes and vapor thrown off from the melted pig lead, and of particles of dust coming from the metal after it had been corroded in the process of converting it into white lead. The jury was fully warranted in finding that the plaintiff was ignorant of this danger when he entered defendant's employ. It is not pretended that the defendant ever gave him any warning or instruction with regard to the matter, nor that it ever made any inquiry as to whether or not he had had any prior experience which would give him any knowledge concerning the danger. As we have already suggested, it certainly cannot be said that the danger of lead poisoning arising from the melting of pig lead or the handling of white lead is so obvious and apparent to the ordinary mind that the plaintiff must be held to have known of it, and, for this reason, the defendant was not justified in assuming that he had the requisite knowledge."

In *Wiseman v. Carter White Lead Co.* (1916) 100 Neb. 584, 160 N. W. 985, 13 N. C. C. A. 1083, the same rule was laid down to the effect that the master must warn the servant of any disease he may be liable to contract while performing the duties of his employment. In that case it appeared that the plaintiff was poisoned by lead fumes, and that he had not been warned by his employer that the inhalation of such fumes would result in serious injury. The court cited and followed the rule laid down in the *Pigeon Case*, *supra*, saying: "He may, for example, have observed that the melted pig lead gave off fumes and that dust arose from the white

lead in the process of manufacture, and that this involved the possibility of some degree of discomfort or injury, without realizing or understanding that the very serious disorders from which he claims to be suffering were a probable consequence. In the face of appellant's contention, strongly urged even on appeal, that there is no danger in the employment in question, it can hardly be claimed that the plaintiff must, as matter of law, be held to have known that the inhalation of the fumes and dust had a tendency to produce lead poisoning, with its accompaniment of loss of teeth, paralysis, and derangement of the digestive organs. This is not a fact of universal knowledge, nor was it necessarily apparent to one employed, even for a long time, in defendant's work. The risks assumed by a servant are only the ordinary risks of the employment. He does not assume the risk of hidden dangers which are, to the knowledge of the master, not apparent to him."

In *Thompson v. United Laboratories Co.* (1915) 221 Mass. 276, 100 N. E. 1042, it appeared that the plaintiff was employed to work around arsenic, and while so doing was poisoned by inhaling the dust from the preparation which she was handling. The court said: "The defendant, admitting that a warning was not given, insists that a warning would have been of no avail because the plaintiff had no way of knowing that the inhalations might poison her, and because the purpose of a warning is to enable the employee to work in safety. But a warning of an unknown and unexpected danger affords also an opportunity to the employee to determine whether the contract of employment shall be enlarged so as to include what is to him a new situation, or whether it shall be abandoned. Considering the nature of a contract of employment, and in connection therewith the frequent hardship of the application of the doctrine of the assumption of the risk, it would seem that the later consideration is the basic reason for requiring a warning. It is not necessary that the per-

son to be harmed or the form which the injury shall assume should have been foreseen. 'It is enough that it now appears to have a natural and probable consequence.'

In *Nickel v. Columbia Paper Stock Co.* (1902) 95 Mo. App. 226, 68 S. W. 955, it appeared that the plaintiff was employed to assort papers, and, while so doing, contracted a disease from inhaling dust and disease germs therefrom. The paper and other matter had been collected from a hospital, and were manifestly of a poisonous nature. The court held that while a servant assumes an ordinary risk under these circumstances, he does not assume the risk of assorting poisonous waste, and said: "And if the business was such that such an injury as happened to plaintiff was likely to unavoidably follow, then it was defendant's duty to have warned the plaintiff of the danger, or to have taken precautions against such consequences. . . . In this case the danger of disease and other injuries from the business in which defendant was engaged was so reasonably likely to follow that it was at least properly asked of the jury whether prudence and care would not have suggested inspection of the material before turning it over to employees for sorting."

III. Limitation of rule.

A master is not bound to warn his servant of the danger of contracting an occupational disease unless he is in a position to have greater knowledge than the servant of the existence of that danger. *Potter v. Richardson & R. Co.* (1915) 6 Boyce (Del.) 314, 99 Atl. 540; *Pinkley v. Chicago & E. I. R. Co.* (1910) 246 Ill. 370, 35 L.R.A.(N.S.) 679, 92 N. E. 896, 1 N. C. C. A. 480, reversing (1909) 151 Ill. App. 356; *Canfield v. Iowa Dairy Separator Co.* (1915) 172 Iowa, 164, 154 N. W. 434; *Gould v. Slater Woolen Co.* (1888) 147 Mass. 315, 17 N. E. 531; *Hysell v. Swift & Co.* (1899) 78 Mo. App. 39; *Corcoran v. Wanamaker* (1898) 185 Pa. 496, 39 Atl. 1108, 4 Am. Neg. Rep. 341.

In *Potter v. Richardson & R. Co.*

(1915) 6 Boyce (Del.) 314, 99 Atl. 540, a demurrer was sustained to a declaration alleging that the plaintiff was employed to dress poultry preparatory to canning, and that while performing the duties of her employment a scratch on her hand became infected with blood poisoning, because of the defendant's negligence in furnishing decayed carcasses to work on. It was held that there was no duty imposed on the defendant under these circumstances to instruct the plaintiff respecting her employment or warn her of any danger that might happen therefrom. The court said: "The servant must have had much experience in the business or considerable knowledge of the conditions existing and materials employed to have appreciated the risk and danger incident to his employment."

In *Pinkley v. Chicago & E. I. R. Co.* (1910) 246 Ill. 370, 35 L.R.A.(N.S.) 679, 92 N. E. 896, 1 N. C. C. A. 480, reversing (1909) 151 Ill. App. 356, the familiar rule that a master is not an insurer of his servants was applied in a case wherein it appeared that the plaintiff was permanently poisoned by the handling of lumber treated with a coal tar preparation. The record showed that with a single exception plaintiff was the only person who had ever received permanent injuries from the creosote or creosote fumes. The court said: "Under such circumstances, a finding that appellant knew, or by exercising ordinary diligence might have known, that the coal tar preparation was liable to produce the injuries of which the appellee complains, is manifestly without any evidence whatever to support it. If the appellant did not know, or by exercising ordinary diligence could not have known, that such injuries were liable to result, then the law did not impose any duty upon it to warn appellee of the danger of receiving such injuries, before or at the time of giving the order, which appellee alleges was negligently given."

In *Canfield v. Iowa Dairy Separator Co.* (1915) 172 Iowa, 164, 154 N. W. 434, it appeared that the plain-

Pliff was poisoned from handling parts of machinery saturated with muriatic acid. It did not appear that the defendant knew of the poisonous nature of this acid. The court in dismissing the complaint cited and followed the rule laid down in the Pinkley Case (Ill.) *supra*, and said: "In the instant case the record fails to show that the defendant knew that the use of muriatic acid in the manner in which it was used imperiled the health or safety of the plaintiff, and fails to disclose a state of facts from which it would be reasonably inferred that by the exercise of reasonable care it could or should have known. It cannot be held, therefore, for negligence in the use of muriatic acid in the way and for the purposes for which it was used."

In *Gould v. Slater Woolen Co.* (1888) 147 Mass. 315, 17 N. E. 531, it appeared that the plaintiff was poisoned by the handling of cloth which had been dyed. Liability was sought to be established against the defendants for their failure to warn the plaintiff of the poison. The court held that no such duty rested in the defendants, as the poisoning was not a result which the defendants were bound to have contemplated as likely to happen.

In *Hysell v. Swift & Co.* (1899) 78 Mo. App. 39, a laborer sued his employer for the loss of his sight caused by bacteria, germinated from animal matter in a beef packing house which, floating in the air, lodged in his eye. The court held that there had been no failure on defendant's part to warn its servants of this danger, as it was highly improbable that such an accident would happen.

In *Corcoran v. Wanamaker* (1898) 185 Pa. 496, 39 Atl. 1108, 4 Am. Neg. Rep. 341, it appeared that a servant in a laundry lost her eyesight as the result of being affected by the fumes of certain acids used therein. The court held that no liability rested on her employer, saying: "There is no evidence that the defendants had any knowledge that the use of the acids complained of would produce the disease from which the plaintiff suffered, and there was no proof that it was not customary to use acids in laundries in the same manner and proportions as they were used in the laundry business conducted by the defendants. The case was therefore destitute of the evidence necessary to establish the charge of negligence without which there could be no recovery."

E. C. B.

SEARS, ROEBUCK, & COMPANY

v.

FEDERAL TRADE COMMISSION.

United States Circuit Court of Appeals, Seventh Circuit — April 29, 1919.

(258 Fed. 307.)

Unfair trade — selling commodity below cost.

1. The statute forbidding unfair methods of competition does not forbid the selling of a particular commodity below cost if it is not connected with representations which tend to injure or discredit competitors.

[See note on this question beginning on page 366.]

Evidence — unfair competition — sufficiency.

2. One may be found to be guilty of intentionally injuring and discrediting competitors by falsely leading the public to believe that they were unfair

dealers by falsely advertising that because of his handling commodities in large quantities and buying direct from manufacturers and producers his goods cost less and therefore he could sell for less.

— judicial notice — government control of commodities.

3. The Federal Trade Commission in passing upon the real nature of a changed attitude of a merchant toward marketing his goods may take judicial notice of the government war-time control of the sale and consumption of the goods in question.

[See 15 R. C. L. 1079, 1080.]

Injunction — effect of discontinuance of objectionable practice.

4. That defendant has discontinued his alleged wrongful practice is no ground for refusing to issue an injunction against him if he attacks the statute under which it is sought as void,

and asserts that even if valid he has not infringed it.

[See 14 R. C. L. 308.]

Statute — indefiniteness — unfair methods of trade.

5. A statute forbidding unfair methods of competition is not void for indefiniteness.

[See 25 R. C. L. 810-812.]

— delegation of power — constitutionality.

6. No unconstitutional delegation of legislative or judicial power occurs in conferring upon a Commission power to find facts and declare them to be a violation of the statute against unfair methods of competition in business.

[See 6 R. C. L. 179.]

(Alschuler, Circuit Judge, dissents in part.)

ORIGINAL petition to review an order of the respondent, commanding petitioner to desist from certain unfair methods of competition in commerce. *Commission directed to modify orders, and petition denied in other respects.*

The facts are stated in the opinion of the court.

Argued before Baker and Alschuler, Circuit Judges, and Carpenter, District Judge.

Messrs. Sidney Adler and Charles Lederer, for petitioner:

A restraining order is not a punitive remedy and is improper as a punishment for past wrongs, and should not be issued to prevent the doing of an act unless the complainant shows reasonable grounds for apprehending that it will otherwise be done.

High, Inj. § 23; Owen v. Ford, 49 Mo. 436; Seward County v. Stouffer, 47 Kan. 287, 27 Pac. 1000; Barber County v. Smith, 48 Kan. 331, 29 Pac. 565; Reynolds v. Everett, 144 N. Y. 189, 39 N. E. 72.

Section 5 of the Federal Trade Commission Act did not enlarge the category of unfair methods of competition in commerce.

United States v. American Tobacco Co. 221 U. S. 106, 55 L. ed. 663, 31 Sup. Ct. Rep. 632; Standard Oil Co. v. United States, 221 U. S. 1, 55 L. ed. 619, 34 L.R.A. (N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734; Mogul S. S. Co. v. McGregor, L. R. 23 Q. B. Div. 598.

Mr. Alfred Beck also for petitioner.

Mr. John Walsh, for respondent:

Section 5 of the Trade Commission Act makes unlawful acts not theretofore unlawful.

Standard Oil Co. v. United States,

221 U. S. 1, 43, 50, 55 L. ed. 619, 638, 641, 34 L.R.A. (N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734; Oceanic Steam Nav. Co. v. Stranahan, 214 U. S. 320, 333, 53 L. ed. 1013, 1019, 29 Sup. Ct. Rep. 671; Mannington v. Hocking Valley R. Co. 183 Fed. 155.

The term, "unfair methods of competition," declares a sufficiently definite rule for the guidance of the Commission and the act does not therefore delegate legislative power.

Mason v. Hoyle, 56 Conn. 255, 14 Atl. 786; First Nat. Bank v. Harper, 61 Minn. 375, 63 N. W. 1079; Rice v. Madelia Farmers' Warehouse Co. 87 Minn. 398, 92 N. W. 225; Yates v. Huson, 8 App. D. C. 98; 28 Am. & Eng. Enc. Law, 2d ed. 348; Nims, Unfair Business Competition, pp. 1, 385; Sperry & H. Co. v. Weber, 161 Fed. 219; Evenson v. Spaulding, 9 L.R.A. (N.S.) 904, 82 C. C. A. 263, 150 Fed. 517; Standard Oil Co. v. Doyle, 118 Ky. 662, 111 Am. St. Rep. 331, 82 S. W. 271; Commercial Acetylene Co. v. Avery Portable Lighting Co. 152 Fed. 642; Standard Oil Co. v. United States, 221 U. S. 43, 55 L. ed. 638, 34 L.R.A. (N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734; International News Service v. Associated Press, 248 U. S. 215, 63 L. ed. 211, 2 A.L.R. 293, 39 Sup. Ct. Rep. 68; Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229, 259,

62 L. ed. 260, 279, L.R.A.1918C, 497, 38 Sup. Ct. Rep. 65, Ann. Cas. 1918B, 461; *United States v. Patterson*, 205 Fed. 292; *Portland R. Light & P. Co. v. Railroad Commission*, 229 U. S. 397, 57 L. ed. 1248, 33 Sup. Ct. Rep. 820.

The act confers upon the Commission the power to determine what constitutes unfair methods of competition.

Cincinnati, H. & D. R. Co. v. Interstate Commerce Commission, 206 U. S. 142, 149, 51 L. ed. 995, 27 Sup. Ct. Rep. 648; *Illinois C. R. Co. v. Interstate Commerce Commission*, 206 U. S. 441, 51 L. ed. 1128, 27 Sup. Ct. Rep. 700; *Pennsylvania R. Co. v. International Coal Min. Co.* 230 U. S. 184, 196, 57 L. ed. 1446, 1451, 33 Sup. Ct. Rep. 893, Ann. Cas. 1915A, 315; *Mitchell Coal & Coke Co. v. Pennsylvania R. Co.* 230 U. S. 247, 257, 57 L. ed. 1472, 1476, 33 Sup. Ct. Rep. 916; *Morrisdale Coal Co. v. Pennsylvania R. Co.* 230 U. S. 304, 313, 57 L. ed. 1494, 1497, 33 Sup. Ct. Rep. 938; *Atchison, T. & S. F. R. Co. v. United States*, 232 U. S. 199, 221, 58 L. ed. 568, 577, 34 Sup. Ct. Rep. 291; *United States v. Du Pont De Nemours*, 188 Fed. 127.

The facts found by the Commission constitute unfair methods of competition within the meaning of the act.

Harris v. Rosenberger, 13 L.R.A. (N.S.) 762, 76 C. C. A. 225, 145 Fed. 449.

Baker, Circuit Judge, delivered the opinion of the court:

This is an original petition to review an order entered by the respondent, the Federal Trade Commission, against the petitioner, Sears, Roebuck, & Company, a corporation, commanding the petitioner to desist from certain unfair methods of competition in commerce. Respondent's order was based on its complaint, filed on February 26, 1918, on the petitioner's answer, and on a written stipulation of facts. Procedure before the Commission and also before this court on review is prescribed in § 5 of the act to create a Federal Trade Commission, approved on September 26, 1914 (38 Stat. at L. 719, chap. 311, Comp. Stat. § 8836e, 4 Fed. Stat. Anno. 2d ed. p. 577). Respondent's authority over the subject-matter of its order is derived from the following

provision in the same section: "Unfair methods of competition in commerce are hereby declared unlawful." Section 4 is a dictionary of terms used in the act. "Commerce" means interstate or foreign commerce; but the general term, "unfair methods of competition," is nowhere defined specifically, nor is there a schedule of methods that shall be deemed unfair.

In its complaint respondent averred that petitioner is engaged in interstate and foreign commerce, conducting a "mail-order" business; that petitioner for more than two years last past has practised unfair methods of competition in commerce by false and misleading advertisements and acts, designed to injure and discredit its competitors and to deceive the general public, in the following ways:

(1) By advertising that petitioner, because of large purchases of sugar and quick disposal of stock, is able to sell sugar at a price lower than others offering sugar for sale;

(2) By advertising that petitioner is selling its sugar at a price much lower than that of its competitors, and thereby imputing to its competitors the purpose of charging more than a fair price for their sugar;

(3) By selling certain of its merchandise at less than cost on the condition that the customer simultaneously purchase other merchandise at prices which give petitioner a profit on the transaction, without letting the customer know the facts;

(4) By advertising that the quality of merchandise sold by its competitors is inferior to that of similar merchandise sold by petitioner, and that petitioner buys certain of its merchandise in markets not accessible to its competitors, and is therefore able to give better advantages in quality and price than those offered by its competitors.

Petitioner extensively circulated the following advertisements, among others:

"We can afford to give this guaranty of a 'less than wholesale price' because we are among the largest

distributors of sugar wholesale or retail in the world. We sell every year 35,000,000 pounds of sugar. And, buying in such vast quantities, and buying directly from the refineries, we naturally get our sugar for less money than other dealers."

"For instance, every grocer carrier granulated sugar in stock, but does he tell you which kind? There are two kinds—granulated cane sugar and granulated beet sugar—and they look exactly alike. Some people prefer the one and some the other. But beet sugar usually costs less than cane sugar, so if you are getting beet sugar you should pay less for it. Do you know which kind you are getting and which you are paying for?

"Our teas have a pronounced, yet delicate, tea flavor with an appealing fragrance, because we spare neither time nor expense to get the very best the greatest tea gardens of the world can produce.

"First, because of the difficulty of getting in this country the exact character and flavor of certain teas, we do our own importing and critically test every tea. Our representative goes to the various tea-growing countries and makes the selection in person. Then, the greatest care is taken to get only first-crop pickings from upland soil.

"Also, by buying direct from the tea gardens while the crops are being harvested, we are able to have them always perfectly fresh.

"It would be natural for you to conclude that all this care in buying and selecting would make our teas very high in price, but in reality, our prices are unusually low for such high quality. Here is a reason; By buying direct from the tea gardens we cut out the middleman's profit."

"Over land and sea, from the greatest coffee regions in the world, we bring you the choicest of the crop and make it possible for you to have that fresh, savory, and fragrantly tempting cup of coffee for your breakfast. You see, we buy direct from the best plantations in the world. We get the pick of the crop

—upland coffees from rich, healthy soil and growers of unquestioned experience and skill. We buy enormous quantities and pay cash, thus making it possible to offer our customers the very best coffees at very low prices."

Petitioner's sales of sugar during the second half of 1915 amounted to \$780,000 on which it lost \$196,000. Petitioner used sugar as a "leader" ("You save 2 to 4 cents on every pound"), offering a limited amount at the losing price in connection with a required purchase of other commodities at prices high enough to afford petitioner a satisfactory profit on the transaction as a whole, without letting the customer know that the sugar was being sold on any other basis than that of the other commodities. Petitioner obtained its sugar in the open market from refiners and wholesalers. Competitors got their sugar from the same sources, of the same quality and at the same price. Sugar is a staple in the market. Price concessions upon large purchases are unobtainable. From the facts respecting petitioner's methods of advertising and buying and selling sugar respondent found, and properly so, in our judgment, that pe-
Evidence—
unfair competition—sum-
mation.

ty injured and discredited its competitors by falsely leading the public to believe that the competitors were unfair dealers in sugar and the other commodities which petitioner was offering in connection with sugar.

Petitioner purchased 75 per cent of its teas from wholesalers and importers in the United States. The remainder it purchased through its representative Peterson in Japan; but there was no proof that Peterson made or was qualified to make "selections in person" or "first-crop pickings from upland soil." All of petitioner's coffees were purchased from wholesalers and importers in the United States. Respondent found that petitioner's advertisements of teas and coffees were false

and designed to deceive the public and injure competitors.

By the order, issued on June 24, 1918, petitioner was commanded to desist from

"(1) Circulating throughout the states and territories of the United States and the District of Columbia catalogues containing advertisements offering for sale sugar, wherein it is falsely represented to its customers or prospective customers of said defendant, or to customers of competitors, or to the public generally, or leads them to believe that, because of large purchasing power and quick-moving stock, defendant is able to sell sugar at a price lower than its competitors;

"(2) Selling, or offering to sell, sugar below cost through catalogues circulated throughout the states and territories of the United States and the District of Columbia among its customers, prospective customers, and customers of its competitors;

"(3) Circulating throughout the various states and territories of the United States and the District of Columbia, among customers, prospective customers, and customers of its competitors, catalogues containing advertisements representing that defendant's competitors do not deal justly, fairly, and honestly with their customers;

"(4) Circulating throughout the various states and territories of the United States and the District of Columbia, among customers, prospective customers, or customers of its competitors, catalogues containing advertisements offering for sale its teas, in which said advertisements it falsely stated that the defendant sends a special representative to Japan who personally goes into the tea gardens of said country and personally supervises the picking of such teas;

"(5) Circulating through the various states and territories of the United States and the District of Columbia, among customers, prospective customers, or customers of its competitors, catalogues containing advertisements offering for sale its

coffees, in which it falsely stated that the defendant purchases all of its coffees direct from the best plantations in the world."

I. Petitioner insists that the injunctive order was improvidently issued because, before the complaint was filed and the hearing had, petitioner had discontinued the methods in question, and, as stated in its answer, had no intention of resuming them. For example, no sugar offers of the character assailed were made after August, 1917. But respondent was required to find from all the evidence before it what was the real nature of petitioner's attitude. It was permissible for respondent to take
~~judicial notice of the government's~~
~~judicial notice of the government's~~
~~control of com-~~
~~modities.~~

war-time control of sugar sales and consumption. It was also proper to note that petitioner was contending (and still contends) that the act is void for indefiniteness, that the act is unconstitutional, and that the act, even if valid under any proper construction, has not been infringed by petitioner's practices. In *Goshen Mfg. Co. v. Hubert A. Myers Mfg. Co.* 242 U. S. 202, 61 L. ed. 248, 37 Sup. Ct. Rep. 105, which was a suit for infringement of a patent, the defendant company averred and introduced evidence to prove that six months before the bill was filed, and with notice to complainant, it had sold its factory, wound up its business, and had no intention of resuming. But throughout the intervening period, and also in the answer to the bill, the defendant company was attacking the validity of the patent and the right of the complainant to compel desistance. This conduct was held to be such a continuing menace as to justify the maintenance of the bill.

So here, no assurance is in sight that petitioner, if it could shake respondent's hand from its shoulder, would not continue its former course.

Injunction—
effect of dis-
continuance of
objectionable
practice.

II. Petitioner urges that the dec-

(358 Fed. 307.)

laration of § 5 must be held void for indefiniteness unless the words, "unfair methods of competition," be

Statute—in-
definiteness—
unfair methods
of trade.

construed to embrace no more than acts which on September 26, 1914,

when Congress spoke, were identifiable as acts of unfair trade then condemned by the common law as expressed in prior cases. But the phrase is no more indefinite than "due process of law." The general idea of that phrase as it appears in constitutions and statutes is quite well known; but we have never encountered what purported to be an all-embracing schedule or found a specific definition that would bar the continuing processes of judicial inclusion and exclusion based upon accumulating experience. If the expression, "unfair methods of competition," is too uncertain for use, then under the same condemnation would fall the innumerable statutes which predicate rights and prohibitions upon "unsound mind," "undue influence," "unfaithfulness," "unfair use," "unfit for cultivation," "unreasonable rate," "unjust discrimination," and the like. This statute is remedial, and orders to desist are civil; but even in criminal law convictions are upheld on statutory prohibitions of "rebates or concessions," or of "schemes to defraud," without any schedule of acts or specific definition of forbidden conduct, thus leaving the courts free to condemn new and ingenious ways that were unknown when the statutes were enacted. Why? Because the general ideas of "dishonesty" and "fraud" are so well, widely, and uniformly understood that the general terms, "rebates or concessions," and "schemes to defraud," are sufficiently accurate measures of conduct.

On the face of this statute the legislative intent is apparent. The commissioners are not required to aver and prove that any competitor has been damaged or that any purchaser has been deceived. The commissioners, representing the govern-

ment as *parens patriæ*, are to exercise their common sense, as informed by their knowledge of the general idea of unfair trade at common law, and stop all those trade practices that have a capacity or a tendency to injure competitors directly or through deception of purchasers, quite irrespective of whether the specific practices in question have yet been denounced in common-law cases. But the restraining order of the commissioners is merely provisional. The trader is entitled to his day in court, and there the same principles and tests that have been applied under the common law or under statutes of the kinds hereinbefore recited are expected by Congress to control. This *prima facie* reading of legislative intent is confirmed by reference to committee reports and debates in Congress, wherein is disclosed a refusal to limit the Commission and the court to a prescribed list of specific acts. Cong. Rec. 63d Cong. 2d Session, pp. 13, 18, 533, 12,246. And this interpretation is not affected by the subsequent adoption of the Clayton Act, October 15, 1914 (38 Stat. at L. 731, chap. 323), condemning certain specific acts.

III. But such a construction of § 5, according to petitioner's urge, brings about an unconstitutional delegation of legislative and judicial power to the Commission. Grants of similar authority to administrative officers and bodies have not been found repugnant to the Constitution. *Buttfield v. Stranahan*, 192 U. S. 470, 48 L. ed. 525, 24 Sup. Ct. Rep. 349; *Union Bridge Co. v. United States*, 204 U. S. 365, 51 L. ed. 527, 27 Sup. Ct. Rep. 367; *Pennsylvania R. Co. v. International Coal Min. Co.* 230 U. S. 184, 57 L. ed. 1446, 33 Sup. Ct. Rep. 893, Ann. Cas. 1915A, 315; *National Pole Co. v. Chicago & N. W. R. Co.* 127 C. C. A. 561, 211 Fed. 65.

With the increasing complexity of human activities, many situations arise where governmental control can be secured only by the "board" or "commission" form of legislation.

In such instances Congress declares the public policy, fixes the general principles that are to control, and charges an administrative body with the duty of ascertaining within particular fields from time to time the facts which bring into play the principles established by Congress. Though the action of the Commission in finding the facts and declaring them to be specific offenses of the character embraced within the general definition by Congress may be deemed to be quasi legislative, it is so only in the sense that it converts the actual legislation from a static into a dynamic condition. But the converter is not the electricity. And though the action of the Commission in ordering desistance may be counted quasi judicial on account

—delegation of
power—con-
stitutionality.

of its form, with respect to power it is not judicial, because a judicial determination is only that which is embodied in a judgment or decree of a court and enforceable by execution or other writ of the court.

IV. In the second paragraph of the order petitioner is commanded to cease selling sugar below cost. We find in the statute no intent on the part of Congress, even if it has the power, to restrain an owner of property from selling it at any price that is acceptable to him or from giving it away. But, manifestly, in making such a sale or gift the owner

Unfair trade—
selling com-
modity below
cost.

may put forward representations and commit acts which have a capacity or a tendency to injure or to discredit competitors and to deceive purchasers as to the real character of the transaction. That paragraph should therefore be modified by adding to it, "by means of or in connection with the representations prohibited in the first paragraph of this order, or similar representation."

Sufficient appears in this record and in the presentation of the case to warrant us in expressing the belief that petitioner's business standards were at least as high as those generally prevailing in the commer-

cial world at the times in question, and that the action of the Commission is to be taken rather as a general illustration of the better methods required for the future than a specific selection of petitioner for reproof on account of its conduct in the past.

Respondent is directed to modify its order as above stated; and in other respects the petition is denied,

Alschuler, Circuit Judge, dissenting in part:

In my judgment the order of the Commission should be further modified by striking out the third paragraph, which relates to alleged representation, that petitioner's competitors do not deal fairly and honestly with their customers. In so far as the sugar, coffee, and tea advertisements ascribe petitioner's asserted lower prices and superior qualities to quantity purchases and special facilities and advantages for inspection, selection, and purchasing, they would tend to negative any imputation upon competitors of unfair dealing with their patrons. I believe the charge of imputing to competitors unfair dealing with their patrons rests wholly on petitioner's so-called "Caveat Emptor" advertisement in its catalogue of March and April, 1916, wherein the public is cautioned in regard to white sugar, stating that some is cane and some beet sugar, alike in appearance, but the former usually higher in price; that petitioner plainly designates which of the two it offers, and the query is suggested, where else are goods so plainly described, and whether the customer gets elsewhere what he thinks he is buying. It seems to me that this does not amount to more than a statement or boast that petitioner, without being asked, describes the white sugars it proposes to sell, and the intimation is carried that competitors do not volunteer such description, but it is not suggested that they actually misrepresent the truth.

The facts before the Commission appear by stipulation, and those con-

earning this advertisement, aside from the advertisement itself, are as follows:

"When Mr. A. M. Daly, the attorney in charge of the investigation in these proceedings, was in Chicago in March, 1916, he submitted to Mr. A. V. H. Mory, chief chemist of Sears, Roebuck, & Company, and Mr. Joseph Scott, manager of the grocery department, a copy of the advertisement entitled 'Caveat Empor' hereinbefore mentioned, and hereto attached, and requested them to state their views as to this particular advertisement and what it meant. They stated that this advertisement was for the purpose of calling attention to the distinction between beet sugar and cane sugar, and laying stress upon the point of the facilities that Sears, Roebuck, & Company have for marking everything plainly so that the customer would know better from description the exact nature of what he was buying. After this explanation Mr. Daly went to his hotel. In a short time Mr. Mory called on him there, and stated in substance that he had submitted the above-mentioned advertisement to Mr. A. H. Loeb, the vice president of Sears, Roebuck, & Company, and that Mr. Loeb said that this course of advertising was unfair and unjust, and declared that it must be discontinued, and further that it was against the policy of the house to send out such advertisements. Thereupon, on March 28, 1916, Mr. A. V. H. Mory, chief chemist, wrote to the Commission in part as follows: 'The young man who wrote this was in to-day, and I pointed out to him wherein he had made a mistake and acted against house policy. He promised to use the soft pedal on all references to the dealer in the future. He tells me that this is an angle that had not occurred to him. He had not thought of the write-up in the light of a criticism of the dealer, so intent was he on pointing out that, with our system of marking everything plainly and our facilities for knowing what we are selling, the

customer would know better from our description the exact nature of what he was buying, in the case of those things difficult to judge, than if he had them placed before him—which, of course, is true.'"

But assuming, as did petitioner's vice president, that this advertisement does carry the imputation that competitors deal unfairly with their customers, under the circumstances indicated by the quotation, ought this advertisement to be the basis of a finding and order? The publication was in the catalogue for March and April, 1916. The complaint was filed nearly two years afterwards. The act authorizes the Commission to proceed when it shall have reason to believe that unfair methods of competition are or have been used, "and if it shall appear to the Commission that a proceeding by it in respect thereof would be of interest to the public." In a monitory proceeding such as this seems to be, it could hardly be said that it would be "of interest to the public" to predicate action on a transgression for which due amends had long before been made, without remotest cause to believe there would be a repetition. To revive a stale advertisement of this nature, which the advertiser immediately after the publication distinctly disavowed as having been unintentionally and inadvertently unfair to competitors, and ordered discontinued, without directly or indirectly repeating or renewing it for so long an interval, far from subserving the public interest, might, in my judgment, have the contrary tendency of raising an imputation of oppressive or at least uncalled-for action, in predicating any proceeding or order on this advertisement.

Nor am I impressed with the authoritative relevancy here of decisions respecting injunctions. In a proceeding such as this, neither remedial nor punitive, decisions of courts respecting injunctive relief in equity are not more analogous than are common-law decisions defining unfair trade practices, aris-

ing out of controversies between individuals, as fixing thereby the limitation of the Commission's authority or scope.

The suggested modification would necessitate corresponding modification of the Commission's findings of facts, eliminating paragraphs numbered 4 and 5 thereof. Paragraphs 2, 6 and 7 (as well as paragraphs 4 and 5) of the findings state the circulation of the several advertisements to have been in each case for

"more than two years last past," indicating thereby the two years next before the date of the findings, which is June 24, 1918. This is no contravention of the stipulated fact that none of the advertisements were more recent than August, 1917, some of them even antedating the passage, September 24, 1914, of the Trade Commission Act itself. These findings should, in my judgment, be modified to comply with the stipulated facts.

ANNOTATION.

Validity and construction of statute creating Federal Trade Commission.

The constitutionality and construction of the act of Congress creating the Federal Trade Commission and defining its powers and duties (Act of Sept. 26, 1914, chap. 311, 38 Stat. at L. 717, Comp. Stat. § 8336a, 4 Fed. Stat. Anno. 2d ed. p. 575) seem to have been passed on by the courts in but three cases. In two of these the interpretation was confined to the two first paragraphs of § 5, which read as follows: "Unfair methods of competition in commerce are hereby declared unlawful. The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the Acts to Regulate Commerce, from using unfair methods of competition in commerce."

In the reported case (*SEARS, R. & CO. v. FEDERAL TRADE COMMISSION*, ante, 358) the validity of this provision was attacked on the ground of indefiniteness in the meaning of the words, "unfair methods of competition," but it is held that these words are of common expression and analogous to other phrases used in numerous statutes where it is not necessary to give specific definitions. They invoke the common sense of the members of the Commission in their interpretation and application to particular instances, and any order, being provisional only, is subject to review by the circuit court of appeals. The contention of the petitioner that the restraining order was improvidently

issued because it had discontinued the trade practice complained of is also held to be without merit, since the validity of the act was being attacked because of indefiniteness. But it is held, as restricting the powers of the Commission, that its authority does not extend to a prohibition against selling articles below cost so long as the public is not deceived and competitors are not discredited by false representations as to the reason for the low price.

In *Federal Trade Commission v. Gratz* (1919) — A.L.R. —, — C. C. A. —, 258 Fed. 814, the jurisdiction of the Commission under the provisions of § 5 is confined to a protection of the interests of the public, and it is held that unfair methods of competition must be construed as meaning such as are unfair to the general public, and that unfair methods of competition between individuals are not within the purview of the act.

In *United States v. Basic Products Co.* (1919) 260 Fed. 472, holding that the power of the Federal Trade Commission under subdivision a, § 6, of the act did not extend to requiring a manufacturing corporation operating under a patent to give access to its books and records to enable the Commission to comply with the request of the Navy Department, which had purchased some of its commodity, to ascertain the cost of production and the investment involved, the decision is upon the ground that investigation un-

der that subdivision is limited to corporations engaged in interstate commerce; and that the corporation was not engaged in interstate commerce in any other way than any other corporation or any citizen may be so engaged, by making one or more shipments of manufactured goods from one state into another. In this connection the court quoted from the opinion in *Kidd v. Pearson* (1888) 128 U. S. 1, 20, 21, 32 L. ed. 346, 350, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 10, with reference to the distinction between manufacture and commerce, and also cited the decision in *Hammer v. Dagenhart* (1918) 247 U. S. 251, 62 L. ed. 1101, 3 A.L.R. 649, 38 Sup. Ct. Rep. 529, Ann. Cas. 1918E, 724, holding unconstitutional the act of Congress which purported to prohibit the transportation in interstate commerce of goods made in factories in which children of tender age might be employed; observing particularly the emphasis placed by that court upon the point that Congress has a regulatory power over interstate transportation and its incidents, but that the production of articles intended for interstate commerce is matter for local regulation. The court, after further observing that an incident of the investigation was the ascertainment of trade secrets, said that the cost of manufacturing a pat-

ented product may be a species of property of great value, and the same is true of refinements of methods in producing the same; that, while the act prohibits a disclosure of trade secrets, the assumption that no such disclosures would be made disappears before the expressed intention to give the information to the Navy Department; and added that there was presented a contemplated search and seizure, and a taking of private property for public use without due process of law which was violative of the 4th and 5th Amendments of the Constitution.

The court in the last case referred to the contention of counsel for defendant, that § 6 of the Federal Trade Commission Act was unconstitutional, not only "in so far as it authorizes investigations and compulsory disclosures of matters which are beyond the commerce power of Congress," but also "in so far as it attempts to authorize a search or seizure by an administrative agency of government without charge or suspicion of wrongdoing;" and said that this contention was probably sound, but that the court did not deem it necessary to go further than to hold that the Commission had not the power to carry on the investigation which they had assumed in the case at bar. W. M. C.

ROBERT FULLERTON

v.

UNITED STATES CASUALTY COMPANY, Appt.

Iowa Supreme Court — May 30, 1918.

(— Iowa, —, 167 N. W. 700.)

Insurance — automobile — injury by member of family.

1. A policy insuring the owner of an automobile against liability on account of injuries suffered by reason of the ownership, maintenance, or use of the car covers injuries caused by operation of the car by the owner's adult son, who is a member of his family and maintained by him; at least, if the policy provides against liability if the car is being driven by any person under sixteen years of age.

[See note on this question beginning on page 376.]

Reformation of instrument — when granted.

2. To warrant reformation of a contract for mistake, the one seeking it must show that the mistake occurred, and that it was mutual.

[See 23 R. C. L. 327.]

— automobile insurance.

3. A policy insuring the owner of an automobile kept for business calls and pleasure against loss by injuries caused by operation of the car may be reformed so as to cover injuries while the car is being driven by members of the owner's family, where he understood that the policy would so cover, the agent knew that he did not drive the car himself, and the insurer, upon notice of the accident, settled part of the claims and attempted to settle others.

Insurance — effect of fact that driver was of age.

4. That a son driving an automobile at the time it inflicted injury was of legal age does not take the accident out of the operation of an indemnity insurance policy against liability on account of injuries suffered by reason of the ownership, maintenance, and use of the car, if he was just out of school, living at home as a member of his father's family, and dependent upon his father for support.

Contract — practical construction — adoption by court.

5. The construction which imports a liability on the part of one party to a contract, and which is put upon it by

both parties to it who have acted upon it in accordance with such construction, will be adopted by the court.

[See 6 R. C. L. 852.]

— when practical construction resorted to.

6. Resort is to be made to the practical construction of a contract by the parties thereto only where there is some degree of uncertainty or doubt in the language employed.

[See 14 R. C. L. 937.]

Insurance — election to defend cause — effect.

7. An indemnity insurer whose contract excluded the assured from participation in the defense or settlement of any claim against him cannot, after settling some of the claims growing out of an accident and undertaking the defense of a suit on other claims, withdraw from the defense and cast the burden thereof on the assured on the theory that it had mistaken the nature of its obligation.

— settlement of cause without judgment — effect.

8. An indemnity insurer which abandons its obligation to defend a suit against assured growing out of an accident cannot defeat a recovery for money paid by the assured in settlement of the claim on the ground that it was paid in compromise without a judgment, whereas the contract provided for recovery only when the payment is in satisfaction of a judgment.

[See 14 R. C. L. 1322.]

APPEAL by defendant from a judgment of the District Court for Polk County (De Graff, J.) in favor of plaintiff in an action brought to reform an indemnity insurance policy and to recover an amount paid in satisfaction of a claim for accidental injury. *Affirmed.*

The facts sufficiently appear in the opinion of the court.

Messrs. Sullivan & Sullivan, for appellant:

To entitle plaintiff to a reformation of his contract upon the ground of mistake, the mistake must be mutual and the evidence to sustain the finding of mistake must be clear, satisfactory, and convincing, and free from reasonable doubt.

Gelpcke, W. & Co. v. Blake, 15 Iowa, 387, 83 Am. Dec. 418; Jack v. Naber, 15 Iowa, 450; Harvey v. Savery, 48 Iowa, 313; Clute v. Frasier, 58 Iowa, 268, 12 N. W. 327; First Presby. Church v. Logan, 77 Iowa, 326, 42 N. W. 310; Wachendorf v. Lancaster, 61 Iowa, 509, 14 N. W. 316, 16 N. W. 538;

Cummins v. Monteith, 61 Iowa, 541, 16 N. W. 591; Carey v. Home Ins. Co. 97 Iowa, 619, 66 N. W. 920; Marshall v. Westrope, 98 Iowa, 324, 67 N. W. 2 7; Montgomery v. Mann, 120 Iowa, 609, 94 N. W. 1109; Bowman v. Besley, 122 Iowa, 42, 97 N. W. 60; Pierce v. Houghton, 122 Iowa, 477, 98 N. W. 306; Pyne v. Knight, 130 Iowa, 113, 106 N. W. 505; Frey v. Camp, 131 Iowa, 110, 107 N. W. 1106; McCarl v. Travelers Ins. Co. 151 Iowa, 669, 132 N. W. 12; Hudson v. Hussey, 155 Iowa, 140, 135 N. W. 626; Fitchner v. Fidelity Mut. Fire Asso. 103 Iowa, 276, 72 N. W. 530; Williams v. Hamilton, 104 Iowa, 423, 65 Am. St. Rep. 475, 78 N. W. 1029;

(— Iowa, —, 167 N. W. 700.)

Dalton v. Milwaukee Mechanics' Ins. Co. 126 Iowa, 377, 102 N. W. 120; **Barnes v. Hekla F. Ins. Co.** 75 Iowa, 12, 9 Am. St. Rep. 450, 39 N. W. 122; **Flickinger v. Farmers' Mut. F. & L. Ins. Asso.** 136 Iowa, 258, 113 N. W. 824.

It is only when the terms of the contract are of doubtful or ambiguous meaning that the construction placed upon the same by the parties by their acts and conduct may be shown for the purpose of arriving at their true intention.

Sternbergh v. Brock, 225 Pa. 279, 24 L.R.A.(N.S.) 1078, 133 Am. St. Rep. 877, 74 Atl. 166; **Ralya v. Atkins**, 157 Ind. 331, 61 N. E. 726; **Scott v. La-Fayette Gas Co.** 42 Ind. App. 614, 86 N. E. 495; **New York v. New York City R. Co.** 193 N. Y. 448, 86 N. E. 565; **Bruce v. Indianapolis Gas Co.** 46 Ind. App. 193, 92 N. E. 189; **Indiana Natural Gas & Oil Co. v. Stewart**, 45 Ind. App. 554, 90 N. E. 384; **Joliet Bottling Co. v. Joliet Citizens' Brewing Co.** 254 Ill. 215, 98 N. E. 263; **Lemcke v. Hendrickson**, 60 Ind. App. 323, 110 N. E. 691; **St. Paul & D. M. R. Co. v. Blackmar**, 44 Minn. 514, 47 N. W. 172; **Loper v. Sheldon**, 120 Wis. 26, 97 N. W. 524; **Burton v. Douglass**, 141 Wis. 110, 123 N. W. 631, 18 Ann. Cas. 734; **Meissner v. Standard R. Equipment Co.** 211 Mo. 112, 109 S. W. 730; **Stewart v. Pierce**, 116 Iowa, 733, 89 N. W. 234; **Gould v. Gunn**, 161 Iowa, 155, 140 N. W. 380; **Pratt v. Prouty**, 104 Iowa, 419, 65 Am. St. Rep. 472, 73 N. W. 1035; **Daily v. Minnick**, 117 Iowa, 563, 60 L.R.A. 840, 91 N. W. 913; **Sanders v. Frankfort M. Acci. & Plate Glass Ins. Co.** 72 N. H. 485, 101 Am. St. Rep. 688, 57 Atl. 656; **Fuller Bros. Toll Lumber & Box Co. v. Fidelity & C. Co.** 94 Mo. App. 490, 68 S. W. 222.

The policy issued to plaintiff was a contract of indemnity, and unless he has suffered loss or damage he is not entitled to recover.

Chickasaw County Farmers' Mut. F. Ins. Co. v. Weller, 98 Iowa, 731, 68 N. W. 443; **Reynolds v. Buck**, 127 Iowa, 601, 103 N. W. 946, 18 Am. Neg. Rep. 412; **Hartley v. Miller**, 165 Mich. 115, 33 L.R.A.(N.S.) 81, 130 N. W. 336, 1 N. C. C. A. 26; **Sultzbach v. Smith**, 174 Iowa, 704, L.R.A.1916F, 228, 156 N. W. 673; **Garner v. Fry**, 104 Iowa, 515, 73 N. W. 1079; **Doran v. Thomsen**, 76 N. J. L. 754, 19 L.R.A.(N.S.) 385, 131 Am. St. Rep. 677, 71 Atl. 296; **Metz v. Soule, K. & Co.** 40 Iowa, 236; 6 A.L.R.—24.

Snyder v. Mutual Teleph. Co. 135 Iowa, 215, 14 L.R.A.(N.S.) 321, 112 N. W. 776.

Messrs. Nourse & Nourse, for appellee:

A policy of insurance may be reformed, if need be, to carry out the intention of the parties.

2 Pom. Eq. Jur. 2d ed. § 845; **Flickinger v. Farmers' Mut. F. & L. Ins. Asso.** 136 Iowa, 258, 113 N. W. 824; **Jacobs v. St. Paul F. & M. Ins. Co.** 86 Iowa, 145, 53 N. W. 101; **Carey v. Home Ins. Co.** 97 Iowa, 619, 66 N. W. 920.

The failure of the insured to read the policy is not such negligence as will defeat recovery.

Barnes v. Hekla F. Ins. Co. 75 Iowa, 12, 9 Am. St. Rep. 450, 39 N. W. 122; **Fitchner v. Fidelity Mut. Fire Asso.** 103 Iowa, 276, 72 N. W. 530.

The construction put upon the contract of insurance by both of the parties in carrying it into effect is controlling.

Fuller Bros. Toll Lumber & Box Co. v. Fidelity & C. Co. 94 Mo. App. 490, 68 S. W. 223; **Sanders v. Frankfort M. Acci. & Plate Glass Ins. Co.** 72 N. H. 485, 101 Am. St. Rep. 688, 57 Atl. 661; **Lombard v. Maguire-Penniman Co.** 78 N. H. 110, 97 Atl. 893; **Haydel v. Mutual Reserve Fund Life Asso.** 44 C. C. A. 169, 104 Fed. 718; **Pratt v. Prouty**, 104 Iowa, 419, 65 Am. St. Rep. 472, 73 N. W. 1035; **Daily v. Minnick**, 117 Iowa, 563, 60 L.R.A. 840, 91 N. W. 913.

The company, by electing to assume and assuming the defense, lost its right to deny that the policy covered or applied.

Sanders v. Frankfort M. Acci. & Plate Glass Ins. Co. 72 N. H. 485, 101 Am. St. Rep. 688, 57 Atl. 661; **Fuller Bros. Toll Lumber Co. v. Fidelity & C. Co.** 94 Mo. App. 490, 68 S. W. 223; **St. Louis Dressed Beef & Provision Co. v. Maryland Casualty Co.** 201 U. S. 183, 50 L. ed. 717, 26 Sup. Ct. Rep. 400.

The refusal of the company to further defend the suit constituted such a breach of the contract of insurance that it released insured from his agreement not to settle the claim without the company's consent, and amounted to a waiver of the condition that the company should only be liable for judgment rendered against assured after trial and after assured had paid judgment.

St. Louis Dressed Beef & Provision Co. v. Maryland Casualty Co. 201 U. S. 173, 50 L. ed. 712, 26 Sup. Ct. Rep.

400; *New Amsterdam Casualty Co. v. East Tennessee Teleph. Co.* 71 C. C. A. 586, 139 Fed. 602; *Bradley v. Standard Life & Acci. Ins. Co.* 46 Misc. 41, 93 N. Y. Supp. 245; *Anderson & I. Co. v. Maryland Casualty Co.* 123 Md. 67, 90 Atl. 780; *Tighe v. Maryland Casualty Co.* 218 Mass. 463, 106 N. E. 135; *Patterson v. Adan*, 119 Minn. 283, 137 N. W. 1112; *South Knoxville Brick Co. v. Empire State Surety Co.* 126 Tenn. 402, 150 S. W. 94, Ann. Cas. 1913E, 107; *Butler Bros. v. American Fidelity Co.* 120 Minn. 157, 44 L.R.A.(N.S.) 609, 139 N. W. 358.

Insured is entitled to recover attorneys' fees expended by him in defending the suit after the company had refused to further proceed with the defense.

Anderson & I. Co. v. Maryland Casualty Co. 123 Md. 67, 90 Atl. 781; *Butler Bros. v. American Fidelity Co.* 120 Minn. 157, 44 L.R.A.(N.S.) 609, 139 N. W. 359; *South Knoxville Brick Co. v. Empire State Surety Co.* 126 Tenn. 402, 150 S. W. 94, Ann. Cas. 1913E, 107.

Weaver, J., delivered the opinion of the court:

On July 14, 1913, the defendant, a liability insurance company, by its duly authorized agent issued a policy of insurance to Robert Fullerton, plaintiff herein, indemnifying him for the period of one year against loss arising or resulting from claims for damages on account of bodily injuries sustained or alleged to have been suffered by any person or persons by reason of the ownership, maintenance, or use of a certain described Pierce-Arrow automobile kept and used by said owner for the purpose of business calls and pleasure. Among other things, the policy provided that in case any suit was brought to enforce a claim of that nature, plaintiff would promptly give notice thereof to the company, which would assume and conduct the defense in plaintiff's name, but at its own cost, whether the claim so sued upon was groundless or not. The company also reserved to itself the right to settle any claim at its own cost at any time. When the policy was issued it was known and understood

by the company that plaintiff did not himself drive or operate the car. At that time, and at the time of the accident hereinafter mentioned, plaintiff was a resident of the city of Des Moines and head of a family. He had a son and daughter, both of whom had arrived at their majority, but were still living at home as dependent members of his family. On July 3, 1914, while the policy was in full force, plaintiff's said son, Donald P. Fullerton, accompanied by his sister and others, was driving the car upon the streets of Des Moines for pleasure. A collision occurred between said vehicle and a buggy occupied by one Hockenberg and wife and a friend, Mrs. Jacobson, with the result that the persons last mentioned, or some of them, were injured. The Hockenbergs having made claim for damages, the insurance company came forward and took charge of the negotiations for a settlement, which was finally effected for the sum of \$1,250 paid by the insurer.

Mrs. Jacobson also presented a claim for damages on her own account, and for a considerable period negotiations were carried on between her and the appellant, looking to an adjustment of such claim without litigation, but no agreement upon the amount to be paid was reached. In December, 1914, Mrs. Jacobson brought suit upon her claim in the district court of Adair county, naming as defendant in such action Donald P. Fullerton, son of the plaintiff in this action. Plaintiff promptly gave notice of this action to the insurance company, which caused its own attorneys, Sullivan & Sullivan, to appear and assume conduct of the defense. As the district court of Polk county afforded a more convenient venue for all parties, Sullivan & Sullivan requested counsel for Mrs. Jacobson to dismiss the suit in Adair county and begin it anew in Polk county, agreeing if this was done that they would appear thereto for the defense and accept or waive service of formal notice. This agreement was made and per-

formed. The action in Adair county was dismissed and petition filed in the district court of Polk county in time for the January, 1915, term of the district court. Service of notice was accepted December 23, 1914. On December 30, 1914, Sullivan & Sullivan, appearing for the defense, filed a motion to require plaintiff to give a cost bond. On February 18, 1915, and before the issues had been settled, Sullivan & Sullivan withdrew their appearance for the defense, and appellant thenceforward took no part in said action. No explanation of such withdrawal appears in the record of that case, but the position taken by the appellant in the case at bar, as hereinafter shown, indicates that it acted on the theory that the claim asserted by Mrs. Jacobson in that action was not one against which the policy of insurance afforded any indemnity. When the defense had thus been abandoned by appellant, plaintiff herein employed other counsel, Nourse & Nourse, to appear in said cause, and later by their assistance effected a settlement by the terms of which Mrs. Jacobson accepted \$1,500, paid by the plaintiff herein in full satisfaction and discharge of her claim for damages against both Robert Fullerton and Donald P. Fullerton. Thereafter plaintiff brought the present action in equity to correct the policy issued by the defendant, and to recover thereon the amount expended in satisfying the Jacobson claim, and in payment of counsel fees for service in that case after the defense thereof had been abandoned by the company.

In his petition plaintiff sets out the facts substantially as hereinbefore related. He further avers that the policy was applied for and issued with the mutual agreement and understanding that it was to cover all damages and claims for damages resulting from injury to any person by the operation of said car when driven by his servant or any member of his family, and if the contract as written is found not to be fairly susceptible of that con-

struction, then it does not express the real contract between the parties, and it should be reformed or corrected to express such intent. The defendant denies the allegations of the petition in so far as it charges any failure of the policy to express the contract of insurance, and denies that it has in any manner failed to perform its agreement. It admits the issuance of the policy sued upon, but alleges that the injuries to the Hockenbergs and Mrs. Jacobson occurred while the car was being driven by Donald P. Fullerton, plaintiff's adult son, and that such injuries created no liability on the part of the plaintiff herein against which the policy undertook to indemnify him. As a further answer it is alleged that, if plaintiff paid damages to Mrs. Jacobson as alleged, it was a purely voluntary act on his part, and defendant is under no contract obligation to reimburse him for such expenditure.

Trial to the court upon the issues thus joined resulted in plaintiff's favor, and a decree for the relief prayed was entered. The defendant appeals.

I. The first proposition argued by counsel is that plaintiff failed to make a case for reformation of the policy of insurance. It is fundamental, of course, that to be entitled to equitable relief of this kind the party asking it must

Reformation of
instrument—
when granted.

show not only that the alleged mistake occurred, but also that it was mutual. In other words, it must be made to appear that by mistake the contract as written fails to express the mutual intent of the parties, and, if the mistake be denied, the fact must be established by a clear and satisfactory preponderance of the evidence. Basing its contention upon the law as thus stated, appellant argues that no mutual mistake appears to have been made in the terms of the policy as written. If plaintiff's case were left to rest solely upon his own unaided testimony as a witness on the trial below, this objection would have to be held

good, for in some respects his statements of what occurred when the insurance was taken out is vague and uncertain; but taking all the circumstances attending that transaction together with the practical interpretation put upon the policy by the company, as well as by plaintiff, from the time of its issuance down to the date when the company withdrew from the Jacobson suit, there is little room for doubt that both considered and treated the contract

as providing indemnity against claims for damages arising from or caused by the operation of the plaintiff's car in the course of its ordinary use as specified in the policy, without respect to the fact whether the car was being driven by the plaintiff himself, or by any other member of his family acting with his permission or by his authority. While plaintiff does not attempt to state the language used in the negotiations between him and the defendant's agent, he says the subject was discussed, and that he understood that the policy to be issued would cover the use of the car by the members of his family, and that if any accident occurred in such use the company undertook the defense of damage claims so arising. The agent does not deny that such was the mutual understanding. He speaks of his general custom to have the terms of insurance issued by him clearly understood, but says: "I don't know what was said at this particular time; I can't remember."

Further, with reference to the writing out of the policy as issued, he says:

I signed exhibit A [the policy], and the blanks were filled out by a clerk under my direction; that is, I gave the policy writer the information to fill out the blanks.

Q. And did that, as you understand it, cover the items that you gave him or her to put in the policy expressed in this exhibit?

A. I think so.

Q. And this at the time expressed

what you thought the policy ought to be?

A. At the time the policy was issued.

Q. That is what you intended to have in the policy just as it appears now?

A. At the time the policy was issued.

It does not even appear that the witness read the policy after it was filled out by his clerk. He does say that he was told, or that he knew the fact to be, that Mr. Fullerton did not himself drive or operate the car, and that he so informed the company; but aside from this he states nothing from his own independent recollection as to the terms discussed between him and the plaintiff. The policy itself describes the use to which the car is devoted as being "for business calls and pleasure." In other words, it was a family car, such a car, as in most families having such a convenience, is ordinarily used and is expected and intended to be used quite indiscriminately, not only by the family head, but also by his wife, sons, and daughters so far as they are reasonably competent so to do. That such was the understanding of the company is sufficiently shown by a clause in the policy which exempts the insurer from liability for injuries when the car is being driven by anyone under sixteen years of age.

Still further, as bearing upon the understanding by the company as to the nature of its agreement, we find, as already noted, that on being notified of the accident it promptly responded, took charge of the negotiations for settlement with the Hockenbergs, and in fact made such settlement, paying a very substantial sum to effect it. It sought a similar settlement with Mrs. Jacobson, but failed to reach an agreement on terms, and when she brought suit against plaintiff's son, the driver of the car, it again responded to plaintiff's notice and took up the defense, and not until a later date did it discover a reading or construction of its policy which

(— Iowa, —, 167 N. W. 700.)

would relieve it from liability. That during all this time plaintiff believed and acted upon the belief that his policy covered a case of this kind is very evident, and that defendant gave him every reason to understand that such was its own construction of their contract is equally clear. We are of the opinion, therefore, that if any reformation of the policy was necessary to entitle plaintiff to a recovery, the proved facts and circumstances to which reference has been made afford ample support for a decree granting such relief.

II. We are not, however, persuaded that a reformation of the policy was necessary to plaintiff's recovery. The contract as written indemnifies the plaintiff against claims for damages on account of bodily injury "accidentally suffered or alleged to have been suffered . . . by any person or persons by reason of the ownership, maintenance, or use" of the described automobile. This clearly does not limit the indemnity to claims for damages on account of injuries occurring while the insured is personally using the car, but extends to all claims of that nature made by

Insurance—
automobile—
injury by
member of
family.

reason of his ownership or maintenance thereof. While we have held that the owner of

an automobile is not liable for injury caused to another by the neglect of a person, even a member of his own family, who attempts to operate the car without the authority, express or implied, of such owner, yet we have never held that one who purchases and owns an automobile for family use, and permits it to be used by the dependent members of his family for their own pleasure, may not be held liable for their neglect in such use of it Reynolds v. Buck, 127 Iowa, 601, 103 N. W. 946, 18 Am. Neg. Rep. 412; Sultzbach v. Smith, 174 Iowa, 704, L.R.A.1916F, 228, 156 N. W. 673; Kayser v. Van Nest, 125 Minn. 277, 51 L.R.A.(N.S.) 970, 146 N.

W. 1091; Birch v. Abercrombie, 74 Wash. 486, 50 L.R.A.(N.S.) 59, 133 Pac. 1020; Ploetz v. Holt, 124 Minn. 169, 144 N. W. 745; Hays v. Hogan, 180 Mo. App. 237, 165 S. W. 1125. On the contrary, we think it may well be said that when a car owner gives it over to the use of his family, and permits it to be operated by the dependent members thereof, the individuals to whom it is so intrusted may properly be considered his representatives or agents in such a sense that their negligence in the use of the car is imputable to him, and that persons injured by reason of such negligence, without fault on their own part, may hold such owner liable for damages so sustained; and if such be the law, then the policy in suit indemnifies the plaintiff against it. (See cases last above cited.) Indeed, the clause in the policy already mentioned, exempting the company from liability when the accident occurs while the car is being driven by anyone under sixteen years of age, seems to be an implied concession or recognition of such liability, where the driver is any member of the family over that age.

In avoidance of this proposition appellant pleads and relies upon the admission that Donald P. Fullerton was of legal age at the time of the accident. It is true that the son had arrived at his majority. He was, however, a young man just out of school, living at the parental home, a member of the family, and as yet dependent upon his father. Under such circumstances, the mere fact that he was more than twenty-one years old would not require the application of any other rule of law than we have already stated.

—effect of fact
that driver
was of age.

Moreover, it is to be said that ordinarily a contract, the meaning or effect of which has been settled by the practical interpretation placed thereon, requires no reformation, but may be enforced according to such meaning. In other words,

where the evidence sufficiently shows that parties to a contract have both so construed it as to import a liability on part of either, and both have acted thereon in accordance with such understanding, such construction will be adopted by the court. *Daily v. Minnick*, 117 Iowa, 567, 60 L.R.A. 840, 91 N. W. 913; *Pratt v. Prouty*, 104 Iowa, 419, 65 Am. St. Rep. 472, 73 N. W. 1035; *St. Louis Gaslight Co. v. St. Louis*, 46 Mo. 121; *Fuller Bros. Toll Lumber & Box Co. v. Fidelity & C. Co.* 94 Mo. App. 490, 68 S. W. 222.

Counsel remind us at this point that the rule by which effect is given to the conduct of the parties to the contract as indicating the proper construction to be placed upon its terms is applicable only where the written agreement is ambiguous or doubtful, and they say the writing now under consideration is clear and unequivocal. Admitting the general correctness of the rule that resort is to be made to the practical construction of a contract by the parties thereto only

—when practical construction resorted to.

where there is some degree of obscurity or doubt in the language employed, we cannot say that the policy in suit is in all respects so free from ambiguity as to exclude consideration of the evidence referred to. For example, the policy contains a provision which exempts the insurer from liability where the injury occurs while the car mentioned in the policy is "being driven by any person under sixteen years of age," or while such car "is being used for any other purpose than that specified in the schedule." The schedule referred to describes the permissible use of the car as being "for business calls and pleasure." Does the exemption of the insurer where the driver is under sixteen years of age imply an admitted liability where the driver is a member of the family of the insured over sixteen years of age? Again, the

limitation of the use of the car to "business calls and pleasure" is very general and indefinite, if not elastic, and affords a very appropriate instance for considering the attitude and conduct of the insurer with reference thereto. Are the "business calls" mentioned those strictly personal to the owner, or do they include those of his wife and children and members of his family? Is the use of the car for "pleasure" a use for his pleasure alone, or does it include use by members of his family over sixteen years of age for their pleasure, or for the pleasure of their guests and friends to whom they extend the ordinary courtesies of social life? Again, there is a clause of the policy which provides that, when any accident happens, the assured shall at once notify the company; and if "any claim is made on account of such accident," like notice shall be given; and "if any suit is brought to enforce such a claim," the company, on notice thereof, "shall defend such suit," etc. The terms, "any accident," "any claim," and "any suit," are very broad, and although, when construed solely in connection with all the terms of the policy and without reference to extrinsic circumstances, they could properly be restricted within the narrow limits for which appellant contends, yet such limitations are not so clearly expressed as to exclude all room for construction. In other words, if the language be open to construction at all, we can conceive of no sound reason for not applying the rule as to practical construction of the parties, if there be any evidence showing such fact.

For the reasons stated, we are satisfied that the trial court correctly interpreted the contract of insurance.

III. We are further disposed to the view that the insurance company having, with full knowledge of the facts, undertaken to defend against the claim and suit of Mrs. Jacobson at its own cost and on its own responsibility, it could not, while the case was still pending and

(— Iowa, —, 167 N. W. 700.)

undetermined, rightfully abandon it for no better reason than its belated conviction that the policy did not impose upon it the duty to assume such defense. The company had not only bound itself to assume the defense of "any claim" against which it undertook to indemnify the plaintiff, but had also carefully excluded him from all right to act independently of the company on the matter of such suit by a provision in the policy that the "assured shall not voluntarily assume any liability either before or after the accident, nor shall he, without the written consent of the company, incur any expense or settle any claim except at his own cost, nor interfere in any negotiation for settlement or in any legal proceeding conducted by the company on account of any "claim." When, therefore, it was notified of the accident and of the claims of the Hockenbergs and Mrs. Jacobson, the company was called upon to act, either to deny that it was under any obligation in the matter, and leave the plaintiff and his son to conduct the defense in their own way and upon their own responsibility for making a defense or settlement, as it should find expedient. It accepted the latter alternative, took the business out of the hands of the insured, made its own settlement with the Hockenbergs, and took exclusive control of the defense to the suit of Mrs. Jacobson. Such conduct of the parties was tantamount to an agreement or mutual concession that the policy was intended to cover these claims for damages, and both parties have proceeded on that basis to a settlement with the Hockenbergs, and on to a point midway in the Jacobson suit; the insurer will not be permitted then to change front, abandon a defense it had undertaken, and escape liability on the plea that it has mistaken the nature of its obligation. If a precedent for such holding be needed, it may be found in a well-

Insurance—
election to
defend cause—
effect.

considered decision by the New Hampshire court (Sanders v. Frankfort M. Acci. & Plate Glass Ins. Co. 72 N. H. 485, 101 Am. St. Rep. 688, 57 Atl. 655), where, speaking upon a very similar question, it is said: "The view that the contract means that the insurance company, after taking control of the proceedings in a suit against the assured, cannot thereafter be discharged except by payment of the indemnity to the assured or securing his discharge from the claim, is thought to best conform to the intent of the parties, and is adopted."

See also Lombard v. Maguire-Penniman Co. 78 N. H. 110, 97 Atl. 892.

Quite in point also is Fuller Bros. Toll Lumber & Box Co. v. Fidelity & C. Co. 94 Mo. App. 490, 68 S. W. 222. There the defendant had insured an employer against liability for personal injuries to his employees. One Goza, an employee, being injured in the operation of an elevator, made claim for damages, and the insurer, on notice from the employer, assumed the defense and conducted it to final settlement. Later another employee, one Hobert, suffered a similar injury in the same elevator, and also made claim for damages, but the insurer denied liability on the theory that the policy did not cover injuries so arising; but the court, referring to the company's act in defending and settling the Goza Case, said: "We are thus furnished with the indubitable evidence of the meaning the defendant assigned to the policy. As said in the case of St. Louis Gaslight Co. v. St. Louis, 46 Mo. 121: 'In a case of that kind, whose interpretation should prevail? If the court gives one differing from that understood by the parties, it . . . makes a new contract—the very thing most to be avoided. If it leaves the parties to be governed by their understanding of their own language, it, in effect, enforces the contract actually made. That they should be so

permitted to construe their own agreement accords with every principle of reason and justice.' It is obvious from the acts and declarations of the parties that they understood the policy to cover the liability of plaintiff to its employees for injuries suffered by them while engaged in work in and about its elevators, and, that being so, it becomes our duty to adopt that understanding as the proper guide to its meaning."

The rule so applied is manifestly a reasonable one, and no principle of law is suggested by counsel which prevents its application to this case.

IV. We are cited to a clause of the contract to the effect that the right of the insured to maintain an action against the company is limited to cases of "loss actually sustained and paid in money in satisfaction of a judgment after trial of the issue," and it is said that the payment of Mrs. Jacobson by plaintiff was by way of a settlement, and not in satisfaction of a judgment. But this provision can avail the appellant nothing in this case. It repudiated its obligation to assume

and carry the defense to final judgment, and, having abandoned the case, it left assured at liberty to take up the defense and contest the claim to final judgment, or, if so advised, to make the most favorable settlement possible. He pursued the latter course, secured a settlement, paid the money, and received from Mrs. Jacobson a discharge in full of all claims against himself and son on account of her injury. It is admitted in the record that the settlement so made was a reasonable one, that the damages paid were not excessive, and that the attorney fee paid Nourse & Nourse for services in conducting the defense, after the withdrawal of Sullivan & Sullivan, is also reasonable.

We find nothing in the record requiring a reversal of the decree of the District Court, and it is therefore affirmed.

Preston, Ch. J., and Gaynor and Stevens, JJ., concur.

Petition for rehearing denied, September 20, 1918.

ANNOTATION.

Automobile liability insurance.

- I. Power of company to issue, 378
- II. Validity of policy, 377.
- III. Liability where one other than insured was using car, 377.
- IV. Liability where car was being driven by infant or other unauthorized person, 378.
- V. Provisions as to determination of insured's liability and payment of claim, 380.
- VI. Right of person injured to recover on policy, 381.

I. Power of company to issue.

While policies insuring owners of automobiles against loss sustained on account of having to pay damages for injuries inflicted by their machines are of recent origin, decisions involving liability thereunder are rapidly increasing. In view of the fact that such policies in a sense involve a new

- VII. Right of insured to settle with person injured, 381.
- VIII. Provisions for insured's co-operation and assistance, 383.
- IX. Defense of suit by insurer, and its effect, 383.
- X. Provisions as to notice of accident or claim, 384.
- XI. Liability for depreciation of machine injured, 385.
- XII. Provisions as to insured's automobile being rented, 386.

line of insurance, as might be expected, contentions have been raised that certain companies have no authority to issue them.

Such a contention was made in *American Automobile Ins. Co. v. Insurance Comrs.* (1913) 174 Mich. 295, 140 N. W. 557, with the result that a company formed under an act au-

therizing the incorporation of companies "to make insurance on automobiles, whether stationary or being operated under their own power, against any hazard," was held not authorized to issue policies insuring against loss or expense resulting from claims for damages by reason of the ownership, maintenance, and operation of an automobile, against bodily injuries or death accidentally suffered as a result of accident, and against the destruction of property by accident, and undertaking to defend suits attempting to enforce such claims against the insured, the view of the court in this case being that the statute merely authorized insurance on automobiles; such, for example, as policies against their loss by fire, theft, etc.

And in another case the issuance of policies undertaking to indemnify owners of automobiles against loss from liability imposed by law on account of bodily injuries or damage to property, suffered through the operation of such machines, was held not authorized by a statutory provision that any company authorized to do business might "insure the health of persons, and against personal injuries, disablement, or death resulting from traveling or general accident," or by another provision that any company might insure employers against loss in consequence of accidents or casualties of any kind to employees or other persons, or to property, resulting from any act of an employee, or any accident or casualty of any kind to persons or property, or both, occurring in or connected with the transaction of their business, or from the operation of any machinery connected therewith. *American Fidelity Co. v. Bleakley* (1912) 157 Iowa, 442, 138 N. W. 508.

The further conclusion was reached in this case that a policy of the character under consideration, issued by a foreign corporation licensed to transact business in the state in accordance with the laws thereof, could not be sustained on the ground of comity.

And it has been decided that a foreign corporation, although authorized

to write liability insurance in the state of its creation, had no authority to write policies in Michigan, insuring against loss resulting from bodily injuries or destruction of property through the operation of automobiles, it being the policy of that state to separate the business of insurance upon property from other lines. *American Automobile Ins. Co. v. Insurance Comrs. (Mich.) supra.*

II. *Validity of policy.*

It has been decided that policies insuring owners of automobiles against loss or damage on account of their operation are not contrary to public policy. *Taxicab Motor Co. v. Pacific Coast Casualty Co.* (1913) 73 Wash. 631, 132 Pac. 393 (so holding, notwithstanding the fact that the policy covered an accident which arose out of a violation of a speed ordinance); *American Fidelity Co. v. Bleakley* (1912) 157 Iowa, 442, 138 N. W. 508 (although, as shown in the preceding subdivision, the company in this case was held not authorized to issue such a policy).

And in *Gould v. Brock* (1908) 221 Pa. 38, 69 Atl. 1122, the court, in refusing to restrain a company which had insured an owner of an automobile against liability for accidents from conducting the defense in an action against the insured, said that there was a time when all insurance, especially life, was looked upon with suspicion and disfavor, being regarded as a species of wagering contracts, but that that time had gone by, and that there was nothing in the case at bar which even remotely disclosed the taint of maintenance.

See also *Messersmith v. American Fidelity Co.* *infra*, IV.

III. *Liability where one other than insured was using car.*

It will be noted that in the reported case (*FULLERTON v. UNITED STATES CASUALTY CO.* *ante*, 367), it was held that a policy insuring the owner of an automobile kept for business calls and pleasure against loss by injuries caused by the operation of the car might be reformed so as to cover in-

juries while the car was being driven by members of his family, where he understood that the policy was to cover this risk, and the agent knew that he did not drive the machine himself, and the insurer, upon notice of an accident, settled part of the claims and attempted to settle others. It was held, however, that reformation was not necessary, as the provision of the policy undertaking to indemnify against claims on account of bodily injury, "accidentally suffered . . . by any person or persons by reason of the ownership, maintenance, or use" of the insured's automobile, covered all claims of the nature indicated, made by reason of the insured's ownership or maintenance of the car, including injuries resulting while the car was being driven by his adult son, who was a member of his family.

A peculiar and interesting question of liability under a policy issued to partners arose in *Hartigan v. Casualty Co.* (1919) 227 N. Y. 175, 124 N. E. 789. In that case, a policy insuring "Hartigan & Dwyer . . . Troy . . . department store merchant," against "loss and expense by reason of claims made upon the assured" by reason of accidents suffered by reason of the "ownership, maintenance, or use" of a delivery automobile, was held unambiguous, and to limit the insurer's liability to accidents which happened while the automobile was being used by the firm mentioned, which was a partnership, and that there was no liability under the policy on account of an accident which occurred while the machine was being used by another firm located in a different city, to which firm it had been loaned, although such firm was composed of the two partners named in the policy and a third person.

In *Mayor, L. & Co. v. Commercial Casualty Ins. Co.* (1915) 169 App. Div. 772, 155 N. Y. Supp. 75, in an action against a company which had refused to defend an action against the insured, to recover the amount paid by the latter to settle the action, it was held that it could not be said as a matter of law that the chauffeur operating the truck causing the injury for

which recovery was sought against the insured was its servant, and engaged in its business at the time of the accident, it appearing that the insured had put the truck in storage with a company which had a right to rent it, and that on the day of the injury it was sent out by the storage company in charge of a chauffeur hired and paid by that company, and that the insured, in the action brought against it on account of the injury, in its answer denied that the chauffeur was its servant.

IV. Liability where car was being driven by infant or other unauthorised person.

An interesting question has arisen under automobile liability policies as to the insurer's liability for loss resulting to the insured on account of an injury inflicted while his car was being operated by an infant or unlicensed person, in violation of regulations governing the issuing of licenses to persons for driving such machines.

It has been held that a policy undertaking to indemnify the insured against loss or expense on account of bodily injuries accidentally incurred by reason of the use of the insured's automobile covered a loss sustained by the insured on account of an injury inflicted by his automobile while it was being operated, in violation of statute, by one under eighteen years of age, the court holding that the policy was founded on a valid consideration, and that it was not connected with the unlawful use of the automobile, and did not aid or assist the insured in any unlawful purpose. *Messersmith v. American Fidelity Co.* (1919) 187 App. Div. 85, 175 N. Y. Supp. 169, reversing (1917) 101 Misc. 598, 167 N. Y. Supp. 579.

And a policy undertaking to indemnify for loss suffered on account of injuries accidentally sustained by others by reason of the insured's ownership and maintenance of an automobile, and providing that it should not apply while the machine was driven or manipulated "by any person under the age fixed by law, or under the age of sixteen in any event," has been held to cover an injury inflicted on a third person while the car

was being driven by the insured's sixteen-year-old son, unaccompanied by a licensed chauffeur, notwithstanding a statute providing that "no person shall operate a motor vehicle . . . until he shall have obtained from the secretary . . . a license for that purpose, but no such license shall be issued until said secretary is satisfied that the applicant is over eighteen years of age and is a proper person to receive it. . . . Nothing herein contained shall prevent the operating of a motor vehicle by an unlicensed person sixteen years of age or more . . . if accompanied by a licensed operator." It was held that the provision that an unlicensed person operating the car must be accompanied by a licensed chauffeur had no relation to the age of the operator, and that the insured's son did not come within the meaning of the words, "under the age fixed by law," contained in the policy, which related solely to the question of age, and not to the question whether the operator had complied with the other requirements of law. *Brock v. Travelers' Ins. Co.* (1914) 88 Conn. 308, 91 Atl. 279. The court observed that the policy did not attempt to excuse defendant from liability for losses incurred by the operation of the automobile contrary to the provisions of the statute.

But it has been held that an insurer is not liable for loss sustained on account of the death of one who was killed by the insured's automobile while it was being driven by his sixteen-year-old son, in violation of an ordinance making it unlawful for persons under eighteen years of age to operate an automobile, where the policy provided that the insurer should not be liable for accidents if the automobile, at the time of the accident, was being driven by a person in violation of law as to age. *Royal Indemnity Co. v. Schwartz* (1914) — Tex. Civ. App. —, 172 S. W. 581.

And in *Morrison v. Royal Indemnity Co.* (1917) 180 App. Div. 709, 167 N. Y. Supp. 732, it was held that there could be no recovery under a policy which provided that the insurer was not to be liable "in respect of injuries

caused in whole or in part by an automobile while being driven or manipulated by any person in violation of law as to age, or if there is no legal age limit under the age of sixteen years," it appearing that a statute provided that no one under eighteen should operate a motor vehicle, unless accompanied by a licensed chauffeur, and that the insured's car, at the time the accident for which it was sought to hold the insurer liable occurred, was being driven by his son under eighteen years of age, and unaccompanied by a licensed chauffeur. It was held in this case that the insurer was not estopped from asserting that one who accompanied the insured's son was not a duly licensed chauffeur because it might have ascertained the fact by diligent investigation, where the insured had represented to the insurer that such person was a duly licensed chauffeur, it being held that the insured could not take advantage of the insurer's reliance upon this representation; and it was further held that the insured, having represented that the supposed chauffeur accompanied his son for the purpose of complying with the statute, could not claim an estoppel against the insurer on the ground that the statute charged the chauffeur accompanying the driver with the duty of superintending the driving, and that the insurer's representatives knew that the supposed chauffeur occupied the back seat of the car.

In *Williams v. Nelson* (1917) 228 Mass. 191, 117 N. E. 189, Ann. Cas. 1918D, 538, where the policy provided that it did not cover loss from liability for, or any suit based on injuries caused by, any automobile while driven or manipulated by any person under the age fixed by law, or under the age of sixteen years in any event, a finding was held supported by the evidence that prior to an accident a son of the insured under sixteen years had been driving the insured's automobile, which caused an injury, but that shortly before the machine struck the person injured the insured suddenly leaned over and took the wheel from his son, and that, although he

was not in a position to readily prevent the accident by manipulating the pedals, or levers for stopping the machine, yet he was driving, and that his was the dominating mind in control of the car, and it was therefore held that a recovery might be had under the policy.

V. Provisions as to determination of insured's liability and payment of claim.

The provisions in some liability policies are such as to render the contract one of liability, that is, to enable the insured to recover where he is liable for an injury, although he has not actually paid the injured person.

Thus, a policy providing that if any person shall sustain bodily injury by accident by reason of the use of the insured's automobile, for which injuries the insured is, or is alleged to be, liable for damages, the company will indemnify the insured against such liability, and will pay all costs incurred with the company's written consent, has been held to indemnify against liability, so that the insured, upon establishing that he is obliged to pay and that the fee is reasonable, is entitled to recover an attorney's fee contracted by him in the defense of a suit instituted against him for injuries inflicted by his automobile, which the insurer had refused to defend, although insured had not paid the fee. *Royal Indemnity Co. v. Schwartz* (1914) — *Tex. Civ. App.* —, 172 S. W. 581.

Other policies, however, provide that no action shall lie against the insurer, unless brought by the insured for loss or expense actually sustained and paid in money, after trial of the issues.

It has been held that such a provision applies only in case the company denies liability and refuses to defend. *Patterson v. Adan* (1912) 119 Minn. 308, 48 L.R.A.(N.S.) 184, 138 N. W. 281.

And in *Mayor, L. & Co. v. Commercial Casualty Ins. Co.* (1915) 169 App. Div. 772, 155 N. Y. Supp. 75, the requirements of a provision of this kind were held to be satisfied where the insured, after the insurer refused to defend a suit, undertook the de-

fense and finally settled it, but not until after the close of the evidence, although before the submission of the case to the jury.

The provisions of other policies bind the insurer to pay only after payment of a final judgment against the insured.

It has been held that no recovery could be had by a corporation owning an automobile liability policy, providing that no action should lie against the insurer unless it was brought by the insured to reimburse it for a loss paid in money after trial of the issue, in satisfaction of a final judgment against it, where it appeared that the corporation paid a judgment recovered in an action against its manager for injuries inflicted by the company's machine while it was being operated by the company's chauffeur to carry the manager, since no action had been brought against the insured, nor a judgment rendered against it. *Rock Springs Distilling Co. v. Employers' Indemnity Co.* (1914) 160 Ky. 317, 169 S. W. 730.

A loss actually sustained, within the meaning of an indemnity policy providing that the insurer shall not be liable in an action "unless it shall be brought by the insured to reimburse him for a loss actually sustained and paid by him in satisfaction of a final judgment," has been held to be sufficiently established, where the testimony showed that the insured, in satisfaction of a judgment, with the consent and approval of the judge of probate, executed and delivered an unsecured promissory note to the administratrix of a person killed by the insured's automobile, there being nothing to indicate that the note was not given in good faith. *Taxicab Motor Co. v. Pacific Coast Casualty Co.* (1918) 73 Wash. 631, 132 Pac. 393. And in this case the payment of a judgment by the insured within ninety days of its affirmance by the appellate court was held within the requirements of the policy, which provided that the insurer should not be liable unless a judgment recovered against the insured was paid within ninety days from the date of such judgment,

although the payment in question was not made within ninety days from the date of the rendition of the judgment.

In *Campbell v. London & L. Indemnity Co.* (1917) 168 N. Y. Supp. 300, where a policy insured a motor company against loss from liability for damages on account of injuries inflicted by its automobiles, and a judgment was recovered against the company for an injury, and, although the company was insolvent, it borrowed the money to pay the judgment, and paid it to the judgment creditor, it was held that, as there was no provision in the policy relieving the insurer from liability in the event that the judgment debtor should borrow money to pay losses insured against, the burden of establishing that the transaction was in bad faith was on the insurer, and that the proof failed to show this.

See also cases under following subdivision.

VI. Right of person injured to recover on policy.

The right of a person injured to recover the insurance depends somewhat on whether the policy is a contract of liability or indemnity.

Thus, where a policy undertakes to indemnify an automobile company for loss sustained by injuring third persons, and provides that no action shall lie against the insurer unless it shall be brought by the insured for loss or expense actually sustained and paid in money after actual trial of the issue, a recovery cannot be had in equity against the insurer by one who has recovered a judgment against the insured for an injury resulting from the operation of one of its automobiles, although the insured is in the hands of a receiver, since a court of equity cannot treat the contract as made for the benefit of any person injured by the insured's automobile without regard to the terms of the contract, and by the terms of the policy no recovery could be had by the insured except for liabilities actually discharged by payment of money. *Goodman v. Georgia L. Ins. Co.* (1914) 189 Ala. 130, 66 So. 649.

In *Williams v. Nelson* (1917) 228

Mass. 191, 117 N. E. 189, Ann. Cas. 1918D, 538, where a statute permitted a judgment creditor of one insured by a contract of casualty insurance against loss or damage on account of bodily injury or death by accident of any person, arising from causes for which the insured was responsible, such judgment having been recovered for a cause covered by the contract of insurance, to proceed in equity against both the insured and the insurer, to recover and apply the insurance money to the satisfaction of the judgment, it was held that one who had recovered a judgment against the owner of an automobile for an injury covered by an indemnity policy held by the latter was entitled to maintain an action against the insurer, although there had been no payment of the judgment. But it was held that the words, "bodily injury . . . of any person," were confined to physical injury, and did not include financial damage to the husband of the person injured, arising from the injury.

Where, under a policy insuring against loss by reason of the insured's automobile, an action is brought by a person injured by the machine against the insured, and the insurer, by virtue of the contract, assumes charge of the defense, a judgment in the action against the insured has been held to become, as between plaintiff, defendant, and the company, a liability or debt owing unconditionally by the latter to the insured, which the plaintiff might reach by garnishment. *Patterson v. Adan* (1912) 119 Minn. 308, 48 L.R.A. (N.S.) 184, 138 N. W. 281.

VII. Right of insured to settle with person injured.

A provision is usually incorporated in liability policies of the kind under consideration, forbidding the insured to settle a claim without the insurer's consent, except at his own risk.

In *Mayor, L. & Co. v. Commercial Casualty Ins. Co.* (1915) 169 App. Div. 772, 155 N. Y. Supp. 76, a condition of this kind was held to be limited to cases in which the insurer performed its contract, requiring it to defend actions against the insured, and the latter was therefore held not precluded

from recovering because he settled an action against him after the insurer had refused to defend it. It was held, however, that the insured, having seen fit to settle the action against him after the insurer had refused to defend it, assumed the risk of showing, in an action against the insurer, not only a liability covered by the policy, but also the amount of liability, and that the recovery against the insurer was limited by the loss sustained, even though the evidence might show that the settlement was for less than such liability.

It will be noticed that in the reported case, *FULLERTON v. UNITED STATES CASUALTY Co.* ante, 867), it was held that an indemnity insurer, which abandoned its obligation to defend a suit against the insured growing out of an accident sustained through the operation of his automobile, could not defeat a recovery for money paid by the insured in settlement of the claim, on the ground that it was paid in compromise without a judgment, although the policy provided for a recovery only when the payment by the insured was in satisfaction of a judgment.

And in *Royal Indemnity Co. v. Schwartz* (1914) — *Tex. Civ. App.* —, 172 S. W. 581, it was held that the insurer, after repudiating its obligation to defend, was estopped to set up a failure of the insured to obtain its consent in writing to the incurring of an attorney's fee contracted by the insured in the defense of a suit against him.

And in *Hartigan v. Casualty Co. of America* (1916) 97 Misc. 464, 161 N. Y. Supp. 145, where the insurer, in accordance with the provision of its policy, assumed the defense of an action against the insured, and, on advice of the insurer's attorney, a settlement was made, it was held that the insurer could not successfully claim that it was not liable because the policy provided that the company should be liable only when legally called upon to pay a judgment rendered.

Where an automobile liability policy gave the insurer the right to defend actions against the insured, and contained no provision binding the in-

surer to consent to a settlement, the insured cannot recover from the insurer the amount he contributed to the sum within the limit of the insurer's liability in settlement of the claim of the person injured, it being the contention of the plaintiff that he was coerced into making that contribution because of the insurer's refusal otherwise to settle the claim, and because of his belief that if the case went to trial a recovery would be had in excess of the amount of the policy. *Levin v. New England Casualty Co.* (1917) 101 Misc. 402, 166 N. Y. Supp. 1055, affirmed in (1919) — *App. Div.* —, 174 N. Y. Supp. 910, and a like conclusion was reached on a former appeal of this case (1916) 97 Misc. 7, 160 N. Y. Supp. 1041.

And in *McAleenan v. Massachusetts Bonding & Ins. Co.* (1916) 173 App. Div. 100, 159 N. Y. Supp. 401, affirmed in (1916) 219 N. Y. 564, 114 N. E. 114, the refusal of the insurer to permit the insured to accept the offer of a person injured by the insured's automobile, to settle for a specified sum in full of all damages that might be recovered in excess of the amount of the insurance, was held not to render the insurer liable for the larger amount which the insured was obliged to pay. And on a subsequent appeal of this case (1917) 179 App. Div. 34, 166 N. Y. Supp. 184, it was held that, as the provisions in question did not preclude the insured's settling with respect to his liability in excess of the indemnity for which the insurer was liable, it was immaterial whether the latter granted or withheld its consent to a settlement, or acted in good or bad faith.

In *Kennelly v. London Guarantee & Acci. Co.* (1918) 184 App. Div. 1, 171 N. Y. Supp. 423, where a policy insuring against loss on account of bodily injuries inflicted by the insured's automobile provided that "the insured may settle any claim at the insured's own expense, giving immediate notice thereof in writing to the company, and the assured may settle any case at the company's expense if the company shall have previously given its consent in writing," it was held that the

insurer was discharged from all liability by the act of the insured in settling, without the insurer's consent, a judgment recovered against the insured, from which judgment the insurer had taken an appeal, which was pending at the time of the settlement and was dismissed by the court because of the settlement.

In *Hopkins v. American Fidelity Co.* (1916) 91 Wash. 680, 158 Pac. 535, a provision of a liability policy that the insured should not "interfere in negotiations for compromise" was held not violated where, on the day of the accident, the insured telephoned the claimant, stating that he was insured and that his attorney would endeavor to get a settlement from the insurer, and subsequently stated that a lawyer who was coming to see the claimant was not the insured's, but the insurance company's, though he might call himself the insured's.

VIII. Provisions for insured's co-operation and assistance.

It has been held that a provision of a liability policy that the insured should render such co-operation and assistance in the defense of actions against it to recover for injuries covered by the policy as lay in its power was not violated because an officer of the insured company gave evidence at an inquest relative to the instructions given its drivers, which conflicted with his evidence on the trial of an action against the insured to recover for negligently killing a person, where it did not appear that the discrepancy in his testimony was anything more than a mistake. *Taxicab Motor Co. v. Pacific Coast Casualty Co.* (1913) 78 Wash. 631, 182 Pac. 393.

And in *Collins v. Standard Acci. Ins. Co.* (1916) 170 Ky. 27, 185 S. W. 112, Ann. Cas. 1917D, 59, there was held to be no violation of a provision of a policy indemnifying against liability for injuries by an automobile, requiring the insured to aid in resisting the recovery of damages against her, because of her refusal to rely on the defense that the negligence of the chauffeur was imputable to the injured person, a guest, as, under the

facts shown, there was no ground for such defense.

In *Collins v. Standard Acci. Ins. Co.* (Ky.) supra, the insured sought indemnity by reason of a recovery against her by her sister, who was injured while riding with her as a guest, and the evidence was held to authorize the submission to the jury of the issue as to the insured's fraud and collusion in connection with the action brought by her sister, and also the question of her failure to aid the insurer in such action, as required by the policy.

IX. Defense of suit by insurance, and its effect.

Practically all liability policies of the kind under consideration provide, in effect, that the insurer shall have the right to defend all actions brought against the insured to recover for any injury covered by the policy.

It has been held that a policy by which the insurer undertook to indemnify the insured against loss from liability imposed by law upon him for damages on account of bodily injuries, including death, accidentally sustained by any person, by reason of the maintenance or use of his automobile, and to defend in the name and on behalf of the insured any suits which might, at any time, be brought against him on account of such injuries, imposed no duty upon the insurer to defend a criminal prosecution for manslaughter instituted against the insured. *Patterson v. Standard Acci. Ins. Co.* (1913) 178 Mich. 288, 51 L.R.A.(N.S.) 583, 144 N. W. 491, Ann. Cas. 1915A, 632.

Where the insurer undertakes by its contract to defend actions against the insured to recover for injuries inflicted by the latter's automobile, and refuses to defend an action to recover for such injuries, it is liable for a breach of its contract to defend. *Mayor, L. & Co. v. Commercial Casualty Ins. Co.* (1915) 169 App. Div. 772, 155 N. Y. Supp. 75.

And the insurer, after having undertaken to defend an action against the insured, must not be negligent, but must exercise proper care in discharging its duty, and is liable for a failure

to do so. Thus where, after a verdict had been recovered against the holder of a policy, the insurer had agreed to appeal from the judgment and assured the defendant in that action that an appeal had been taken, and without the latter's knowledge had permitted the time for taking an appeal to expire without taking one, it was held that a recovery for the amount of the judgment that the insured had been obliged to pay in excess of the amount of the policy might be had against the insurer for its neglect. *McAleenan v. Massachusetts Bonding & Ins. Co.* (1916) 219 N. Y. 564, 114 N. E. 114, affirming (1916) 173 App. Div. 100, 159 N. Y. Supp. 401.

And in the reported case, *FULLERTON v. UNITED STATES CASUALTY CO.* ante, 367, it was held that an indemnity insurer whose contract excluded the insured from participation in the defense or settlement of any claims against him could not, after settling some of the claims growing out of an accident and undertaking the defense of a suit on other claims, withdraw from the defense and cast the burden thereof on the insured, on the theory that it had mistaken the nature of its obligation.

And where an insurer takes charge of the defense of an action against the insured to recover for a death caused by the latter's machine, it cannot defend an action by the insured to recover the amount paid in satisfaction of a judgment recovered, on the ground that the death resulted from the malpractice of the attending physician, and not from the insured's negligence. *Taxicab Motor Co. v. Pacific Coast Casualty Co.* (1913) 73 Wash. 631, 132 Pac. 393.

In *Hartigan v. Casualty Co. of America* (1916) 97 Misc. 464, 161 N. Y. Supp. 145, the statement of the attorney for a company which had issued an automobile liability policy binding it to defend suits against the insured, that the insurer assumed the defense in a case under a reservation of policy rights, and without assuming any liability for any judgment that might be recovered, was held to mean that the insurer would assume in the

defense of the action, only such liability, if any, which it must assume under the policy.

In *Morrison v. Royal Indemnity Co.* (1917) 180 App. Div. 709, 167 N. Y. Supp. 732, supra, IV., the insurer's brief and necessary continuance of the defense of the action against the insured, after learning that the supposed chauffeur was under eighteen years of age, was held not a waiver of the right to disclaim liability.

X. Provisions as to notice of accident or claim.

A provision of a liability policy of the character under consideration, requiring immediate written notice of the occurrence of an accident, is reasonable. *Chapin v. Ocean Acci. & G. Corp.* (1914) 96 Neb. 213, 52 L.R.A. (N.S.) 227, 147 N. W. 465.

The word "immediate" means within a reasonable time after the insured learns of an accident or claim. *Oakland Motor Car Co. v. American Fidelity Co.* (1916) 190 Mich. 74, 155 N. W. 729; *Chapin v. Ocean Acci. & G. Corp.* (Neb.) supra.

And the word "accident" in such a provision means an undesigned and unforeseen occurrence of an afflictive or unfortunate character, resulting in bodily injury to a person other than the insured. *Chapin v. Ocean Acci. & G. Corp.* (Neb.) supra.

This provision has been held not to require that notice should be given of all accidents resulting from the operation of the insured's automobile, but merely those which result in bodily injuries to others. *Ibid.*

And where, at the time a person was thrown from his bicycle through being struck by the insured's automobile, no injury was apparent, and the person thrown stated that he had received none, and for about a year thereafter the insured honestly believed that none resulted, it was held that it could not be said, as a matter of law, that the conditions of the accident were such as to bring it within the class of which it was the insured's duty to give immediate notice, or that the notice given was not given within a reasonable time, it appearing that, upon the insured's being notified that a suit was

to be brought against him on account of the injury, he immediately notified the insurer. *Ibid.*

In *Haas Tobacco Co. v. American Fidelity Co.* (1919) 226 N. Y. 343, — A.L.R. —, 123 N. E. 755, where there was a like provision for notice of accidents and claims, it was held that the condition did not apply to every trivial occurrence, even though it might prove afterward to have resulted in serious injury; that if no apparent harm came from a mishap, and there was no reasonable ground for believing at the time that bodily injury would follow, there was no duty upon the insured to notify the insurer. But in this case the insured was held not absolved from giving the notice provided for, where, on the day following an accident in which one of the insured's automobiles knocked down a boy, the insured's manager saw a statement of the accident in the paper, and asked the driver about it, and the latter admitted that the machine struck the boy, but said that he did not think that it amounted to much, and no notice was given for ten days.

An automobile company holding a policy indemnifying it against loss or liability on account of bodily injuries inflicted by its automobiles was held in *Oakland Motor Co. v. American Fidelity Co.* (1916) 190 Mich. 74, 155 N. W. 729, not relieved from complying with the provision requiring "immediate notice" of the occurrence of accidents and claims made on account thereof, where both its inspector and superintendent of mechanical parts, and the head tester of the company, had notice of an accident and injuries caused by one of its cars, and of a claim of the injured person, a few days after the accident occurred, and investigated it, and decided to believe the denial of the company's testers that any accident had occurred.

And the provision requiring immediate notice of the occurrence of an accident was held not to have been complied with, where the insured was located about 30 miles from the insurer's office, with all modern means of communication between the places, but gave no notice of the occurrence of

an accident until three months thereafter. *Ibid.*

The insurer in this case was held not precluded from asserting as a defense a failure to comply with the provision requiring immediate notice, because it took charge of the defense of an action against the insured, under a belief that the latter had first learned of the matter when the summons was served, and did not learn that this was not so until the trial, especially where an agreement had been entered into between the parties that all acts with reference to the conduct of the defense of the case against the insured should be considered as done without prejudice to their rights under the policy. *Ibid.*

In *Lee v. Casualty Co. of America* (1916) 90 Conn. 202, 96 Atl. 952, although the reply of the plaintiff in an action on a liability policy failed to deny the insurer's allegation that notice of an injury inflicted by the insured's automobile was not given within the time required, it was held that the requirement as to notice might be waived by the insurer, and that a demurrer to the reply should have been overruled, where the reply stated that the insurer, knowing that there had not been a strict compliance with the provision as to notice, proceeded to make a settlement with the injured person and continued its attempt for two months, when it called on the insured for further information, and two months later asked for the papers in the action against him, and, shortly before the trial of the action, returned them and denied liability.

XI. Liability for depreciation of machine injured.

The question has arisen, whether one holding a policy insuring him against loss by reason of liability imposed by law upon him for destruction of, or injury to, property of others, arising from the use of his automobile, was entitled to recover from the insurer not only the actual cost of repairs to a machine which was damaged by his car, but also the amount which he was obliged to pay for depreciation in the value of the automobile, caused by its having been in a

collision; and it was held that such a recovery could be had, although the policy contained a limitation clause that the insurer's liability "is limited to the actual intrinsic value of the property damaged or destroyed, . . . which shall not be greater than the actual cost of repairs or replacement thereof," it being held that this clause did not limit the liability of the insurer to the actual cost of repairs made, when it appeared that they did not, and could not, make the car as good as it was before the accident. *Christison v. St. Paul F. & M. Ins. Co.* (1917) 138 Minn. 51, L.R.A.1917F, 612, 163 N. W. 980.

XII. Provisions as to insured's automobiles being rented.

It has been held that a provision that "none of the automobiles herein

described are rented to others," contained in a policy covering loss by reason of the ownership, maintenance, and use of an automobile, referred to the date of the policy, and was not violated because the insured's automobile was rented at the time an accident occurred, some time after the date of the policy. *Mayor, L. & Co. v. Commercial Casualty Ins. Co.* (1914) 150 N. Y. Supp. 624.

The same conclusion was reached on a subsequent appeal of this case in (1915) 169 App. Div. 772, 155 N. Y. Supp. 75, the provision that none of the automobiles described were rented being held merely a warranty that the trucks were not rented at the time the policy took effect, and not a warranty that they were not to be rented subsequently. J. T. W.

JANE McCULLOCH

v.

MARGARET M. GOODRICH, Appt.

Kansas Supreme Court—June 7, 1919.

(105 Kan. 1, 181 Pac. 556.)

Assault — mutual combat — recovery.

1. Where persons engage in a mutual combat, each may recover from the other all damages caused by injuries received from the other in the fight.

[See note on this question beginning on page 388.]

Evidence — assault — mutual combat.

2. In an action to recover damages for an assault and battery, where the petition alleges that the defendant assaulted the plaintiff, and the answer alleges that the plaintiff assaulted the defendant, and each party introduces evidence to support his contention, competent evidence cannot be properly excluded, although it may tend to prove that the parties engaged in a mutual combat, and, if there is evidence tend-

ing to prove that fact, it is proper for the court to instruct the jury concerning the law of mutual combat.

—self-defense — mutual combat.

3. In an action for assault and battery, where the defense is self-defense from an assault committed by plaintiff, evidence is admissible that the parties were to engage in a fight with each other and that each willingly engaged in the contest.

[See 2 R. C. L. 562, 574.]

Headnotes 1 and 2 by MARSHALL, J.

APPEAL by defendant from a judgment of the District Court for Sherman County (Sparks, J.) in favor of plaintiff in an action brought to recover damages for an alleged assault and battery. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. John Hartzler, for appellant:

If the plaintiff, in ejecting defendant from her office, used more force than was necessary, she thereby became the aggressor, and defendant was not liable.

State v. Bradbury, 67 Kan. 808, 74 Pac. 231; Taylor v. Clendening, 4 Kan. 524.

Mr. E. F. Murphy, for appellee:

A verdict and judgment supported by a substantial though conflicting evidence cannot be disturbed on appeal.

Biernacki v. Ratzlaff, 102 Kan. 573, 171 Pac. 672; Patmore v. Hough, 28 Kan. 636.

It is not within the province of the court, on appeal, to consider the weight of evidence or the credibility of witnesses.

Ott v. Cunningham, 9 Kan. 886.

Each contestant may recover from the other all damages resulting from injuries received in a fight.

McNeil v. Mullin, 70 Kan. 634, 79 Pac. 168.

If defendant wantonly, wilfully, and maliciously used more force than was necessary in resisting excessive force or assault, she would be liable to plaintiff for damages resulting therefrom.

Eckerd v. Weve, 85 Kan. 756, 38 L.R.A. (N.S.) 516, 119 Pac. 870.

Marshall, J., delivered the opinion of the court:

The plaintiff sued for damages which resulted from injuries inflicted upon her in an assault by the defendant.

The petition alleged that the defendant assaulted the plaintiff with an umbrella and dangerously wounded her. The answer contained a general denial of the allegations of the petition, and pleaded assault and battery by the plaintiff. The answer also pleaded self-defense, and that if the defendant did strike the plaintiff with an umbrella it was unintentional, and only incidental to her lawful defense against the assaults of the plaintiff. Judgment was rendered for the plaintiff, and the defendant appeals.

1. The defendant contends that the court erred in giving the following instruction:

"The jury is instructed that if parties fight by mutual consent the aggressions are mutual, and the circumstances of who committed the

first act of violence is not material in an action to recover damages for the injuries he received in the fight."

"If the conduct of the parties to a mutual combat constitutes a breach of the criminal law, the consent of either one to participate in the mêlée does not deprive him of his civil remedy against the other. Each contestant may recover from the other all damages resulting from the injuries he received in the fight."

The defendant argues that by this instruction the court gave the law concerning mutual combat, and that under the pleadings no evidence of mutual combat could be properly introduced. By the pleadings each party alleged that the other committed an assault and battery on the party pleading. Each probably introduced evidence to prove her contention. That evidence may have

tended to prove that each was ready to engage in a fight

Evidence—
assault—
mutual combat.

with the other, and that each willingly engaged in the contest. If such a condition existed, that evidence could not be excluded, and the court properly gave the instruction.

—self-defense
mutual combat.

This action is closely parallel to McNeil v. Mullin, 70 Kan. 634, 79 Pac. 168, and the rule there declared controls.

2. Complaint is made of the following instruction: "The defendant claims in her answer herein that the plaintiff at the time of the alleged controversy was a licensed physician, and as such licensed physician was maintaining a public office in Goodland, Kansas, and that at said time she went to said office on a business errand. You are instructed that one who is a physician and maintains a public office, as such, thereby invites the public to said office for the purpose of consultation and rendering medical services to those who might request it; and if the defendant in a peaceable, quiet, and orderly manner entered said office on a business er-

rand with the plaintiff herein, she had a right so to do, and to remain therein for a reasonable length of time in order to transact such business, providing that during all of said time she was acting in a quiet, peaceable, and orderly manner; but if at any time she became abusive in her language or manner toward the plaintiff or any of the occupants therein, then and in such a case the plaintiff would have a right to request her to depart from said office, and, defendant failing to do so within a reasonable length of time after being so requested, the plaintiff would have a right to use such force as was reasonably necessary in ejecting said defendant from said office; and, if plaintiff did use more force than was reasonably necessary in ejecting defendant from said office at said time, the defendant would have the right to use such force in resisting such excessive force on the part of the plaintiff, and protecting herself against harm and injury therefrom, as appeared to her at the time, acting in good faith, to be reasonably necessary, and in such a case the defendant would not be liable for injury resulting to plaintiff from the force used by the defendant. However, in such case, if the defendant wantonly, wilfully and maliciously used more force than was necessary in resisting such ex-

cessive force or assault, she would be liable to plaintiff for damages resulting therefrom."

The defendant argues that there can be no question that if, as the court assumes, the plaintiff used more force than was necessary, she was the aggressor, and, if the defendant, in defending herself against such aggressions, used more force than was necessary, she cannot be held for damages. The defendant further argues that, as the plaintiff was the aggressor, she cannot complain if she was beaten in a combat which she herself began. The defendant's argument is not good. Each party is liable for her own wrongdoing. The

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—recovery.**

defendant assumes that the plaintiff was the aggressor, and argues from that assumption that she cannot complain if she came out second best in the fight. The assumption omits the possibility that the defendant consented to the fight and willingly engaged in it. If she did so consent, and did so engage in it, she is liable for the injuries inflicted by her on her opponent. *McNeil v. Mullin*, supra; 5 C. J. 630.

A careful examination of the instruction does not disclose any error therein of which the defendant can complain.

The judgment is affirmed.

ANNOTATION.

Civil liability growing out of mutual combat.

- I. Combats in anger:
 - a. Majority rule:
 1. In general, 388.
 2. Right of defendant to offset damage for injury to him, 393.
 - b. Minority rule, 393.
 - c. Right to mitigate damages, 394.
 - d. Comparison of the rules, 394.
- II. Friendly combats, 395.

Scope.

This note deals only with cases involving mutual combats, and does not include cases involving fights between the parties where one is the aggressor

and the other defends himself, even though in defending himself he becomes the aggressor.

I. Combats in anger.

a. Majority rule.

1. In general.

By the majority rule, where the parties engage in mutual combat in anger, each is civilly liable to the other for any physical injury inflicted by him during the fight. The fact that the parties voluntarily engaged in the combat is no defense to an action by

either of them to recover damage for personal injuries inflicted upon him by the other.

Illinois.—*Thomas v. Riley* (1904) 114 Ill. App. 520.

Indiana.—*Adams v. Waggoner* (1870) 33 Ind. 531, 5 Am. Rep. 230.

Iowa.—*Lund v. Tyler* (1901) 115 Iowa, 236, 88 N. W. 333.

Kansas.—*MCCULLOCH v. GOODRICH* (reported herewith) ante, 386; *McNeil v. Mullin* (1905) 70 Kan. 634, 79 Pac. 168.

Maine.—*Grotton v. Glidden* (1892) 84 Me. 539, 30 Am. St. Rep. 413, 24 Atl. 1008.

Mississippi.—*Lizana v. Lang* (1907) 90 Miss. 469, 43 So. 477.

Missouri.—*Jones v. Gale* (1886) 22 Mo. App. 637.

Nebraska.—*Morris v. Miller* (1909) 83 Neb. 218, 20 L.R.A. (N.S.) 907, 131 Am. St. Rep. 636, 119 N. W. 458, 17 Ann. Cas. 1047.

New Hampshire.—*Dole v. Erskine* (1857) 35 N. H. 508.

North Carolina.—*Bell v. Hansley* (1855) 48 N. C. (3 Jones, L.) 131; *Lewis v. Fountain* (1915) 168 N. C. 277, 84 S. E. 278.

Ohio.—*Barholt v. Wright* (1887) 45 Ohio St. 177, 4 Am. St. Rep. 535, 12 N. E. 185.

Texas.—*McCue v. Klein* (1883) 60 Tex. 168, 43 Am. Rep. 260.

Vermont.—*Willey v. Carpenter* (1891) 64 Vt. 212, 15 L.R.A. 853, 23 Atl. 630.

Wisconsin.—*Shay v. Thompson* (1884) 59 Wis. 540, 48 Am. Rep. 538, 18 N. W. 473.

England.—*Boulter v. Clark* (1747) cited in Bull. N. P. 16.

This rule is based upon the ground that the act of the parties in engaging in a fight is unlawful, and hence neither party can rely upon the consent of the other as a defense to the action against him to recover damages for the injury he has inflicted. In other words, consent to an assault and battery upon the person consenting is no bar to an action by him to recover the damage inflicted upon him by the battery.

In *Shay v. Thompson* (Wis.) supra, the court said that the principle that,

the fighting being unlawful, the consent of the plaintiff to fight is no bar to his action to recover damage for the injury inflicted upon him, is one of sound public policy, and we do not hesitate to incorporate it in the jurisprudence of this state.

Upon this point in *Barholt v. Wright* (Ohio) supra, the court said: "It would seem at first blush contrary to certain general principles of remedial justice to allow a plaintiff to recover damages for an injury inflicted on him by a defendant in a combat of his own seeking; or where, as in this case, the fight occurred by an agreement between the parties to fight. Thus, in cases for damages resulting from the clearest negligence on the part of the defendant, a recovery is denied the plaintiff if it appear that his own fault in any way contributed to the injury of which he complains. And a maxim as old as the law, '*Volenti non fit injuria*,' forbids a recovery by a plaintiff where it appears that the ground of his complaint had been induced by that to which he had assented; for, in judgment of law, that to which a party assents is not deemed an injury. Broom, *Legal Maxims*, 268. But as often as the question has been presented, it has been decided that a recovery may be had by a plaintiff for injuries inflicted by the defendant in a mutual combat, as well as in a combat where the plaintiff was the first assailant, and the injuries resulted from the use of excessive and unnecessary force by the defendant in repelling the assault. These apparent anomalies rest upon the importance which the law attaches to the public peace as well as to the life and person of the citizen. From considerations of this kind, it no more regards an agreement by which one man may have assented to be beaten than it does an agreement to part with his liberty and become the slave of another. But the fact that the injuries were received in a combat in which the parties had engaged by mutual agreement may be shown in mitigation of damages."

In *Adams v. Waggoner* (Ind.) supra, the court, after observing that if the appellant (defendant) had been

entirely without fault when the appellee (plaintiff) attacked him, but in defending himself had used an excess of force, a suit for damages could have been maintained by the appellee for the excess, although he was the first in the wrong, said: "Can it be said or held that as to his right to recover damages for the cutting he received he is placed in a worse situation by an agreement to fight than he would have been upon an unprovoked assault upon an innocent man? In 2 Greenl. Ev. § 85, it is said 'that if the injury was done in a fight, though by consent, it is an unjustifiable battery; the proof of consent being admissible only in mitigation of damages.' In *Boulter v. Clark* (1747) cited in Bull. N. P. 16, Parker, C. B., said: 'The fighting being unlawful, the consent of the plaintiff to fight, if proved, would be no bar to his action, and that he was entitled to a verdict for the injury done him.' In *Matthew v. Ollerton* (1689) Comb. 218, 90 Eng. Reprint, 438, it is held 'that if a man license another to beat him such license is void because it is against the peace.' In *Stout v. Wren* (1821) 8 N. C. (1 Hawks) 420, 9 Am. Dec. 653, it was held 'that a man shall not recover recompense for an injury received by his own consent, provided the act from which the injury be received be lawful; but when two fight by consent and one is beaten, he may recover damages for the injury, because the fighting is illegal.' In the case of *Bell v. Hansley* (1855) 48 N. C. (3 Jones, L.) 131, the court held 'that one may recover in an action for an assault and battery, although he agreed to fight, for such agreement to break the peace is void.' The same doctrine is held in *Logan v. Austin* (1828) 1 Stew. (Ala.) 476, and *Dole v. Erskine* (1857) 35 N. H. 503. We have cited enough from secular or human laws to settle this question; but we will add one more authority to show that this doctrine is not modern and secular, or human only, but that it is ancient and divine. In Exodus, xxi. 18, 19, it is written; 'And if men strive together, and one smite another with a stone or with his fist' (we insert, or cut him

with a knife), 'and he die not, but keepeth his bed; if he rise again, and walk about upon his staff, then shall he that smote him be quit: only he shall pay for the loss of his time, and shall cause him to be thoroughly healed.' We have bestowed no limited amount of consideration on the question presented, and we think the deduction and conclusion to which we have come are fully warranted by the law and the reason thereof; which is that an agreement, leave, or license to do an act which in itself is unlawful, forbidden by positive law, and for the doing of which a penalty is attached and denounced, whether a felony or a misdemeanor, is no defense to an action for damages by a party who has been injured by the doing of such act, though he made the agreement, gave the license, leave, and consent; but when the wrong complained of is not forbidden by law, though it may be by morals, such as the seduction or debauching of a man's wife or daughter, slander, libel, or trespass on his real estate or to his personal property, agreement, consent, or license is a good defense."

In *McNeil v. Mullin* (1905) 70 Kan. 634, 79 Pac. 168, supra, the court said: "If the parties fought by mutual consent, the circumstance of who committed the first act of violence was immaterial; and, so long as each combatant persisted in his original determination to vanquish his antagonist, the aggressions were mutual. A resistance which has for its real object the securing of an opportunity to mangle the assailant is not legal self-defense; and while it seems to be the law that, in a proper case, the jury may be required to follow the kaleidoscopic fortunes of a rough-and-tumble fight, and determine whether at a given moment of time a finger was bitten off or an eye was gouged as a matter of self-protection, rather than of attack, . . . they are not obliged to take the striking of the first blow as the point of departure in a case of mutual combat. . . . Because it was a criminal enterprise, his consent to participate in the mêlée does not deprive either party of his civil rem-

edy against the other, and each one is entitled to recover from the other all damages resulting from the injuries he received in the fight. Chief Justice Cooley, in his work on Torts, 2d ed. p. 187, states the law on this subject as follows: 'Consent is generally a full and perfect shield, when that is complained of as a civil injury which was consented to. A man cannot complain of a nuisance, the erection of which he concurred in or countenanced. He is not injured by a negligence which is partly chargeable to his own fault. A man may not even complain of the adultery of his wife which he connived at or assented to. If he concurs in the dishonor of his bed, the law will not give him redress, because he is not wronged. These cases are plain enough, because they are cases in which the questions arise between the parties alone. But in case of a breach of the peace it is different. The state is wronged by this, and forbids it on public grounds. If men fight, the state will punish them. If one is injured, the law will not listen to an excuse based on a breach of the law. There are three parties here; one being the state, which for its own good does not suffer the others to deal on a basis of contract with the public peace. The rule of law is, therefore, clear and unquestionable that consent to an assault is no justification. The exception to this general rule embraces only those cases in which that to which assent is given is matter of indifference to public order, such as slight batteries in play or lawful games—such unimportant injuries as, even when they constitute technical wrongs, may well be overlooked and excused by the party injured, if not done of deliberate malice. But an injury, even in sport, would be an assault if it went beyond what was admissible in sports of the sort, and was intentional.' Sir Frederick Pollock, in his treatise on the subject of Torts, concurs fully in these views (Pollock, Torts, 157); and the consensus of judicial opinion, both in England and in the United States, is, with but slight demur, to the same effect."

In *Stout v. Wren* (1821) 8 N. C. (1

Hawks) 420, 9 Am. Dec. 653, the facts were that the parties agreed to fight, and the plaintiff assented to the defendant's query as to whether or not he would "clear him of the law," whereupon the defendant beat the plaintiff, the latter making no resistance; notwithstanding, the defendant was held liable in a civil action for the damage inflicted.

In *Lizana v. Lang* (1907) 90 Miss. 469, 43 So. 477, supra, it is declared that the acceptance of a challenge to fight, and voluntarily engaging in a fight by one party with the other because of such challenge, cannot be set up as a defense to a civil action for damages for injuries received by one of the parties during the fight, since fighting under a challenge is unlawful, and affords no justification to the other party.

It has been said that, "consent to engage in mutual combat may be inferred from circumstances. Conduct may have much more weight than profanity in determining the actual attitude of the parties toward each other, and the rules for ascertaining the true state of mind of brawlers who finally come to blows are not different from those applied in other cases. If the encounter were the result of reciprocal desires to fight, the conduct of each party was criminal. Each one was punishable, at least, for a breach of the peace, and for an assault and battery." *McNeil v. Mullin* (1905) 70 Kan. 634, 79 Pac. 168.

In *Freed v. Collins* (1915) 169 Iowa, 359, 151 N. W. 471, the parties, who were old men, voluntarily engaged in a fight in anger, although apparently neither of them was eager for the affray, one of them claiming to be too tired to fight and the other not wanting to fight at that particular place. The only injury was trivial, the result of the plaintiff being struck by the defendant with a shovel upon the portion of his anatomy "which has always been deemed surgically safe, and which has always borne harmlessly the corporal discipline of all the generations." In the action brought, a matter of debt was also presented by defendant as an offset, and a small verdict was ren-

dered for the defendant which was less than the amount of his counterclaim for the debt, and the court construed the verdict to be the allowance of the small sum in favor of the plaintiff because of the manner in which the defendant wielded the shovel.

In *Jones v. Fortune* (1889) 128 Ill. 518, 21 N. E. 523, reversing (1889) 30 Ill. App. 116, it is held that a master is not entitled to defend his servant where the latter is engaged in a fight with another, if the servant was the aggressor or had engaged in a mutual combat.

In *St. John v. Parr* (1857) 7 U. C. C. P. 142, the facts were that the defendant committed the assault and battery upon the plaintiff by striking him with a club; his defense to the action by the plaintiff to recover damages for the assault was that at some time prior to the assault the plaintiff had challenged him to a fight. This defense was held not available, even assuming that the challenge to fight, if accepted and acted upon at the time, would have been a good defense—a matter not passed upon by the court.

While not strictly within the scope of this note, a case of interest in connection with this subject is *Eisentraut v. Madden* (1915) 97 Neb. 466, L.R.A. 1915C, 893, 150 N. W. 627, holding that the rule that when parties enter into mutual combat and one of them in good faith withdraws therefrom, and is afterwards assaulted, he may recover damages for such assault, does not apply when the one who is assaulted and severely beaten strikes his assailant immediately, in the heat of passion, on escaping from his attack.

In *Willey v. Carpenter* (1891) 64 Vt. 212, 15 L.R.A. 853, 23 Atl. 630, the question was presented upon the pleadings, and it was held that the consent of the plaintiff to the assault was not a bar to a civil action by him to recover damages therefor. The court said that if the consent of the plaintiff to a moderate assault upon him was a justification, he saw no reason why consent to one so great as to take his life would not also be a justification. And see upon this point *Christopherson v. Bare* (1848) 11 Q. B.

473, 116 Eng. Reprint, 554, 17 L. J. Q. B. N. S. 109, 12 Jur. 374, holding that consent to an assault and battery upon him is not a bar to an action by the person consenting to recover damages for the assault. This is also the holding in *Matthew v. Ollerton* (1689) Comb. 218, 90 Eng. Reprint, 438; *Kavanagh v. Gudge* (1844) 7 Mann. & G. 316, 135 Eng. Reprint, 132, 7 Scott N. R. 1025, 1 Dowl. & L. 923, 13 L. J. C. P. N. S. 99, 8 Jur. 362; *Logan v. Austin* (1828)*1 Stew. (Ala.) 476. This note is not exhaustive upon the point of the effect of consent as a defense to an action to recover damage for an assault and battery.

In *Gutzman v. Clancy* (1902) 114 Wis. 589, 58 L.R.A. 744, 90 N. W. 1081, the difficulty commenced by a discussion between the parties, terminating, as styled by the court, *vi et armis*. It is not clear that it was regarded as a mutual combat. The court said, however, "that in the course of the same fracas one party at one time, and his opponent at another, may be guilty of assault, so that each may be entitled to recover damages, seems to be entirely settled by the authorities. . . . The original aggressor continues such so long as the other restrains himself within the bounds of defense, but when the latter exceeds those bounds by using more than necessary force he thereupon becomes aggressor, and liable for such damages as he thereby inflicts. As the principle is stated in *Dole v. Erskine* (1857) 35 N. H. 503, and most of the other cases, there are in effect two assaults, one succeeding the other, separated, indeed, by only a moment of time, but as effectively in law as if a day had intervened, so that they are different transactions. This sounds well on paper, and is perhaps too well supported by authority to be now repudiated; but we confess serious difficulty in applying it to the ordinary physical encounter, where victory may be continually shifting her perch from one combatant to the other, and where each, as he gains the advantage, changes from defender to aggressor. It is likely to be extremely difficult for juries to ascertain whether a blackened eye or flattened nose

occurred at a moment of illegal attack or lawful defense. However, as the law seems well settled, those difficulties we may leave for solution by the trial courts and their juries."

2. Right of defendant to offset damage for injury to him.

In *Dole v. Erskine* (1857) 35 N. H. 503, *supra*, it is held that one party is not entitled to offset an injury received by him in an action against him by the other party to recover damages for his injuries. The court said: "We think that these are not matters of set-off; that the one cannot be merged in the other, and that each party has been guilty of a wrong for which he has made himself liable to the other. There have, in effect, been two trespasses committed; the one by the assailant in commencing the assault, and the other by the assailed party in using the excessive force; and, upon principle, we do not see why the one can be an answer to the other, any more than an assault committed by one party on one day can be set off against one committed by the other party on another day. The only difference would seem to consist in the length of time that has elapsed between the two trespasses. In a case where excessive force is used, the party using it is innocent up to the time that he exceeds the bounds of self-defense. When he uses the excessive force, he then for the first time becomes a trespasser. And wherein consists the difference, except it be that of time, between a trespass committed by him then, and one committed by him on the same person the day after?"

In *McNatt v. McRae* (1903) 117 Ga. 898, 45 S. E. 248, it is held that cross actions for assault and battery may arise out of the same affray in favor of each party, and their claims for damages may be presented in separate suits, or in a petition by one and a plea of set-off by the other. And see *Freed v. Collins* (1915) 169 Iowa, 359, 151 N. W. 471, *supra*.

b. Minority rule.

In some jurisdictions, the view is taken that, where parties engage in

a mutual combat in anger, the act of each is unlawful and relief will be denied them in a civil action; at least, in the absence of a showing of excessive force or malicious intent to do serious injury upon the part of the defendant.

This is the doctrine of *Smith v. Simon* (1888) 69 Mich. 481, 37 N. W. 548, in which the parties voluntarily engaged in a fight, and during the *mêlée* the plaintiff's shoulder was dislocated and the bones of his arm fractured. There was, however, an entire absence of testimony tending to show that the defendant was guilty of excessive cruelty which occasioned the injury, or that he was guilty of unnecessary beating and harshness. Under these circumstances it was held that the plaintiff could not recover.

And in *Galbraith v. Fleming* (1886) 60 Mich. 408, 27 N. W. 583, where the injury to neither party was serious, it was held if the plaintiff voluntarily engaged in the fight in the first instance for the sake of fighting, and not as a means of self-defense, he could not recover unless the defendant beat him excessively or unreasonably. The court said: "The law does not put a premium upon fighting, and one who voluntarily enters into a quarrel will not be afforded relief for his own wrong and damages if he come out second best. While the voluntary act on the part of the plaintiff would not preclude the state from punishing him or the defendant for a breach of the peace, it nevertheless prevents him from bringing a civil action to recover compensation for injuries received by his own seeking, and in violation of law." To the same effect is *White v. Whittall* (1897) 113 Mich. 498, 71 N. W. 1118.

In *Mitchell v. United R. Co.* (1907) 125 Mo. App. 1, 102 S. W. 661, it is said that it is well-settled law that if a man voluntarily enters into a fight, not in self-defense, and gets the worst of it, he cannot recover damages unless the defendant unreasonably and excessively beats him.

In *Beavers v. Bowen* (1904) 26 Ky. L. Rep. 291, 80 S. W. 1165, the facts were that the parties to the action en-

gaged in a fight in which the defendant was getting the worst of it when his sons came to his aid. The plaintiff was finally beaten into insensibility, as he claimed. Under these facts it was held proper to instruct the jury that, if at the time the defendant assaulted the plaintiff he in good faith believed and had good grounds to believe that he was then in danger of an assault about to be committed upon him by the plaintiff, he had the right to use such force as was necessary, or as appeared to him in the exercise of a reasonable judgment to be necessary, to repel the assault and save him harmless.

In *Lykins v. Hamrick* (1911) 144 Ky. 80, 187 S. W. 852, it appeared that the parties voluntarily engaged in a knife-cutting contest, each striving to cut the other and each being more or less successful, the defendant apparently inflicting more damage than the plaintiff. The jury brought a verdict that neither party was entitled to any damage and that each party should pay his own costs. The verdict of the jury, so far as it amounted to no cause for action, was sustained on appeal, although it was reversed so far as it undertook to regulate the matter of costs. The court said that: "We cannot say that the verdict of the jury is not fully justified by the evidence on the ground that Hamrick and Lykins each made an attack on the other with an open knife, that neither was without fault, as each attacked the other and thus made the danger to himself by placing his antagonist in like peril.

. . . It is true that both Lykins and Hamrick are liable in a criminal prosecution by the state, and that in such a prosecution neither could rely on the fact that the other consented to be beaten, or that the conflict was a mutual combat. It is true that the agreement to fight was unlawful, but we do not see why, in a civil action, the rule should not apply that the law will refuse relief or an award of damages to him who voluntarily engages in a thing forbidden by law. The fight being unlawful, and both being equally to blame for the fight, it is hard to see upon what principle the law should, in

a civil action, make a settlement between wrongdoers. It is a wise rule of the law to leave the wrongdoer where it finds him, and it seems to us that the rule applies equally to violations of the law by fighting as to other violations. We therefore adhere to the conclusion reached in the case above referred to. It is true that case did not involve a breach of the peace, but was a suit for an abortion. But an abortion is a more grave offense than a breach of the peace, and more condemned by the law."

In *Milam v. Milam* (1907) 46 Wash. 468, 90 Pac. 595, it appeared that the parties mutually engaged in a fight during which the defendant bit off a knuckle of the plaintiff's hand and broke one of his fingers. This was held cruel and unjustifiable, and the defendant was held liable therefor. The court does not indicate which rule it followed in holding the defendant liable.

c. Right to mitigate damages.

Even in jurisdictions where it is held that the fact that the parties mutually engaged in a combat is not a bar to a recovery by either of them of damage for the injury he sustains, it has been held that this fact may be relied upon in mitigation of damages. *Barholt v. Wright* (1887) 45 Ohio St. 177, 4 Am. St. Rep. 595, 12 N. E. 185, supra; *Lund v. Tyler* (1901) 115 Iowa, 236, 88 N. W. 333, supra; *Chrisman v. Hunter* (1885) 3 Dana (Ky.) 83.

d. Comparison of the rules.

A comparison of the results reached in the cases that sustain the respective rules suggests that those results have been somewhat less affected by the difference in the rules than might have been expected; since in many, at least of the cases that declare the majority rule, the facts show that the defendant used excessive and disproportionate force, and so might have been held liable even under the minority rule. However, the possibility of a serious injury to one combatant at the hands of another who does not use what, in the circumstances, amounts to excessive or disproportionate force,

affords some scope for difference in the respective rules.

In the following cases, which sustain the majority rule, the injury inflicted was of such a serious character as to indicate the use of excessive force.

In *Adams v. Waggoner* (1870) 83 Ind. 531, 5 Am. Rep. 230, *supra*, the injury complained of was inflicted with a knife, the plaintiff having been seriously stabbed by the defendant during the *mêlée*. The court reasoned: "Is an agreement to fight, and the fact that the injury complained of was inflicted in the heat of passion during such fight, without previous malice, a good defense to an action for an assault and battery? There certainly is no agreement proved by the evidence in this case, all of which is in the record, that one was to fight with, and the other without, a knife."

In *McNeil v. Mullin* (1905) 70 Kan. 634, 79 Pac. 168, and in *Bartholt v. Wright* (1887) 45 Ohio St. 177, 4 Am. St. Rep. 535, 12 N. E. 185, *supra*, the injury inflicted upon the plaintiff amounted to mayhem.

In *Shay v. Thompson* (1884) 59 Wis. 540, 48 Am. Rep. 538, 18 N. W. 473, *supra*, the court pointed out that the parties fought with great brutality, that the defendant was the larger and probably the stronger man, and that he so gouged both eyes of the plaintiff as to permanently impair the sight of one of them.

In *Thomas v. Riley* (1904) 114 Ill. App. 520, *supra*, the court found as a fact that the defendant made a vicious and unwarranted assault upon the plaintiff, inflicting severe cuts and bruises.

In *Lund v. Tyler* (1901) 115 Iowa, 236, 88 N. W. 333, *supra*, the injuries to the plaintiff were severe enough to lay him up for two weeks.

In *Grotton v. Glidden* (1892) 84 Me. 589, 30 Am. St. Rep. 413, 24 Atl. 1008, *supra*, the plaintiff had both of his eyes blacked, his face scratched, his head bruised, his back lamed, and he was so severely kicked in the lower part of his abdomen as to cause him to pass bloody urine.

In *Dole v. Erskine* (1857) 35 N. H.

503, *supra*, the nature of the injuries received by the plaintiff are not stated, but it is held that excessive force had been used by both parties and it appeared that the defendant was the aggressor.

In *Morris v. Muller* (1909) 63 Neb. 218, 20 L.R.A.(N.S.) 907, 131 Am. St. Rep. 636, 119 N. W. 458, 17 Ann. Cas. 1047, *supra*, it is said that there is no question but what plaintiff was seriously wounded upon his head.

In *Lizana v. Lang* (1907) 90 Miss. 469, 43 So. 477, *supra*, the defendant struck the plaintiff with a pistol.

In *Lewis v. Fountain* (1915) 168 N. C. 277, 84 S. E. 278, *supra*, the defendant shot the plaintiff, inflicting serious personal injuries.

II. *Friendly combats.*

It is to be noted that the rule holding either party liable to the other for injuries received in a voluntary combat applies only where the combat is in anger, and it has no application to a friendly combat, providing the injuries inflicted are accidental, and without malice or intent to do harm, and unreasonable or unnecessary force is not used.

If the parties engaged in a friendly scuffle or other lawful athletic sport, it is not unlawful and does not constitute assault and battery unless one of them uses greater force and violence than are justifiable under the circumstances, or is reckless or negligent in his conduct. *Nicholls v. Colwell* (1904) 118 Ill. App. 219.

In *Fitzgerald v. Cavin* (1872) 110 Mass. 158, the facts were that the parties were fooling and playing with each other, when the defendant seized the plaintiff by the testicles and squeezed him severely. It was held proper for the court to instruct the jury that if there was no malice on the part of the defendant, and no intent to do the plaintiff any bodily harm, and the parties were lawfully playing with one another by mutual consent, and the act done by the defendant was no other than the plaintiff had good reason to believe might be done in such play, the defendant was not liable. The verdict for the plaintiff for substantial damages was sustained.

In *Vosburg v. Putney* (1891) 80 Wis. 523, 14 L.R.A. 226, 27 Am. St. Rep. 47, 50 N. W. 403, the defendant was held liable for damages to the plaintiff by kicking him in the leg during a session of school, both parties being children attending the school. The court pointed out that it would hesitate to hold the defendant liable had the kicking occurred upon the playground while the parties were engaged in the usual boyish pranks, providing the defendant was free from malice or negligence. Under the circumstances the absence of malice or intent did not relieve him from liability.

In *Gibeline v. Smith* (1904) 106 Mo. App. 545, 80 S. W. 961, it is held that where the parties voluntarily engaged in a friendly scuffle and one of them, without intending so to do, accidentally harms the other, an action will not

lie to recover damages for the injury. The court said: "It is our opinion that if the parties to this controversy each voluntarily engaged in a friendly scuffle, and the defendant, without intending so to do, accidentally hurt the plaintiff, no action will lie. The mutual and lawful character of the act of the parties prevents liability attaching for an accident which may result to either. We do not say that a lawful act resulting in unintentional injury necessarily excuses the party committing it. But if the act is lawful, and is invited and participated in by another, and an injury unintentionally results, no liability arises."

If the evidence is in conflict as to whether or not the parties engaged in a friendly scuffle, it is a question for the jury. *Nicholls v. Colwell* (1904) 113 Ill. App. 219. A. G. S.

GEORGE C. WEGEFARTH, Appt.,
v.
GEORGE F. WIESSNER et al.

Maryland Court of Appeals—June 24, 1910.

(— Md. —, 107 Atl. 364.)

Malicious prosecution — filing caveat to will — liability.

1. No liability arises from the filing of a caveat to a will, even though it was filed maliciously and without probable cause.

[See note on this question beginning on page 407.]

Fraud — false representations — disbelief — effect.

2. One cannot impeach a sale of corporate stock alleged to have been induced by false and fraudulent statements as to the condition of the corporation which he did not believe to be true.

[See 12 R. C. L. 287, 293, 381.]

Appeal — exclusion of evidence — nonreversible error.

3. Exclusion of evidence is not reversible error if its admission would not have changed the conclusion reached.

[See 2 R. C. L. 253.]

APPEAL by plaintiff from a judgment of the Baltimore City Court (Heusler, J.) in favor of defendants in an action brought to recover damages for alleged acts of defendants by unlawful means to induce a sale of corporate stock. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Edward M. Hammond, Albert D. Gill, William L. Rawls, and W. L. Marbury, for appellant:

The release relied upon, having been

obtained by unlawful means, constitutes no defense to the action.

Brager v. Friedenwald, 128 Md. 3, 97 Atl. 515.

Corporations are liable for torts done in conspiracy and combination between them.

West Virginia Transp. Co. v. Standard Oil Co. 50 W. Va. 611, 56 L.R.A. 804, 88 Am. St. Rep. 895, 40 S. E. 591; Buffalo Lubricating Oil Co. v. Standard Oil Co. 106 N. Y. 669, 12 N. E. 825.

All who aid, advise, or assist in the commission of a wrongful act by another are liable in the same manner as they would be if they had done the same wrongful act themselves.

Miller v. John, 208 Ill. 173, 70 N. E. 27; Doremus v. Hennessy, 62 Ill. App. 391; Wildee v. McKee, 111 Pa. 335, 56 Am. Rep. 271, 2 Atl. 108; Hood v. Palm, 8 Pa. 237.

Threatening to caveat the will of Mrs. Wegefardh, the defendants were only threatening to do what they had a right to do; but it was none the less an unlawful threat, and unlawful means were employed to accomplish their end.

Klingel's Pharmacy v. Sharp & Dohme, 104 Md. 233, 7 L.R.A. (N.S.) 976, 118 Am. St. Rep. 399, 64 Atl. 1029, 9 Ann. Cas. 1184.

Messrs. Albert C. Ritchie, John M. Requardt, and Charles F. Harley, for appellees:

Defendants had a legal right to file a caveat at any time within three years.

Supreme Lodge, A. P. L. v. Unverzagt, 76 Md. 104, 24 Atl. 823.

Plaintiff must prove that there was a fraudulent statement; and it must appear that he not only in fact relied upon it, but had a right to rely upon it in the full belief of its truth; for otherwise it was his own folly or fault, and he cannot ask the law to relieve him from the consequences.

Reynolds v. Evans, 123 Md. 367, 91 Atl. 564; Boulden v. Stilwell, 100 Md. 552, 1 L.R.A. (N.S.) 258, 60 Atl. 609; Lewis v. Clark, 86 Md. 331, 37 Atl. 1035; Brager v. Friedenwald, 128 Md. 21, 97 Atl. 515.

Fraud is never presumed, but must be proved by clear and satisfactory evidence.

Lynn v. Baltimore & O. R. Co. 60 Md. 404, 45 Am. Rep. 741; People v. Manzanaro, 218 N. Y. 9, 112 N. E. 436.

Fraud without damage is not actionable.

Cahill v. Applegarth, 98 Md. 500, 56 Atl. 794; Boulden v. Stilwell, 100 Md. 543, 1 L.R.A. (N.S.) 258, 60 Atl. 609.

Burke, J., delivered the opinion of the court:

This case has been twice argued in this court. A motion to dismiss the appeal was denied for the reasons stated in the opinion filed April 25, 1918, in the case of Wegefardh v. Weissner, 132 Md. 595, 106 Atl. 854, and a reargument of the case was ordered on July 10, 1918. In view of the length of the record, which is very voluminous, we shall confine our consideration to what appear to us to be the essential and determining facts in the case.

The declaration contains four counts, and, in addition to the general issue pleas, the defendants set up pleas of accord and satisfaction, evidenced by releases under seal and other written documents by which it was intended that a compromise and settlement in full discharge of all mutual matters and litigation between the parties should be made. The pleas setting up the settlement were traversed by the plaintiff, and issue was joined upon the traverse. Both the declaration and special pleas are lengthy, and we do not find it necessary to quote from them to any great extent in this opinion. The ground of the action is an alleged conspiracy upon the part of the defendants to obtain, and by which it is alleged they did obtain, from the plaintiff, at a greatly reduced price, by means of fraud, threats, and coercion, 25 shares of the capital stock of the John F. Wiessner & Sons Brewing Company, a corporation of Baltimore city, hereinafter referred to as the Brewing Company.

At the conclusion of the plaintiff's case the court granted the following prayers:

"No evidence has been offered legally sufficient to entitle the plaintiff to recover in this case, and the verdict of the jury must therefore be for the defendants.

"Under the pleadings in this case, no evidence has been offered legally sufficient to entitle the plaintiff to recover, and the verdict of the jury

must therefore be for the defendants."

The jury rendered a verdict for the defendants, and from the judgment entered thereon in favor of the defendants the plaintiff has brought this appeal.

The record shows that the Brewing Company was founded by John F. Wiessner, who died leaving surviving him the following children, viz.: Frederick Wiessner, George F. Wiessner, Henry F. Wiessner, Elizabeth Ann Wiessner, who married Frederick W. Lipps, and Margaret Wiessner, who married the plaintiff in 1901. The capital stock of the Brewing Company consisted of 100 shares, and each of the above-mentioned children of John F. Wiessner owned 20 shares. The brewery, which was a highly successful and profitable business paying large dividends, was managed exclusively by the sons. It was regarded strictly as a family institution in which the children of its founder took a great deal of pride. Frederick Wiessner died intestate in 1907, and his 20 shares of stock were distributed in equal proportions among his two brothers and two sisters, thus making the holding of each 25 shares.

At the time of the marriage of the plaintiff to Margaret Wiessner she owned stocks and bonds in her own right in excess of \$100,000, in addition to her 20 shares of stock in the Brewing Company. This stock was very valuable, and her fortune was subsequently increased by the death of her brother, Frederick. The plaintiff was a practicing physician at the time of his marriage, but about the year 1905 he abandoned the practice of medicine and engaged in real estate development on quite a large and expensive scale. We here quote from his testimony as to the extent of his real estate operations:

"In 1905 he organized the Evergreen Lawn Land & Improvement Company, a company which was developing 25 acres at the corner of Hamilton avenue and Harford road

in Hamilton. The stockholders in the Evergreen Lawn Land & Improvement Company were Frederick W. Lipps and his wife and witness's wife and himself; each owned one-fourth interest in the tract in the company. That company engaged in very active real estate operations; the first year, I think they put up buildings to the extent of \$100,000 or more, dwelling and stores and business property. It was a suburban development at Hamilton, on the Harford road and Hamilton avenue. That is about 1 mile outside of the city limits. Witness was president of the Evergreen Lawn Land & Improvement Company, Mr. Frederick W. Lipps was treasurer, and Mr. C. R. Wattenscheidt was secretary. Mr. Wattenscheidt is a nephew of Mr. Frederick W. Lipps.

"Witness then organized the City & Suburban Realty Company, which was composed of his wife and himself. We each held half interest. That company purchased 218 acres adjoining the Evergreen Lawn Land & Improvement Company at Hamilton and also 104 acres at Mt. Washington, and we were also engaged in the development of city property; we built two-story houses as well as suburban cottages. That the great expense of the City & Suburban Realty Company in the first year of its existence was the overhead charge. We had these large tracts of land, which had to be purchased a number of years before the time of development in order to get the land at a low enough figure to justify carrying it until the opportune time of development. Our expenses in that company were very heavy. The company was not very active for the first five or six years. Overhead charges were the interest charges, the taxes, the office expenses, the maintenance of the property and carrying it and a certain amount of help required to keep it in order. In this case we had to build our own water plant, drill artesian wells, and extend water mains and gas mains and all those details which are preliminary in the de-

velopment of property. The money was gotten by the sale of the stock which my wife had, which stock was turned into money to pay for this property and for the carrying along of the overheads. The company did borrow money from banks. We borrowed from the Merchants' National Bank; the principal loan was from the Merchants' National Bank. The time we began borrowing was the time our dividends were cut from the brewery. In purchasing these large tracts of land we calculated on having this large income and we would have a surplus as the result of it, and our idea was to take that surplus and pay off on these tracts of land which we had purchased, and carry them along until the time came to market them to advantage. Instead of receiving the usual amount of dividends we were cut off. My wife had 20 shares of the J. F. Wiessner Brewing Company in 1905. In 1905 she received \$20,000 dividend. The year before that she received about \$19,000. She had been receiving dividends all along on this stock after our marriage, so far as I knew."

Mrs. Wegefarth died in May, 1912. The dividends on the stock were regularly paid to her during her life, and after her death to the plaintiff as her executor, until June, 1914, when the dividends were withheld, under the circumstances hereinafter stated. Mrs. Wegefarth left a last will and testament, dated June 4, 1909, which was admitted to probate by the orphans' court of Baltimore city. By this will, after bequests of \$33,000 to certain persons and charitable institutions, she devised and bequeathed all the rest and residue of her estate to her husband, and appointed him executor, and letters testamentary were duly issued to him by the orphans' court.

At the date of Mrs. Wegefarth's death, the City & Suburban Realty Company, which, as we have seen, was composed of the plaintiff and his wife, each holding a one-half interest, was indebted to the Merchants'-Mechanics' National Bank,

which will be referred to hereafter in this opinion as the Bank, in the sum of \$86,000. This indebtedness was evidenced by the note of the company, indorsed by the plaintiff and his wife, and secured by the hypothecation of stock of the company and the 25 shares of the brewery stock owned by Mrs. Wegefarth. This stock then stood in her name upon the books of the Brewing Company, and was deposited by her as collateral security for the note. After the death of Mrs. Wegefarth the plaintiff borrowed \$34,500 additional from the Bank upon the understanding and agreement that the brewery stock should likewise be held as collateral for this as well as for the prior loan. So that at the time this controversy arose the plaintiff was indebted to the Bank in the sum of \$120,500, for the payment of which the brewery stock was pledged. Dr. Wegefarth settled the estate in the orphans' court, and distributed this stock to himself as residuary legatee under his wife's will, and by an order of the orphans' court dated the 10th day of June, 1914, he was ordered as executor to cause to be transferred said 25 shares of stock to himself individually.

Frederick Wiessner had caused to be prepared a will by which his 20 shares of stock should pass upon his death to his brothers, George F. and Henry F. Wiessner, but had died without executing the will. The will was prepared in pursuance of an understanding between himself and his brothers that each should make a will bequeathing his stock to the survivors, in order that they might have control of the affairs of the brewery. Both Henry and George made wills carrying out this arrangement. The death of Frederick intestate left his two brothers without owning a majority of the stock. They were evidently much disappointed, although they made no complaint or claim during Mrs. Wegefarth's life for the 5 shares which passed to her upon Frederick's death. They regarded the concern

as an exclusively family business, to be managed and controlled by the family, and when they found that, under the will of their sister, the 5 shares had passed to Dr. Wegefarth, they took the position that, in view of the understanding between themselves and their deceased brother, these 5 shares should be given to them, and thereby they would secure control of the business. There was, of course, no legal basis for this claim, but they seemed to think that under the circumstances they had some kind of a moral claim upon the stock. They asked Dr. Wegefarth to give them the 5 shares which his wife had gotten from the estate of her brother Frederick. This he refused to do. The 25 shares of stock owned by Mrs. Wegefarth were appraised at \$75,000, and the final account of the plaintiff as executor appears to have been passed on March 13, 1914. In February, 1914, George and Henry Wiessner employed counsel with a view of filing a caveat to Mrs. Wegefarth's will.

In April, 1914, at a meeting at the Hotel Rennert between the plaintiff and Henry F. Wiessner, the latter told the plaintiff that he was authorized by his brother George to offer him \$75,000 for the 25 shares of stock. We quote from the plaintiff's evidence as to what was said when this offer was made:

I said, "What is the stock worth?" He said he didn't know. I said, "How much money have you got in bank?" He said, "I don't know." I said, "What is the net profits of the business each year?" He said he didn't know. I said, "It doesn't look very fair for me to sell you this stock for \$75,000 and not have an idea of what it is worth." I said, "I will tell you what I will do." I said, "Suppose you go back to your brother and tell him that I have no objection to his buying the stock if they do not want me in the business; I am not anxious to stay in, but I will not lay anything in the way of remaining in it. You appoint a representative or an auditor and I will appoint one and we

will take the third one for a referee and whatever they say goes with me." He said—

Q. Wait a minute, I do not quite understand that. You suggested to him that they should appoint an auditor?

A. Yes.

Q. For what purpose?

A. To examine the books.

Q. The books of the J. F. Wiessner Brewing Company?

A. Yes; to find out what the stock was worth.

Q. And that you should appoint one and he appoint one and those two should select a third?

A. Yes; to go over the books and to find out what the stock was worth.

Q. What then?

A. He says, "There is no use in going back; my brother is sore with you anyhow; he said you were out to the place most every day and you should have brought that stock out instead of sending it out by the lawyer." I said, "I have nothing to do with that." I said, "That is the way I will sell the stock." I said, "Furthermore, you know that I am obligated more than that to the Merchants' National Bank, and even if I wanted to sell it for \$75,000, I couldn't do it." "Well," he said, "he told me to give you until 12 o'clock Monday to accept that offer, or," he said, "it is fight."

The plaintiff testified that Henry Wiessner knew at that time he had borrowed money from the Bank upon the stock, and, further, that the Wiessners had refused to transfer the stock to him and were talking of contesting the will of his wife unless he would give up the 5 shares, and that he so informed the Bank. Mr. Vernon Cook, the counsel for the plaintiff, wrote to the Wiessners asking that arrangements be made for the transfer of the stock. After sending that letter Mr. Requardt, representing the Wiessners, called upon him and said his clients disputed the validity of the will of Mrs. Wegefarth, and therefore they declined to transfer the stock. He also—

stated that 5 shares of the 25 which stood in the name of Margaret Wegefardth had come from the estate of her deceased brother, Fred. Wiessner, I believe was his name, and Mr. Requardt claimed that there had always been some family understanding about that stock to the effect that it was to go to the boys, as I recall, was his claim. He also, at the same interview, made a proposition of settlement. Do you want me to go into that?

Q. Yes.

A. Well he suggested, as I recall it, that the matter could be settled if Dr. Wegefardth would give up these 5 shares and if he would also give up any claim that he might have to a certain dwelling house where, I think, the Wiessners lived, that they would be willing to settle and compromise the matter in that way.

Q. Do you mean they would abandon the idea of attacking the will?

A. Yes.

On June 1, 1914, George F. and Henry F. Wiessner filed the caveat to the will of Mrs. Wegefardth and an answer was filed by the plaintiff as executor, and on August 21, 1914, issues involving due execution, mental incapacity, fraud, and undue influence were transmitted to the court of common pleas for trial. On August 19, 1914, the Brewing Company brought suit against the plaintiff on a promissory note for \$8,288 and interest. On June 5, 1914, the plaintiff demanded for the first time a statement of the affairs of the corporation, which it refused to furnish pending the caveat. Thereupon the plaintiff filed a petition for a mandamus to compel a statement and inspection of the books of the corporation. The defendants, whilst denying the plaintiff's right to a statement, did, however, on June 18th and June 20th, send two statements, and asked to have the petition "for mandamus dismissed, according to our understanding." In response to the letter of June 20th transmitting the second statement the counsel for the appellees received from Gans & Haman a letter dated June 22, 1914,

in which they said: "On going over with our client the figures which the company has submitted to us in reference to the matter, we find that they differ so widely from what Dr. Wegefardth had reason to expect that he has determined to insist on his right as a stockholder to have an accountant make an examination of the books of the company. Opportunity to make such an examination was asked in our petition for mandamus. Will you let us know whether the company will consent to the making of such an examination? If not, we shall have to ask you to file your demurrer or answer in the mandamus case as promptly as possible, so that the rights of the respective parties may be determined by the court."

Thereafter the appellees filed their answer to the petition for mandamus. On the 12th of August, 1914, Dr. Wegefardth authorized the Bank to sell the stock for \$150,000, and the bank offered the stock to the Wiessners at that price. At that time the plaintiff was suffering from a severe nervous breakdown, and he put his affairs in charge of his brother, Dr. Arthur Wegefardth, who went to the bank and threatened to file an injunction to prevent the sale of the stock for \$150,000. Mr. W. Calvin Chesnut, representing the plaintiff, went to the Bank on August 15th and found the stock had been offered to the Wiessners for that sum, but that the offer had not been accepted. He induced the Bank to withdraw the offer. The Bank on May 19, 1914, had renewed the plaintiff's note and by its terms it would have matured on September 19th, but under the power conferred by the collateral note it had the right to call for additional collateral, and if that was not furnished to declare the note due. On August 17th the Bank did demand additional collateral, but it was not furnished. No action, however, appears to have been taken under the demand.

On August 22, 1914, counsel for plaintiff wrote Mr. John B. Ramsay,

vice president of the Bank, submitting the following offer of sale and settlement:

August 22d, 1914.

John B. Ramsay, Esq., Vice President, Merchants'-Mechanics' National Bank, South and Water Streets, City. Dear Mr. Ramsay:—Pursuant to my conversation with you yesterday afternoon, I write on behalf of our client, Dr. George C. Wegefath, to authorize you to offer twenty-five shares of stock of the Wiessner Brewing Company, now held by your bank as collateral to the note of the City & Suburban Realty Company, and belonging to Dr. George C. Wegefath, to the Messrs. Wiessner for sale for \$165,000.

When you submit this offer to the Messrs. Wiessner or their counsel, will you please advise them that it is a condition of the offer that the caveat case filed by them against Dr. Wegefath should be dismissed, and of course, upon the sale of the stock, the mandamus case heretofore filed by Dr. Wegefath against them would also be dismissed.

Pending the caveat, the Wiessners have withheld the payment of the customary semiannual dividend to Dr. Wegefath. This, of course, should be paid to him now in addition to the principal purchase price of the stock.

As you know, Dr. Wegefath considers that the fair and reasonable value of this stock is very greatly indeed in excess of the price at which it is now offered for sale, and that a sale at this price will be a very great financial sacrifice for him to make. He is only impelled to submit the sale of stock at this very low price by reason of his present poor condition of health, which renders it important for him to close up, so far as possible, his financial and business affairs for the time being. He is also actuated by a desire to facilitate the liquidation of the note held by your bank.

It is important, therefore, in order to meet the reasons actuating him in offering the stock for sale,

that the offer made should be promptly accepted. Will you therefore please explain to the Messrs. Wiessner or their counsel, when you submit the offer, that it is not to remain open indefinitely, but if accepted must be within a reasonably short time, say two or three days after you have communicated it to them.

Yours very truly,
E. [Signed] Calvin Chesnut.

After some negotiations between the parties, acting through their respective counsel and the Bank, an agreement of settlement under seal, dated September 22, 1914, was entered into, which in substance provided as follows:

First. That the plaintiff agreed to sell to George F. and Henry F. Wiessner the said 25 shares of stock for the sum of \$160,000 cash, and, in addition thereto and as a part of said purchase price, that the Wiessners should satisfy, pay, and discharge to the Brewing Company the indebtedness evidenced by the promissory note of the plaintiff for \$8,288, upon which suit had been brought, and that said note should be surrendered to the plaintiff.

Second. That the caveat proceedings be dismissed, and that George F. and Henry F. Wiessner "do hereby release and assign unto the said George C. Wegefath any and all claims which they now have or claim to have against the estate of said Margaret Wegefath, or the said George C. Wegefath as executor thereof, or legatee under said will, and agreed that said dismissal of said caveat and release and assignment of claim as herein mentioned shall be a perpetual bar to any future assertion of any claim of any character by them as next of kin, heirs at law, or distributees, in and to the assets of the estate of Margaret Wegefath, and that no further caveat shall hereafter be filed by them against said will. The dismissal of said caveat case shall be made in such form and manner as counsel for the respective parties may advise to be most efficacious to legally and conclu-

sively establish the validity of said will of the said Margaret Wegefarth, and preclude any future attack thereon by anyone. The said George F. and Henry F. Wiessner agree to pay the costs of said caveat proceeding."

Third. That the petition for mandamus be dismissed, the costs to be paid by the petitioner.

Fourth. The dismissal of the suit upon the promissory note mentioned, and the surrender of said note as paid and canceled to the plaintiff herein; the Brewing Company to pay the costs.

Fifth. That the plaintiff should transfer to George F. and Henry F. Wiessner, "all his remaining right, title, and interest in and to the 'undistributed' estate of his late father-in-law, J. Fred Wiessner, Sr., and his late brother-in-law, J. Fred Wiessner, Jr., late of Baltimore city, deceased, and will execute such further acts and deeds as may be necessary to more effectually consummate said transfer and assignment."

Pursuant to this agreement George F. and Henry F. Wiessner paid \$160,000 cash for the stock, and it was turned over to them, and in addition thereto the suit of the Brewing Company against George C. Wegefarth upon the promissory note referred to above was entered, agreed and settled, and the note delivered to the plaintiff herein. On October 13, 1914, a jury in the court of common pleas, sworn to try the issues in the caveat case, found a verdict in favor of the defendant on all the issues, thereby establishing the validity of the will of Mrs. Wegefarth. The record of proceedings in the case was transmitted to the orphans' court of Baltimore city, and that court on the 14th day of October, 1914, adjudged and decreed: "That the paper writing dated June 4, 1909, purporting to be the last will and testament of Margaret Wegefarth, late of Baltimore city, deceased, is the true and genuine last will and testament of the said Margaret Wegefarth, late of Baltimore city, deceased, and that the

petition and caveat heretofore filed in this cause be and the same is hereby dismissed, and that the probate of said will and letters testamentary thereunder be and the same remain in full force and effect."

The costs of the proceeding were paid by the caveators. The petition for mandamus was dismissed and the costs paid by the petitioner, and on the 18th of September, 1914, Dr. Wegefarth executed and delivered to George F. and Henry F. Wiessner a deed for all his interest in the property mentioned in the fifth clause of the agreement. On September 18, 1914, George C. Wegefarth, executor of Margaret Wegefarth, executed, acknowledged, and delivered to George F. and Henry F. Wiessner and the John F. Wiessner & Sons Brewing Company a release under seal. This release recited that certain controversies had arisen between the parties, and that a full settlement had been made between them, and that the legal actions which had arisen thereout had been dismissed, and that the settlement so made was intended to put an end to any claim or suit whatsoever which the said executor might have against the said parties. Therefore "in consideration of the premises and \$1, the said George C. Wegefarth, executor as aforesaid, doth hereby release, acquit, exonerate, and discharge the said John F. Wiessner & Sons Brewing Company and George F. Wiessner and Henry F. Wiessner, its and their respective successors, heirs, executors, and administrators, of and from all and every action, suit, claim, or demand which could or might possibly be brought, exhibited, or prosecuted against it, them, or any of them, for and on account of any matter or claim whatsoever; the said George C. Wegefarth, executor as aforesaid, hereby declaring himself fully satisfied, contented, and paid."

There is no legally sufficient evidence to support the allegations that the defendants, by threats made to the Bank, destroyed his credit and

induced it to call his loan. Under the well-settled law of this state no damages can be predicated of the filing of the caveat to the will of Mrs. Wegefarth, even if it be conceded that that caveat was filed maliciously and without probable cause. *McNamee v. Minke*, 49 Md. 122; *Supreme Lodge, A. P. L. v. Unverzagt*, 76 Md. 104, 24 Atl. 323; *Bartlett v. Christhilf*, 69 Md. 219, 14 Atl. 518; *H. P. Rieger & Co. v. Knight*, 128 Md. 189, L.R.A.1916E, 1277, 97 Atl. 358.

Malicious
prosecution—
filing caveat to
will—liability.

It is obvious, we think, that the plaintiff can in no event recover in this case without showing that the settlement and release were secured by fraud. This charge is made in each count of the declaration, and is alleged to consist in the false and fraudulent statements made to the plaintiff as to the financial condition of the defendant corporation. It is alleged in the first count of the declaration: "That said statements were untrue and false, and that the defendants did not believe the statements to be true, and that they had actual knowledge of the falsity of the representations therein made, together with a reckless indifference as to their truth; and, further, that the falsity of said statements was so material that had the false entries thereon not been made, but the true ones inserted, the sale of said stock by the plaintiff to the defendants would not have been made, because a true statement of the condition of the John F. Wiessner & Sons Brewing Company, the defendant, would show assets of about \$1,500,000, instead of assets in said statements rendered of \$879,873.34, as of the date thereof, all of which the plaintiff but recently discovered; that the plaintiff, relying and believing altogether and exclusively on the truth of said statements so given him as to the true value of said stock, and which were given to him as hereinbefore set forth for the purpose of influencing him in the sale of said stock at a figure much

below its true value, was induced thereby and did, on the 19th day of September, 1914, sell and transfer, through the Merchants'-Mechanics' National Bank, to the said defendants, the aforesaid 25 shares of stock of the said defendant corporation."

This charge is in substance repeated in each of the other counts. In *Hammond v. New York, P. & N. R. Co.* 128 Md. 442, 97 Atl. 1011, Judge Briscoe said:

"It is well-settled law that evidence of fraud, to warrant a court in submitting a case to the jury as to the invalidity of an instrument under seal, must be clear, direct, and satisfactory.

"In *Pennsylvania R. Co. v. Shay*, 82 Pa. 198, a somewhat similar case, Mr. Justice Sharwood said: 'It has been more than once held that it is error to submit a question of fraud to the jury upon slight parol evidence to overturn a written instrument. The evidence of fraud must be clear, precise, and indubitable; otherwise it should be withdrawn from the jury. *Stine v. Sherk*, 1 Watts & S. 195; *Dean v. Fuller*, 40 Pa. 474; *Irwin v. Shoemaker*, 8 Watts & S. 75.'

"In *Duvall v. Coale*, 1 Md. Ch. 168, it is said that deliberate settlements and solemn instruments are not to be impeached and overthrown by light and trivial circumstances which, at most, furnish a foundation for ingenious minds to speculate upon and to weave plausible theories of unfairness in the transaction with which they are associated."

If the plaintiff did not believe the statements as to the financial condition of the corporation to be true, it is quite clear that he cannot impeach the settlement upon the ground that those statements were false and fraudulent. *McAleer v. Horsey*, 35 Md. 439; *Boulden v. Stilwell*, 100 Md. 548, 1 L.R.A. (N.S.) 258, 60 Atl. 609; *Reynolds v. Evans*, 123 Md. 365, 91 Atl. 564; *Lucas v. Long*, 125 Md. 420, 94 Atl. 12.

Fraud—false
representations
—disbelief—
effect.

It was said in the last-cited case that "the fraud must work an actual injury to the party complaining, and it must appear that he not only did in fact rely upon the fraudulent statement, but had a right to rely upon it in the full belief of its truth; for otherwise it was his own folly or fault, and he cannot ask of the court to relieve him from the consequences."

The law will not permit one to predicate damage upon a statement which he did not believe to be true.

A brief reference to the more prominent facts adduced to support the charge of fraud will show that they are legally insufficient under the principles stated to support it. Both of these alleged fraudulent statements were in the possession of the plaintiff on the 20th of June, 1914, and the letter of Gans & Haman of June 22d indicates plainly that the plaintiff did not accept these statements as true. Again, the proposition of settlement came from the plaintiff through his counsel, Mr. Chestnut, in his letter to the Bank dated August 22, 1914, already referred to. In this letter it is stated that "Dr. Wegefath considers the fair and reasonable value of the stock is very greatly indeed in excess of the price at which it is now offered for sale."

And Dr. Wegefath testified that he doubted the statements, and when asked if he relied upon the statement that the net assets of the John F. Wiessner & Sons Brewing Company were \$870,873.04 and no more—that being the net assets shown by both statements—was correct, said: "I did not believe anything of the kind, as far as that is concerned." This evidence relating to the question of fraud is undisputed, and under the settled law of this state precludes a recovery on that ground.

Mr. Chesnut, who, as counsel for Dr. Wegefath, drew the agreement of settlement, testified: "That it was the understanding all around, as I remember it, that everything

should be settled and disposed of and no open issue or controversy of any kind should be left standing."

We do not find it necessary to discuss the testimony of Mr. Ramsay and Mr. Ingle as to the negotiations which led to the settlement. Their testimony corroborates that of Mr. Chesnut, and shows that no pressure or influence of any kind was exerted upon the Bank by the Wiessners.

At the time the settlement was made Dr. Wegefath was undoubtedly in a desperate financial situation, but we do not find that it was a condition chargeable to the defendants. Mr. Ingle, testifying to the efforts of the bank to sell the stock to the Wiessners, said: "We had gotten Mr. Wiessner to come across in steps, started him with \$75,000—I have forgotten the successive steps, until he probably had gotten up to a place certainly short of \$160,000, or we would have closed at that figure. That was obvious. So the state had been reached in which neither would concede—we were in council with Dr. Wegefath, I imagine—I am sure—most of the time and reported back to him the best we were able to do with Mr. Wiessner, and Mr. Wegefath would shake his head and say, 'Not enough, won't think of it,' and so on, but at last the time came when we got Mr. Wiessner to pay \$168,000, and instead of Dr. Wegefath shaking his head one way he shook it the other and we got the \$168,000, and we thought he was awfully happy,—we were, I assure you,—because we returned him back \$30,000 in real money."

He further said that being minority stock in a private industrial corporation, "there was not but one place for this stock to fall and that was in the hands of the majority owners. You would not have given anybody on earth \$5,000 for it as an investment."

During the course of the trial certain exceptions were reserved by the plaintiff to rulings on evidence. In

view of our holding that the plaintiff offered no legally sufficient evidence to impeach the legal force and effect of the agreement of settlement, it must be ap-

Appeal—
exclusion of
evidence—
nonreversible
error.

parent that the character of evidence embraced in the exceptions would not change our conclusion. It is therefore unnecessary to prolong this opinion by discussing the exceptions.

Judgment affirmed, with costs.

ANNOTATION.

Right of action for malicious contest of will.

In the reported case (*WEGEFARTH v. WIESSNER*, ante, 396) it is held that no action lies for the malicious filing of a caveat to a will. While apparently no other case has passed on this point, it is to be noted that the holding rests on the doctrine obtaining in Maryland that no liability in tort arises from the malicious prosecution of a civil action or proceeding unless

person or property is seized therein. The weight of authority, however, seems to be against that doctrine (see 18 R. C. L. pp. 13 et seq.), and in jurisdictions where it is not recognized, it would seem that the holding of the reported case (*WEGEFARTH v. WIESSNER*, ante, 396) should not be followed.
R. R. R.

CHARLES E. OEHLERT

v.

THERESA U. OEHLERT.

Massachusetts Supreme Judicial Court—September 11, 1919.

(— Mass. —, 124 N. E. 249.)

Aliens — collateral attack on naturalization.

Libellee cannot, in a suit for divorce by one duly admitted to citizenship in the United States, collaterally attack the decree by which he was admitted.

[See note on this question beginning on page 407.]

REPORT by the Supreme Judicial Court for Worcester County (Wait, J.) for the determination by the Supreme Judicial Court of a question arising in a proceeding for a divorce which resulted in a decree nisi for libellant. *Decree and orders to stand.*

The facts are stated in the opinion of the court.

Messrs. George S. Taft and Willis E. Sibley for libellant.

Mr. David F. O'Donnell for libellee.

De Courcy, J., delivered the opinion of the court:

The trial judge granted a decree nisi to the libellant, and reported the case to this court. It appears that Oehlert, who was born in Ger-

many, declared his intention of becoming a citizen of the United States on February 11, 1913, and filed his petition on March 20, 1917, but was not admitted to citizenship until November 14, 1917, or more than seven months after the declaration of Congress that a state of war existed between the Imperial German

(— Mass. —, 184 N. E. 249.)

Government and the United States (April 6, 1917). See U. S. Rev. Stat. § 2171, Comp. Stat. § 4362, 6 Fed. Stat. Anno. 2d ed. p. 947. The single question presented by the report is whether the decree is invalid by reason of the fact that the libellant was naturalized during the continuance of the war.

It is not necessary for us to consider whether the words, "the time of his application," in said § 2171 (at which time an alien whose country is at war with the United States is excluded from citizenship), mean the time of filing the petition, or the time of the hearing in court. That question was not raised in the naturalization proceedings. See *United States v. Meyer*, 154 C. C. A. 185, 241 Fed. 305, Ann. Cas. 1918C, 704; *Re Duus* (D. C.) 245 Fed. 813. It is not open to the libellee in the present suit. When this libel was filed in the superior court, November 22, 1917, the libellant had

been admitted to citizenship. The order of the court so admitting him was a judgment of the same dignity as any other judgment of a court having jurisdiction. It is conclusive as to all matters necessarily before the court and involved in the issue, and is not open to collateral attack. *Spratt v. Spratt*, 4 Pet. 393, 7 L. ed. 897; *Scott v. Strobach*, 49 Ala. 477, 490; 2 C. J. 1124, and cases cited. It can be impeached or annulled only by a direct proceeding brought for that purpose, which now may be an independent suit under § 15, Act June 29, 1906, chap. 3592, 34 Stat. at L. 601, Comp. Stat. § 4374, 6 Fed. Stat. Anno. 2d ed. p. 987; *Johannessen v. United States*, 225 U. S. 227, 56 L. ed. 1066, 32 Sup. Ct. Rep. 613.

In accordance with the terms of the report, the decree nisi and the accompanying orders are to stand.

So ordered.

Aliens—
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ANNOTATION.

Collateral attack on order admitting to citizenship.

I. General rule, 407.

II. Application of rule:

a. Requisites to admission, 409.

b. Effect of fraud, forgery, or perjury, 410.

III. Exceptions to rule, 411.

I. General rule.

The general rule is to the effect that an order issued by a court of competent jurisdiction and valid on its face, admitting a person to citizenship, is conclusive, when collaterally attacked, as to all matters necessarily before the naturalization court and involved in the issue presented. The following cases so hold:

United States.—*Campbell v. Gordon* (1810) 6 Cranch, 176, 3 L. ed. 190; *Stark v. Chesapeake Ins. Co.* (1813) 7 Cranch, 420, 3 L. ed. 391; *Spratt v. Spratt* (1830) 4 Pet. 393, 7 L. ed. 897, cited with seeming approval in *Johannessen v. United States* (1911) 225 U. S. 227, 56 L. ed. 1066, 32 Sup.

Ct. Rep. 613; *The Acorn* (1870) 2 Abb. (U. S.) 434, Fed. Cas. No. 29; *United States v. Walsh* (1884) 22 Fed. 644; *Green v. Salas* (1887) 31 Fed. 106; *United States v. Ragazzini* (1892) 50 Fed. 923; *United States v. Gleason* (1897) 78 Fed. 396, affirmed in (1898) 83 C. C. A. 272, 62 U. S. App. 311, 90 Fed. 778; *Pintsch Compressing Co. v. Bergin* (1897) 84 Fed. 140; *United States v. Hamilton* (1907) 157 Fed. 569; *Re Symanowski* (1909) 168 Fed. 978; *United States v. Aaker-vik* (1910) 180 Fed. 137; *United States v. Stoller* (1910) 180 Fed. 910; *United States v. Nechman* (1910) 183 Fed. 788; *Wiggin v. Pacheco*, 5 Cong. El. Cas. 16, as set out in *Webster on Naturalization*, p. 92.

Alabama.—*Harley v. State* (1867) 40 Ala. 689; *Scott v. Strobach* (1873) 49 Ala. 477.

Arkansas.—*State v. Penney* (1850) 10 Ark. 621.

California.—*Tinn v. United States*

Dist. Atty. (1906) 148 Cal. 773, 113 Am. St. Rep. 354, 84 Pac. 152.

Illinois.—*People ex rel. Brackett v. McGowan* (1875) 77 Ill. 644, 20 Am. Rep. 254; *Behrensmeyer v. Kreitz* (1891) 135 Ill. 591, 26 N. E. 704; *Ackerman v. Haenck* (1893) 147 Ill. 514, 35 N. E. 381.

Indian Territory.—*Raymond v. Raymond* (1896) 1 Ind. Terr. 334, 37 S. W. 202, reversed on other grounds in (1897) 28 C. C. A. 38, 55 U. S. App. 89, 83 Fed. 721.

Kentucky. — *Morgan v. Dudley* (1858) 18 B. Mon. 693, 68 Am. Dec. 735.

Maine.—*Rockland v. Hurricane Isle* (1909) 106 Me. 169, 76 Atl. 286.

Massachusetts.—*OEHLERT v. OEHLERT* (reported herewith) ante, 406.

Michigan.—*Andres v. Arnold* (Andres v. Circuit Ct. Judge) (1889) 77 Mich. 85, 6 L.R.A. 238, 43 N. W. 857.

Minnesota.—*State ex rel. Brown v. Macdonald* (1877) 24 Minn. 48; *State ex rel. Engelhard v. Weber* (1905) 96 Minn. 422, 113 Am. St. Rep. 630, 105 N. W. 490. See also *State v. Barrett* (1889) 40 Minn. 65, 41 N. W. 459.

Missouri.—*State ex rel. Lacy v. Brandhorst* (1900) 156 Mo. 457, 79 Am. St. Rep. 538, 56 S. W. 1094; *Re O'Sullivan* (1909) 137 Mo. App. 214, 117 S. W. 651.

New York. — *Ritchie v. Putnam* (1835) 13 Wend. 524; *Banks v. Walker* (1848) 3 Barb. Ch. 438; *McCarthy v. Marsh* (1851) 5 N. Y. 263, in effect overruling *McCarty v. Hodges* (1846) 2 Edm. Sel. Cas. 433; *Re Mesa y Hernandez* (1916) 172 App. Div. 467, 159 N. Y. Supp. 59; *People ex rel. Smith v. Pease* (1860) 30 Barb. 588, affirmed in (1863) 27 N. Y. 45, 84 Am. Dec. 242; *Re Christern* (1878) 56 How. Pr. 5, 11 Jones & S. 523; *Re McCarran* (1894) 8 Misc. 482, 23 L.R.A. 835, 29 N. Y. Supp. 582, 31 Abb. N. C. 416; *Re Wagner* (1912) 75 Misc. 419, 135 N. Y. Supp. 678.

Pennsylvania.—*Com. ex rel. Simpson v. Sheriff* (1868) 1 Brewst. 183; *Com. v. Leary* (1868) 1 Brewst. 270; *Re Contested Elections* (1868) 2 Brewst. 1; *Re Blythe Twp. Election* (1897) 19 Pa. Co. Ct. 499. And see to the same effect *Anonymous*, 1 Lack.

Leg. Rec. 481; *Re Conroy*, 1 Legal Rec. Rep. 57, as set out in 2 C. J. 1124, note 2, and *Re Contested Election* (1900) 10 Kulp, 367.

Virginia.—*Com. v. Towles* (1835) 5 Leigh, 743.

Washington.—*Re Yamashita* (1902) 30 Wash. 234, 59 L.R.A. 671, 94 Am. St. Rep. 860, 70 Pac. 482.

Wisconsin.—*State ex rel. Kickbush v. Hoeflinger* (1874) 35 Wis. 393; *State ex rel. Atkinson v. McDonald* (1900) 108 Wis. 8, 81 Am. St. Rep. 878, 84 N. W. 171.

And the same rule applies even in a criminal prosecution against the one whose citizenship is attacked. *United States v. Hamilton* (1907) 157 Fed. 569.

The theory upon which the general rule is based is that an order admitting to citizenship has the force and effect of a judgment, and is of the same dignity as any other judgment of a court vested with jurisdiction, so that another court cannot, except on direct attack, look behind it and inquire on what testimony it was pronounced.

United States. — *Spratt v. Spratt* (1830) 4 Pet. 393, 7 L. ed. 897; *The Acorn* (1870) 2 Abb. (U. S.) 434, Fed. Cas. No. 29; *Green v. Salas* (1887) 81 Fed. 106; *Pintsch Compressing Co. v. Bergin* (1897) 84 Fed. 140; *United States v. Aakervik* (1910) 180 Fed. 137; *United States v. Stoller* (1910) 180 Fed. 910; *United States v. Nechman* (1910) 183 Fed. 788.

Alabama.—*Scott v. Strobach* (1873) 49 Ala. 477.

Arkansas.—*State v. Penney* (1850) 10 Ark. 621.

California.—*Tinn v. United States Dist. Atty.* (1906) 148 Cal. 773, 113 Am. St. Rep. 354, 84 Pac. 152.

Illinois.—*People ex rel. Brackett v. McGowan* (1875) 77 Ill. 644, 20 Am. Rep. 254.

Maine.—*Rockland v. Hurricane Isle* (1909) 106 Me. 169, 76 Atl. 286.

Massachusetts.—*OEHLERT v. OEHLERT* (reported herewith) ante, 406.

Minnesota.—*State ex rel. Brown v. Macdonald* (1877) 24 Minn. 48; *State ex rel. Engelhard v. Weber* (1905) 96

Minn. 422, 113 Am. St. Rep. 630, 105 N. W. 490.

Missouri. — *State ex rel. Lacy v. Brandhorst* (1900) 156 Mo. 457, 79 Am. St. Rep. 538, 56 S. W. 1094; *Re O'Sullivan* (1909) 137 Mo. App. 214, 117 S. W. 651.

New York. — *McCarthy v. Marsh* (1851) 5 N. Y. 263; *People ex rel. Smith v. Pease* (1860) 30 Barb. 588, affirmed in (1863) 27 N. Y. 45, 84 Am. Dec. 242.

Pennsylvania. — *Com. v. Leary* (1868) 1 Brewst. 270.

Wisconsin.—*State ex rel. Kickbush v. Hoefinger* (1874) 35 Wis. 393; *State ex rel. Atkinson v. McDonald* (1900) 108 Wis. 8, 81 Am. St. Rep. 878, 84 N. W. 171.

In *Re O'Sullivan* (1909) 137 Mo. App. 214, 117 S. W. 651, the court, in the latter connection, said: "A decree granting naturalization is like any other judgment of the court; while not required to be of any particular form, when granted, an order admitting to citizenship has all the effect of a judgment. The proceeding is generally regarded as a proceeding in rem. When granted, the order or judgment granting it cannot be corrected at a subsequent term to that at which it was rendered, nor attacked except in the manner and for the causes for which judgments of a court of record can be assailed. If attacked in a proper proceeding, it might, for cause, be annulled, set aside, or parties enjoined from claiming under it."

And in the much cited and quoted case of *Spratt v. Spratt* (1830) 4 Pet. (U. S.) 393, 7 L. ed. 897, Chief Justice Marshall discussed this question as follows: "The various acts upon the subject submit the decision of the right of aliens to admission as citizens to courts of record. They are to receive testimony, to compare it with the law, and to judge on both law and fact. This judgment is entered on record as the judgment of the court. It seems to us, if it be in legal form, to close all inquiry, and, like every other judgment, to be complete evidence of its own validity. The inconvenience which might arise from

this principle has been pressed upon the court; but the inconvenience might be still greater if the opposite opinion be established."

Again, in *People ex rel. Smith v. Pease* (N. Y.) supra, the court said: "The certificate was the legal evidence of the judgment of a court of competent jurisdiction collaterally in question in the action. It was final and conclusive. It imported absolute verity, and could not, if valid on its face, be thus impeached in this action. When alienage is in issue, the judgment of the court admitting the alien to become a citizen is conclusive evidence upon that point. . . . A record of naturalization cannot be contradicted by extrinsic proof that no declaration of intention had in truth been made. . . . Like any other judgment, it is complete evidence of its own validity."

II. Application of rule.

a. Requisites to admission.

The general rule of conclusiveness of an order admitting to citizenship has been held to apply to all requisites to admission, although they were not stated in the certificate of naturalization. See, generally, to this effect:

United States. — *Stark v. Chesapeake Ins. Co.* (1813) 7 Cranch, 420, 8 L. ed. 391; *Spratt v. Spratt* (1830) 4 Pet. 393, 7 L. ed. 897; *The Acorn* (1870) 2 Abb. (U. S.) 434, Fed. Cas. No. 29.

Alabama. — *Harley v. State* (1867) 40 Ala. 689.

Arkansas. — *State v. Penney* (1850) 10 Ark. 621.

Illinois. — *People ex rel. Brackett v. McGowan* (1875) 77 Ill. 644, 20 Am. Rep. 254.

Massachusetts. — *OEHLERT v. OEHLERT* (reported herewith) ante, 406.

Minnesota. — *State ex rel. Brown v. Macdonald* (1877) 24 Minn. 48; *State ex rel. Engelhard v. Weber* (1905) 96 Minn. 422, 113 Am. St. Rep. 630, 105 N. W. 490.

New York. — *Ritchie v. Putnam* (1835) 18 Wend. 524; *Banks v. Walker* (1848) 3 Barb. Ch. 438; *McCarthy v. Marsh* (1851) 5 N. Y. 263, in effect overruling *McCarty v. Hodges* (1846)

2 Edm. Sel. Cas. 433; *People ex rel. Smith v. Pease* (1860) 30 Barb. 588, affirmed in (1863) 27 N. Y. 45, 84 Am. Dec. 242.

Pennsylvania. — *Com. v. Leary* (1868) 1 Brewst. 270.

Virginia. — See *Com. v. Towles* (1835) 5 Leigh, 743.

Wisconsin. — *State ex rel. Atkinson v. McDonald* (1900) 108 Wis. 8, 81 Am. St. Rep. 878, 84 N. W. 171.

And, applying this general rule, it has been specifically held that the naturalization court must have been satisfied as to the moral character of the candidate for citizenship (*Campbell v. Gordon* (1810) 6 Cranch (U. S.) 176, 3 L. ed. 190); that he was well disposed to the good order and happiness of the United States (*ibid.*); that the necessary report of arrival had been made to the proper official (*Spratt v. Spratt* (1830) 4 Pet. (U. S.) 393, 7 L. ed. 897; and see *United States v. Ness* (1916) 145 C. C. A. 144, 230 Fed. 950, Ann. Cas. 1917C, 41, which affirmed (1914) 217 Fed. 169), or that he had previously declared his intention of becoming a citizen, as required by statute (*Stark v. Chesapeake Ins. Co.* (1813) 7 Cranch (U. S.) 420, 3 L. ed. 391; *The Acorn* (1870) 2 Abb. (U. S.) 434, Fed. Cas. No. 29; *Re Symanowski* (1909) 168 Fed. 978; *United States v. Nechman* (1910) 183 Fed. 788; *People ex rel. Brackett v. McGowan* (1875) 77 Ill. 644, 20 Am. Rep. 254; *Andres v. Arnold* (*Andres v. Circuit Ct. Judge*) (1889) 77 Mich. 85, 6 L.R.A. 238, 43 N. W. 857 [holding that it is immaterial where the declaration is made so long as it is made to the proper official]; *State ex rel. Brown v. McDonald* (1877) 24 Minn. 48; *Banks v. Walker* (1848) 3 Barb. Ch. (N. Y.) 438 [provided the certificate is not defective in this respect, on its face]; *McCarthy v. Marsh* (1851) 5 N. Y. 263, in effect overruling *McCarty v. Hodges* (1846) 2 Edm. Sel. Cas. (N. Y.) 433; *People ex rel. Smith v. Pease* (1860) 30 Barb. (N. Y.) 588, affirmed in (1863) 27 N. Y. 45, 84 Am. Dec. 242; *State ex rel. Kickbush v. Hoeflinger* (1874) 35 Wis. 393); that he had proved to the satisfaction of the nat-

uralization court that such intention had continued for the statutory period (*Pintsch Compressing Co. v. Bergin* (1897) 84 Fed. 140); that he had resided within the proper limits for the proper period, so as to be entitled to the benefit of the Naturalization Act (*Stark v. Chesapeake Ins. Co.* (1813) 7 Cranch (U. S.) 420, 3 L. ed. 391; *The Acorn* (1870) 2 Abb. (U. S.) 434, Fed. Cas. No. 29; *People ex rel. Brackett v. McGowan* (1875) 77 Ill. 644, 20 Am. Rep. 254; *Rockland v. Hurricane Isle* (1909) 106 Me. 169, 76 Atl. 286; *Com. v. Leary* (1868) 1 Brewst. (Pa.) 270; *State ex rel. Atkinson v. McDonald* (1900) 108 Wis. 8, 81 Am. St. Rep. 878, 84 N. W. 171); and that he took the required oath of allegiance (*The Acorn* (1870) 2 Abb. (U. S.) 434, Fed. Cas. No. 29. And see *Com. v. Towles* (1835) 5 Leigh (Va.) 743).

Nor is an order of naturalization subject to collateral attack merely because the court failed to comply with certain statutory requirements (*United States v. Stoller* (1910) 180 Fed. 910); or because of the fact that it may have erred in granting a certificate (*Ackerman v. Haenck* (1893) 147 Ill. 514, 35 N. E. 381; *State ex rel. Lacy v. Brandhorst* (1900) 156 Mo. 457, 79 Am. St. Rep. 538, 56 S. W. 1094).

So it has been held that, in a suit collateral to a naturalization proceeding, a party thereto cannot question the order admitting to citizenship on the ground that the naturalized person was a German and had been naturalized while the United States was at war with Germany. *OEHLERT v. OEHLERT* (reported herewith) ante, 406.

b. Effect of fraud, forgery, or perjury.

The great weight of authority is to the effect that a certificate of naturalization, if issued by a court having jurisdiction, is conclusive on collateral attack, even as against fraud in its procurement. *United States v. Gleason* (1897) 78 Fed. 896, affirmed in (1898) 33 C. C. A. 272, 62 U. S. App. 811, 90 Fed. 778; *United States v. Razzini* (1892) 50 Fed. 923; *United States v. Aakervik* (1910) 180 Fed. 187; *Scott v. Strobach* (1873) 49 Ala.

477; *Tinn v. United States Dist. Atty.* (1906) 148 Cal. 773, 113 Am. St. Rep. 354, 84 Pac. 152; *Behrensmeyer v. Kreitz* (1891) 135 Ill. 591, 26 N. E. 704; *People ex rel. Smith v. Pease* (1860) 30 Barb. (N. Y.) 588, affirmed in (1863) 27 N. Y. 45, 84 Am. Dec. 242; *Re Blythe Twp. Election* (1897) 19 Pa. Co. Ct. 499.

Nor can a certificate of citizenship, if *prima facie* and apparently valid, be collaterally attacked on the ground that it is a forgery. *United States v. Ragazzini* (1892) 50 Fed. 923.

And the same has been held where the holder of the certificate admitted that it was obtained by perjury. *Wigin v. Pacheco*, 5 Cong. El. Cas. (U. S.) 16, as set out in *Webster on Naturalization*, p. 92; *Scott v. Strobach* (1873) 49 Ala. 477; *Behrensmeyer v. Kreitz* (1891) 135 Ill. 591, 26 N. E. 704.

At least, this is the rule as to collateral impeachment of an order admitting to citizenship, on the ground of fraud or perjury as to any facts which were necessarily before the naturalization court. *The Acorn* (1870) 2 Abb. (U. S.) 434, Fed. Cas. No. 29.

On the other hand, in *Vaux v. Nesbit* (1826) 6 S. C. Eq. (1 M'Cord) 352, it was held that a certificate of naturalization, when attacked upon the ground of fraud, may have its regularity inquired into in a collateral proceeding, and ignored where it is positively made to appear that the court granting the same was imposed upon. This decision seems to stand alone, and, in addition, is apparently in conflict with the earlier *South Carolina case of McDaniel v. Richards* (1820) 12 S. C. L. (1 M'Cord) 187, wherein it was held that the court would indulge the presumption of regularity in the granting of an order admitting to citizenship. However, the court in the *Vaux Case* attempted to differentiate the *McDaniel Case* on the ground that in the then present case there was positive proof of fraud, whereas such was not the case in *McDaniel v. Richards*.

III. Exceptions to rule.

The general rule as to immunity from collateral attack does not apply

where the order of naturalization is absolutely void.

Thus it has been held that an order admitting to citizenship may be collaterally attacked where the court entering the same had no jurisdiction. *Gagnon v. United States* (1903) 193 U. S. 451, 48 L. ed. 745, 24 Sup. Ct. Rep. 510 (holding void for lack of jurisdiction, and therefore subject to collateral attack, a judgment of naturalization which had never been recorded, or, if recorded, the record of which had been lost, but which had been entered by a common-law court *nunc pro tunc* thirty-three years after its rendition, notwithstanding no entry or memorandum appeared upon the record or files at the time the original judgment is supposed to have been rendered, and although the declaration of intention was made before another court in another state, and the territorial court which is alleged to have entered the judgment had itself been abolished and a state court substituted in its place); *Raymond v. Raymond* (1897) 28 C. C. A. 38, 55 U. S. App. 89, 83 Fed. 721, reversing (1896) 1 Ind. Terr. 334, 37 S. W. 202 (holding that, where Federal courts have lost jurisdiction to the courts of an Indian tribe over a citizen of the United States, a subsequent unauthorized naturalization of such person is void for want of jurisdiction, and may be collaterally attacked); *Re Gee Hop* (1895) 71 Fed. 274 (holding that a certificate of naturalization of a Chinaman was absolutely void on its face, and therefore subject to collateral attack, Chinamen not being subject to naturalization so as to give the court jurisdiction); *Mills v. McCabe* (1867) 44 Ill. 194 (holding a certificate of naturalization to be void because granted by a court not having authority to entertain naturalization proceedings, because not one of record within the meaning of the Naturalization Laws); *Behrensmeyer v. Kreitz* (1891) 135 Ill. 591, 26 N. E. 704) holding an order of a justice of the peace admitting an alien to citizenship void, for lack of jurisdiction in the justice); *Re Yamashita* (1902) 30 Wash. 234, 59 L.R.A.

671, 94 Am. St. Rep. 860, 70 Pac. 482 (holding that an order of naturalization which shows on its face that it was granted to a Japanese not subject to naturalization was void on its face, because of lack of jurisdiction in the court to grant the same, and therefore that it was subject to collateral attack). See also *State ex rel. Bancroft v. Stumpf* (1869) 23 Wis. 630. But in connection with *Mills v. McCabe* (Ill.) *supra*, see *Com. ex rel. Simpson v. Sheriff* (1868) 1 Brewst. (Pa.) 183.

In *Re Yamashita* (Wash.) *supra*, the court said that the judgment of the court which granted the naturalization order was conclusive if it was acting within its jurisdiction, but that, "if the judgment upon its face shows that the court was without authority to pronounce the judgment, the determination is void and must be disregarded. A judgment void upon its face may be attacked at any time, and in any proceeding, and the same may be disregarded." G. J. C.

ANTHONY LA ROSA, by Next Friend,

v.

ARMAND F. NICHOLS, Appt.

New Jersey Court of Errors and Appeals — November 18, 1918.

(92 N. J. L. 375, 105 Atl. 201.)

Estoppel — of infant to deny contract.

1. The contracts of infants are not absolutely void, but only voidable; and if a youth under twenty-one years of age, by falsely representing himself to be an adult, which he appears to be, for the purpose of inducing another to enter into a contract with him, and thereby, through such representation and appearance, the other party is led to believe that such infant is an adult and makes a contract with him, the benefit of which he obtains and retains, then, in a suit on that contract, the minor will not be permitted to set up the privilege of infancy, because by his fraudulent conduct he has estopped himself from so pleading; and this in a court of law, as well as in a court of equity.

[See note on this question beginning on page 416.]

— enforcement at law.

2. The doctrine of equitable estoppel is not exclusively of equitable cognizance, for, although the creature of

equity and depending upon equitable principles, it is enforced alike by courts of law and equity.

[See 10 R. C. L. 841.]

Headnotes by WALKER, Ch.

APPEAL by defendant from a judgment of the Supreme Court affirming a judgment of the Circuit Court for Atlantic County in favor of plaintiff in an action of replevin brought to recover possession of an automobile stored by plaintiff in defendant's garage. *Reversed.*

The facts are stated in the opinion of the court.

Mr. Louis E. Stern, for appellant: Plaintiff is estopped from setting up the defense of infancy.

Commander v. Brazil, 88 Miss. 668, 9 L.R.A. (N.S.) 1117, 41 So. 497; *Grauman, M. & C. Co. v. Krienitz*, 142 Wis.

556, 126 N. W. 50; *Lake v. Perry*, 95 Miss. 550, 49 So. 569; *Pemberton Bldg. & L. Asso. v. Adams*, 53 N. J. Eq. 258, 31 Atl. 280; *Ex parte Unity Joint Stock Mut. Bkg. Asso.* 3 De G. & J. 68, 44 Eng. Reprint, 1192, 27 L. J. Bankr. N.

S. 33, 4 Jur. N. S. 1257, 6 Week. Rep. 640; *Overton v. Banister*, 3 Hare, 503, 67 Eng. Reprint, 479, 8 Jur. 906.

Plaintiff should be held to his contract for the things furnished him, which were necessary to his business and to the preservation of the machine, which he claims to own.

Rundel v. Keeler, 7 Watts, 237; *Mohney v. Evans*, 51 Pa. 83.

Where an infant seeks affirmative relief by repudiating a contract, the court should not allow him that relief unless he place the person against whom he seeks that relief in statu quo.

Welch v. Welch, 103 Mass. 562; *Breed v. Judd*, 1 Gray, 455, 12 Mor. Min. Rep. 293; *Bartholomew v. Finne-more*, 17 Barb. 428; *Badger v. Phinney*, 15 Mass. 359, 8 Am. Dec. 105; *Taft v. Pike*, 14 Vt. 405, 39 Am. Dec. 228.

Messrs. Ewart & Siracusa for appellee.

Walker, Ch., delivered the opinion of the court:

The defendant-appellant, a garage keeper in Atlantic City, stored the automobile of the plaintiff, furnished supplies for, and did work upon it, at the special instance and request of the plaintiff, who owned the machine. The bill thus contracted amounted to \$74.49, and, default being made in its payment, defendant retained possession of the automobile, asserting a lien under the act for the protection of garage keepers and automobile repairmen. Pamph. Laws 1915, p. 556. Plaintiff brought replevin in the Atlantic circuit court, setting up that he was an infant twenty years of age; that he repudiated his contract to pay for gasoline and storage, supplies, accessories, and for repairs to his automobile, and demanded possession of it free from any lien claimed by the defendant. The defendant answered, and set up that the plaintiff represented himself to be of full age when he engaged the defendant to store his automobile, etc.; that the plaintiff received the benefit of the storage, work, and labor, and materials furnished; that the same were necessary to the plaintiff in order to operate his machine in and about his business of a jitney driver; and that the prices charged were

reasonable. The case was submitted to the court without a jury. The judge found in favor of the plaintiff and against the defendant, and judgment was thereupon entered, with costs. Appeal was taken to the supreme court, and the judgment was there affirmed. 91 N. J. L. 355, 103 Atl. 390. From the judgment entered upon that affirmance appeal has been taken to this court.

The case was tried in the court of first instance upon an agreed state of facts, as follows: That the amount claimed by defendant is due and owing to him from plaintiff; that at the time of storing the car and purchasing the supplies, etc., plaintiff was an infant and would not be of age until October, 1917 (the items running over a period from September 16, 1916, to January 17, 1917); that at the time mentioned plaintiff had the appearance of being of full age, and then, and prior thereto, represented himself to defendant as being of full age, and before that time executed a chattel mortgage to defendant on the automobile, and, in the acknowledgment of the execution of the mortgage, recited the fact that he was of full age; that plaintiff held a state license to drive an automobile in Atlantic City for hire, to operate a car commonly called a "jitney;" that the plaintiff's father, who is acting as his next friend in this suit, knew that the plaintiff was engaged in the business of operating an automobile for hire, and that the car was stored in the defendant's garage, and that plaintiff was purchasing gasoline, etc., from defendant, and consented thereto; that plaintiff lived with his father, and irregularly contributed money to his household.

If this suit were in the court of chancery the plea of infancy in the circumstances of this case would not be tolerated. *Parker v. Hayes*, 39 N. J. Eq. 469; *Pemberton Bldg. & L. Asso. v. Adams*, 53 N. J. Eq. 258, 31 Atl. 280. In the former case it was held by Vice Chancellor Van Fleet that if an infant, entitled to a

sum of money on attaining twenty-one years of age, induces his trustee to pay it to him in advance of that time by fraudulently representing himself to be of full age, he will, in equity, be bound by the payment, although he would not be at law. See pages 478, 479. And in the latter case Vice Chancellor Bird held that infancy is no defense to a suit on a contract, the consideration of which was money advanced to the infant upon his falsely representing himself to be of age, when the representation is relied upon by the lender, and that a court of equity will not permit the plea of infancy to prevent the enforcement of a contract for a loan of money without a return of the loan, and this irrespective of fraud. I understand the vice chancellor's assertion (53 N. J. Eq. at page 259), that the law will not, in such circumstances, allow a fraud doer to protect himself under the plea of infancy, to refer to the law administered in courts of equity. The authorities he cites show this. *Parker v. Hayes* went to the court or errors and appeals, and there Mr. Justice Reed, writing the opinion for that court, said the equitable rule was fully and correctly stated in the opinion of the learned vice chancellor. *Hayes v. Parker*, 41 N. J. Eq. 630, 632, 7 Atl. 511.

Counsel for plaintiff urges that neither in *Parker v. Hayes* nor *Pemberton Bldg. & L. Asso. v. Adams* did the court of chancery say that infants were bound by their contracts, but that enforcement of the contracts was denied on the

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enforcement at
law.**

ground of estoppel, equitable estoppel. But this doctrine is not now one of exclusively equitable cognizance; for, as this court in *Central R. Co. v. MacCartney*, 68 N. J. L. 165, at page 175, 52 Atl. 575, speaking by Mr. Justice Pitney, said, the doctrine of equitable estoppel, although the creature of equity and depending upon equitable principles, is recognized and enforced alike by courts of law and equity.

Two cases decided by our supreme court were cited as authority for that court's decision in the case at bar, namely, *Woolston v. King*, 3 N. J. L. 1049, and *Hall v. Kjer*, 47 N. J. L. 341. In the former the suit was on a promissory note, and the defense set up was that the defendant was an infant when the note was given. The court held that it is because of the real or supposed incapacity of mind in an infant to make judicious contracts that the law renders invalid his bargains. And the latter case was on a mechanic's lien claim against the builder, who contracted the debt, and against the owner who was an infant, to charge his land with the lien. The court held that there could be no lien on an infant's land under the *Mechanic's Lien Law*, for the lien thereby given (except in a certain instance, which is immaterial here) is incident only to a liability to pay, which a minor is not competent to incur for building upon his land.

That the contracts of infants are voidable by them generally must be conceded; but there is nothing in either of the cases just mentioned which suggests that they fell under the doctrine of equitable estoppel, nor that that doctrine cannot be invoked against an infant in a proper case, even one at law.

In *Hayes v. Parker*, *supra*, 41 N. J. Eq. at page 631, there is, however, an observation that at law a person within the age of twenty-one is conclusively presumed to be unfitted for business, and that every contract into which he enters is to his disadvantage, and that he is incapable of fraudulent acts which will estop him from interposing the shield of infancy against its enforcement. But this is obiter dictum. The case before the court was one in equity, calling for the application of equitable principles, and the observation concerning a different situation at law was, as stated, obiter dictum. And this is true of the similar observation of Vice Chancellor Van Fleet in the same case. We are, therefore, at liberty to adopt in the

case sub judice the rule which we think is most consonant with reason, and therefore the better law.

The stipulation in the record that the plaintiff's father was aware of his son's transactions with defendant, and consented thereto, and that the boy, who lived with his father, irregularly contributed money to the household, was apparently intended to import the doctrine of emancipation into the case, which, if found as a fact, would doubtless have entitled the defendant to prevail; for this court said in *Costello v. Prospect Brewing Co.* 52 N. J. Eq. 557, at page 560, 30 Atl. 682, that it is clear that a father may give an infant his time, or authorize him to make contracts in his own name and receive pay therefor, and in such case the minor may sue and recover his wages.

Defendant in this case pleaded that what was furnished to plaintiff were necessities, and that therefore he was liable. In the view I take of this case a decision of these questions of emancipation and necessities is not called for. I prefer to put my vote to reverse solely on the ground of estoppel in pais, equitable estoppel. It seems anomalous indeed that youths of sufficient age and capacity, although less than twenty-one years old, may be convicted of crime and be held liable for their torts, and yet not be liable on their contracts when apparently of sufficient capacity to make them, and when they procure their making by fraud.

Let it be remembered that the contracts of infants are not absolutely void, but only voidable. An illuminating discussion of this question will be found in the opinion of Stanley, J., in the supreme court of New Hampshire, in *Hall v. Butterfield* (1879) 59 N. H. 354, 47 Am. Rep. 209. At page 357 of 59 N. H. he quotes Lord Mansfield, as follows: "Great inconveniences must arise to others if infants were bound by no act. The law, therefore, at the same time that it protects their imbecility and indiscretion from injury

through their own imprudence, enables them to do binding acts for their benefit. . . . A third rule, deducible from the nature of the privilege that is given as a shield and not as a sword, is that it never shall be turned into an offensive weapon of fraud or injustice."

And the learned judge further says, at page 358 of 59 N. H.: "No reason appears why the wise and just principle enunciated by Lord Mansfield should not be given its full force, and the rights and obligations of lunatics, persons non compos mentis, drunkards when in such a state as to be entirely bereft of reason, and infants, be placed on the same ground. The obligation to account only for the benefit actually received secures ample protection from fraud and imposition, and at the same time prevents the privilege from being used to perpetrate fraud. It prevents their disability from being 'not their protection merely, but an extraordinary legal ability to rob others; not a shield, but a sword; not a mere legal incapacity to be plundered by their fellow men, but a vast capacity to plunder them with impunity.'"

And, further, at page 359 of 59 N. H.: "If benefit obtained by the infant is the test in one case, why not make it the test in all cases? . . . The true rule is that the contract of an infant or lunatic, whether executed or executory, cannot be rescinded or avoided without restoring to the other party the consideration received, or allowing him to recover compensation for all the benefit conferred upon the party seeking to avoid the contract. The question whether the infant has received a benefit—like the question of what are necessities, and what sum the infant ought to pay for them, or the question of negligence or ordinary care, and other similar questions—is one of mixed law and fact. No uniform rule can be established. . . . In no two cases are we likely to find the same facts; and it must always be for the trier

to apply the law to the facts, and determine whether the infant has been benefited, and to what extent."

As applied to the facts in the case at bar, the law, as I view it, is that

if a youth under
—of infant to deny contract. twenty-one years of

age, by falsely representing himself to be an adult, which he appears to be, for the purpose of inducing another to enter into a contract with him, and thereby, through such representation and appearance, the other party is led to believe that such infant is an adult, and makes a contract with him, the benefit of which he obtains and retains, then, in a suit on that contract, the minor will not be permitted to set up the privilege of infancy, because by his fraudulent conduct he has estopped himself from so pleading; and this in a

court of law, as well as in a court of equity.

In the case at bar there were no disputed facts, and the false pretense—that is, the fraud of the infant—was admitted, and therefore the judge's decision, in my opinion, should have been for the defendant. I shall therefore vote to reverse.

The judgment will be reversed, with costs.

Swayze, J., concurring:

I find myself unable to concur in the reasoning of the opinion. My vote to reverse rests on the ground that the parties have stipulated that the amount claimed by the defendant is due and owing to him from the plaintiff. This is legally possible, notwithstanding the plaintiff's infancy, and must, therefore, be accepted as a fact. It is conclusive of the controversy.

ANNOTATION.

Misrepresentation as to age as estoppel to plead infancy.

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- II. When sued at law on the contract, 418.
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- V. When suing in equity, 423.
- VI. Statutes, 425.
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I. Introductory.

This note does not include cases of master and servant, nor of contracts of marriage, nor is it intended to include cases of implied representations, although one or two of these are cited. The reader will understand that this note does not touch the question of the infant's liability in tort for his misrepresentations.

The courts are not agreed upon this subject. Some of the cases hold that the misrepresentation of the infant as to his age will estop him to plead infancy, others that it will not estop him. Some hold that he is estopped in equity. As far as actions *ex contractu* are concerned, the weight of authority is decidedly against the estoppel; in other cases, it is not easy to say where it is.

In *Zouch ex dem. Abbot v. Parsons* (1765) 3 Burr. 1794, 97 Eng. Reprint, 1103, Lord Mansfield said that a rule deducible from the nature of the infant's privilege, "which is given as a shield, and not as a sword, is 'that it never shall be turned into an offensive weapon of fraud or injustice.'" It is interesting to contrast with this the statement of Lord Sumner in *Leslie v. Sheill* [1914] 3 K. B. (Eng.) 607, 6 B. R. C. 758, Ann.-Cas. 1916C, 992, where he said: "He [Lord King] is reported to have said, 'Infants have no privilege to cheat men,'—a wholesome truth, indeed, but I should hardly call it a principle."

In *Ferguson v. Bobo* (1876) 54 Miss. 127, in enjoining an action of ejectment brought by one who, while an infant, had conveyed land to her father to enable him to borrow, the court said: "It may be stated as a general proposition, fully borne out by the authorities, that whenever an infant who has arrived at years of discretion, by direct participation, or by silence when he was called upon to speak, has entrapped a party, ignorant

of his title or of his minority, into purchasing his property from another, he will be estopped in a court of chancery from setting up such title. . . . How long before this doctrine will be fully adopted by courts of law, as so many equitable principles have been, the future history of our jurisprudence must determine."

In *County Bd. of Edu. v. Hensley* (1912) 147 Ky. 441, 42 L.R.A.(N.S.) 643, 144 S. W. 63, the court said: "When one deals with an infant, knowing him to be an infant, the latter is not estopped from relying upon his infancy in avoidance of the contract; but when an infant by reason of his personal appearance, family surroundings, and business activities, coupled with a misrepresentation of fraudulent concealment, leads one who deals with him in good faith, and not knowing that he is an infant, to believe that he is of age, he will be estopped from maintaining an action to avoid his executed contract. When he comes into equity seeking relief, he must come with clean hands. The privilege of infancy is a shield for the protection of the infant, and not a weapon of attack; nor is it to be used as a means of defrauding others."

In holding an infant liable in equity, *Lush, J.*, said in *Stocks v. Wilson* [1913] 2 K. B. (Eng.) 235: "In my opinion it follows that, if an infant has wrongfully sold the property which he acquired by a fraudulent misrepresentation as to his age, he must at all events account for the proceeds to the party he has defrauded. I can see no logical ground on which he can be allowed to resist such a claim in that case, if he is accountable for the money itself in a case where he has obtained money, and not goods, by means of a like fraud."

In *Hayes v. Parker* (1886) 41 N. J. Eq. 630, 7 Atl. 581, the court said: "At law it is conclusively presumed that a person within the age of twenty-one is unfitted for business, and that every contract into which he enters is to his disadvantage, and that he is incapable of fraudulent acts which will estop him from interposing the shield of infancy against its en-

forcement. In equity, however, this rigid rule has its exceptions. Equity will regard the circumstances surrounding the transaction—the appearance of the minor, his intelligence, the character of his representations, the advantage he has gained by the fraudulent representations, and the disadvantage to which the person deceived has been put by them, in determining whether he should be permitted to invoke successfully the plea of infancy."

Statements against the estoppel.

If an allegation that the infant represented that he was of full age "were ever permitted to destroy an infant's right of avoiding contracts, not one in a hundred of his contracts would be placed in his power to avoid, for nothing would be easier than to prevail upon the infant to make a declaration which might be shown as evidence of deliberate imposition on his part, though prompted solely by the person intended to be benefited by it." *Conroe v. Birdsall* (1799) 1 Johns. Cas. (N. Y.) 127, 1 Am. Dec. 105.

"The fraud of the defendant, if ever so clearly shown, does not restore validity to his promise, or in any way enhance its obligation. . . . The doctrine contended for by the plaintiff would effectually deprive infants of that protection which the law sedulously seeks to afford them in their dealings." *Merriam v. Cunningham* (1853) 11 Cush. (Mass.) 40.

"A minor is no more liable in equity than law for fraud in a contract, for if he is incapable of making, he is incapable of committing a fraud in a contract; besides, this would defeat the law made for the protection of minors, if, although they would not be liable upon their contracts, yet, by using deceit in them, they should be made liable." *Geer v. Hovey* (1790) 1 Root (Conn.) 179.

In affirming a judgment for the defendant in a suit to foreclose mortgages given by an infant married woman, the court said: "But it is insisted that because she obtained money by false representations as to her age, she was estopped from denying her obligation to pay. If the

courts should sanction this doctrine, the result would be that the ancient rule, established as a safeguard to protect infants from the wiles of designing rascals, would be abrogated, and the way opened up to reckless youths to evade the law by lying. The courts would thereby put a premium upon falsehood and hold out the temptation to infants and to others, who hope to profit by debauching them, to resort to this disreputable method of enabling the one to squander and the other to extort the patrimony intended to prepare a child for future usefulness." *Carolina Interstate Bldg. & L. Asso. v. Black* (1896) 119 N. C. 323, 25 S. E. 975.

In *Sims v. Everhardt* (1880) 102 U. S. 300, 26 L. ed. 87, in holding that one making a deed while an infant was not estopped to bring an action to avoid it, by her assertion at the time of making it that she was of age, the court said: "The question is, whether acts and declarations of an infant during infancy can estop him from asserting the invalidity of his deed after he has attained his majority. In regard to this there can be no doubt, founded either upon reason or authority. Without spending time to look at the reason, the authorities are all one way. An estoppel in pais is not applicable to infants, and a fraudulent representation of capacity cannot be an equivalent for actual capacity. *Brown v. McCune* (1851) 5 Sandf. (N. Y.) 224; *Keen v. Coleman* (1861) 39 Pa. 299, 80 Am. Dec. 524. A conveyance by an infant is an assertion of his right to convey. A contemporaneous declaration of his right or of his age adds nothing to what is implied in his deed. An assertion of an estoppel against him is but a claim that he has assented or contracted. But he can no more do that effectively than he can make the contract alleged to be confirmed."

II. When sued at law on the contract.

One sued upon a contract is not estopped to plead infancy because he induced the contract by his fraudulent representations that he was of age.

Georgia. — *McKamy v. Cooper* (1888) 81 Ga. 679, 8 S. E. 812.

Indiana. — *Price v. Jennings* (1877) 62 Ind. 111.

Massachusetts. — *Merriam v. Cunningham* (1853) 11 Cush. 40.

Minnesota. — *Conrad v. Lane* (1880) 26 Minn. 389, 37 Am. Rep. 412, 4 N. W. 695; *Folds v. Allardt* (1886) 35 Minn. 488, 29 N. W. 201.

New Hampshire. — *Burley v. Russell* (1839) 10 N. H. 184, 34 Am. Dec. 146.

New York. — *Conroe v. Birdsall* (1799) 1 Johns. Cas. 127, 1 Am. Dec. 105; *International Text Book Co. v. Connelly* (1912) 206 N. Y. 188, 42 L.R.A. (N.S.) 1115, 99 N. E. 722 (stating the rule); *Brown v. McCune* (1851) 5 Sandf. 224.

England. — *Bartlett v. Wells* (1862) 1 Best. & S. 836, 121 Eng. Reprint, 924, 31 L. J. Q. B. N. S. 57, 8 Jur. N. S. 762, 5 L. T. N. S. 607, 10 Week. Rep. 229; *Miller v. Blankley* (1878) 38 L. T. N. S. 527; *Levene v. Brougham* (1909) 25 Times L. R. 265, 53 Sol. Jo. 243; *Lesley v. Sheill* [1914] 3 K. B. 607, 6 B. R. C. 738, 83 L. J. K. B. N. S. 1145, 111 L. T. N. S. 106, 30 Times L. R. 460, 58 Sol. Jo. 453, Ann. Cas. 1916C, 992.

Ireland. — *Bateman v. Kingston* (1880) Ir. L. R. 6 C. L. 328.

In *Conroe v. Birdsall* (1799) 1 Johns. Cas. (N. Y.) 127, 1 Am. Dec. 105, *supra*, the defendant, upon being asked by the plaintiff's agent at the time of the execution of the bond on which the action was brought, whether he was of age, replied that he was. The plaintiff contended that the infant ought not to be allowed to set up his own fraud, but it was held that infancy was a defense.

In an action to establish a lien on a building for materials, it was held that an infant cannot make himself liable on his contracts by simply holding himself out as an adult. *Price v. Jennings* (1877) 62 Ind. 111, *supra*.

In *Folds v. Allardt* (1886) 35 Minn. 488, 29 N. W. 201, *supra*, an action on contract for goods sold and delivered to a partnership, it is held that an infant is not estopped from setting up infancy as a defense, by the

fact that he has engaged in business as a member of such partnership. The court said: "It would be a singular innovation upon the common-law rule if, in cases where his appearance and business were such as to induce the belief that he was over age, an infant would, in consequence, be held bound as though of full age."

In *Leslie v. Sheill* [1914] 3 K. B. (Eng.) 607, 6 B. R. C. 738, 83 L. J. K. B. N. S. 1145, 111 L. T. N. S. 106, 30 Times L. R. 460, 58 Sol. Jo. 453, Ann. Cas. 1916C, 992, *supra*, where the defendant induced plaintiff to lend him money by fraudulently representing that he was of age, it was held that infancy was a good plea to an action to recover the amount loaned on the ground that it had been obtained by fraudulent misrepresentation, or, in the alternative, for money had and received to the plaintiff's use, being in substance an action *ex contractu*, the court holding this to be so even without the statute known as the Infant's Relief Act 1874. The court referred to, but was not stopped by, *Stocks v. Wilson* [1913] 2 K. B. (Eng.) 235, 82 L. J. K. B. N. S. 598, 108 L. T. N. S. 834, 29 Times L. R. 352, 20 Manson, 129, *supra*, I.

In *International Text Book Co. v. Connelly* (1912) 206 N. Y. 188, 42 L.R.A. (N.S.) 1115, 99 N. E. 722, *supra*, in holding that one who, while an infant, entered into contract for instruction with a correspondence school, was not, after attaining majority, estopped to plead infancy in an action on the contract because of having misrepresented, with no intent to defraud, that he was of age, in the subscription paper, the court said: "It is well settled in this state that, in an action upon a contract made by an infant, he is not estopped from pleading his infancy by any representation as to his age made by him to induce another person to contract with him."

In *Pennsylvania*, on a *sci. fa.* upon a mortgage, an infant may show that her representation that she was of full age was false. *Ledger Loan & Bldg. Assn. v. Cook* (1879) 6 W. N. C. (Pa.) 428. See *infra*, IV.

Where the grantee of an infant sued in ejectment those who had received a deed from the infant after he became of age, the defendants were not estopped to plead the infancy, although the infant falsely represented that he was of age when giving the plaintiff's deed. *Ridgeway v. Herbert* (1899) 150 Mo. 606, 73 Am. St. Rep. 464, 51 S. W. 1040.

There are a few cases holding that an infant sued on a contract induced by his fraudulent representations that he was of age is estopped to plead infancy. *Damron v. Com.* (1901) 110 Ky. 268, 96 Am. St. Rep. 453, 61 S. W. 459; *Harseim v. Cohen* (1894) — Tex. Civ. App. —, 25 S. W. 977.

In *Damron v. Com.* (Ky.) *supra*, it was held that one who, for the purpose of qualifying his father to become a surety on a bail bond, conveyed certain property to him, at the same time testifying in court that he was over twenty-one years of age, which his appearance made probable, he being in fact about twenty years of age at that time, was estopped, in an action by the commonwealth to recover the land which it had purchased at an execution sale under a judgment recovered against the father on the bond, to disaffirm the deed on the ground of infancy; and that a subsequent purchaser from him was affected by that estoppel.

In *Harseim v. Cohen* (Tex.) *supra*, where a father carried on a business of his own under the name of his infant daughter, who was aware of the fraud, it was held that her plea of infancy was no defense to an action against her for goods sold and delivered, as it was the law in Texas that a minor could be held upon contracts secured by his fraudulent representations, which were here implied.

The holding in *Zouch ex dem. Abbot v. Parsons* (1765) 3 Burr. 1794, 97 Eng. Reprint, 1103, 1 W. Bl. 575, 96 Eng. Reprint, 332, that an infant mortgagee, who, upon repayment, had reconveyed the property, could not, on re-entry, resist ejectment, was because he was compellable by law to reconvey.

III. When suing at law.

The infant is not estopped to bring an action at law by his fraudulent representation that he was of age when making the contract.

United States.—*Burdett v. Williams* (1887) 30 Fed. 697.

Arkansas.—*Tobin v. Spann* (1908) 85 Ark. 556, 16 L.R.A.(N.S.) 672, 109 S. W. 534.

Illinois.—*Wieland v. Kobick* (1884) 110 Ill. 16, 51 Am. Rep. 676.

Indiana.—*Carpenter v. Carpenter* (1873) 45 Ind. 142.

Massachusetts.—*Raymond v. General Motorcycle Sales Co.* (1918) 230 Mass. 54, 119 N. E. 359.

Ohio.—*Mills v. Rodgers* (1861) 2 Ohio Dec. Reprint, 481.

South Carolina.—*Norris v. Vance* (1846) 37 S. C. L. (3 Rich.) 164.

Vermont.—*Whitcomb v. Joslyn* (1878) 51 Vt. 79, 31 Am. Rep. 678.

It is no defense to an infant's action to rescind a contract of trading horses, and to recover the horse he had given, that he falsely represented that he was of age. *Carpenter v. Carpenter* (1873) 45 Ind. 142, *supra*.

Similarly in *Whitcomb v. Joslyn* (1878) 51 Vt. 79, 31 Am. Rep. 678, *supra*, where an infant, by means of representing himself of age, bought a wagon, paying part, the seller retaining a lien for the rest, and on default the wagon was sold by the vendor, it was held that the infant was not estopped to avoid his contract and sue for the money paid. The court said: "The false representations . . . do not make the contract any more binding than it otherwise would be."

Where the infant, with his father, signed a bill of sale of a slave, saying he was of age, in trover for the slave it was held that he was not precluded by his fraud. *Norris v. Vance* (1846) 37 S. C. L. (3 Rich.) 164, *supra*.

An infant's fraud as to his age, on signing shipping articles, does not estop him from rescinding his contract and suing on quantum meruit. *Burdett v. Williams* (Fed.) *supra*.

An infant is not estopped from suing to recover money paid on a contract to buy a motorcycle by a false

statement in the contract that he was at least twenty-one years of age. *Raymond v. General Motorcycle Sales Co.* (1918) 230 Mass. 54, 119 N. E. 359, *supra*.

A minor cannot estop himself from bringing an action to recover lands conveyed by his deed by false representations at the time of the deed that he was of age (*Tobin v. Spann* (1908) 85 Ark. 556, 16 L.R.A.(N.S.) 672, 109 S. W. 534; *Mills v. Rodgers* (1861) 2 Ohio Dec. Reprint, 481; *Buchanan v. Hubbard* (1884) 96 Ind. 1 [as stating the rule]); or by a false statement in his deed to that effect (*Wieland v. Kobick* (1884) 110 Ill. 16, 51 Am. Rep. 676).

In *Newport News & M. Valley Co. v. Glenn* (1889) 11 Ky. L. Rep. 579, an action to recover damages for personal injuries resulting from negligence, it was held that the plaintiff was not bound by a settlement of his claim made with the defendant while he was an infant, although he fraudulently represented himself to be of age.

There are a few cases holding that a minor is estopped from bringing an action at law by his false representations as to his age, inducing a contract.

Irwin v. Morell (1831) *Dudley* (Ga.) 72 (as stating the rule); (*LA ROSA v. NICHOLS* (reported herewith) ante, 412; *Gregson v. Law* (1914) 19 B. C. 240, 15 D. L. R. 514.

An infant may not, on reaching age, recover land conveyed by her when an infant, making an acknowledgment representing herself as of full age. "Whilst apparently it is true to say that, being an infant, she could not be made liable on a contract thus brought about, it is, I think, an altogether different proposition to say the court will actually assist her to obtain advantages based entirely on her own fraudulent act." *Gregson v. Law* (B. C.) *supra*.

It will be seen that it is held in the reported case (*LA ROSA v. NICHOLS*, ante, 412) that an infant who falsely represents himself to a garage keeper to be of age, and thus has his automobile repaired, is es-

topped to repudiate the contract and replevy the car.

In *Irwin v. Morell* (1831) *Dudley* (Ga.) 72, *supra*, where the infant allowed her father to mortgage her slave without objection, in trover brought by the infant upon reaching her majority, the court said that infancy was no protection, provided the minor had arrived at those years of discretion when a fraudulent intent could be reasonably imputed to her.

IV. *When sued in equity.*

It has been held in a number of cases that one sued in equity may not escape on the ground of infancy, a contract induced by his false representations that he was of full age. *Strain v. Wright* (1849) 7 Ga. 568; *United States Invest. Corp. v. Ulrickson* (1901) 84 Minn. 14, 87 Am. St. Rep. 326, 86 N. W. 613; *Brantley v. Wolf* (1882) 60 Miss. 420 (as stating the rule); *Commander v. Brazil* (1906) 88 Miss. 668, 9 L.R.A.(N.S.) 1117, 41 So. 497 (enforcing deed of trust); *Pemberton Bldg. & L. Asso. v. Adams* (1895) 53 N. J. Eq. 258, 31 Atl. 280; *Watts v. Creswell* (1714) 2 Eq. Cas. Abr. 515, 22 Eng. Reprint, 435; *Beckett v. Cordley* (1784) 1 Bro. Ch. 353, 28 Eng. Reprint, 1174 (as stating the rule); *Lempriere v. Lange* (1879) L. R. 12 Ch. Div. (Eng.) 675, 41 L. T. N. S. 378, 27 Week. Rep. 879; *Stocks v. Wilson* [1913] 2 K. B. (Eng.) 215, 82 L. J. K. B. N. S. 598, 108 L. T. N. S. 884, 29 Times L. R. 352, 20 Manson, 129; *Bennetto v. Holden* (1874) 21 Grant, Ch. (U. C.) 222; *Goyer v. Morrison* (1878) 26 Grant, Ch. (U. C.) 69.

In *Davidson v. Young* (1865) 38 Ill. 145, the court inclined to a similar view; and possibly a like opinion is intimated in *Adams v. Fite* (1873) 3 Baxt. (Tenn.) 69.

Where an infant bought a negro, paying part, and for the balance giving a note which he later disaffirmed, the seller brought a bill in equity, and the court decreed the sale of the negro to reimburse the infant, and to pay the balance to the vendor, on the ground that the remedy of the vendor at law was inadequate and difficult.

Strain v. Wright (1849) 7 Ga. 568, *supra*.

Where an infant with knowledge of her rights conveyed land to her father to enable him to borrow, and he conveyed to the mortgagee, the infant's action of ejectment was enjoined in equity. *Ferguson v. Bobo* (1876) 54 Miss. 121.

An infant, having entered into a family arrangement by which his father's property was conveyed to him and he mortgaged the same to clear off its encumbrances, cannot, on reaching full age, escape his mortgage and retain the land, the court not paying much attention to the fact that at the time of execution of the mortgage the father asserted in the son's presence that he was of age. *United States Invest. Corp. v. Ulrickson* (1901) 84 Minn. 14, 87 Am. St. Rep. 326, 86 N. W. 613, *supra*.

In Ontario it was held in *Bennetto v. Holden* (1874) 21 Grant, Ch. (U. C.) 222, *supra*, that where an infant conveying land represented herself as of age, and after majority conveyed to others who had knowledge of the earlier grant, she was bound by her misrepresentations, the action being brought in equity by the successors of the earlier grantee.

In *Pemberton Bldg. & L. Asso. v. Adams* (1895) 53 N. J. Eq. 258, 31 Atl. 280, *supra*, a suit in equity against a borrower of money, it was held that he could not set up his infancy as a defense where the person making the loan asked him if he was of age, and he replied in the affirmative, and his reply was relied upon, it being held that the law would not, under such circumstances, allow the fraud doer to protect himself by the plea of infancy.

In *Watts v. Creswell* (1714) 2 Eq. Cas. Abr. 515, 22 Eng. Reprint, 435, *supra*, an infant remainderman was compelled to account, where he had conducted negotiations to mortgage land for the benefit of his father, the life tenant, the latter making an affidavit of title in fee in himself. Lord Cowper stated that if an infant is old and cunning enough to contrive and carry on a fraud, in equity he ought to make satisfaction for it.

But in *Inman v. Inman* (1873) L. R. 15 Eq. (Eng.) 260, 31 Week. Rep. 433, where an infant, with the statutory declaration that he was of age, executed a charge on a fund, and, upon reaching his majority, executed a mortgage upon the same fund to one without notice of the former charge, it was held, upon an application by the later encumbrancer for funds of the infant in the hands of the court, that the second charge was a valid disaffirmance of the first, and the infant not himself seeking to take advantage of his fraud, it would not avail the first lender against the second.

In *Beckett v. Cordley* (1784) 1 Bro. Ch. 353, 28 Eng. Reprint, 1174, *supra*, where an infant executed a discharge of her interest, and later reclaimed it in an equitable suit against herself and others, but no fraud on her part was made out, it was said: "If there was a fraud, of which the infant was cognizant, she would be bound as much as an adult."

Where an infant induced the plaintiff to lease him a house, by representations that he was of age, he was ordered to give up possession, and the lease was declared void; but the infant was not charged for use and occupation. *Lempriere v. Lange* (1879) L. R. 12 Ch. Div. (Eng.) 675, 41 L. T. N. S. 378, 27 Week. Rep. 879, *supra*.

An infant, having by false representations of full age induced the delivery to him of furniture and effects which he bought from the plaintiff, sold some of the furniture, and later, with the plaintiff's consent, assigned the rest of it as security for a loan from a third person. It was held in an action for equitable relief that the plaintiff was entitled to recover the actual moneys received by the defendant from the sale and loan. *Stocks v. Wilson* [1913] 2 K. B. (Eng.) 235, 82 L. J. K. B. N. S. 598, 108 L. T. N. S. 834, 29 Times L. R. 352, 20 Manson, 129. This case would seem to come close to an action at law, and is discussed by the several judges, though without express condemnation in *Leslie v. Sheill*

[1914] 3 K. B. (Eng.) 607, 6 B. R. C. 738, Ann. Cas. 1916C, 992, where Sumner, J., said: "I think that the whole current of decisions down to 1913, apart from dicta which are inconclusive, went to show that when an infant obtained an advantage by falsely stating himself to be of full age, equity required him to restore his ill-gotten gains, or to release the party deceived from obligations or acts in law induced by the fraud, but scrupulously stopped short of enforcing against him a contractual obligation, entered into while he was an infant, even by means of a fraud."

In *Clarke v. Cobley* (1789) 2 Cox, Ch. Cas. 173, 30 Eng. Reprint, 80, 2 Revised Rep. 25, a woman made notes, and later married an infant, who gave a bond and received the notes in exchange. In an action on the bond the defendant pleaded his infancy, and, upon the plaintiff filing a bill in equity for relief, the court compelled the defendant to give up the notes in exchange for his bond, on the principle that "an infant shall not take advantage of his own fraud."

In bankruptcy (*Ex parte Unity Joint Stock Mut. Bkg. Asso.* (1858) 8 De G. & J. 63, 44 Eng. Reprint, 1192, 27 L. J. Bankr. N. S. 33, 4 Jur. N. S. 1257, 6 Week. Rep. 640) it was decided that an infant who had obtained a loan by fraudulently representing himself to be of age made himself liable in equity for the amount; the equitable rule applying in bankruptcy proceedings.

Other cases hold that one sued in equity is not estopped to plead infancy because the contract was induced by his false representations. *Geer v. Hovy* (1790) 1 Root (Conn.) 179; *Bush v. Linthicum* (1883) 59 Md. 344; *New York Bldg. Loan Bkg. Co. v. Fisher* (1897) 23 App. Div. 363, 48 N. Y. Supp. 152; *Carolina Invest. Bldg. & L. Asso. v. Black* (1896) 119 N. C. 323, 25 S. E. 975.

In *Geer v. Hovy* (1790) 1 Root (Conn.) 179, *supra*, the petition alleged that the defendant pretended that he was of full age, and the plaintiff exchanged horses with him, and was cheated by him, and was without

remedy at law; but the court held that "a minor is no more liable in equity than law for fraud in a contract, for if he is incapable of making, he is incapable of committing a fraud in a contract; besides, this would defeat the law made for the protection of minors; if, although they would not be liable upon their contracts, yet, by using deceit in them, they should be made liable."

The rule has example in suits for foreclosure where it is held that the mortgagor is not estopped to plead infancy. *New York Bldg. Loan Bkg. Co. v. Fisher* (1897) 23 App. Div. 363, 48 N. Y. Supp. 152; *Carolina Invest. Bldg. & L. Asso. v. Black* (1896) 119 N. C. 323, 25 S. E. 975. See also in this connection *Alt v. Graff* (1896) 65 Minn. 191, 98 N. W. 9, *infra*, V.; *Ledger Loan & Bldg. Asso. v. Cook* (1879) 6 W. N. C. (Pa.) 428, *supra*, II.

An infant cannot have imposed upon him any personal liability for the debts of a partnership, although he entered into it holding himself out to his partner and the world as of full age. *Bush v. Linthicum* (1882) 59 Md. 344 (action by the partner for dissolution).

It may be noted that in *Monumental Bldg. Asso. v. Herman* (1870) 33 Md. 123, infant mortgagors who had failed to pay the loan were held entitled to object to the ratification of an *ex parte* decree for the sale of the mortgaged property, where the evidence was meager as to whether they had misrepresented their age at the time the mortgage was executed, and there was no evidence that they received the money borrowed or were capable of perpetrating a gross fraud.

It may also be noted that in *Baker v. Stone* (1883) 136 Mass. 405, where the strongest statement of fraud alleged in a bill in equity seeking to establish a promissory note and mortgage by a minor was that the minor, knowing her minority and not disclosing it, borrowed money from a person who she knew believed her to be of full age, and gave a note and a mortgage to secure it, it was held that these facts would not estop her from

avoiding the obligations by setting up her minority.

V. *When suing in equity.*

There is considerable authority to the effect that one, having while an infant induced a contract by fraudulent representations that he was of full age, may not demand relief from a court of equity.

Kentucky.—*Schmitheimer v. Eise-man* (1870) 7 Bush, 298; *Ingram v. Ison* (1904) 26 Ky. L. Rep. 48, 80 S. W. 787; *Edgar v. Gertison*, — Ky. —, 112 S. W. 831; *Sackett v. Asher* (1908) — Ky. —, 22 L.R.A.(N.S.) 453, 112 S. W. 833; *Pace v. Cawood* (1908) 33 Ky. L. Rep. 592, 110 S. W. 414; *County Bd. of Edu. v. Hensley* (1912) 147 Ky. 441, 42 L.R.A.(N.S.) 643, 144 S. W. 63; *Turner v. Stewart* (1912) 149 Ky. 15, 147 S. W. 772; *Goff v. Murphy* (1913) 153 Ky. 634, 156 S. W. 95.

Mississippi. — *Ostrander v. Quin* (1904) 84 Miss. 230, 105 Am. St. Rep. 426, 36 So. 257.

Missouri.—*Ryan v. Growney* (1894) 125 Mo. 474, 28 S. W. 189, 755.

New Jersey. — *Hayes v. Parker* (1886) 41 N. J. Eq. 630, 7 Atl. 511.

Oklahoma.—*International Land Co. v. Marshall* (1908) 22 Okla. 693, 19 L.R.A.(N.S.) 1056, 98 Pac. 951.

Texas.—*Kilgore v. Jordan* (1856) 17 Tex. 341 (as stating the rule).

England.—*Cory v. Gertcken* (1802) 2 Madd. Ch. 40, 56 Eng. Reprint, 250, 17 Revised Rep. 180; *Wright v. Snowe* (1848) 2 De G. & S. 321, 64 Eng. Reprint, 144. The court expressed a similar opinion in *Thormaehlen v. Kaepfel* (1893) 86 Wis. 379, 56 N. W. 1089.

An infant who conveys land, falsely representing himself to be of age, cannot have his deed set aside on the ground of infancy. *Schmitheimer v. Eise-man*; *Ingram v. Ison*; *Edgar v. Gertison*; *Sackett v. Asher*; *Pace v. Cawood*; *County Bd. of Edu. v. Hensley*; *Turner v. Stewart*; *Goff v. Murphy* (Ky); *Ryan v. Growney* (Mo.) and *Kilgore v. Jordan* (Tex.)—*supra* (as stating the rule).

Thus, in *Sackett v. Asher* (1908) — Ky. —, 22 L.R.A.(N.S.) 453, 112 S. W. 833, *supra*, an appeal by a purchaser, intervener in a suit by a son against

his father to cancel a deed alleged to have been made by the son to his father during minority, it was held that the son was estopped to set up infancy for the purpose of defeating the title of his father's grantee, where he was present at the father's transfer, saw the money paid on the faith of the title being good, and expressly then stated that he was of age when he made his conveyance.

Similarly, where an infant representing himself to be of age conveyed property by deed, and on attaining full age conveyed it to a third person, it was held that such third person, in an action against the first grantee to quiet title, could not have the first deed set aside. *Asher v. Bennett* (1911) 143 Ky. 361, 186 S. W. 879.

But where a girl of seventeen years executed a deed containing a recital to the effect that the grantor was of full age, it was held that her guardian might bring an action to set aside the deed, and she was not estopped to disaffirm it, even against creditors of her grantee who had acquired liens. *Wilson v. Wilson* (1889) 20 Ky. L. Rep. 1971, 50 S. W. 260.

In *Hayes v. Parker* (1886) 41 N. J. Eq. 630, 7 Atl. 511, it was held that an infant who, by falsely representing himself to be of age, secures a settlement with his guardian and executes a discharge, is not permitted to compel his guardian to account.

And in *Cory v. Gertcken* (Eng.) supra, where an infant persuaded his trustee to make a payment to him, the concealment of his infancy was held to be a fraud, and precluded him from calling for a repayment.

And in *Wright v. Snowe* (Eng.) supra, it was even held that an infant representing that he is of age, who executes a release on which the other party acts, cannot impeach its validity, on a bill brought by him, whether the other knows his real age or not.

In *Ostrander v. Quin* (1904) 84 Miss. 230, 105 Am. St. Rep. 426, 36 So. 257, it was held that the wilful misrepresentation by a mature woman over eighteen years of age, and of discretion, that she was twenty-one

at the time she borrowed money on a mortgage, was a bar to a suit in equity by her to avoid the mortgage on the ground of her minority at the time of its execution, especially where the fruits of the fraud were not tendered back.

Where a party's fraudulent representations of full age, in connection with his appearance and size, induce a lender to lend him money, and he gives a deed as a mortgage, he may not invoke the aid of equity to cancel the deed without offering to return the money loaned. *International Land Co. v. Marshall* (1908) 22 Okla. 693, 19 L.R.A. (N.S.) 1056, 98 Pac. 951.

Contrary doctrine.

An infant is not precluded from relief in equity because he induced the contract by false representations that he was of full age. *Sims v. Everhardt* (1880) 102 U. S. 300, 26 L. ed. 87; *Alfrey v. Colbert* (1909) 93 C. C. A. 517, 168 Fed. 231; *Watson v. Billings* (1881) 38 Ark. 278, 42 Am. Rep. 1; *Alt v. Graff* (1896) 65 Minn. 191, 68 N. W. 9.

One making a deed while an infant is not estopped to bring an action to avoid it by his assertion at the time of making it that he was of age. *Sims v. Everhardt* (U. S.) and *Alfrey v. Colbert* (Fed.) supra.

In *Watson v. Billings* (1881) 38 Ark. 278, 281, 42 Am. Rep. 1, where an infant married woman executed a release of dower, making a representation to the officer taking the acknowledgment that she was of age, but it was not proved that the statement was known to the releasee, upon her bringing her bill in equity to establish her dower, the court said, in upholding the bill, that infants cannot by fraud denude themselves of the protection thrown around them by the policy of the law.

In a statutory action by a mortgagor to determine adverse claims to real estate, the plaintiff was not estopped to set up his infancy as a defense to the mortgage by the fact that at the time of its execution he represented that he was of age. *Alt v. Graff* (Minn.) supra.

In *F. B. Collins Invest. Co. v. Beard*

(1915) 46 Okla. 310, 148 Pac. 846, it was held that representations by a minor Indian allottee that he is of lawful age and competent to convey, made at the time of the execution of a deed to his allotted lands, which is void because in contravention of the restrictive legislation of Congress regarding the alienation of such allotment, will not estop such allottee from bringing an action to cancel such deed in a court of equity, nor require, as a condition precedent therein, a restoration of, or offer to restore, the consideration so received, where it appears that the money was squandered and dissipated during minority without permanently bettering his estate, notwithstanding statutes which provide in substance, when considered together, that a minor over the age of eighteen years has a limited right to contract relative to his lands, subject to his disaffirmance upon coming of age, on the condition that he restore the condition he has received.

In *Webb v. Reagin* (1909) 160 Ala. 537, 49 So. 580, where the complainant sought to have a deed canceled on the ground of infancy, and the respondent urged misrepresentation as to age, which was not made by the infant, the court, in affirming a decree for the plaintiff, who got none of the consideration, said: "The extent to which our own court has gone is that where the infant has received the consideration of a sale, and seeks to disaffirm it on reaching majority, he must return the money or property received, if he still has it."

VI. Statutes.

Sometimes a statute prevents disaffirmance of contracts "in cases where, on account of the minor's own misrepresentations as to his majority, or from his having engaged in business as an adult, the other party had good reason to believe the minor capable of contracting." *Oswald v. Broderic* (1855) 1 Iowa, 380; *Prouty v. Edgar* (1858) 6 Iowa, 353; *Dillon v. Burnham* (1890) 43 Kan. 77, 22 Pac. 1016.

In *First Nat. Bank v. Casey* (1912) 158 Iowa, 349, 138 N. W. 897, which

was a suit on promissory notes given for money advanced to a partnership, of which one member was a minor, it was held under the statute that the issue whether the plaintiff, from the defendant's engaging in business as an adult, had good cause to believe him such, should have been submitted to the jury.

One does not "engage in business as an adult" by working by the year as a farm laborer, nor by buying lots and exchanging them for a team of horses. *Beickler v. Guenther* (1903) 121 Iowa, 419, 96 N. W. 895.

In *Ackerman v. Hawkins* (1909) 45 Ind. App. 483, 88 N. E. 616, it was held that an action would not lie to set aside deeds by a married woman under age, having the appearance of an adult, which recited that she had become twenty-one years of age, where she knew that the grantee, who acted in good faith, relied on her representation as to age; and that, as she had received the consideration for the deeds and failed to return it, the case came within the statute providing that an infant could not disaffirm a sale of real estate without restoring the consideration, where he had falsely represented himself to the purchaser to be over twenty-one years of age, and the purchaser had relied upon such representations and had good cause to believe said infant of full age; and that she could not disaffirm.

It may be noted that it is provided by the English Infants' Relief Act 1874 (37 & 38 Vict. chap. 62) § 1, referred to in *Leslie v. Shiell* [1914] 3 K. B. (Eng.) 607, 6 B. R. C. 788, *supra*, III. a, that "all contracts, whether by specialty or by simple contract, henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessities), and all accounts stated with infants, shall be absolutely void: Provided always, that this enactment shall not invalidate any contract into which an infant may, by any existing or future statute, or by the rules of common law or equity, enter, except such as now by law are voidable."

VII. Miscellaneous.

A minor sued in Alabama on notes made and payable in Tennessee is not estopped to set up infancy as a defense, by a representation that his disabilities of nonage had been removed by a chancery court of Alabama, since the contract is governed by the law of Tennessee. *Wilkinson v. Buster* (1899) 124 Ala. 574, 26 So. 940.

A court of equity will not aid an adult to recover back his purchase money on a land contract with an infant, or to get title to the land, where his complaint is that at the time of the contract the infant's father asserted that he was of age, and it appears that such father was a spendthrift who arbitrarily controlled the infant, and received most of the purchase money. *Dibble v. Jones* (1860) 58 N. C. (5 Jones, Eq.) 389.

Johnson v. Clark (1898) 23 Misc. 346, 51 N. Y. Supp. 238, where an infant, representing himself to be of age, gave jewelry for poker chips, and was held not estopped to reclaim it, went on the ground of the special rule as to gambling contracts.

In *Lacy v. Pixler* (1898) 120 Mo. 383, 25 S. W. 206, where a man and his wife brought ejectment and sought to disaffirm and avoid a deed because they executed it when minors, the court, while not deeming it necessary to express an opinion upon the question whether an infant will be estopped from avoiding his deed where he has induced the grantee to accept it by representing himself to be of age, held that where one mortgages and conveys land, as in this case, falsely representing that he is of age, and besides, after majority, stands by and sees it being conveyed to subsequent purchasers without asserting or claiming any interest in the land, he is estopped to disaffirm the conveyance.

It may be noted that *Grauman, M. & C. Co. v. Krienitz* (1910) 142 Wis. 556, 126 N. W. 50, is too doubtful on the facts to be of much value, and that the question of estoppel was not decided in *International Text Book Co. v. Doran* (1907) 80 Conn. 307, 68 Atl. 255; *Putnal v. Walker* (1911) 61 Fla. 720, 36 L.R.A. (N.S.) 83, 55 So. 844; or in *Cobbey v. Buchanan* (1896) 48 Neb. 391, 67 N. W. 176. B. B. B.

CLARA ALLION, Plff. in Err.,

v.

CITY OF TOLEDO.

Ohio Supreme Court — April 15, 1919.

(— Ohio St. —, 124 N. E. 237.)

Constitutional law — fixing size of bread loaf.

1. A city ordinance, fixing standard sizes of bread loaves and prescribing loaves of 1 pound avoirdupois as the minimum weight that may be manufactured and sold by a baker, is not an unreasonable or arbitrary exercise of police power, and is constitutionally valid.

[See note on this question beginning on page 429.]

Courts — interference with legislative discretion.

2. Unless there is a clear and palpable abuse of power, a court will not substitute its judgment for legislative

discretion. Local authorities are presumed to be familiar with local conditions and to know the needs of the community.

[See 19 R. C. L. 807-810.]

Headnotes by the COURT.

(Nichols, Ch. J., and Donahue and Robinson, JJ., dissent from headnote 1.)

ERROR to the Court of Appeals for Lucas County to review a judgment reversing a judgment of the Court of Common Pleas and affirming a judgment of the Police Court, convicting defendant of selling a loaf of bread weighing less than the weight fixed by ordinance. *Affirmed.*

Statement by Jones, J.:

Plaintiff in error, Clara Allion, being engaged in the bakery business in the city of Toledo, Ohio, was charged in the police court and there convicted of selling a loaf of bread weighing less than 1 pound avoirdupois weight, in violation of a city ordinance regulating the size of loaves of bread to be sold within the city of Toledo. The ordinance provided "that every loaf of bread made or procured for the purpose of sale, sold, offered or exposed for sale within the city of Toledo shall weigh a pound avoirdupois (except as hereinafter provided) and such loaf shall be considered the standard loaf in the city of Toledo. Bread may also be made or exposed for sale in 1-pound, 1½-pound, 2-pound, 2½-pound, 3-pound, and 3½-pound, 4-pound, 4½-pound, 5-pound, 5½-pound or 6-pound loaves and in no other way. . . .

That if any person, firm or corporation shall make or procure for the purpose of sale, sell, offer or expose for sale within the city of Toledo any bread which contains a deleterious substance or material, any bread the loaf or loaves of which are not standard pound, pound and one-half, 2-pound, 2½-pound, 3-pound, 3½-pound, 4-pound, 4½-pound, 5-pound, 5½-pound, or 6-pound loaf, as defined in § 2 hereof, or any bread which is not made in a clean and sanitary place; or shall make or procure for the purpose of sale, sell, offer or expose for sale, within the city of Toledo, any standard loaf or loaves of bread which do not weigh 1 pound each, or any bread the loaf or loaves of which do not weigh as much as the weight mark on the label thereon, or any bread or loaf or loaves of which do not have affixed thereon the label marked, as provided in § 2, such person, firm or corporation, shall be fined not less than \$10 nor more than \$100 for each offense."

The judgment of conviction in the police court was reversed by the

court of common pleas. The court of appeals reversed the judgment of the court of common pleas, and affirmed the judgment of conviction in the police court. Error is now prosecuted in this court.

Messrs. R. S. Holbrook, C. R. Banker, and George A. Bassett, for plaintiff in error:

The ordinance in question is in contravention of the Constitutions of the state of Ohio and of the United States.

Chicago v. Netcher, 183 Ill. 104, 48 L.R.A. 261, 75 Am. St. Rep. 93, 55 N. E. 707; *Re Steube*, 91 Ohio St. 185, L.R.A. 1916E, 377, 110 N. E. 250, 16 Ohio N. P. (N. S.) 401; *State ex rel. Book v. Cleveland*, 20 Ohio C. C. N. S. 538; *Crawford v. Topeka*, 51 Kan. 756, 20 L.R.A. 692, 37 Am. St. Rep. 323, 33 Pac. 476; *State v. Boone*, 84 Ohio St. 346, 39 L.R.A. (N.S.) 1015, 95 N. E. 924, Ann. Cas. 1912C, 683; *Lochner v. New York*, 198 U. S. 46, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133.

It is the ultimate province of the court and not of the legislature to determine whether this ordinance is a reasonable regulation within the provisions of the Constitution.

Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; *Freund*, Pol. Power, 1904, §§ 63, 150, pp. 60, 61; *State v. Redmon*, 134 Wis. 89, 14 L.R.A. (N.S.) 229, 126 Am. St. Rep. 1003, 114 N. W. 137, 15 Ann. Cas. 408; *Hennington v. Georgia*, 163 U. S. 299, 41 L. ed. 166, 16 Sup. Ct. Rep. 1086.

The selling of a loaf of bread weighing less than a pound is a lawful and beneficial business which cannot be prohibited under the guise of the police power.

Adams v. Tanner, 244 U. S. 590, 61 L. ed. 1336, L.R.A. 1917F, 1163, 37 Sup. Ct. Rep. 662, Ann. Cas. 1917D, 973; *Lochner v. New York*, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133; *Dent v. West Virginia*, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231; *State v. Moore*, 113 N. C. 697, 22 L.R.A. 472, 18 S. E. 342; *Dobbins v. Los Angeles*, 195 U. S. 223, 236, 49 L. ed. 169, 175, 25 Sup. Ct. Rep. 18; *Mugler v. Kansas*, 123 U. S. 623, 661, 31 L. ed. 205, 210, 8 Sup. Ct. Rep. 273; *Nolen v. Riechman*, 225 Fed. 812; *Alleyer v. Louisiana*, 165 U. S. 578, 41

L. ed. 832, 17 Sup. Ct. Rep. 427; Booth v. Illinois, 184 U. S. 425, 46 L. ed. 623, 22 Sup. Ct. Rep. 425; McLean v. Arkansas, 211 U. S. 539, 53 L. ed. 315, 29 Sup. Ct. Rep. 206; State v. Redmon, 134 Wis. 89, 14 L.R.A. (N.S.) 229, 126 Am. St. Rep. 1003, 114 N. W. 137, 15 Ann. Cas. 408; Mirick v. Gims, 79 Ohio St. 174, 20 L.R.A. (N.S.) 42, 86 N. E. 880; Phillips v. State, 77 Ohio St. 214, 82 N. E. 1064; Sanning v. Cincinnati, 81 Ohio St. 155, 25 L.R.A. (N.S.) 686, 90 N. E. 125.

Police regulations must bear the judicial test of reasonableness.

Re Steube, 91 Ohio St. 135, L.R.A. 1916E, 377, 110 N. E. 250; State v. Boone, 84 Ohio St. 346, 39 L.R.A. (N.S.) 1015, 95 N. E. 924, Ann. Cas. 1912C, 683.

Messrs. Ralph Emery and Charles T. Lawton, for defendant in error:

The ordinance in question is valid.

Chicago v. Schmidinger, 243 Ill. 167, 44 L.R.A. (N.S.) 632, 90 N. E. 369, 17 Ann. Cas. 614; Guillotte v. New Orleans, 12 La. Ann. 432; Mobile v. Yuille, 3 Ala. 137, 36 Am. Dec. 441; State v. McCool, 83 Kan. 428, 111 Pac. 477; People v. Wagner, 86 Mich. 594, 13 L.R.A. 286, 24 Am. St. Rep. 141, 49 N. W. 609; Com. v. McArthur, 152 Mass. 522, 25 N. E. 836; Paige v. Fazackerly, 36 Barb. 392; Rex v. Chisholm, 14 Ont. L. Rep. 178; Re Nasmith, 2 Ont. Rep. 192; Armour & Co. v. North Dakota, 240 U. S. 510, 60 L. ed. 771, 36 Sup. Ct. Rep. 440, Ann. Cas. 1916D, 548; Williams v. Sandles, 93 Ohio St. 92, 112 N. E. 206, Ann. Cas. 1918D, 154; Chittenden v. Columbus, 5 Ohio C. C. N. S. 84, 16 Ohio C. D. 531, 71 Ohio St. 477, 74 N. E. 1134; Wellsville v. O'Connor, 1 Ohio C. C. N. S. 253, 14 Ohio C. D. 689.

Jones, J., delivered the opinion of the court:

It is contended on behalf of the plaintiff in error that the city ordinance contravenes § 1, article 1, of the Ohio Constitution, and § 1, article 14, of the Amendments to the Federal Constitution. The fundamental guaranties of these two sections protect the right of private contract and the freedom of engagement in lawful business. However, there are various callings, though lawful and useful, which are subject to surveillance of the regulation

by the state in the interest of the health, safety, or welfare of the community. That bakeries may be so regulated, and the state's police power invoked for that purpose, is not open to question. This right of regulation is now generally conceded in both state and Federal jurisdictions. Therefore the only question remaining, and the one here urged, is that the city council of Toledo, in the passage of this ordinance, clearly abused its power, and that its action was a palpable and unwarranted interference with the business of plaintiff in error.

The record discloses that the plaintiff in error, at the time of the accusation, daily baked and sold five large loaves of 21½ ounces each, and seventy loaves, each weighing from 11 to 11½ ounces. The minimum standard loaf prescribed by the ordinance was 1 pound avoirdupois. The proof discloses the sale of a loaf weighing 11½ ounces. The amount of deficiency, therefore, between the standard used by the baker, and that adopted by the city council ranged from 4¼ to 5 ounces. While Toledo is a large city, the record does not disclose any demand for bread loaves smaller than the minimum legal standard, other than the seventy loaves daily manufactured by the accused and sold to her customers. The grievance of the plaintiff in error is that by the adoption of the standard loaf the city council deprived her of the right to bake a loaf of less than 1 pound avoirdupois, and that this deprivation was wholly unwarranted, and the power so exercised was unreasonable and arbitrary.

An ordinance fixing manufactured standard loaves of bread at 1, 2, and 4 pounds avoirdupois weight, and no other, was held constitutionally valid by the supreme court of Michigan. People v. Wagner, 86 Mich. 594, 13 L.R.A. 286, 24 Am. St. Rep. 141, 49 N. W. 609.

An ordinance similar to the Toledo ordinance was passed by the city council of Chicago, Illinois, permit-

ting the manufacture of $\frac{1}{2}$ -pound loaves, as the minimum, and sextuple, or 6-pound loaves, as the maximum, weight that could be baked. This ordinance was sustained by the supreme court of Illinois in *Chicago v. Schmidinger*, 243 Ill. 167, 44 L.R.A. (N.S.) 632, 90 N. E. 369, 17 Ann. Cas. 614. This case eventually reached the Supreme Court of the United States (*Schmidinger v. Chicago*, 226 U. S. 578, 57 L. ed. 364, 33 Sup. Ct. Rep. 182, Ann. Cas. 1918B, 284), where the judgment of the Illinois court was affirmed. While in the present case the ordinance prescribing the minimum standard loaf is attacked because the same is from 4 to 5 ounces heavier than her customers' trade demanded, in the *Chicago Case* the attack was launched for the reason that the sextuple, or 6-pound loaf, was the maximum weight permitted to be made and sold in the city, although there was a considerable demand in some parts of the city for bread in weights different from those prescribed by the ordinance. As stated by Mr. Justice Day in that case: "In some parts of the city bread weighing 7 pounds is commonly sold."

Unless there is a clear and palpable abuse of power the court will

not substitute its judgment for legislative discretion. The local authorities acquainted with local conditions are presumed to know what the needs of the community demand.

Courts—interference with legislative discretion.

"Local legislative authorities, and not the courts, are primarily the judges of the necessities of local situations calling for police regulation, and the courts can only interfere when such regulation arbitrarily exceeds a reasonable exercise of authority." *Schmidinger v. Chicago*, supra.

In prescribing the standard 1-pound loaf as the minimum which could be manufactured and sold by the baker, this court cannot say that the fixing of that standard, in the exercise of legislative discretion by the council, was so unreasonable and arbitrary as to require judicial interference. The ordinance is therefore constitutionally valid, and the judgment of the Court of Appeals is affirmed.

Constitutional law—fixing size of bread loaf.

Matthias, Johnson, and Wanamaker, JJ., concur.

Nichols, Ch. J., and Donahue and Robinson, JJ., dissent from first proposition of the syllabus and from the judgment.

ANNOTATION.

Validity of statute or ordinance requiring commodities to be sold in a specified quantity or weight.

- I. In general, 429.
- II. Purpose of statutes or ordinances, 433.
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 - b. Due process of law, 425.
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 - f. Unlawful discrimination, 438.
- IV. Validity of municipal ordinances as tested by charter authority, 439.

I. In general.

The present discussion is not concerned with statutes or ordinances

which merely require the true weight or the true net weight to be stated or to appear on the packages, nor to that other class of statutes and ordinances which require articles to be sold by weight, or by measure, or by number. The validity of statutes and ordinances relating to containers is discussed in the note appended to *Stegmann v. Weeke*, 5 A.L.R. 1060. The statutes and ordinances under consideration herein prescribe a package or measure of a definite fixed amount, and require the specified articles to be sold in this manner. These statutes

and ordinances have varied, however, in their provisions, as appears from the succeeding paragraph.

Statutes and ordinances of the purpose of that involved in the reported case (*ALLION v. TOLEDO*, ante, 426), and such as are included herein, may be roughly divided into three classes: (a) Those prescribing a minimum weight or quantity of an article that may be sold; (b) those prescribing that, when an article is sold other than in bulk and by weight, it must be sold in loaves or packages containing a specified weight or quantity; and (c) those prescribing that an article must be sold in loaves or packages of a certain weight or quantity, and making no provision for sale in any other manner; in fact, expressly or impliedly prohibiting sale in any other manner. Statutes and ordinances taking the one or the other of these forms have generally been sustained as constitutional.

United States.—*Williams v. Walsh* (1912) 222 U. S. 415, 56 L. ed. 253, 32 Sup. Ct. Rep. 187, affirming (1908) 79 Kan. 212, 98 Pac. 777; *Schmidinger v. Chicago* (1913) 226 U. S. 578, 57 L. ed. 364, 33 Sup. Ct. Rep. 182, Ann. Cas. 1914B, 284, affirming (1909) 243 Ill. 167, 44 L.R.A.(N.S.) 632, 90 N. E. 369, 17 Ann. Cas. 614, s. c. on 2d appeal (1910) 245 Ill. 317, 92 N. E. 244; *Armour & Co. v. North Dakota* (1916) 240 U. S. 510, 60 L. ed. 771, 36 Sup. Ct. Rep. 440, Ann. Cas. 1916D, 548, affirming (1913) 27 N. D. 177, L.R.A. 1916E, 380, 145 N. W. 1033, Ann. Cas. 1916B, 1149.

Alabama.—*Mobile v. Yuille* (1841) 3 Ala. 137, 36 Am. Dec. 441.

Delaware.—*State v. Huber* (1913) 4 Boyce, 259, 88 Atl. 453.

Illinois.—*Schmidinger v. Chicago*, supra.

Kansas.—*Monroe v. Lawrence* (1890) 44 Kan. 607, 10 L.R.A. 520, 24 Pac. 1113; *Re Jahn* (1895) 55 Kan. 694, 41 Pac. 956; *State v. McCool* (1910) 83 Kan. 429, 111 Pac. 477; *Williams v. Walsh*, supra; *Lincoln Center v. Linker* (1897) 6 Kan. App. 371, 51 Pac. 807; *Lincoln Center v. Linker* (1898) 7 Kan. App. 282, 53 Pac. 787; *Eureka v. Jackson* (1898) 8 Kan. App.

49, 54 Pac. 5. See *State v. Belle Springs Creamery Co.* (1910) 83 Kan. 389, L.R.A.1915D, 515, 111 Pac. 474, *infra*.

Louisiana.—*Guillotte v. New Orleans* (1857) 12 La. Ann. 432.

Michigan.—*People v. Wagner* (1891) 86 Mich. 594, 13 L.R.A. 286, 24 Am. St. Rep. 141, 49 N. W. 609.

Missouri.—*St. Louis v. Jackson* (1857) 25 Mo. 37.

North Dakota.—*Armour & Co. v. North Dakota*, supra.

Tennessee.—*State v. Co-operative Store Co.* (1910) 123 Tenn. 399, 131 S. W. 867, Ann. Cas. 1912C, 248.

Washington.—See *Spokane v. Arnold* (1913) 73 Wash. 256, 131 Pac. 815, *infra*.

Contra: *Buffalo v. Collins Baking Co.* (1899) 39 App. Div. 432, 57 N. Y. Supp. 347.

Whether such statutes or ordinances violate the interstate commerce clause of the Federal Constitution has not been exhaustively considered herein. It is interesting to note in this connection, however, that it has been held that a statute regulating the sale of lard, which is directed to the manner of selling at retail within the state, does not violate the commerce clause of the Federal Constitution. *State v. Armour & Co.* (1913) 27 N. D. 177, L.R.A.1916E, 380, 145 N. W. 1033, Ann. Cas. 1916B, 1149, affirmed in (1916) 240 U. S. 510, 60 L. ed. 771, 36 Sup. Ct. Rep. 440, Ann. Cas. 1916D, 548. The statute involved in *Re Williams* (1908) 79 Kan. 212, 98 Pac. 777, affirmed in (1912) 222 U. S. 415, 56 L. ed. 253, 32 Sup. Ct. Rep. 137, was held not to unlawfully interfere with interstate commerce.

Nor does the note consider generally the effect of the Federal Pure Food and Drugs Act, but here again it may be noted that it has been held that a statute requiring every lot of lard compound or lard substitute, unless sold in bulk, to be put up in pails or other containers holding 1, 3, or 5 pounds net weight, or some whole multiple of these numbers, and not any fractions thereof, is not repugnant to the Pure Food and Drugs Act of June 30th, 1906 (34 Stat. at L. 768,

chap. 3915, Comp. Stat. § 8717, 3 Fed. Stat. Anno. 2d ed. p. 358). *Armour & Co. v. North Dakota* (1916) 240 U. S. 510, 60 L. ed. 771, 36 Sup. Ct. Rep. 440, Ann. Cas. 1916D, 548. It is stated by the United States Supreme Court that the Pure Food and Drugs Act is directed against the adulteration and misbranding of articles of food transported in interstate commerce, that the state statute in question has no such purpose, but is directed to the manner of selling at retail, which is in no way repugnant to the Federal law, and the operation of that law is in no way displaced or interfered with.

A number of such statutes or ordinances have related to bread. In accord with the general rule just announced, it has been held that a statute making it a misdemeanor to sell or offer to sell a loaf of bread made in whole or part from wheat flour, which weighs less than 1 pound, is valid. *State v. Huber* (1913) 4 Boyce (Del.) 259, 88 Atl. 453. A statute providing: "A loaf of bread for sale shall be 2 pounds in weight. Bread, unless composed in chief part of rye or maize, shall be sold only in whole, half, and quarter loaves, and not otherwise," is valid. *State v. McCool* (1910) 83 Kan. 429, 111 Pac. 477. An ordinance requiring bread for sale to be made into loaves of 1, 2, and 4 pounds, and no other, is valid. *People v. Wagner* (1891) 86 Mich. 594, 13 L.R.A. 286, 24 Am. St. Rep. 141, 49 N. W. 609 (see discussion of this case, *infra*, III. e). An ordinance fixing the weight of a standard loaf of bread at 1 pound, and providing that bread may also be offered for sale in half, three-quarter, double, triple, quadruple, or sextuple loaves, and in no other way, is valid. *Chicago v. Schmidinger* (1909) 243 Ill. 167, 44 L.R.A. (N.S.) 632, 90 N. E. 369, 17 Ann. Cas. 614, s. c. on 2d appeal (1910) 245 Ill. 317, 92 N. E. 244, affirmed in (1913) 226 U. S. 578, 57 L. ed. 364, 33 Sup. Ct. Rep. 182, Ann. Cas. 1914B, 284. An ordinance prescribing the weight of bread on a graduated scale according to the price of flour, and requiring the mayor of the municipality to issue a proclamation as often as a change in the price of flour

requires an alteration in the weight of the bread, has been sustained. *Mobile v. Yuille* (1841) 3 Ala. 137, 86 Am. Dec. 441. An ordinance regulating the size of loaves of bread to be sold was sustained in *Guillotte v. New Orleans* (1857) 12 La. Ann. 432.

In *Com. v. McArthur* (1890) 152 Mass. 522, 25 N. E. 836, a conviction was sustained for selling bread otherwise than in whole, half, three-quarter, or one-quarter loaves, as required by statute, but no question seems to have arisen as to the constitutionality of the act.

See *Re Nasmith* (1882) 2 Ont. Rep. 192; *Rex v. Chisholm* (1907) 14 Ont. L. Rep. 178, 9 Ont. Week. Rep. 914, and *Harwood v. Williamson* (1908) 1 Sask. L. R. 66, *infra*, IV.

See contrary decision in *Buffalo v. Collins Baking Co.* (N. Y.) *infra*.

Commodities other than bread have been the subject of regulations by statutes or ordinances of this kind which have been held valid. A statute requiring lard, lard compounds, or substitutes, unless sold in bulk, to be sold in pails or other containers holding 1, 3, or 5 pounds, net weight, or some whole multiple of these numbers, and not any fractions thereof, is valid. *State v. Armour & Co.* (1913) 27 N. D. 177, L.R.A. 1916E, 380, 145 N. W. 1083, Ann. Cas. 1916B, 1149, affirmed in (1916) 240 U. S. 510, 60 L. ed. 771, 36 Sup. Ct. Rep. 440, Ann. Cas. 1916D, 548.

A statute fixing the standard weight of a bushel of corn meal at 48 pounds, and making it unlawful to pack or sell corn meal except in bags or packages containing, by standard weight, 2, 1, $\frac{3}{4}$, $\frac{1}{2}$, or $\frac{1}{4}$ bushel, respectively, but containing a proviso making the statute inapplicable to the retailing of meal directly to customers from bulk stock, when priced and delivered by actual weight or measure, is constitutional. *State v. Co-operative Store Co.* (1910) 123 Tenn. 399, 181 S. W. 867, Ann. Cas. 1912C, 248. This statute, as indicated by its terms, is construed to apply only when the corn meal is put in bags or packages for sale, and sold, or offered for sale, without being weighed or measured. See *People v.*

Wagner (1891) 86 Mich. 594, 13 L.R.A. 286, 24 Am. St. Rep. 141, 49 N. W. 1109, *infra*, III. e.

An ordinance declaring that "no person, not being the lessee of a butcher's stall, shall sell or offer for sale in market, or in any other place, any fresh meat in less quantities than one quarter," is valid. *St. Louis v. Jackson* (1857) 25 Mo. 37. See *Re O'Meara* (1886) 11 Ont. Rep. 603, *infra*, IV.

A statute making it unlawful to sell, offer for sale, or deliver for use at any coal mine, black powder in any manner except in original packages containing 12½ pounds and securely sealed, is valid. *Re Williams* (1908) 79 Kan. 212, 98 Pac. 777, affirmed in (1912) 222 U. S. 415, 56 L. ed. 253, 32 Sup. Ct. Rep. 137.

An ordinance prohibiting the sale or giving away of cider in less quantities than 1 gallon, although passed for the purpose of controlling the sale and disposition of cider that was not intoxicating, and not for the regulation of the sale of intoxicating liquors, is valid. *Monroe v. Lawrence* (1890) 44 Kan. 607, 10 L.R.A. 520, 24 Pac. 1113. Similar ordinances which related not alone to cider, but which made it unlawful to sell or give away any malt, American hop ale, hop tea, hop-tea tonic, ginger ale, cider, or other drink of like nature in less quantities than 1 gallon, was sustained in *Re Jahn* (1895) 55 Kan. 694, 41 Pac. 956; *Lincoln Center v. Linker* (1897) 6 Kan. App. 871, 51 Pac. 807; *Lincoln Center v. Linker* (1898) 7 Kan. App. 282, 53 Pac. 787. And in *Eureka v. Jackson* (1898) 8 Kan. App. 49, 54 Pac. 5, an ordinance was sustained which made it unlawful to sell, barter, or give away in less quantities than 1 gallon, hop-tea tonic, spirituous, malt, vinous, or fermented liquors, or any other liquid of any kind or character containing alcohol in any quantity which is or may be drunk as a beverage. This ordinance is held not to have been enacted for the purpose of regulating the sale of intoxicating liquors, but for the purpose of regulating the sale of all liquids which contain alcohol in quantities not sufficient to render them intoxicating. Such an ordinance is

valid, even though the incidental effect of such regulation may be to destroy a business as formerly carried on. *Lincoln Center v. Linker* (1898) 7 Kan. App. 282, 53 Pac. 787. This note, however, does not include, in general, regulations relating to the sale of intoxicating liquors, although they may prohibit the sale of less than a certain quantity.

An ordinance providing that "a brick or cake of butter for commercial purposes . . . shall contain 1 pound of butter net avoirdupois," and providing in another section that one who packs or sells any goods or articles sold by weight without marking on the package the gross and tare or net weight shall be guilty of a misdemeanor, is construed in *Spokane v. Arnold* (1913) 73 Wash. 256, 131 Pac. 815, to mean that where butter is sold in cakes or bricks without any mark thereon, such cakes or bricks must contain 1 pound net avoirdupois, and where any quantity less than 1 pound is sold in cases or packages, the net and gross weight must be stated upon the container, and, therefore, one who sold bricks or cakes of butter weighing a fraction over 15 ounces, and less than 16 ounces avoirdupois, in cartons which were plainly marked with the net and gross weight, did not violate the ordinance. The constitutionality of this ordinance is sustained on the authority of *Seattle v. Goldsmith* (1913) 73 Wash. 54, 131 Pac. 456, a case dealing solely with an ordinance requiring the marking of packages with the true net weight. A statute very similar to the Washington statute was sustained in *State v. Belle Springs Creamery Co.* (1910) 83 Kan. 389, L.R.A.1915D, 515, 111 Pac. 474. The Kansas statute provided that "a print or package of butter shall contain 16 ounces avoirdupois, and when a print or package of butter containing less than 16 ounces avoirdupois shall be sold, its net weight shall be disclosed by the seller to the buyer, or a statement of the net weight be made upon a label attached thereto."

A statute making it unlawful to sell, deliver, or receive for a price any cotton in the seed in a quantity less than

a bale, unless the sale be evidenced by writing, was sustained in *State v. Moore* (1889) 104 N. C. 714, 17 Am. St. Rep. 696, 10 S. E. 143.

The only dissent from the theory of the foregoing cases sustaining the constitutionality of such statutes or ordinances appears in *Buffalo v. Collins Baking Co.* (1899) 39 App. Div. 432, 57 N. Y. Supp. 347, where an ordinance requiring "all bread baked by any baker to whom a license or permit is issued . . . and all bread sold or offered for sale . . . shall be made into loaves weighing not less than 1½ pounds each," was held invalid. The court, after referring to the difficulty in a particular case of determining when an ordinance in restraint of trade transcends the power of the legislative body by its infringement upon the rights of the individual, continues: "If the purpose to be obtained is for the public health or comfort or the public weal generally, then the rights of the individual must yield to the common good. In this case no good to the public is apparent. Bread of the same composition weighing 1 pound is equally wholesome as a loaf half a pound larger. There is no advantage to the public on the score of economy as the price is ratably the same. There is no pretense of any attempt to cheat in the weight and no question of inspection is involved. There is a demand for loaves of bread of 1 pound weight. The sales of this size made by defendant have averaged about 200 loaves each day. It is therefore engaged in a proper business, supplying the needs of the people daily at a confessedly moderate charge, and without any criticism as to the quality of the food furnished. There is no necessity for the common council to prohibit it from carrying on this trade; its endeavor to do so is an unreasonable proscription of a legitimate calling. Enforcement of the ordinance will tend to lessen the value of the property invested in the enterprise, to diminish the number of its employees, and to decrease its sales, and with no benefit accruing to the people of the city of Buffalo." In the earlier New York case of *Paige v.* 6 A.L.R.—28.

Fazackerly (1862) 36 Barb. (N. Y.) 392, a penalty was recovered of a baker for selling bread of deficient weight in violation of an ordinance at law of the common council of the city. It was urged in this case that the ordinance was unconstitutional. This point is not discussed, nor are the terms of the ordinance set out in the opinion.

II. Purpose of statutes or ordinances.

The purpose of statutes or ordinances such as are the subject of this note has an important bearing upon their validity. The purpose varies. The purpose of most of the food regulations has been to prevent fraud. As expressed in *State v. McCool* (1910) 83 Kan. 428, 111 Pac. 477: The size of a loaf of bread is fairly well established by trade custom, "and the price is generally a common price per loaf of the popularly understood size. There are among us to-day persons like those who, in the time of Amos, made the ephah small and the shekel great, and falsified the balances by deceit. Some of them make and deal in bread, and by shrinking the size of their loaves, or by other devices, they cheat the uncritical and unsuspecting public, which relies upon the prevailing customs. The legislature found such practices to be sufficiently extensive in this state to need correcting. Therefore, every condition essential to a valid exercise of the police power exists." The court, in *People v. Wagner* (1891) 86 Mich. 594, 13 L.R.A. 286, 24 Am. St. Rep. 141, 49 N. W. 609, states that "bread is an article of general consumption. It is usually sold by the loaf, and the individual consumer, in the majority of cases, buys by the single loaf. Each transaction involves but a few pennies, although the number of individual transactions in a large city reaches each day into the thousands, and the opportunities for fraud are frequent. It would be practically impossible to prevent fraud in the sale of short-weight loaves if the matter was left to the ordinary legal remedy afforded the individual consumer for fraud or deceit. The amount involved would not justify a resort to litigation. Sales are invaria-

bly made in loaves of the size of 1, 2, or 4 pound packages, and the ordinance simply takes the usual and ordinary packages or loaves into which bread is made, and fixes the standard of weight of each package." The supreme court of Tennessee, in speaking of a statute requiring corn meal to be sold in packages containing specified weights unless sold by retailers direct to customers from bulk stock and priced and delivered by actual weight or measure, states that "the object of this statute is the prevention of fraud in the sale of one of the most common articles of commerce and food. The fraudulent practice sought to be suppressed is the sale of packages of corn meal, purporting expressly or by implication to contain certain weights and measures for which the purchaser is charged, when in fact they contain less quantities, whereby the public is deceived and defrauded to the extent of the deficiency in weight or measure of the package purchased. The prevention of fraud in general has always been recognized as well within the police power. Statutes enacted for this purpose, and which have a fair, just, and reasonable relation to the preservation of the lives, health, and morals, and general welfare of the public, do not contravene the constitutional provisions here relied upon, although they may interfere to some extent with individual liberty and the free use and enjoyment of private property." *State v. Co-operative Store Co.* (1910) 123 Tenn. 399, 131 S. W. 867, Ann. Cas. 1912C, 248.

Some of the statutes or ordinances are in the nature of health regulations.

For example, the supreme court of Missouri, in sustaining an ordinance that "no person not being the lessee of a butcher's stall shall sell or offer for sale in market or in any other place any fresh meat in less quantities than one quarter," states that "there is no better way to manage and control the hucksters and vendors of meat, etc., than by fixing a place for the sale of such commodities. There is not so much danger of unwholesome

meats, of impure and unsound meats, being exposed for sale now as there would be if there were no such ordinance." *St. Louis v. Jackson* (1857) 25 Mo. 37.

The ordinances involved in the Kansas cases above cited, relating to the sale of beverages, in addition to prohibiting the sale of less than a specified quantity, prohibited the drinking thereof on the premises where sold, and were enacted as police regulations. As stated in *Monroe v. Lawrence* (1890) 44 Kan. 607, 10 L.R.A. 520, 24 Pac. 1113: "It may have been thought that the drinking of cider might foster a taste for strong liquors, and that if the unrestricted sale of cider by the glass was permitted the officers might be easily deceived as to the character of the drinks sold, and that a tippling shop might be carried on under the guise of a place to sell cider. In the interest of the health of the people and the peace and good order of the community, it was deemed wise to regulate the traffic. To sell it by the glass and allow it to be drunk upon the premises where sold was deemed to be subversive of good order and dangerous to the health and morals of the people, and hence the city imposed a regulation that it should not be sold in less quantities than 1 gallon, and should not be drunk at the place of sale. Such a regulation violates no private right, and does not unreasonably or improperly restrain trade." The statute involved in *State v. Moore* (1889) 104 N. C. 714, 17 Am. St. Rep. 696, 10 S. E. 143, was a police regulation enacted to prevent the sale of stolen cotton.

The statute regulating the sale or delivery of powder to coal mines was to provide for safety in the operation of such mines. *Re Williams* (1908) 79 Kan. 212, 98 Pac. 777, affirmed in (1912) 222 U. S. 415, 56 L. ed. 253, 32 Sup. Ct. Rep. 137. In answer to the objection to the validity of the act because each can was required to contain neither more nor less than 12½ pounds, the supreme court of Kansas in *Re Williams* (Kan.) *supra*, states that "the sale in this case was of 25 pounds, so that the effect of a sale of

a lesser quantity is not directly presented. The law, however, cannot be held invalid for the reason suggested. The legislative power to restrict the sale to not more than the given quantity is not insufficient to declare that it shall not be less. A dangerous substance is to be introduced into a mine; safeguards are provided to reduce the danger to the smallest possible degree consistent with the proper execution of the work; the legislature has determined that 12½ pounds in a can, securely sealed, is the quantity that will best promote the greatest safety at the least expense and inconvenience, and so best calculated to accomplish the intended purpose. It is not perceived how the court can say that it will not do this. Conceding the power to regulate, the wisdom of the regulation, unless clearly arbitrary or oppressive, must be upheld."

III. Constitutional objections.

a. In general.

The constitutional objections that have been urged against such statutes and ordinances have been varied. In discussing the validity of an ordinance enacted by a municipality under legislative authority, prescribing the weight of bread on a graduated scale according to the price of flour, and requiring the mayor to issue his proclamation as often as a change in the price of flour required an alteration in the weight of the bread, the court in *Mobile v. Yuille* (1841) 8 Ala. 137, 36 Am. Dec. 441, treats it as a question of the power of the legislature to authorize the municipality to make such a by-law, and says: "The legislature having full power to pass such laws as are deemed necessary for the public good, their acts cannot be impeached on the ground that they are unwise, or not in accordance with just and enlightened views of political economy as understood at the present day. The laws against usury and quarantine and other sanitary regulations are by many considered as most vexatious and improper restraints on trade and commerce, but, so long as they remain in force, must be enforced by courts of justice; ar-

guments against their policy must be addressed to the legislative department of the government. If, however, such an inquiry were open it would be very difficult to satisfy this court that the assize of bread in a populous city or town is an unwise regulation. The practice has prevailed too long, and has been too generally, not to say almost universally, acquiesced in and continued, to permit us to doubt that some regulation on this interesting subject is necessary and proper."

The court in *St. Louis v. Jackson* (1857) 25 Mo. 37, after sustaining an ordinance providing that "no person not being the lessee of a butcher's stall shall sell or offer for sale in market or in any other place any fresh meat in less quantities than one quarter," states that it is unable to see how the ordinance operated in restraint of trade, and continues: "This ordinance is not against any known law of our state, nor does it interfere with the right of selling the commodities of our citizens; it requires that the person retailing fresh meat shall have a stall in some market for that purpose. The city undergoes heavy expense in erecting commodious and convenient market houses; it rents the stalls of those houses to butchers and others retailing fresh meats; the rents are of importance by way of income to the city. Now to permit anyone who may think proper to put up a block or shanty on any street or alley, or corner of any street or alley, for the purpose of selling fresh meats in quantity less than a quarter, and thereby withdraw the purchasers from the market houses, is at once giving to such retailers a very great advantage over those who rent the stalls and pay a high price for them."

b. Due process of law.

An ordinance regulating the weight of loaves of bread does not deprive a baker of his property without due process of law. *Chicago v. Schmidinger* (1909) 248 Ill. 167, 44 L.R.A. (N.S.) 632, 90 N. E. 369, 17 Ann. Cas. 614, s. c. on 2d appeal (1910) 245 Ill. 317, 92 N. E. 244, affirmed in (1913) 226 U. S. 578, 57 L. ed. 364, 33 Sup. Ct. Rep. 182,

Ann. Cas. 1914B, 284; *State v. Huber* (1913) 4 Boyce (Del.) 259, 88 Atl. 453.

A statute requiring lard, unless sold in bulk, to be put up in pails or containers holding 1, 3, or 5 pounds net weight, or some whole multiple of these numbers, and not any fraction thereof, does not violate the constitutional guaranty against the taking of property without due process of law. *State v. Armour & Co.* (1913) 27 N. D. 177, L.R.A.1916E, 380, 145 N. W. 1033, Ann. Cas. 1916B, 1149, affirmed in (1916) 240 U. S. 510, 60 L. ed. 771, 36 Sup. Ct. Rep. 440, Ann. Cas. 1916D, 548.

The statute involved in *State v. Moore* (1889) 104 N. C. 714, 17 Am. St. Rep. 696, 10 S. E. 143, *supra*, I., was held not to violate the due process of law guaranty.

c. Equal protection of the laws.

A statute requiring lard, unless sold in bulk, to be put up in pails or containers holding 1, 3, or 5 pounds net weight, or some whole multiple of these numbers, and not any fraction thereof, does not violate the constitutional guaranty of equal protection of the law. *State v. Armour & Co.* (1913) 27 N. D. 177, L.R.A.1916E, 380, 145 N. W. 1033, Ann. Cas. 1916B, 1149, affirmed in (1916) 240 U. S. 510, 60 L. ed. 771, 36 Sup. Ct. Rep. 440, Ann. Cas. 1916D, 548.

d. Freedom of contract.

A statute prescribing a minimum weight for loaves of bread does not unconstitutionally deprive a baker of freedom of contract. *State v. Huber* (1913) 4 Boyce (Del.) 259, 88 Atl. 453.

A statute requiring lard, unless sold in bulk, to be put up in pails or containers holding 1, 3, or 5 pounds net weight, or some whole multiple of these numbers, and not any fraction thereof, does not interfere with the constitutional guaranty of the right of freedom of contract. *State v. Armour & Co.* (1913) 27 N. D. 177, L.R.A. 1916E, 380, 145 N. W. 1033, Ann. Cas. 1916B, 1149, affirmed in (1916) 240 U. S. 510, 60 L. ed. 771, 36 Sup. Ct. Rep. 440, Ann. Cas. 1916D, 548.

The supreme court of Tennessee, in sustaining the validity of a statute re-

quiring corn meal to be sold in packages containing certain specified weights, unless sold by retailers direct to customers from bulk stock, and priced and delivered by actual weight or measure, states: "We see nothing in this statute which deprives a citizen of the liberty to contract, or of his property. It simply provides that when a staple article of food of universal consumption in this country is sold in packages, the packages shall contain certain quantities of the article, and that the quality and quantity,—that is, whether bolted or unbolted, and how many bushels, fractions of bushel, and pounds,—shall be printed and marked thereon." *State v. Co-operative Store Co.* (1910) 123 Tenn. 399, 131 S. W. 867, Ann. Cas. 1912C, 248.

A statute forbidding a sale or delivery for use at a coal mine of black powder, except in sealed packages containing 12½ pounds, does not unlawfully interfere with the right of contract. *Re Williams* (1908) 79 Kan. 212, 98 Pac. 777, affirmed in (1912) 222 U. S. 415, 56 L. ed. 253, 32 Sup. Ct. Rep. 137.

See *St. Louis v. Jackson* (1887) 25 Mo. 37, *supra*, III. a.

e. Police power.

Such a statute or ordinance as is under consideration herein is regarded as a valid exercise of the police power. *Chicago v. Schmidinger* (1909) 243 Ill. 167, 44 L.R.A.(N.S.) 632, 90 N. E. 369, 17 Ann. Cas. 614, *s. c.* on 2d appeal (1910) 245 Ill. 317, 92 N. E. 244, affirmed in (1913) 226 U. S. 578, 57 L. ed. 364, 33 Sup. Ct. Rep. 182, Ann. Cas. 1914B, 284; *State v. Belle Springs Creamery Co.* (1910) 83 Kan. 389, L.R.A.1915D, 515, 111 Pac. 474 (see statute involved, *supra*, I.); *State v. Moore* (1889) 104 N. C. 714, 17 Am. St. Rep. 696, 10 S. E. 143 (see statute *supra*, I.); *State v. Armour & Co.* (1913) 27 N. D. 177, L.R.A.1916E, 380, 145 N. W. 1033, Ann. Cas. 1916B, 1149, affirmed in (1916) 240 U. S. 510, 60 L. ed. 771, 36 Sup. Ct. Rep. 440, Ann. Cas. 1916D, 548; *State v. McCool* (1910) 83 Kan. 428, 111 Pac. 477; *State v. Co-operative Store Co.* (1910) 123 Tenn.

399, 181 S. W. 367, Ann. Cas. 1912C, 243.

The reasonableness of such an ordinance is dependent upon the individual ordinance. In *Chicago v. Schmidinger* (1909) 243 Ill. 167, 44 L.R.A. (N.S.) 632, 90 N. E. 369, 17 Ann. Cas. 614, s. c. on 2d appeal (1910) 245 Ill. 317, 92 N. E. 244, affirmed in (1913) 226 U. S. 578, 57 L. ed. 364, 33 Sup. Ct. Rep. 182, Ann. Cas. 1914B, 284, an ordinance establishing a loaf of 1 pound as the standard loaf, and providing that bread may be made and sold in loaves containing $\frac{1}{2}$ pound, $\frac{3}{4}$ pound, 1 pound, 2 pounds, 3 pounds, 4 pounds, 5 pounds, and 6 pounds, and in no other way, is not such an unreasonable regulation of the business of bakers as to render it void. A statute making it a misdemeanor for any baker or manufacturer of bread in whole or in part from wheat flour, to sell or offer to sell to any person a loaf or loaves of such bread that shall weigh less than 1 pound, is a reasonable and legitimate exercise of the police power, and therefore constitutional. *State v. Huber* (1913) 4 Boyce (Del.) 259, 88 Atl. 453.

The difficulty of making a loaf of bread conform to a given weight is answered by the Illinois court in *Chicago v. Schmidinger* (1909) 243 Ill. 167, 44 L.R.A. (N.S.) 632, 90 N. E. 369, 17 Ann. Cas. 614, s. c. on 2d appeal (1910) 245 Ill. 317, 92 N. E. 244, by stating that the purpose of the ordinance was only to prevent the sale of loaves of bread which were short in weight, and that there "is nothing in the ordinance which limits the weight of a loaf to a pound, or the fractional part of a pound, or the multiple of a pound." This construction of the ordinance was adopted by the Supreme Court of the United States upon appeal (1913) 226 U. S. 578, 57 L. ed. 364, 33 Sup. Ct. Rep. 182, Ann. Cas. 1914B, 284. The court in *People v. Wagner* (1891) 86 Mich. 594, 13 L.R.A. 286, 24 Am. St. Rep. 141, 49 N. W. 609, assumes it to be possible; in fact states that the defendant in this case has been able to bake his bread so that the finished loaf met the requirements of the ordinance. It is stated, how-

ever, that the ordinance "does not prohibit the sale of bread by weight if it overruns, as it is claimed it sometimes does," and the court adds what seems more problematical: "Nor does it prohibit the exaction of an increased price by reason of the additional weight. It does not prohibit the sale of a half or a quarter or any other fraction of a loaf." Seemingly the only effect given the ordinance by this construction put upon it by the court is to prevent the sale of bread by the loaf unless it complies with the ordinance, but not preventing its sale by weight. The ordinance in question provided that "all bread of every description manufactured by the bakers of this city for sale shall be made of good and wholesome flour or meal into loaves of 1 pound, 2 pounds, and 4 pounds, and no other." In sustaining the validity of a statute fixing the weight of loaves of bread which might lawfully be sold, the court in *State v. McCool* (1910) 83 Kan. 428, 111 Pac. 477, states that "allowance is to be made for usual and ordinary evaporation between the time the bread is placed on sale and the time it is sold, and common-sense allowance is to be made for slight variations in weight as often above as below the standard; . . . but after these allowances are made bread must be sold only in the prescribed weights, and not otherwise, unless it be composed in chief part of rye or maize." Referring particularly to the reasonableness of the statute, the court states that "rye bread, corn bread, fancy bread, and rolls of the usual size are not within the statute. Loaves of bread may be in three sizes—certainly enough to satisfy the demands of any trade. Unavoidable variations in size are not taken into account, and with these out of consideration the loss to any honest baker from mishaps resulting in unsalable short-weight loaves will be infinitesimal. To allow short-weight loaves to be sold would lead to the baking of short-weight and odd-weight loaves for a purpose, and would open the door to the very practices which the legislature sought to thwart."

See *Harwood v. Williamson* (1908) 1 Sask. L. R. 66, *infra*.

In *State v. Armour & Co.* (1913) 27 N. D. 177, L.R.A.1916E, 380, 145 N. W. 1033, Ann. Cas. 1916B, 1149, affirmed in (1916) 240 U. S. 510, 60 L. ed. 771, 36 Sup. Ct. Rep. 440, Ann. Cas. 1916D, 548, there were a number of objections to a statute requiring lard, unless sold in bulk, to be put up in pails or other containers holding 1, 3, or 5 pounds, net weight, or some whole multiple of these numbers, and not any fractions thereof, on the ground that such a statute was unreasonable. It was claimed (1) that the law was unreasonable because it had been the custom of the defendant, a packer, and the custom of other packers, for over twenty years, to use gross-weight pails, and that it had, therefore, become a settled right of the trade; (2) that the law was unreasonable because it imposed an additional expense on the packers, in that they must furnish a different sized pail for North Dakota than was supplied to other of the states; (3) that the law was unreasonable because, in any event, consumers were not prejudiced by the sale of lard other than as required by statute; (4) that the enforcement of the law would drive the packers to use bulk lard only, and that this is unsanitary. All of these objections were overruled, and the court concluded that the law was not unreasonable, arbitrary, or capricious, that it supplied a necessary piece of legislation, and worked no hardship on the defendants.

An ordinance fixing the weight of loaves of bread is not void for unreasonableness because it makes no provision for sale by special contract of loaves of different weights than those specified. *Chicago v. Schmidinger* (1909) 243 Ill. 167, 44 L.R.A.(N.S.) 632, 90 N. E. 369, 17 Ann. Cas. 614, s. c. on 2d appeal (1910) 245 Ill. 317, 92 N. E. 244, affirmed in (1913) 226 U. S. 578, 57 L. ed. 364, 33 Sup. Ct. Rep. 182, Ann. Cas. 1914B, 284.

f. Unlawful discrimination.

An ordinance which fixes the weight of loaves of bread which may be sold is not invalid because other food prod-

ucts are not so regulated. *Chicago v. Schmidinger* (1909) 243 Ill. 167, 44 L.R.A.(N.S.) 632, 90 N. E. 369, 17 Ann. Cas. 614, s. c. on 2d appeal (1910) 245 Ill. 317, 92 N. E. 244, affirmed in (1913) 226 U. S. 578, 57 L. ed. 364, 33 Sup. Ct. Rep. 182, Ann. Cas. 1914B, 284.

A statute which requires lard, lard compounds, and lard substitutes, unless sold in bulk, to be put up in containers holding 1, 3, or 5 pounds, net weight, or some whole multiple of these numbers, and not any fraction thereof, is not void as being discriminatory. *State v. Armour & Co.* (1913) 27 N. D. 177, L.R.A.1916E, 380, 145 N. W. 1033, Ann. Cas. 1916B, 1149, affirmed in (1916) 240 U. S. 510, 60 L. ed. 771, 36 Sup. Ct. Rep. 440, Ann. Cas. 1916D, 548. In the appeal from the decision of the North Dakota court to the Supreme Court of the United States in this case, it was urged that the equal protection clause of the 14th Amendment was violated in that the statute involved, "arbitrarily and without reasonable ground therefor, singles out lard from all food products" which are sold in packages, such as prints of butter, packages of coffee, boxes of crackers, and the endless number of other products sold in package form, when no natural and reasonable ground for excluding them and singling out lard is suggested. In answer to this argument, the court states that "the range of discretion that a state possesses in classifying objects of legislation, we may be excused from expressing, in view of very recent decisions. The power may be determined by degrees of evil, or exercised in cases where detriment is specially experienced. *Carroll v. Greenwich Ins. Co.* (1905) 199 U. S. 401, 411, 50 L. ed. 246, 250, 26 Sup. Ct. Rep. 66; *Central Lumber Co. v. South Dakota* (1912) 226 U. S. 157, 161, 57 L. ed. 164, 169, 33 Sup. Ct. Rep. 66. The law of North Dakota does not exceed this power."

In *State v. Co-operative Store Co.* (1910) 123 Tenn. 399, 131 S. W. 867, Ann. Cas. 1912B, 248, a statute requiring corn meal to be sold in bags or packages containing certain specified weights, unless sold directly to customers by retailers from bulk stock, and priced and delivered by actual

weight or measure, is held not to be discriminatory. The court says that "it does not prohibit the manufacturer, the wholesaler, or any person from selling meal in any bag or other receptacle or quantity desired by the seller or consumer when priced and delivered by actual weight or measure. All persons, whether retailers or not, may sell it in that way."

A statute which regulates the sale and delivery of black powder to coal mines is not invalid because of discrimination, from the fact that it does not refer to mines of other minerals. *Re Williams* (1908) 79 Kan. 212, 98 Pac. 777, affirmed in (1912) 222 U. S. 415, 56 L. ed. 253, 32 Sup. Ct. Rep. 137. The supreme court of Kansas states that the fact that a law operates only upon a class does not make it invalid if the classification is reasonable; that it is sufficient to sustain the validity of the law if the classification is based upon some differences which bear a just and proper relation to the attempted classification, and is not a mere arbitrary selection; that the conditions in the coal-mining industry of the state are different than those relating to other mining industries, and may properly call for different regulations, nor is this statute void because it relates to black powder alone. *Ibid.*

A proviso in the Kansas statute that the act should not be construed as in any manner conflicting with any existing contract of sale of black powder was held not to make the statute repugnant to the 14th Amendment to the Federal Constitution, as denying the equal protection of the laws. *Williams v. Walsh* (1912) 222 U. S. 415, 56 L. ed. 253, 32 Sup. Ct. Rep. 137.

That there was discrimination, and for this reason the statute involved in *State v. Armour Co.* (N. D.) *supra*, was void for unreasonableness, was urged in that case on the further ground that it was unreasonable in that other traders had been using gross-weight methods, therefore the vendors of lard were discriminated against, and the specific example was given that butchers weigh paper along with the meat and charge meat prices for the paper. To this argument, the court replies that

the defendant is not helped thereby; that the fact that the butcher may be dishonest in his business does not excuse dishonest methods in other lines, nor render unreasonable laws to regulate them.

IV. Validity of municipal ordinances as tested by charter authority.

The power of a municipality to enact an ordinance raises two questions: one, the charter power; the other, the general question of constitutional restrictions. The latter question is discussed above in connection with statutes. The former or charter power depends upon the particular provisions of the charter, and cannot be stated in any general way.

A municipality was held to have charter power to enact an ordinance that no person shall barter, sell, or give away cider in less quantities than 1 gallon, or permit or allow the same to be drunk at any store, stand, or other place of sale, although there was no provision in the statute directly authorizing the enactment of such an ordinance, but the legislature, after conferring power to pass ordinances for certain specific purposes, authorized city councils "to enact and make all such ordinances, by-laws, rules, and regulations, not inconsistent with the laws of the state, as may be expedient for maintaining the peace, good government, and welfare of the city, and in trade and commerce." *Monroe v. Lawrence* (1890) 44 Kan. 607, 10 L.R.A. 520, 24 Pac. 1113.

A municipal ordinance making it unlawful for any person to barter, sell, or give away any malt, hop-tea tonic, ginger ale, cider, or other drink of like nature in less quantities than 1 gallon, or to permit or allow the same to be drunk at any store or other place of sale, is not invalid because the sale of intoxicating liquors is regulated by the laws of the state, for the state may confer upon the municipalities the right to punish, pursuant to their ordinances, illegal sales of intoxicating liquor, or keeping of any place, or conducting such business within their limits. *Re Jahn* (1895) 55 Kan. 696, 41 Pac. 956.

A city is empowered to enact an or-

dinance regulating the size of loaves of bread, and requiring the manufacturer to mark the bread with his initials or other mark, under charter power "to regulate everything which relates to bakers." *Guillotte v. New Orleans* (1857) 12 La. Ann. 432.

An ordinance providing that "no person not being the lessee of a butcher's stall shall sell or offer for sale in market or in any other place any fresh meat in less quantities than one quarter" is within the powers granted to the municipality in its charter, which confers upon the municipality power "to regulate the vending of meat, poultry, and vegetables." *St. Louis v. Jackson* (1857) 25 Mo. 37.

A municipal ordinance prescribing the weight of loaves of bread of 1½, 2, and 4 pounds, and requiring that the weight should be stamped on each loaf, was held not ultra vires or unreasonable in *Re Nasmith* (1883) 2 Ont. Rep. 192. Upon the authority of this case it was held in *Rex v. Chisholm* (1907) 14 Ont. L. Rep. 178, 9 Ont. Week. Rep. 914, that a municipal ordinance which required bread to be sold in 1 and 3 pound loaves, and fixed a penalty for offering for sale short-weight loaves, was not ultra vires, where the municipality was given power to pass by-laws "for seizing and forfeiting bread or other articles when of light weight or short measurements," and generally was given power to pass by-laws for inflicting reasonable fines not exceeding \$50 for breach of any by-law.

Under a provision that the council of every municipality may pass by-laws for "regulating the assize of bread and preventing the use of deleterious materials in making bread," a municipality may enact an ordinance providing "that the assize of baker's bread for this town shall be the loaf weighing 4 pounds, and the half weighing 2 pounds, and no person shall sell or dispose of any loaf of any other size or weight." *Harwood v. Williamson* (1908) 1 Sask. L. R. 66. The court construes this ordinance as not preventing the sale of overweight bread, stating that if the ordinance be construed to prevent the sale of bread that is overweight it is unreasonable,

but, construed merely to prohibit persons from selling underweight or light-weight bread, the ordinance is reasonable. The difficulty of making bread of the prescribed weight is met in this opinion by the statement that while this may be so there seems to be no difficulty in preparing bread so that when it comes out of the oven, and for some time afterward, it may remain of the proper weight or a little over.

An ordinance apparently preventing the sale of fresh meat in quantities less than by the quarter carcass, unless by a person holding a valid license and in a place authorized by the council, was sustained as reasonable in *Re O'Meara* (1886) 11 Ont. Rep. 603. It seems that the municipality was expressly authorized by statute to enact such an ordinance.

In *Mobile v. Yuille* (1841) 3 Ala. 137, 36 Am. Dec. 441, where the power of a municipality to enact the ordinance was raised, the charter of the municipality contained a provision authorizing it "to license bakers and regulate the weight and price of bread, and prohibit the baking for sale except by those licensed." The court assumes that this conferred power on the municipality to enact an ordinance prescribing the weight of bread on a graduated scale, according to the price of flour, and requiring the mayor to issue his proclamation as often as a change in the price of flour required an alteration in the weight of bread. In answer to the argument that the legislature could not delegate this power to a corporation, the court states: "We have seen that the mere creation of a corporation carries with it the power to make all by-laws which are reasonable and not contrary to the general law of the state; it is also true that an express grant to pass an unreasonable or unlawful by-law is void; it follows, therefore, most conclusively, that the legislature may grant expressly the power to do that which the corporation might do without express grant."

It was also held in *Mobile v. Yuille* (Ala.) supra, that the municipality had power to inflict a penalty for a violation of the ordinance. The court

states that the right to enact ordinances necessarily implies the power of enforcing the ordinance by some penalty.

A penalty provided in an ordinance for the violation thereof, which consists of a fine "in itself not exceeding \$50," was held void because it was not for a sum certain in *Mobile v. Yuille* (Ala.) supra. The court states that "the penalty must be a sum certain, and cannot be left to the arbitrary assessment of the corporation court, to be determined according to the nature of the offense. It is also said that, although the utmost limit of the penalty be fixed beyond which the fine cannot extend, it does not remove the objection. The reason assigned is that it permits the corporation to be a judge in its own cause. Nor, it is said, can the penalty of a by-law extend to forfeiture of goods,

unless such power be expressly given by the charter."

The validity of a provision for the forfeiture of such bread as is not of the weight required by the ordinance was doubted also. *Mobile v. Yuille* (Ala.) supra.

An ordinance which authorized the police officers to enter any bakeshop, storehouse, etc., where bread is kept, to stop and detain all bakers carrying bread for sale, to examine whether the same is marked, and ascertain the weight thereof, and in case it is unstamped or wanting in weight, or not baked according to the ordinance, to conduct the offender before the recorder, there to be dealt with, is held to be no violation of article 6 of the Amendments to the Constitution of the United States. *Guillotte v. New Orleans* (1857) 12 La. Ann. 432.

W. A. E.

METROPOLITAN LIFE INSURANCE COMPANY, Plff. in Err.,
v.
WILLIE B. PEELER.

Oklahoma Supreme Court—December 10, 1913.

(— Okla. —, 176 Pac. 989.)

Insurance — Incontestability — fraud — public policy.

1. A provision in a life insurance policy that "this policy (and the application therefor) constitutes the entire contract between the parties and shall be incontestable after one year from the date of its issue, except for nonpayment of premiums," includes fraud on the part of the insured in obtaining the insurance, and, after one year from the date the policy is issued, the insurance company cannot plead such fraud as a defense to an action brought by the beneficiary under the policy to recover the amount thereof, or in a cross action to cancel the policy and rescind the insurance contract.

[See note on this question beginning on page 448.]

— public policy.

2. Such a provision in a life insurance policy is neither unreasonable nor contrary to public policy.

[See 14 R. C. L. 1199.]

— validity.

3. Such a provision in a life insurance policy is not contrary to any express provision of law, nor contrary to the policy of express law, though not expressly prohibited, nor otherwise contrary to good morals.

Headnotes by TISINGER, J.

ERROR to the District Court for Oklahoma County (Clark, J.) to review a judgment sustaining plaintiff's motion for judgment on the pleadings, in an action brought to recover the amount alleged to be due on a life insurance policy. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Embry, Crockett, & Johnson, for plaintiff in error:

The incontestable clause does not prevent the defendant from defending an action brought on the policy, on the ground of the fraud of the insured in procuring its execution.

Ritter v. Mutual L. Ins. Co. 169 U. S. 139, 42 L. ed. 693, 18 Sup. Ct. Rep. 300; St. Louis & S. F. R. Co. v. James, 36 Okla. 196, 128 Pac. 279; Keys v. Williamsburg City F. Ins. Co. 37 Okla. 482, 132 Pac. 818; Welch v. Union Cent. L. Ins. Co. 108 Iowa, 224, 50 L.R.A. 774, 78 N. W. 853; Reagan v. Union Mut. L. Ins. Co. 189 Mass. 555, 2 L.R.A. (N.S.) 821, 109 Am. St. Rep. 659, 76 N. E. 217, 4 Ann. Cas. 362; New York L. Ins. Co. v. Weaver, 114 Ky. 295, 70 S. W. 628; Duvall v. National Ins. Co. 28 Idaho, 356, L.R.A. 1917E, 333, 154 Pac. 632, Ann. Cas. 1917E, 1112.

Messrs. E. G. McAdams and D. S. Levy for defendant in error.

Tisinger, J., delivered the opinion of the court:

On August 8, 1916, the Metropolitan Life Insurance Company issued its policy of insurance on her life to Nannie D. Lloyd, in which Willie B. Peeler was named as beneficiary. On August 10, 1917, one year and two days after the policy was issued, the insured died. Suit was brought by the beneficiary against the insurance company to recover the amount of the policy of insurance, and a copy of the policy was attached to the petition and, by special reference, made a part of it. This policy contained the following clause:

"Incontestability.—This policy (and the application therefor) constitutes the entire contract between the parties and shall be incontestable after one year from the date of its issue, except for nonpayment of premiums."

The insurance company defended the action brought against it by alleging in its answer that the insured, for the purpose of obtaining the policy and defrauding it, falsely represented to it in her written ap-

plication, which by its terms formed the basis of the insurance and was made a part of the policy, that she had never had cancer or tumor, had never had any illness since childhood, had never been attended or prescribed for by a physician, had never been confined to the house by illness, and had never been an inmate of or visited a hospital or sanatorium for treatment,—when, in fact, she was, during the month of January, 1916, afflicted with cancer of the breast, that she consulted with and was attended by a physician and surgeon on account of this affliction, who performed an operation removing the cancer, which operation resulted in a personal injury or deformity, that she was an inmate of a hospital during the month of January, 1916, and that, for a long time after the cancer was removed, she was confined to her home on account of the disease and the operation. The company also alleged that the statements and representations so made by the insured to it were knowingly and falsely made by her with the fraudulent intent to induce it, and by means whereof it was induced, to issue the policy of insurance on her life; and that, on account of the fraud of the insured in obtaining the insurance, the beneficiary named in the policy was not entitled to recover. A cross petition was also filed by the insurance company, alleging substantially the same facts and praying for a cancellation of the policy on the ground of fraud in its procurement.

A motion for judgment on the pleadings was filed by the beneficiary and sustained by the court. From this judgment the insurance company appeals.

Accepting the allegations in the answer and cross petition of the insurance company as true, as they had to be accepted by the trial court

(— Okla. —, 176 Pac. 939.)

in rendering its judgment on the pleadings, there is no question but what the insured was not a fit and suitable subject for insurance at the time the policy was issued; that ill health and bodily infirmities of a serious character, well known to her and concealed by her in making her application, would have caused the company to reject the application had it known of the same.

The rights of the parties to this suit are therefore made to turn on the force and effect of the incontestable clause in the insurance policy, which expressly stipulates that it "shall be incontestable after one year from the date of its issue, except for nonpayment of premiums."

It is to be presumed that the insurance company had some purpose in view when it offered to the insured a policy containing this stipulation and that the stipulation itself had some meaning. It was not inserted as a mere matter of form. It was an inducement for the insured to take the insurance. It guaranteed her that her policy should not be contested after the expiration of one year, provided the premiums were paid. It carried with it the assurance that, if she paid the premiums and died after one year from the date it issued, the beneficiary selected by her and for whom she attempted to provide would not be met with a contest and lawsuit to determine whether the insurance ever had any validity or force. The stipulation is broad in its terms. There is only one condition upon which the validity of the policy can be questioned after the lapse of a year, and that is the nonpayment of premiums. The meaning of the provision is that, if the premiums are paid, the liability shall be absolute under the policy, and that no question shall be made of its original validity. The language admits of no reasonable construction other than that the company reserves to itself the right to ascertain all the matter and facts material to its risk and the validity

of its contract for one year, and that if within that time it does not ascertain all the facts, and does not cancel and rescind the contract, it may not do so afterwards upon any ground then in existence. *Mutual L. Ins. Co. v. Buford*, — Okla. —, 160 Pac. 928; *Clement v. New York L. Ins. Co.* 101 Tenn. 22, 42 L.R.A. 247, 70 Am. St. Rep. 650, 46 S. W. 561; *Thompson v. Fidelity Mut. L. Ins. Co.* 116 Tenn. 557, 6 L.R.A. (N.S.) 1039, 115 Am. St. Rep. 823, 92 S. W. 1098; *Wright v. Mutual Ben. Life Asso.* 118 N. Y. 237, 6 L.R.A. 731, 16 Am. St. Rep. 749, 23 N. E. 186.

It is urged by the insurance company that on account of the fraud of the insured in procuring the policy the contract of insurance is null and void; that in this, as in other cases, fraud vitiates the agreements and undertakings based upon it, and may be set aside at the instance of the party defrauded. It is true that fraud in procuring the policy would vitiate it at the option and upon the motion of the party defrauded; but, under the stipulation in question, the defrauded party must within the

Insurance—
incontestability
—fraud—public
policy.

year after the policy is issued test its validity by exercising his right to repudiate and rescind it. The stipulation is in the nature of, and serves a similar purpose as, the statutes of limitation, which are sometimes called statutes of repose. It creates by contract a limitation for the benefit of the insured, within which limited period the insured must test, if ever, the validity of the policy.

The general rule is announced in 14 R. C. L. § 380, of the article on Insurance, as follows: "A provision in a contract of insurance, limiting the time in which the insurer may take advantage of certain facts that might otherwise constitute a good defense to its liability on such contract, precludes every defense to the policy other than the defenses excepted in the provision itself, including false an-

swers in the application, and even fraud where the time fixed by the contract is not unreasonably short." *Indiana Nat. L. Ins. Co. v. McGinnis*, 180 Ind. 9, 45 L.R.A. (N.S.) 192, 101 N. E. 289; *Great Western L. Ins. Co. v. Snively*, 46 L.R.A. (N.S.) 1056, 124 C. C. A. 154, 206 Fed. 20; *Massachusetts Ben. Life Asso. v. Robinson*, 104 Ga. 256, 42 L.R.A. 261, 30 S. E. 918; *Citizens' L. Ins. Co. v. McClure*, 138 Ky. 138, 27 L.R.A. (N.S.) 1026, 127 S. W. 749; *Kansas Mut. L. Ins. Co. v. Whitehead*, 123 Ky. 21, 93 S. W. 609, 13 Ann. Cas. 301; *Clement v. New York L. Ins. Co.* 101 Tenn. 22, 42 L.R.A. 247, 70 Am. St. Rep. 650, 46 S. W. 561.

It was said by the supreme court of Tennessee, in the case of *Clement v. New York L. Ins. Co.* supra: "Fraud is always required to be set up promptly when discovered, or it may be treated as waived, and the effect of this stipulation is that the insurer must exercise due diligence to discover such fraud within the year, and, if it fails to do so, it will treat it as waived, and no inquiry will be made or allowed into such matters."

But the insurance company contends that this stipulation is void, being against public policy, and that the interpretation and construction we have given it is repugnant to § 973, Revised Laws 1910, which reads: "All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or wilful injury to the person or property of another or violation of law whether wilful or negligent, are against the policy of the law."

This contention, it seems to us, is based upon an entire misconception of the object and meaning of the stipulation. It was not a stipulation to exempt anyone from responsibility for his own fraud. On the contrary, it recognizes the possibility of fraud, but provides ample time and opportunity within which it may be established.

Under the title "Life Insurance,"

25 Cyc. p. 873, the following is stated as the rule: "A clause now often inserted in policies, that after being in force a specified time they shall not be disputed or shall be incontestable, precludes any defense after the stipulated period on account of false statements which were warranted to be true, even though they were made fraudulently."

And that such a clause is not against public policy as applied to the defense of fraud, see *Massachusetts Ben. Life Asso. v. Robinson*, 104 Ga. 256, 42 L.R.A. 261, 30 S. E. 918; *Murray v. State Mut. L. Ins. Co.* 22 R. I. 524, 53 L.R.A. 742, 48 Atl. 800; *Union Cent. L. Ins. Co. v. Fox*, 106 Tenn. 347, 82 Am. St. Rep. 885, 61 S. W. 62; *Patterson v. Natural Premium Mut. L. Ins. Co.* 100 Wis. 118, 42 L.R.A. 253, 69 Am. St. Rep. 899, 75 N. W. 980.

As was said by the supreme court of Georgia in the case of *Massachusetts Ben. Life Asso. v. Robinson*, 104 Ga. 273, 42 L.R.A. 261, 30 S. E. 918; "Where parties enter into a contract which from its nature affords an opportunity to one party to perpetrate a fraud upon another, and it is stipulated therein that the party who is liable to be defrauded shall have a specified time in which to make inquiry as to the acts and conduct of the other party, he is on notice, by the very terms of the contract itself, that fraud may be involved in it, and the duty is upon him to commence at once an investigation into the acts, conduct, and representations of the other party; and, if the time fixed is such that the information which would show that the fraud had been perpetrated could have been, by the exercise of ordinary diligence, obtained, then the parties are bound by their contract as to time, and after the lapse of that time fraud is no longer a defense. This does not violate in any way the well-settled principle that fraud is to be abhorred, vitiates everything it touches, and the person guilty of it is not to be countenanced in any way by the courts.

While all this is true, it is equally well settled that a contract which has for its foundation a wilful fraud may become vitalized and enforceable by the negligence of the party who was the victim of the fraud."

In the case of *Wright v. Mutual Ben. Life Asso.* 43 Hun, 61, in construing a similar stipulation, the court said: "A stipulation like the one under consideration ought to be an incentive for the insurer to exercise vigilance and good faith in investigating the truth or falsity of the representations upon which the policy is issued while the matter is fresh. The witnesses are all alive, and the exact truth can, if ever, be ascertained; and the stipulation prevents the insurer from lying by and receiving the premiums during the life of the insured, and after his death, when the good faith and truth of his representations cannot be supported by his oath, contesting the policy upon the ground that the insured's representations were false or untrue. Such a stipulation is neither unreasonable nor contrary to public policy."

In affirming this decision the court of appeals of the state of New York (118 N. Y. 237, 6 L.R.A. 731, 16 Am. St. Rep. 749, 23 N. E. 186), speaking through Mr. Justice Potter, said: "No doubt the defendant held it out as an inducement to insurance by removing the hesitation in the minds of many prudent men against paying ill-afforded premiums for a series of years, when in the end, and after the payment of premiums, the death of the insured, and the loss of his and the testimony of others, the claimant, instead of receiving the promised insurance, may be met by an expensive lawsuit to determine that the insurance which the deceased has been paying for through many years has not, and never had, an existence, except in name. While fraud is obnoxious and should justly vitiate all contracts, the courts should exercise care that fraud and imposition should not be successful in annulling an agreement to the effect that,

if cause be not found and charged within a reasonable and specific time, establishing the invalidity of the contract of insurance, it should, thereafter be treated as valid. Hence I fail to perceive any error in the disposition made of this question in the court below."

We conclude that the stipulation in question is not against public policy, and that it is not repugnant to § 973, Revised Laws 1910.

It is further contended by the insurance company that the stipulation in question is in violation by § 977, Revised Laws 1910, which reads: "Every stipulation or condition in a contract, by which any party thereto is restricted from enforcing his rights under the contract by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void."

It contends: First, that by this stipulation it is restricted from enforcing its rights under the contract, and, second, that inasmuch as a party may, under the general Statute of Limitations (Rev. Laws 1910, § 4657), commence an action for relief on the ground of fraud within two years from the discovery of the fraud, the stipulation making the policy "incontestable after one year from the date of its issue" is void where fraud in its procurement is relied on as a defense against a suit to recover on the policy, and where a cross petition is also begun to rescind the contract and cancel the policy on that ground.

The first contention is wholly untenable. The insurance company is not restricted by the stipulation from enforcing its rights under the contract by the usual legal proceedings in the ordinary tribunals. In fact, it is now engaged in an effort to enforce what it deems to be its rights under the contract. As was said by Mr. Justice Kane in the case of *Voris v. Hall*, — Okla. —, 175 Pac. 220: "The section . . . is not directed against stipulations in contracts

which restrict the rights of the parties to pursue the usual legal remedies in the ordinary tribunal, etc., but against stipulations or conditions by which any party to a contract is restricted from enforcing his rights under the contract, by the usual legal proceedings, etc. There is no stipulation or condition contained in either of these contracts by which any party thereto is restricted from enforcing his rights under the contract by the usual legal proceedings in the ordinary tribunals, and the fact that the parties are now engaged in an effort to enforce what they deem to be their respective rights under the contract by legal proceedings in the ordinary tribunals of the state furnishes the most convincing proof that this is so."

The second contention presents a more difficult question. The period fixed by law within which an action may be brought for relief on the ground of fraud is for the benefit and protection of the parties interested in the contract. Ordinarily, and in the absence of prohibitory statute, it is competent for them to stipulate that the time given them by the law within which they may act shall be shortened or lengthened as they may agree. Statutes of limitations may be waived by agreement for a definite or limited time, or for an indefinite or unlimited time. *State Loan & T. Co. v. Cochran*, 130 Cal. 245, 62 Pac. 466, 600; *Wells F. & Co. v. Enright*, 127 Cal. 669, 49 L.R.A. 647, 60 Pac. 439; *Smith v. Lawrence*, 38 Cal. 24, 99 Am. Dec. 344; *Holman v. Omaha R. & Bridge Co.* 117 Iowa, 268, 62 L.R.A. 395, 94 Am. St. Rep. 293, 90 N. W. 833; *Webber v. Williams College*, 23 Pick. 302; *Mann v. Cooper*, 2 App. D. C. 226; *Bridges v. Stephens*, 132 Mo. 524, 34 S. W. 555; *Quick v. Corlies*, 39 N. J. L. 11; *State Trust Co. v. Sheldon*, 68 Vt. 259, 35 Atl. 177; *Re Board of Education*, 35 Okla. 733, 130 Pac. 951; *Blumle v. Kramer*, 14 Okla. 366, 79 Pac. 215.

Section 977, Revised Laws 1910,

relied on by the insurance company, is a statement of the common-law rule that a private agreement to avoid a public statute is against public policy and void. The exception to the rule is that, where no principle of public policy is violated, parties are at liberty to forego the protection of the law.

Whether a party, not acting in a representative capacity, invokes a limitation created by statute and which will operate in his favor, if invoked, is a privilege which he may or may not exercise, as he chooses. He is not under any obligation to the state or towards third persons to plead it. It does not extinguish a debtor's obligation. Unless relied on or pleaded, it neither extinguishes an obligation nor prolongs or shortens the time for asserting a right.

It was said in *State Trust Co. v. Sheldon*, 68 Vt. 260, 35 Atl. 177: "Statutory provisions designed for the benefit of individuals may be waived; but, where the enactment is to secure general objects of policy or morals, no consent will render a noncompliance with the statute effectual. The statute limiting the time within which actions shall be brought is for the benefit and repose of individuals, and not to secure general objects of policy or morals. Its protection may therefore be waived in legal form by those who are entitled to it, and such waiver, when acted upon, becomes an estoppel to plead the statute."

But the limitation provided by statute within which an action may be brought for relief on the ground of fraud is modified and controlled by the general insurance law of the state, adopted by the legislature in 1909, in so far as it affects life insurance policies issued or delivered in this state. Section 3470, Revised Laws 1910, reads: "No policy of life insurance shall be issued or delivered in this state, or be issued by a life insurance company organized under the laws of this state, unless the same shall at least provide in substance the following: . . .

Third. That the policy, together with the application therefor, a copy of which application shall be indorsed upon or attached to the policy and made a part thereof, shall constitute the entire contract between the parties and shall be incontestable after two years from its date, except for nonpayment of premiums and except all violations of the conditions of the policy relating to the naval or military service in time of war; provided, that the application therefor need not be attached to any policy containing a clause making the policy incontestable from date of issue."

This statute makes no reference to fraud in the procurement of the policy, or to the time of the discovery of the fraud. Its evident purpose and its effect are that every policy of life insurance issued or delivered in the state shall provide that it shall be incontestable after two years from its date, at the most. The words used in the statute, "unless the same shall at least provide in substance . . . that the policy shall be incontestable after two years from its date," admit of no other construction. The words "shall at least provide," when read with the context, show that the evident legislative intent was to make the maximum limit of time within which a policy might be contestable two years, leaving it for the parties to the insurance contract to fix a lesser time, if they so agreed. And the same paragraph of the section, in its proviso, makes it unnecessary to attach to the policy the application therefor where it contains a clause making the policy incontestable from date of issue.

This construction is borne out by the section immediately following the one under discussion. Section 3471, Revised Laws 1910, reads:

"No policy of life insurance shall be issued or delivered in this state . . . if it contains any of the following provisions:

"First. A provision limiting the time within which any action at law or in equity may be commenced to

less than three years after the cause of action shall accrue. . . .

"Third. In the event of the maturity of any policy after the expiration of the contestable period thereof, a provision for any mode of settlement after maturity of less value, according to the company's published rates therefor, than the amount insured on the face of the policy, etc."

As authority for this construction of the meaning of the words "at least," when read with the context, see *Courson v. Parker*, 39 W. Va. 521, 20 S. E. 583; *Hernandez v. His Creditors*, 57 Cal. 333, 334; *Warren Mfg. Co. v. Hoffman*, 62 Md. 165, 170.

The limitation as to action for relief on account of fraud being thus modified by statute especially applicable to life insurance contracts, it was competent for the insurance company and the insured to stipulate, in the policy declared on in this case, that it should be incontestable after one year from the date of its issue, etc. And such a stipulation did not in any manner limit the time in which the insurance company might, under the contract and by the usual proceedings in the ordinary tribunals, enforce its rights.

We are inclined, also, to agree with the views of the supreme court of Kentucky, in the case of *Citizens' L. Ins. Co. v. McClure*, 138 Ky. 147, 27 L.R.A. (N.S.) 1026, 127 S. W. 749, when, in construing a similar stipulation, the court said: "The question of limitation has no proper place. . . . Indeed, statutes of limitations apply to actions, and not defenses; so discussion of the Statute of Limitations in this case would therefore be irrelevant. It is not claimed by appellee that appellant's defense is barred by limitation. The sole question is, Does the stipulation of the policy in question preclude appellant from making the defense set up in the answer? The fact that the effect of holding the policy incontestable would be to exclude a defense that would be good if the policy were not incontestable

is beside the question. It is incontestability of the policy, and not the limitation, that bars the defense. The parties to the contract of insurance in making it incontestable, as in the policy provided, did not substitute a shorter period of limitation for that provided by the statute. The stipulation has no reference to limitation, but to a waiver by the insurer of the right of defense on the ground of fraud that may have been practised by the insured in obtaining the policy, in consideration of the latter's making payment of premiums as required by the policy; the time for the policy to become incontestable being fixed as of the payment of the second premium, to give the insurer time to satisfy itself that no fraud was committed by the insured. If, within that time, discovery of the fraud is made, the policy may be canceled by the insurer, without suit, under another provision of the policy; but if no fraud is discovered, or, if discovered, the policy is not canceled before the payment of the second

premium, and the insured dies after the policy becomes incontestable, defense cannot be made by the insurer, to an action on the policy, on the ground that it was procured by fraud on the part of the insured. The provision as to incontestability seems to be a most reasonable one. It is fair both to insurer and insured, for it is calculated to make the former diligent in investigating the truth or falsity of the statements made in the application for the policy, and affords time for the investigation; while to the latter it furnishes an incentive to promptness in paying the second and all subsequent premiums and gives assurance that in his incontestable policy he has a safe investment by which those dependent upon him may be benefited after his death. There is nothing in such a stipulation hurtful to the rights of the parties, or contrary to public policy."

The judgment of the trial court is affirmed.

All the Justices concur.

ANNOTATION.

Insurance: incontestable clause as excluding a defense based upon public policy.

- I. Where insured was committing unlawful act or was executed, 448.
- II. In case of suicide, 450.
- III. Where there is a want of insurable interest, 452.
- IV. In case of fraud, 452.

As indicated by the title this note intends collecting cases involving facts on the face of which it would have been against public policy to have permitted a recovery, and to show the effect of the incontestable clause in such a situation.

I. Where insured was committing unlawful act or was executed.

In *Supreme Lodge, K. P. v. Overton* (1919) — Ala. —, — A.L.R. —, 82 So. 443, the defense that the insured was killed as an escaping felon under death sentence was held not available to the insurer, the court holding that

the incontestable clause involved was valid, and not against public policy, and that it estopped the insurer from setting up such a defense.

The conclusion in this case was based in part on the decision in *Weil v. Travelers' Ins. Co.* (1918) — Ala. App. —, 80 So. 352, which upon the authority of *Mutual L. Ins. Co. v. Lovejoy* (Ala.) *infra*, II., reversed the appellate court's decision in (1916) — Ala. App. —, 80 So. 348, where it was held that a clause providing that if "this policy matures" after two years, payment of the sum insured shall not be disputed, was by its terms dependent upon the maturity of the policy in a manner within the contemplation of the parties, and that there was no maturity by reason of the legal execution of the insured.

In *United Order, G. C. v. Overton*

(1919) — Ala. —, — A.L.R. —, 83 So. 59, which was an action against insurer for the same death that was involved in *Supreme Lodge, K. P. v. Overton* (Ala.) supra, the doctrine of the latter case was not questioned by the court; but the decision was in favor of the insurer upon the ground that the incontestable clause was not pleaded.

And in *Sun L. Ins. Co. v. Taylor* (1900) 108 Ky. 408, 94 Am. St. Rep. 383, 56 S. W. 668, the insurer was held precluded, after the expiration of three years, from setting up the defense that the insured died in consequence of his own criminal action in committing an assault, where the policy provided that if the insured should die three or more years after its date, it should be incontestable, although it provided in a prior clause that the policy should be void if the insured should die in consequence of his own criminal act. The court said: "It is insisted that the twelfth clause of the policy, which we have quoted, does not render it incontestable where the insured died in consequence of his own criminal action; that the parties did not intend by that provision of the policy to render unavailable a defense based on a violation of law which was made a breach of the policy by its terms, but that the provision as to the incontestable nature was that it should not be contested for misrepresentations in securing it. The language providing that the policy should be incontestable does not restrict it to any particular grounds of contest, but it is broad and comprehensive enough to embrace any and every defense which might have been made to it before the expiration of three years. To say that it has reference to one defense, and not to another, is writing into the policy terms which the very language of it excludes. In construing a contract, the whole must be taken together, in order to determine the intention of the contracting parties. It is not reasonable to suppose that a party would take out a policy of insurance with the view of committing suicide, or to lose his life by some criminal action, three years after the delivery of the policy.

6 A.L.R.—29.

Neither would it be supposed that he would attempt to practise a fraud upon the insurance company in that way. Forfeitures are not favored by the law. The insured is never permitted to select the terms used in a policy of insurance, and the rule is that in construing a policy wherein its terms render doubtful its meaning, a construction must be given which is favorable to the party insured; and, in addition thereto, if the policy contain inconsistent or contradictory provisions, force must be given to those that sustain, rather than to those which forfeit, the contract. . . . Under these rules of interpretation we must conclude that it was the intention of the parties to the contract that the policy was to be incontestable after three years, notwithstanding the insured might then die from his own criminal action."

It has been held, however, in some cases, that a clause making a life insurance policy incontestable does not prevent the insurer from contesting its liability on the ground that the insured was executed for a crime. *Scarborough v. American Nat. Ins. Co.* (1916) 171 N. C. 353, L.R.A.1918A, 896, 88 S. E. 482, Ann. Cas. 1917D, 1181; *Collins v. Metropolitan L. Ins. Co.* (1905) 27 Pa. Super. Ct. 353; and a like view was held in *Collins v. Metropolitan L. Ins. Co.* (1907) 133 Ill. App. 326, reversed on other grounds in (1907) 232 Ill. 37, 14 L.R.A. (N.S.) 356, 122 Am. St. Rep. 54, 83 N. E. 542, 13 Ann. Cas. 129.

The court, in *Scarborough v. American Nat. Ins. Co.* (N. C.) supra, said that the term "incontestable" meant that the provisions of the policy would not be contested, not that the insurer agreed to waive the right to defend itself against a risk which it never assumed; and held that the policy did not cover the risk of execution for violation of law, although such risk was not expressly excepted.

And the court in *Collins v. Metropolitan L. Ins. Co.* (Pa.) supra, said: "The learned counsel for the appellant contends that the effect of the clause in the policy, 'after two years this policy shall be noncontestable except

for the nonpayment of premiums as stipulated or for fraud,' is to deprive the insurer, after the expiration of the period mentioned, of every defense founded in the express provisions of the contract or the law applicable to such contracts, against any claim that may be made by the insured or his legal representatives. We cannot give this clause that effect. By its terms, it is not the claim presented by the assured, irrespective of the cause of death, which is made incontestable; it is merely the validity of the policy, as an obligation binding upon the company. The two years having expired, the company could not escape liability by showing that the insured, at the time the contract was made, had mistakenly, not fraudulently, made misstatements as to his family history or age. The effect of the stipulation in question was not to change the covenants of the contract at the expiration of two years. Those covenants are still the contract of the parties, and the liability of this defendant is that which under the law to such covenants attaches. . . . The question, therefore, is whether an ordinary life policy, containing no applicable special provisions, is a binding contract to insure against a legal execution for crime. Had the policy expressly insured against this risk,—that is, that in consideration of the insured paying a certain sum of money, year by year, the company would, in the event of his committing capital felony, and being tried, convicted, and executed for that felony, pay to his legal representatives a certain sum of money,—such a contract could not be sustained. It must be held to be void upon principles of public policy. . . . A contract the tendency of which is to endanger the public interests or injuriously affect the public good, or which is subversive of sound morality, ought never to receive the sanction of a court of justice, or be made the foundation of its judgment. As a life policy which expressly covenanted against a legal execution of the insured for crime would be void as against public policy, so an ordinary policy, containing no applicable special provisions, is not to be construed as insuring against such

a risk. Public policy forbids the insertion in the contract of a condition which would tend to induce crime, and as it forbids the introduction of such a stipulation, it also forbids the enforcement of a contract under circumstances which cannot be lawfully stipulated for. . . . The reason for the refusal of the courts to aid one who founds his cause of action upon his own criminal act is because of the public interests involved, which require that the laws against crime be enforced, and that the courts aid no man to take a profit from their violation. The rule is enforced upon the ground of public policy alone, and not out of consideration for the defendant, to whom the advantage is incidental."

II. In case of suicide.

In some states policies including the risk of suicide are expressly favored, and statutes forbid the excepting of such a risk from the policy. This note does not include cases where it expressly appears that suicide was not regarded as a crime, or regarded in such a light that the insurance of such a risk might have been considered against public policy.

It will be observed that in some of the cases cited in this subdivision, the contention against the applicability of the incontestable clause is not so much that it would be contrary to public policy to permit a recovery in case of suicide, but that suicide is a risk entirely beyond the scope of the policy.

In *Mutual L. Ins. Co. v. Lovejoy* (1917) — Ala. —, L.R.A.1918D, 860, 78 So. 299, relied upon in *Supreme Lodge, K. P. v. Overton* (1919) — Ala. —, — A.L.R. —, 82 So. 443, a clause making a policy incontestable after two years was held to preclude the insurer from asserting the defense of suicide. The court said: "To allow the insurance company to set up this defense, in order to defeat the action, would be to ignore this clause of the contract, or to make and enforce a new contract for the parties. Without either affirming or denying that suicide while sane is a crime, or that it is not within the risk of a life insurance policy unless expressly so pro-

vided, or that, if so provided, the provision would be void as against public policy, we hold that the object and effect of the incontestable clause is to prevent any such questions from arising, or being set up by the insurer as a defense to an action on the contract, after the death of the insured. We fail to see why such a clause or provision is not valid, or why the courts should not enforce it. We cannot presume, in the absence of proof, that either party to the contract intended to violate the law, or to make a contract against public policy. If parties to an insurance contract or any other contract should attempt to incorporate a provision in violation of a statute or against public policy, the attempt would fail; the contract would be void, and would not be enforced by the courts. The contract of insurance here sued upon, on its face, shows no such attempt on the part of either party. The incontestable clause in question was not, so far as we are informed, intended by the parties, or either of them, to be given such effect. No court, so far as we are advised, has construed such clause. Certain it is that this court has never construed such a clause."

In the following cases, where it is not clear whether insurance against death by suicide was regarded as against public policy, provisions for incontestability after a stated period were held valid, although they did not expressly exclude cases of suicide, and were held to preclude the defense of suicide after the expiration of the incontestable period, notwithstanding that the policy also provided that the insurer should not be liable in case of suicide: *Mutual Protective League v. McKee* (1905) 122 Ill. App. 376, affirmed on other grounds in (1906) 223 Ill. 364, 79 N. E. 25; *Seymour v. Mutual Protective League* (1910) 155 Ill. App. 21; *Goodwin v. Provident Sav. Life Assur. Asso.* (1896) 97 Iowa, 226, 32 L.R.A. 473, 59 Am. St. Rep. 411, 66 N. W. 157; *Supreme Court of Honor v. Updegraff* (1904) 68 Kan. 474, 75 Pac. 477, 1 Ann. Cas. 309; *Mutual Reserve Fund Life Asso. v. Payne* (1895) — Tex. Civ. App. —, 32 S. W. 1063.

And the same conclusion has been reached where the policy contained an incontestable clause, and provided for the exclusion of liability if the insured should die in consequence of a violation of law, or his own criminal action. *Patterson v. Natural Premium Mut. L. Ins. Co.* (1898) 100 Wis. 118, 42 L.R.A. 253, 69 Am. St. Rep. 899, 75 N. W. 980. It expressly appears in this case that suicide was technically a crime.

The court in *Mutual Reserve Fund Life Asso. v. Payne* (1895) — Tex. Civ. App. —, 32 S. W. 1063, supra, said: "Plaintiff in error insists that the clause in the policy to the effect that, if it continue in force for five years from its date, it shall thereafter be incontestable for any cause, should not be construed to include the exemption from liability by suicide; that the clause does not mean that the association would be liable in case of suicide by the assured after the policy had continued in force for five years, because the policy did not contract for liability in case of suicide, but expressly declares that it would not be liable for death by suicide. Defendant in error's contention is that the clause should be construed to render the policy incontestable after it had been in force for five years, for any cause, though the death was by suicide. We agree with the defendant in error. The part of the policy which declares that 'death of a member by his own hand, whether voluntarily or involuntarily, sane or insane at the time, is not a risk assumed by the association in this contract,' should be construed in connection with the clause declaring it incontestable for any cause if continued in force for five years from its date. It should be construed as matter that would defeat liability as to other parts of the contract relating to conditions that would render it null and void. It was a stated condition, upon the happening of which the company would not be liable. The policy contracted positively to pay the beneficiary, in a certain time after proof of the death of the insured, \$3,000; and in a subsequent part of it, in which the duties of the insured were set out, and where conditions were

stated that would render it void, it was declared that the association did not assume liability or risk in case of death of the assured by his own hand,—equivalent to a stipulation or proviso that in case of death by suicide the association would not be liable upon the policy. This part of the policy was embraced in the clause declaring the policy incontestable for any cause after five years of life. It is a cause upon which the policy could have been contested, and is the cause now relied on in contesting its validity. The suicide clause of the contract upon death by suicide would make it null and void in the absence of the clause rendering the policy incontestable. The policy should be construed most strongly against the insurer, and in case of doubt because of ambiguity in stipulations it should be construed against the company."

III. Where there is a want of insurable interest.

It is held that, notwithstanding an incontestable clause, the insurer is entitled, after the expiration of the incontestable period, to defend on the grounds of want of insurable interest if the policy would otherwise have been void for lack of insurable interest. *Bromley v. Washington L. Ins. Co.* (1906) 122 Ky. 402, 5 L.R.A. (N.S.) 747, 121 Am. St. Rep. 467, 92 S. W. 17, 12 Ann. Cas. 685; *Brady v. Prudential L. Ins. Co.* (1890) 5 Kulp (Pa.) 505; *Clement v. New York L. Ins. Co.* (1898) 101 Tenn. 22, 42 L.R.A. 247, 70 Am. St. Rep. 650, 46 S. W. 561.

The court in *Bromley v. Washington L. Ins. Co.* (Ky.) *supra*, said: "It is also insisted for the plaintiff that as the policies contain a clause to the effect that they are incontestable after one year, the company cannot rely upon this defense. But the incontestable clause is no less a part of the contract than any other provision of it. If the contract is against public policy, the court will not lend its aid to its enforcement. The defense need not be pleaded. If at any time it appears in the process of the action that the contract sued upon is one which the law forbids, the court will refuse relief. The parties to an illegal contract can-

not, by stipulating that it shall be incontestable, tie the hands of the court and compel it to enforce contracts which are illegal and void. If this were allowed, then the law might be evaded in all cases, and the aid of the court might be secured in aid of its infraction."

And in *Anctil v. Manufacturers' L. Ins. Co.* [1899] A. C. (Eng.) 604, 68 L. J. P. C. N. S. 123, 81 L. T. N. S. 279, affirming (1897) 28 Can. S. C. 103, a clause in a policy that it should be incontestable after a year, during which premiums were paid, was held not to furnish an answer to the objection that the insured had no insurable interest as was required by statute. The court stated that the rule of the statute appeared to be one which rested upon general principles of public policy, or expediency, which could not be defeated by the private convention of the parties.

In *Wright v. Mutual Ben. Life Asso.* (1890) 118 N. Y. 237, 6 L.R.A. 731, 16 Am. St. Rep. 749, 23 N. E. 186, the defense that the beneficiary had no insurable interest in the life of the insured, and that the policy was taken out by the insured in pursuance of a fraudulent scheme devised by the beneficiary, was held within the operation of a clause providing for incontestability after two years. The opinion, however, is given over almost entirely to a discussion of the effect of the incontestable clause upon the defense of fraudulent representations, and it is not clear that the policy would have been avoided for lack of insurable interest, apart from the fraud, even in the absence of an incontestable clause.

IV. In case of fraud.

It will be observed that the scope of the annotation excludes from this subdivision all questions relating to the construction of the incontestable clause and all cases involving incontestable clauses which except fraud.

While the practice of fraud is against public policy, and fraud will, as a general rule, vitiate all contracts into which it enters, yet an incontestable clause in an insurance policy which allows the insurer a reasonable time for investigation is upheld and

given effect as against a claim of fraud.

It will be observed that in the reported case (*METROPOLITAN L. INS. CO. v. PEELER*, ante 441), a provision that the policy should be incontestable after one year was held not a stipulation to exempt from fraud, but an agreement affording ample time for establishing it, and was accordingly held not against public policy, or repugnant to a statute providing that all contracts having for their object the exemption of one from responsibility for his fraud are against the policy of the law.

And in the following cases, clauses providing for incontestability after a specified time were held valid, and the insurers were held precluded thereby from asserting the defense of fraud, on the theory that such a provision merely prescribed a short statute of limitations:

United States.—*Arnold v. Equitable Life Assur. Soc.* (1915) 228 Fed. 157; *Great Western L. Ins. Co. v. Snively* (1913) 46 L.R.A.(N.S.) 1057, 124 C. C. A. 154, 206 Fed. 20.

California.—*Dibble v. Reliance L. Ins. Co.* (1915) 170 Cal. 199, 149 Pac. 171, Ann. Cas. 1917E, 34.

District of Columbia.—*Prudential Ins. Co. v. Lear* (1908) 31 App. D. C. 184.

Georgia.—*Massachusetts Ben. Life Assn. v. Robinson* (1898) 104 Ga. 256, 42 L.R.A. 261, 30 S. E. 918.

Illinois.—*Weil v. Federal L. Ins. Co.* (1914) 264 Ill. 425, 106 N. E. 246, Ann. Cas. 1915D, 974; *Flanigan v. Federal L. Ins. Co.* (1907) 231 Ill. 399, 83 N. E. 178.

Indiana.—*Indiana Nat. L. Ins. Co. v. McGinnis* (1913) 180 Ind. 9, 45 L.R.A.(N.S.) 192, 101 N. E. 289, reversing (1912) — Ind. App. —, 99 N. E. 751; *Indiana Nat. L. Ins. Co. v. McGinnis* (1913) 180 Ind. 701, 101 N. E. 295, reversing (1912) — Ind. App. —, 99 N. E. 756; *Commercial L. Ins. Co. v. McGinnis* (1912) 50 Ind. App. 630, 97 N. E. 1018.

Kentucky.—*Kansas Mut. L. Ins. Co. v. Whitehead* (1906) 123 Ky. 21, 93 S. W. 609, 13 Ann. Cas. 301.

Louisiana.—*Mutual L. Ins. Co. v.*

New (1909) 125 La. 41, 27 L.R.A.(N.S.) 431, 186 Am. St. Rep. 326, 51 So. 61.

Massachusetts.—*Reagan v. Union Mut. L. Ins. Co.* (1905) 189 Mass. 555, 2 L.R.A.(N.S.) 821, 109 Am. St. Rep. 659, 76 N. E. 217, 4 Ann. Cas. 362.

Missouri.—*Williams v. St. Louis L. Ins. Co.* (1905) 189 Mo. 70, 87 S. W. 499; *Harris v. Security L. Ins. Co.* (1912) 248 Mo. 304, 154 S. W. 68, Ann. Cas. 1914C, 648.

New Jersey.—*Drews v. Metropolitan L. Ins. Co.* (1910) 79 N. J. L. 398, 75 Atl. 167.

New York.—*Wright v. Mutual Ben. Life Asso.* (1890) 118 N. Y. 237, 6 L.R.A. 731, 16 Am. St. Rep. 749, 23 N. E. 186; *Vetter v. Massachusetts Nat. Life Asso.* (1898) 29 App. Div. 72, 51 N. Y. Supp. 393; *People v. Alexander* (1918) 183 App. Div. 868, 171 N. Y. Supp. 881; *Bates v. United L. Ins. Asso.* (1893) 68 Hun. 144, 22 N. Y. Supp. 626, affirmed in (1894) 142 N. Y. 677, 87 N. E. 824; *Teeter v. United L. Ins. Asso.* (1899) 159 N. Y. 416, 54 N. E. 72.

North Carolina.—*American Trust Co. v. Life Ins. Co.* (1917) 173 N. C. 558, 92 S. E. 706.

Pennsylvania.—*Central Trust Co. v. Fidelity Mut. L. Ins. Co.* (1911) 45 Pa. Super. Ct. 313; *Gaughan v. Home L. Ins. Co.* (1915) 59 Pa. Super. Ct. 414; *Brady v. Prudential Ins. Co.* (1895) 168 Pa. 645, 32 Atl. 102; *Lawler v. Home L. Ins. Co.* (1915) 59 Pa. Super. Ct. 409.

Rhode Island.—*Murray v. State Mut. L. Ins. Co.* (1901) 22 R. I. 524, 53 L.R.A. 742, 48 Atl. 800.

South Carolina.—*Philadelphia L. Ins. Co. v. Arnold* (1913) 97 S. C. 418, 81 S. E. 964, Ann. Cas. 1916C, 706.

Tennessee.—*Clement v. New York L. Ins. Co.* (1898) 101 Tenn. 22, 42 L.R.A. 247, 70 Am. St. Rep. 650, 46 S. W. 561.

Texas.—*American Nat. Ins. Co. v. Briggs* (1913) — Tex. Civ. App. —, 156 S. W. 909; *Franklin Ins. Co. v. Ville-neuve* (1901) 25 Tex. Civ. App. 356, 60 S. W. 1014.

Wisconsin.—*Patterson v. Natural Premium Mut. L. Ins. Co.* (1898) 100 Wis. 118, 42 L.R.A. 253, 69 Am. St. Rep. 899, 75 N. W. 980.

The court in *Great Western L. Ins. Co. v. Snively* (1913) 46 L.R.A. (N.S.) 1057, 124 C. C. A. 154, 206 Fed. 20, supra, said: "The incontestable clause in the present policy is very general, excepting nothing from its scope, and by the strong current of authority precludes any defense after the expiration of one year on account of false statements, warranted to be true, although they may have been made for a fraudulent purpose. This is true as spoken of the original policy. The grounds for its support are that insurance companies, in order to obtain business, represented that they will issue policies incontestable as to certain matters after a designated period, and individuals negotiate with them on that basis. Furthermore, the clause constitutes in effect a short period of limitation, which it is perfectly competent for the parties to agree upon. While it is true that fraud vitiates all contracts, yet in contracts of the kind, where the beneficiaries are placed at a disadvantage because the dead cannot speak, it is not contrary to public policy for the parties to agree that the company shall be precluded upon the subject after some specified time, reasonable, within which to make investigation. The clause lends stability to the contract, and renders life insurance of greater value to the insured and beneficiary."

And in *Southern Union L. Ins. Co. v. White* (1916) — Tex. Civ. App. —, 188 S. W. 266, where a statute required insurers to insert a clause making the policy incontestable after two years, a provision that the policy should be incontestable after one year was held to preclude the insurer after one year from asserting fraud.

And in *Citizens' L. Ins. Co. v. McClure* (1910) 138 Ky. 138, 27 L.R.A. (N.S.) 1026, 127 S. W. 749, a clause providing that a policy should be incontestable after one year was held valid, and held to preclude the insurer from defending on the ground of fraud. In this case the provision was said to have no reference to limitations, but was said to be a waiver by

the insurer of the right to defend on the ground of fraud.

In some cases a clause providing for incontestability from date, and allowing no period for the insurer to investigate after the issuance of a policy, has been held valid, and given effect so as to bar the insurer from asserting fraud. *National Annuity Asso. v. Carter* (1910) 96 Ark. 495, 132 S. W. 633; *Duvall v. National L. Ins. Co.* (1916) 28 Idaho, 356, L.R.A. 1917E, 333, 154 Pac. 632, Ann. Cas. 1917E, 1112; *Union Cent. L. Ins. Co. v. Fox* (1901) 106 Tenn. 347, 82 Am. St. Rep. 885, 61 S. W. 62; *MacKendree v. Southern States L. Ins. Co.* (1919) — S. C. —, 99 S. E. 806; *Patterson v. Natural Premium Mut. L. Ins. Co.* (1898) 100 Wis. 118, 42 L.R.A. 253, 69 Am. St. Rep. 899, 75 N. W. 980.

The court in *MacKendree v. Southern States L. Ins. Co.* (1919) — S. C. —, 99 S. E. 806, supra, said: "It is plain that the expressed words of the contract declare that the policy shall 'be incontestable from date of issue.' It will not be denied by anybody that those words are broad enough to exclude a contest for fraud, and those courts which deny exclusion in such a case do so as a matter of 'public policy.' That is a wide domain of shifting sands. If such a policy demands the paramount protection of the insurer, then the clause ought not to prohibit the defense. But if such a policy demands as well the protection of the insured, then the clause ought to have a wider import than the insurer concedes to it. Thereabout the following reflections are pertinent. The insurer writes the policy, and it should be read most strongly against the writer; policies are usually periphrastic and sometimes ambiguous; the insured must take that tendered or none; propaganda has constituted life insurance to be almost one of the necessities of life; neither the insured nor the selling agent of the insurer are, as a rule, experts in the use of or in the interpretation of language; the ordinary man who buys a policy would judge the clause in issue to mean that which the plain words of it imply, and especially is that true when those

words, in the instant case, are printed in bold type; the insurer has unmeasured time before a contract is made to investigate the facts, and to that end the insured is called in the answers to the application to testify against himself; there is no reason why the truth may not be ascertained before as well as after the contract is made; clauses like the instant one are calculated to lure men into taking insurance who would not otherwise do so; differences about the health of the insured affect the very prerequisites of the contract, and are really the only facts to be settled before the contract is made; fraud resides in the intent of a party, and the inquiry about it ought not to be deferred until such time as he who had the intent is dead, and he who reasonably understood that such an inquiry could only be made in his lifetime; the insurer, by practice and experience, always and for its protection anticipates deception by the insured, and sets to work by exhaustive and ex parte methods to discover it; at the close of the inquiry the insurer has stipulated that there shall be no further contest about that matter, and the insured has gone to his death in that belief. Upon consideration of these matters there is no clear warrant for a court to affirm on which side of the case the largest and best public policies lie. The insurer inserted the clause in the contract; if its allowance by the courts shall promote concealment on the part of these who seek insurance, its disallowance by the court may promote the deception of these seeking insurance, and suggest to the insurer a fabrication of defenses to avoid its contracts. In such a contest we shall take no part, but leave the parties to the words of the instrument."

In some cases, however, clauses providing for incontestability from date have been held invalid as regards defenses of fraud, on the ground that they contravene public policy. *Massachusetts Ben. Life Assn. v. Robinson* (1898) 104 Ga. 256, 42 L.R.A. 261, 30 S. E. 918; *New York L. Ins. Co. v. Hardison* (1908) 199 Mass. 190, 127 Am. St. Rep. 478, 85 N. E. 410; *Reagan*

v. Union Mut. L. Ins. Co. (1905) 189 Mass. 555, 2 L.R.A. (N.S.) 821, 109 Am. St. Rep. 659, 76 N. E. 217, 4 Ann. Cas. 362.

The court in *Reagan v. Union Mut. L. Ins. Co.* (Mass.) supra, said: "We think the question intended to be presented by the report of the judge is the same as if the plaintiff's intestate had gone into the home office of the defendant and had made material representations as inducements to the issuing of a policy, and the defendant's manager had said: I will give you a policy relying on your representations. I do not know whether they are true or false; but however false and fraudulent they may be, the company will never avail itself of the fraud as a defense to a suit upon the policy,"—and had then given him a policy containing this clause. Will the court enforce an agreement never to set up fraud in defense to a contract, when the contract is made in reliance upon material representations that may be true or false? This question has been considered in its application to contracts of insurance. In *Wheelton v. Hardisty* (1857) 8 El. & Bl. 283, 120 Eng. Reprint, 106, 27 L. J. Q. B. N. S. 241, 5 Jur. N. S. 14, 6 Week. Rep. 539, Lord Campbell interpreted a provision that a contract should be indefensible as meaning indisputable, 'subject to an implied exception of personal fraud, which will vitiate every contract.' In *Massachusetts Ben. Life Assn. v. Robinson* (1898; Ga.) supra, the court said: 'A policy providing generally that it should be incontestable from its date, but silent on the subject of defending upon grounds originating in fraud, would still be a valid contract. The waiver of the right to defend on the ground of fraud not being the subject of express stipulation, the law would imply that the insurer intended to reserve to himself the right to defend upon that ground. If, however, the policy stipulated that it should be incontestable from its date, and the insurer should not be allowed any defenses, whether originating in fraud or otherwise; or if it were clear from the terms of the contract that it was the intention of

the parties that fraud should not be a defense,—then such a contract would be void as being opposed to the policy of the law.’”

And in *Welch v. Union Cent. L. Ins. Co.* (1899) 108 Iowa, 224, 50 L.R.A. 774, 78 N. W. 858, a provision that a policy should be incontestable for any cause but misstatement of age, “except as hereinbefore provided,” was held not to preclude the insurer from relying on a breach of the warranties in the application, which was a part of the contract, and the statements in which were made the basis of the policy. The court stated that probably the most conclusive reason why the defense might be asserted was that fraud vitiates every contract into which it enters, and that an agreement that an insurer will not raise any objection even in the case of fraud is void, that fraud, if not mentioned, must be assumed to have been excluded, since that construction is always favored which will support a contract.

In *New York L. Ins. Co. v. Manning* (1910) 124 N. Y. Supp. 775, the court said that the policy expressly declared that it was incontestable, and that the insurer could not avoid its obligation on the ground of fraud or misrepresentation. The phraseology of the provision involved, however, does not appear.

In *New York L. Ins. Co. v. Weaver* (1902) 114 Ky. 295, 70 S. W. 628, where the insurer was suing the insured’s administrator to recover the amount paid on the policy, the court stated that if, as alleged, the policy was obtained by fraud, they thought there could be no doubt that notwithstanding the incontestable clause, a court of chancery would have canceled the policy in a suit for rescission brought within a reasonable time. A recovery was refused in this case, however, on the ground that suit for rescission had not been brought within a reasonable time and because it had failed to set up the defense of fraud when sued on the policy. J. T. W.

L. G. OCHSENREITER, Respt.,

v.

JOSEPH BLOCK, Appt.

South Dakota Supreme Court — July 22, 1910.

(— S. D. —, 173 N. W. 734.)

Bills and notes — note payable to order of maker.

1. That a note is payable to the order of the maker is not sufficient to excite the suspicion of a purchaser so as to prevent his becoming a bona fide holder.

[See note on this question beginning on page 458.]

— duty of purchaser — inquiry.

2. One contemplating the purchase of a note is not bound to inquire of the maker whether or not he has defense to it, although he is in telephonic communication with him.

[See 3 R. C. L. 1072-1075.]

Appeal — finding of jury.

3. The finding of the jury on conflicting evidence upon the question whether or not a note was procured from the maker by fraud is conclusive on appeal.

[See 2 R. C. L. 194.]

— presumption as to instruction.

4. The appellate court will assume that the trial court submitted an issue under proper instructions, if the instructions are not in the record.

[See 2 R. C. L. 219.]

Bills and notes — notice of infirmity — what constitutes.

5. To charge the purchaser of a note with notice of infirmity in it he must have had actual knowledge of it or knowledge of such facts that his action in taking the instrument amounts to bad faith.

[See 3 R. C. L. 1071, 1072.]

(— S. D. —, 178 N. W. 734.)

Pleading — amendment to conform to proof — discretion.

6. Permitting amendments of a complaint counting on a note payable to maker so as to show that it was pay-

able to the order of maker for the purpose of making the pleading conform to the proof is within the discretion of the trial judge.

[See 21 R. C. L. 579 et seq.]

APPEAL by defendant from a judgment of the Circuit Court for Day County (Bouck, J.) and from an order denying a new trial in an action brought to recover the amount alleged to be due on a promissory note. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Waddel & Dougherty for appellant.

Mr. Rex W. Harris, for respondent:

Where a note is made payable to a corporation and is indorsed by a person signing as an officer thereof, the indorsement will be presumed to be a corporate act.

Page v. Ford, 65 Or. 450, 45 L.R.A. (N.S.) 247, 131 Pac. 1013, Ann. Cas. 1915A, 1048; Merrill v. Hurley, 6 S. D. 592, 55 Am. St. Rep. 859, 62 N. W. 958; Iowa Nat. Bank v. Sherman, 17 S. D. 396, 106 Am. St. Rep. 778, 97 N. W. 12; 7 R. C. L. § 437; 10 Cyc. 904, note 74.

Mere suspicious circumstances will not defeat a recovery.

First Nat. Bank v. Flath, 10 N. D. 281, 86 N. W. 867; American Nat. Bank v. Lundy, 21 N. D. 167, 129 N. W. 99; Citizens' Trust & Sav. Bank v. Empey, 34 S. D. 361, 143 N. W. 606.

Polley, J., delivered the opinion of the court:

This action is brought to recover on a promissory note. Plaintiff is an indorsee of the note and claims to have acquired it for value and in due course, without notice. Plaintiff had judgment, and defendant appeals.

A number of defenses are pleaded in the answer that might have been available against the original payee of the note, but which are not available against the plaintiff, if he is in fact an indorsee in due course. There is no question but that plaintiff paid practically full face value for the note, and it is not claimed that he had actual knowledge of any defect or infirmity in the note. The form of the note was somewhat out of the usual order. It reads: ". . . I promise to pay to the order of myself. . . ." It is then signed by defendant, and

by him indorsed on the back. While this is not in the ordinary form, there is nothing about it to excite suspicion or to put

Bills and notes—note payable to order of maker.

plaintiff upon inquiry. It was shown at the trial that at the time plaintiff purchased the note he was only a few miles distant from defendant, and that telephone connections were at hand, but that plaintiff made no inquiry, or any attempt whatever, to find out whether the defendant had any defense to the note. But it was

not incumbent upon plaintiff to make

—duty of purchaser—inquiry.

such inquiry. The note being negotiable in form and regular upon its face, plaintiff had a right to rely upon it under the law. Defendant alleged in his answer, and at the trial produced evidence to prove, that the note was procured from him through fraud and false representations. But upon this subject the evidence was conflicting, and in the absence

of the instructions of the court upon

—presumption as to instruction.

this question we must presume that the court submitted the matter to the jury under a proper instruction, and that the jury found against defendant upon the facts. Upon the question of plaintiff's good faith in acquiring the note, the trial court charged the jury that "the purchaser of a promissory note cannot rely alone upon the fact that he has no information of any defect, defense, or defect of title, or infirmity in or to the same, in order to constitute him a purchaser in good faith, but he must go further, and show that he

has used the means that an ordinarily prudent person would use to ascertain the manner in which the note was obtained from the maker. He is not permitted to refrain from making inquiry, but the burden is upon him to show that he has used the ordinary means to ascertain whether or not the note is valid in the hands of the vendor."

If this instruction were unqualified, and correctly stated the law, defendant would have been entitled to a verdict under the facts in the case; but upon the same subject the court gave a further instruction, as follows: "And further, to constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect or knowledge of such facts that his action in taking the instrument amounted to bad faith."

This instruction correctly states the law, and, as there was no evidence to show that plaintiff had actual knowledge of any infirmity or defect in the note, or any knowledge to

**Bills and notes—
notice of infirmity—what constitutes.**

put him upon inquiry, the jury was warranted in finding for the plaintiff. It may be that the trial court regarded the last-quoted instruction as a qualification of the first, and the verdict indicates that this was the understanding of the jury.

It is alleged in the original complaint that the note, as executed by defendant, was payable to "himself." During the trial, plaintiff asked leave of the court to amend the complaint so as to make it read, payable to "himself or order." The amendment was allowed, and the allowance thereof is assigned as error. The allowance of this amendment

was clearly within the discretion of the trial court. No question of identification of the note was involved. The amendment was made for the purpose, and it was so stated by the trial court at the time, of making the complaint conform to the proof.

**Pleading—
amendment to conform to proof—discretion.**

This disposes of the case, and it is not necessary to consider the matters involving the circumstances under which the note was executed and delivered to the original payee.

The judgment and order appealed from are affirmed.

ANNOTATION.

Fact that note is made payable to maker as affecting bona fides of purchaser.

The effect of the fact that a note is payable to the maker upon the bona fide character of a purchaser thereof has not received much judicial attention. That it does not charge a purchaser with notice is the conclusion reached in the reported case (*OCHSENREITER v. BLOCK*, ante, 456), and this is the necessary implication from the holding that the purchaser was a bona fide holder in *Clark v. Whitaker* (1906) 117 La. 298, 41 So. 580, although there is no discussion in the latter case.

A person holding in his possession and under his control, before maturity, a promissory note made to the order of the maker and indorsed by him, may be presumed, as between that person and the public, the owner of the same,

or as agent with full power to dispose of it so that one purchasing the note from such agent is not under obligation to inquire as to the authority of the agent. *Theard v. Gueringer* (1905) 115 La. 242, 38 So. 979.

One who takes in payment of equipment furnished to a contractor for the construction of a street railway, notes made by and payable to the contractor himself, containing the indorsement of the company for which the maker is performing work, is held, in the absence of evidence that the debt is in fact that of the indorser, chargeable with knowledge that the indorsement is merely for accommodation, and therefore ultra vires, in *B. G. Brill Co.*

v. Norton & T. Street R. Co. (1905) 189 Mass. 431, 2 L.R.A. (N.S.) 525, 75 N. E. 1090.

The fact that one takes a bill or note from the drawer or maker has been considered upon the question of his good faith in case of a bill payable to the drawer. *Merritt v. Duncan* (1872) 7 Heisk. (Tenn.) 156, 19 Am. Rep. 612. It is held that the fact that the drawer

of a bill after it has been indorsed has it in his possession for sale does not, as matter of law, carry with it the force of notice of prior equities to a purchaser, but it is a fact which may have weight or not according to the surrounding circumstances to be looked to in determining whether the purchaser had notice or not.

W. A. E.

B. A. KONICK, Appt.,

v.

WELDON V. CHAMPNEYS, Respt.

Washington Supreme Court (Dept. No. 2)—July 31, 1910.

(— Wash. —, 183 Pac. 75.)

License — to enter apartment house — delivery of supplies.

1. One from whom supplies are ordered by a tenant of an apartment house has an implied license to enter the building to deliver them.

[See note on this question beginning on page 465.]

Pleading — two causes of action — insufficient statement of one.

2. The ineffectual attempt to state a second cause of action in a complaint is not cause for demurrer for improperly uniting two causes of action, but the allegations will be treated as merely redundant matter.

[See 21 R. C. L. 523.]

Assault — ejection of one delivering supplies in apartment house.

3. One who, in attempting to exercise his implied license to deliver supplies to a tenant of an apartment house, is wantonly and unlawfully assaulted by the owner of the building, has a right of action against him for assault.

[See 2 R. C. L. 557-559.]

Landlord and tenant — apartment house — rights of persons having business with tenant.

4. The owner of a building who fits it up for business or office uses and lets rooms therein to tenants, retaining control over the entrance ways to such rooms, impliedly invites all persons to enter the building whose entry is naturally incident to the business carried on by the tenant.

[See 16 R. C. L. 1072, 1073.]

— duty of owner.

5. To one having business with tenants, the owner of an apartment house

owes the same duty of care which he owes to the tenants; he must keep the ways reasonably safe for him and permit his entry at all reasonable hours.

[See 16 R. C. L. 1067.]

— right to revoke license.

6. The owner of an office building occupied by professional tenants may revoke at pleasure the license to enter of peddlers, solicitors, and persons seeking a purchaser for something which they have to sell.

Injunction — against interference with right to enter a building.

7. Injunction lies in favor of one from whom supplies have been ordered by a tenant of an apartment house to prevent the owner of the building from interfering with his right to enter the building to deliver them.

Definition — apartment house.

8. An apartment house is a building arranged in several suites of connecting rooms, each suite designed for independent housekeeping, but with certain mechanical conveniences, such as heat, light, or elevator service, in common to all families occupying the building.

Landlord and tenant — apartment house — regulation for delivery of supplies.

9. The regulations promulgated by

the owner of an apartment house for the delivery of supplies to tenants must be reasonable, and not so stringent as to amount to a practical denial of the right of delivery.

Pleading — joinder of causes of action — assault and injunction.

10. A cause of action for assault up-

on one seeking to enter an apartment house to deliver supplies to tenants, and for injunction against further interference with such entry, cannot be united in the same complaint under a statute permitting the uniting of two or more causes of action when they arise out of the same transaction.

APPEAL by plaintiff from a judgment of the Superior Court for King County (Hall, J.) dismissing an action brought to recover damages for alleged unlawful assault on plaintiff when delivering supplies to a tenant in an apartment house, and for an injunction to restrain defendant from interfering or preventing plaintiff from making deliveries in such house. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Million & Houser, for appellant:

The fact that two or more causes of action are not separately stated is not ground for demurrer.

Richardson v. Carbon Hill Coal Co. 10 Wash. 651, 39 Pac. 95; Peterson v. Pantheon Lumber Co. 62 Wash. 190, 113 Pac. 562.

If all other requisites of the statute are complied with, legal causes of action of the most dissimilar character may be united in one proceeding, provided they all arise out of the same transaction, or out of transactions connected with the same subject of action.

Pom. Code Rem. 3d ed. 463; Harding v. Ostrander R. & Timber Co. 64 Wash. 232, 116 Pac. 635; Littlefield v. Bowen, 90 Wash. 287, 155 Pac. 1053, Ann. Cas. 1918B, 177; Stilwell Bros. v. Union Machinery & Supply Co. 94 Wash. 62, 161 Pac. 1043; Welch v. Northern Bank & T. Co. 100 Wash. 352, 170 Pac. 1029.

An implied license is given to any and all persons to enter the apartment house upon business.

25 Cyc. 642.

Messrs. George B. Cole and John Wesley Dolby, for respondent:

Plaintiff is required to clearly point out each error that he relies upon for a reversal.

Haugh v. Tacoma, 12 Wash. 386, 41 Pac. 173, 43 Pac. 37; Perkins v. Mitchell, L. & S. Co. 15 Wash. 470, 46 Pac. 1039; Doran v. Brown, 16 Wash. 703, 48 Pac. 251; Sengfelder v. Hill, 21 Wash. 371, 390, 58 Pac. 250; State v. Hanover, 55 Wash. 403, 407, 104 Pac. 624, 107 Pac. 388.

If several causes of action are joined in one complaint they must be sep-

arately stated, even in equity, or the complaint will be stricken.

Hockersmith v. Ferguson, 51 Wash. 256, 98 Pac. 670.

Plaintiff had no vested right to enter the apartment house. If he had any right at all it was merely implied, merely a license, and such a license can be revoked at the option of the licensor.

25 Cyc. 644; Marston v. Gale, 24 N. H. 176.

Fullerton, J., delivered the opinion of the court:

To the complaint of the plaintiff in this action the defendant interposed a demurrer, on the grounds: (1) That several causes of action have been improperly united; and (2) that the complaint does not state facts sufficient to constitute a cause of action. The demurrer was sustained by the trial court, whereupon the plaintiff elected to stand thereon and not plead further. The court then entered a judgment dismissing the action with costs, from which judgment the plaintiff appeals.

The complaint, omitting the formal parts, is as follows:

"I. That at all the times herein-after mentioned the plaintiff has been and is now engaged in the occupation and business of carrying on and conducting a retail grocery store at 277 Bellevue avenue north, in Seattle, King county, Washington.

"II. That at all the times hereinafter mentioned the defendant is

the owner, manager, and has charge of that certain apartment house known as the 'Carlyle Apartments,' situated at 320 Summit avenue north, in the city of Seattle, King county, Washington.

"III. That heretofore on the — day of October, 1917, the plaintiff received by phone an order from one of the tenants or occupants of the apartments in said Carlyle apartment house for groceries, and the plaintiff, answering said call and order, went personally to said apartment house for the purpose of making delivery of said groceries, whereupon the defendant met the plaintiff at the rear entrance of said apartment house, the same being the customary place for the delivering of such articles as groceries, and thereupon the defendant did, in a rude, insolent, angry, and contemptuous manner, forbid plaintiff entering said apartment house or making said deliveries, and did wantonly, recklessly, and unlawfully then and there assault, beat, and bruise the plaintiff, by shaking him, pulling his ears, and talking to him in a loud, insolent, and boisterous manner, and did with force prevent the plaintiff entering said premises and apartment house.

"IV. That by reason of the said conduct of the said defendant plaintiff suffered great pain and anguish of body and mind, all to his great damage in the sum of \$500.

"V. That the plaintiff has several customers in said apartment house, and at whose invitation the plaintiff is anxious and willing to sell his goods, wares, and merchandise, but that the defendant wrongfully refuses to allow the plaintiff to enter upon said premises, or to deliver groceries to his tenants in the said apartments, and threatens to do the plaintiff great bodily harm should he attempt to make delivery thereof, thereby damaging plaintiff's business, but such damages are uncertain and difficult to ascertain, and are therefore irreparable.

"Wherefore, plaintiff prays for a

judgment and decree of this court as follows:

"First. Awarding plaintiff damages in the sum of \$500.

"Second. For a permanent injunction enjoining the defendant from in any manner interfering and molesting plaintiff or preventing him from making deliveries of groceries in the usual, customary, and ordinary manner to tenants in said apartment house, and that plaintiff have any other and further and different relief to which he may be entitled."

The record does not disclose the grounds upon which the trial court sustained the demurrer. A due determination of the issue joined, however, requires a consideration of both of the grounds stated therein. There was plainly an attempt to state two causes of action. If, therefore, the pleader succeeded in stating two causes of action, and these causes are improperly united, the demurrer was rightly sustained, since the Code expressly makes the improper uniting of two or more causes of action a ground for demurrer. Rem. Code, § 259, subd. 5. If, on the other hand, the pleader stated one good cause of action, but failed in his facts as to the other, it was the duty of the court to overrule the demurrer and retain the case for trial upon the cause of action well stated. The allegations made in the attempt to state the other cause of action would be irrelevant and redundant matter, which it is the office of a motion, not a demurrer, to reach. Rem. Code, § 286.

Pleading—two causes of action—insufficient statement of one.

The first question to be considered then is, Are there two causes of action stated in the complaint? That there is a cause of action stated for personal injuries arising from an assault and battery can hardly be doubted. The allegations are that the appellant, a grocer, received an order for groceries from a tenant in the respondent's apartment house; that he went personally to the apart-

ment house to make delivery of the groceries, and was met by the respondent at the rear entrance to the house, the same being the customary place for the delivery of such articles as groceries, and was there wantonly and unlawfully assaulted and beaten by the respondent, to his damage in a stated sum of money. There is nothing to show that he had been theretofore forbidden to enter the premises for the delivery of groceries, or that he was acting otherwise than in an orderly and peaceful manner.

License—to enter apartment house—delivery of supplies.

Plainly, therefore, he had an implied license to enter for the purposes intended, or, at least, was not a trespasser in so doing, and the respondent had no cause to assault and beat him for making the attempt. More than this, it is alleged that the assault was wanton and unlawful. If this be true, and for the purposes of the demurrer it must be so considered, the assault gave rise to a cause of action, even though the attempt to enter the building to deliver the groceries was wrongful, since these words negative the presumption that the assault and battery may have been necessary to prevent a wrongful act.

Is there stated a cause of action for injunctive relief?

It is a well-settled rule that when the owner of a building fits it up for business or office uses, and leases rooms therein to tenants, retaining

Landlord and tenant—apartment house—rights of persons having business with tenant.

control over the entrance ways to such rooms, he impliedly invites all persons to enter the building, whose entry is naturally incident to the business carried on by the tenant.

"The rule of implied invitation may be stated as follows: Invitation as distinguished from mere license is implied by law only when the visitor comes for some purpose connected with the business in

which the owner or occupant is there engaged, or which he permits there to be carried on, and there must be some real or supposed mutuality of interest in the subject to which the visitor's business relates." *Gasch v. Rounds*, 93 Wash. 317, 160 Pac. 962.

It is a well-settled rule also that the duty of care which the owner of such a building owes to invitees differs from the duty of care he owes to a mere licensee. If the building be open, and there is nothing to indicate that strangers are not wanted, any person may enter without becoming a trespasser, but the owner owes him no duty of care, other, perhaps, than the negative one of not wantonly injuring him. To the invitee, however, he owes the same duty of care that he owes to the tenant; he must keep the ways reasonably safe for him, and must permit entry at all reasonable hours. *Gasch v. Rounds*, supra; *Stanwood v. Clancey*, 106 Me. 72, 26 L.R.A. (N.S.) 1213, 75 Atl. 293.

The rule presupposes, of course, that the invitee enters at a reasonable hour, conducts himself in an orderly manner, and, as said in the case cited from this court, enters on some business in which the tenant has an interest. In the case where the tenant is a lawyer, doctor, architect, or other professional man, the rule would include a person who enters to consult him on professional business, and, in the case of a manufacturer of or dealer in commodities, would include a person entering for the purpose of dealing with relation to such commodities. It would not, however, include a peddler or solicitor, or a person seeking a purchaser for something he had to sell. Such persons, even if they are expressly permitted to enter

—right to revoke license.

onto the premises, are mere licensees, and their right of entry is subject to be revoked by the owner at any time and for any cause that may seem to the owner sufficient.

It follows from these principles,

we think, that an invitee has privileges in the premises which he can enforce in his own right. Certainly, under all of the cases, he can recover for personal injuries suffered by him caused by the negligence of the owner, and it would seem equally plain that if his right of entry is wrongfully interfered

**Injunction—
against interference with
right to enter a
building.**

with by the owner, he can have, at least as the practice is administered in

this state, injunctive relief against the denial of the right.

The legal status of the owner of an apartment house is not essentially different from that of the owner of office or business buildings generally. Such a house has been defined

**Definition—
apartment
house.**

as a building arranged in several suites of connecting

rooms, each suite designed for independent housekeeping, but with certain mechanical conveniences, such as heat, light, or elevator services, in common to all families occupying the building. *Kitching v. Brown*, 180 N. Y. 414, 70 L.R.A. 742, 73 N. E. 241. The owner of such a building, when he leases the rooms therein for the purposes intended, confers rights in the tenants, not only in the rooms actually leased, but rights in the common entrance ways to such rooms, notwithstanding he may have retained control of them for the common use of all of his tenants. Since the leasing is for housekeeping purposes, among these rights is the right to carry through such entrance ways the commodities necessary for their sustenance. Having this right, the tenant can, in the absence of a special covenant to the contrary, confer it upon another, and that other, when the right is so conferred, becomes an invitee of the owner. The rule applies to a grocer from whom groceries are ordered, when ordered with the understanding or agreement that they shall be delivered. He has business with an occupant of the building, in which business the

occupant has an interest. It is not, of course, intended to be said that the owner of an apartment house may not make reasonable regulations governing the use of the entrance ways to the building. He may, as he seems to have done in this instance, provide a place for the delivery of commodities to his tenants, and require such commodities to be delivered at that place, and, as before indicated, can require entrance to be made at reasonable hours and in an orderly manner; and it may be also that for just cause he can forbid a particular person or particular persons from entering. But the regulations must be reasonable, they must not be so stringent as to amount to practical denial of the right.

**Landlord and
tenant—apartment house—
regulation for
delivery of
supplies.**

In the light of these considerations we think the complaint, although somewhat meager in its allegations, states facts sufficient to sustain a judgment awarding injunctive relief. The complaint therefore states two causes of action, and the question arises, Are they improperly united? The appellant argues that they are not, and calls to his assistance that section of the Code which permits two or more causes of action to be united in one complaint when they arise out of the same transaction. *Rem. Code*, § 296. But we cannot think the statute aids the appellant. Discussing this provision of the statute, Mr. Pomeroy, in his work on Remedies and Remedial Rights, § 474, says: "It is clear that every event affecting two persons is not necessarily a 'transaction' within the meaning of the statute; indeed, the word as used in common speech has no such signification. 'Transaction' implies mutuality, something done by both in concert, in which each takes some part. Much less can it be said that, because two events occur to the same persons at the same time, they are necessarily so connected as to become one transaction.

The case cited above, in which a cause of action for an assault and battery and one for a slander were united, illustrates this statement. Two events happened simultaneously, the beating and the defamation, but neither was a 'transaction' in any proper sense of the word. The wrong which formed a part of one cause of action was the beating; that which formed a part of the other was the malicious speaking. The plaintiff's primary rights which previously existed were broken by two independent and different wrongs. The only common point between the causes of action was one of time; but this unity of time was certainly not a 'transaction.' Much of the difficulty in construing this language has resulted, I think, from a failure to apprehend the true nature of a 'cause of action,' from a forgetfulness that it includes two factors—the primary right and the wrong which invades it. A 'cause of action' cannot be said to 'arise out of' an event, when the event produces or contains but one of these factors, the delict or wrongful act."

The case referred to in the quotation is *Anderson v. Hill*, 53 Barb. 238. The complaint united a cause of action for an assault and battery with one for slander, alleging that the defamatory words were uttered while the beating was in actual progress. To a demurrer for a misjoinder it was answered that both causes of action arose out of the same transaction. Passing upon the question the court said: "It is claimed, however, by the plaintiff's counsel that the assault and battery and the slander arose out of the same transaction, inasmuch as both causes originated or occurred at the same period of time, and therefore both belong to the first class. This is what is held in *Brewer v. Temple*, 15 How. Pr. 286. But it by no means follows that, because the two causes of action originated or happened at the same time, each cause arose out of the same transaction.

It is certainly neither physically nor morally impossible that there should be two transactions occurring simultaneously, each differing from the other, in essential attitudes and qualities. As here, the transaction out of which the cause of action for the assault springs is the beating, the physical force used; while the transaction out of which the cause of action for slander springs is not the beating, or the force used, but defamatory words uttered. The maker of a promissory note might, at the very instant of its delivery and inception, falsely call the payee a thief; and yet who would say that the two causes of action arose out of the same transaction? It has been held that a contract of warranty and a fraud practised in the sale of a horse, at the same trade, did not arise out of the same transaction, so as to be connected each with the same subject of action, and that a complaint containing both causes of action was demurrable. *Sweet v. Ingerson*, 12 How. Pr. 331. This was a general term decision, and of course as authority has greater weight than that of *Brewer v. Temple*. Assault and battery and slander are as separate and distinct causes of action as any two actions which can be named. True they are both torts, but they do not belong to the same category or class, either at common law or by the Code. Indeed the Code, in express terms, enumerates and classifies them separately. The subjects of the two actions are not connected with each other. Each subject of action is as distinct and different from the other as the character of an individual is from his bodily structure. The question is not whether both causes of action sprang into existence at the same moment of time. Time has very little to do in solving the real question. The question is, Did each cause of action accrue or arise out of the same transaction, the same thing done? It is apparent that

each cause of action arose, and indeed must necessarily have arisen, out of the doing of quite different things by the defendant. Different in their nature and all their qualities and characteristics, and inflicting injuries altogether different and dissimilar. The same evidence would not sustain either cause of action, and they may require different answers."

Within the principles here announced the complaint plainly im-

properly unites two causes of action, and since the Code, Pleading—joinder of causes of action—assault and injunction. as we have shown, makes the improper uniting of two or more causes of action a distinct ground of demurrer, the demurrer was properly sustained.

The judgment is affirmed.

Mount and Parker, JJ., concur.

Petition for rehearing denied, September 24, 1919.

ANNOTATION.

Right of third person to enter premises against objection of the landlord.

- I. Where lease covers entire premises, 466.
- II. Where lease is of portion of premises:
 - a. In general, 466.
 - b. Where reasonable means of access to tenant is provided, 467.
- III. Where landlord ejects third person at request of tenant, 467.

I. Where lease covers entire premises.

This note does not treat the question as to the right of action by a landlord against third persons for trespassing upon or injuring the leased premises. The term "third person," as herein used, has reference to trespassers, licensees, and invitees of tenants, but it does not include members of the tenant's family.

Of course, where the owner of premises leases the same without any reservation of any part thereof, the status of the lessee as to the premises is very similar to that of a purchaser. The only substantial difference, so far as concerns the question here raised, is that his estate is limited. Hence the landlord would have nothing to do with the right of third persons to go upon the premises, providing they did not commit a trespass amounting to an injury to the landlord's property.

For example, in *Mitchell v. State* (1913) 12 Ga. App. 557, 77 S. E. 889, in reversing the conviction of a husband for going upon the premises of which his wife was the tenant, where the prosecution was in behalf of the landlord, the court said: "The house

and yard were in the possession of the wife of the accused as a tenant of the owner. She had sufficient dominion and control over the premises to forbid a trespass by another. *Bryce v. State* (1901) 113 Ga. 705, 39 S. E. 282. One entitled to the possession of land is for the time being entitled to the undisturbed enjoyment of such right, regardless of who is the true owner. . . . In the absence of a special contract, the landlord has no right to forbid a person to go upon the premises in the possession of a tenant, by the latter's permission and for a lawful purpose. The tenant has the right to select his own guests and have them come upon the rented premises for a proper purpose at such times as may suit the convenience of the tenant and the guest. The right to the undisturbed enjoyment of the rented premises necessarily carries with it freedom from the dictation of the landlord in reference to the personnel of the tenant's guests. The statute must be strictly construed in the light of this well-recognized principle of law. Where the land is in the possession of the owner, either actually or constructively, he can forbid a trespass upon it. But, where he has surrendered possession to another, 'the person entitled to the possession for the time being' has the exclusive right to say who shall come upon the premises for a lawful purpose. Furthermore, it appears that the accused went upon the rented premises for the purpose

of paying a visit to his wife, and with her permission, so far as the evidence disclosed. We are unwilling to hold that one who has rented a house to a man's wife can lawfully forbid the husband to visit her at any time when it suits their convenience. It does not appear that the field was rented to the wife, but it does affirmatively appear that the house was so rented; and of course this carried with it the right to use so much of the yard as was necessary for the undisturbed enjoyment of the rented premises. The fact that the husband and the wife had been living separate and apart makes no difference. The law encourages reconciliation, and will be slow to approve any conduct or act of a third person which is designed to prevent a husband and wife from living together. By the landlord's own admissions in this case, it seems to have been his purpose to keep the husband and wife separate and apart, in order that he might obtain the benefit of the wife's labor. This conduct of the landlord was wholly unjustifiable, and the conviction of the accused cannot be sustained."

In *Montgomery v. Com.* (1901) 99 Va. 333, 37 S. E. 841, it was held that a person upon rented premises had a right to defend himself against an assault by the owner of the premises, in an attempt to compel him to leave. In so holding, the court pointed out that the person assaulted was on premises the right to which was in the tenant, and not in the landlord, and the latter had no right to order him away.

In *Suggs v. Anderson* (1853) 12 Ga. 461, the owner of premises violently dragged a woman out of the house occupied by a tenant, the assaulted party being there with the consent of the tenant. Under these circumstances, the owner was held guilty of assault and battery, and the fact that the injured person had been talking about the defendant and his wife was held to be no justification for the assault.

II. Where lease is of portion of premises.

a. In general.

The question, however, is presented with reference to property leased to

different tenants, where the landlord retains control of passageways, hallways, etc., for the use of the different tenants in common. In such case it is clear that each tenant has the right to make reasonable use of that portion of the premises retained for the use of the different tenants in common; and so also have third persons who come upon the premises at the express or implied invitation of a tenant, and the landlord is not justified in unreasonably restricting the right of such third person to come upon the premises.

Williams v. Lubbering (1906) 73 N. J. L. 317, 63 Atl. 90, 20 Am. Neg. Rep. 115; *Brendlin v. Beers* (1911) 144 App. Div. 403, 129 N. Y. Supp. 222, reversing (1910) 68 Misc. 310, 123 N. Y. Supp. 1062; *KONICK v. CHAMPNEYS* (reported herewith) ante, 459.

In *Williams v. Lubbering* (N. J.) supra, the janitor of an apartment building, under the instruction of his employer, the owner thereof, undertook to prevent an iceman accustomed to deliver ice to a tenant, from entering the premises for the purpose of delivering ice, under an arrangement with the tenant; the janitor undertook to hold the doors through which the iceman had to pass, and was pushed aside by the latter and injured; it did not appear that the latter used more force than was necessary to enter the premises. It was held that he was not guilty of an assault and battery upon the janitor. The doctrine is here stated that "when a landlord rents apartments to another he impliedly grants all that is indispensable for their free use and full enjoyment, and he cannot deprive a lessee of ingress and egress to such apartments at all hours and times. . . . Nor can the landlord object to the free use of the bell and knocker, halls, staircase, or passageways, or any of the necessary adjuncts of his furnished apartments unless it be otherwise stipulated at the time of the taking of the apartments. . . . Not only is the lessor himself entitled to egress and ingress, but so are those who visit him. To such the landlord, who controls the entrance, is liable for any injury resulting from an imperfectly constructed or repaired

or lighted passage. The landlord is liable because such persons are not trespassers, but are exercising a legal right to use the passage. In the language of Mr. Justice Magie, the use of the apartments and dwelling necessitates the use of the passage by tradesmen in delivering goods, by persons having other business with the occupants, and by those who visit him for social purposes. . . . Now if the tenant himself, and his visitors, and the tradesmen delivering goods have a right to pass through such a passage, the landlord has no authority to prevent the enjoyment of such right, so long as it is exercised in a proper manner. Nor has the landlord the right to select the visitors, or the tradesmen, or the tradesmen's servants, so long, at least, as they are decent in character and behavior. The tenant is at liberty to receive whom he pleases and engage any tradesman or deal with any merchant at his pleasure. The defendant having a right to use this way, he had a right to remove any obstruction which deprived him of this use, and if that obstruction was, in part, the person of the plaintiff, the defendant had a right, after warning the plaintiff of his purpose, to use adequate force to remove him."

A somewhat similar case is the reported case (*KONICK v. CHAMPNEYS*, ante, 459) which sustains the right of a grocer to recover damages for an assault and battery upon him by the landlord of an apartment house while the grocer was attempting to deliver groceries which a tenant had ordered of him.

b. Where reasonable means of access to tenant is provided.

Of course, if the landlord provides a reasonable method or means for tradesmen and others under express or implied invitation of a tenant to enter upon the premises, it is the duty of such invitee to make use of the means

provided, and he is not entitled to use any other method. This is the holding in *Brendlin v. Beers* (1911) 144 App. Div. 403, 129 N. Y. Supp. 222, reversing (1910) 68 Misc. 310, 123 N. Y. Supp. 1062. It is here held that where a person having a bill to collect from a tenant undertook to enter the apartment house by the vestibule, and was informed by the janitor that deliveries of goods to tenants and collection for them must be made by means of a dumb waiter which had been provided for that purpose, and was further informed that this rule was in accordance with orders given to him by the owner of the premises, it was the duty of the collector to make use of these means, and where he undertook to pass through the vestibule over the objection of the janitor, and was injured by the latter, he could not recover for the assault and battery, it not appearing that the janitor used any more force than was necessary to prevent the plaintiff from entering the house after he had been told that he could not do so.

III. Where landlord ejects third person at request of tenant.

In *McKeon v. Taylor* (1911) 132 N. Y. Supp. 445, where a collector who had gained access to rooms of a guest in a hotel and refused to leave until the guest paid her the amount of the bill was, at the request of the guest, forcibly removed from the room by a servant of the owner, the latter was held not liable for an assault and battery upon the collector unless the servant used excessive force.

This doctrine is also recognized in *Fitch v. Huff* (1914) 134 C. C. A. 31, 218 Fed. 17, holding that, where the owner of an apartment house removed the wife of a guest at the request of the latter, and in so doing used excessive force, he was guilty of an assault and battery. A. G. S.

EDGAR M. FROST, Appt.,
v.
CITY OF LOS ANGELES et al., Respts.

California Supreme Court (In Banc)—August 11, 1919.

(— Cal. —, 183 Pac. 342.)

Constitutional law — police power — requiring municipal water supply to be the purest obtainable.

1. A statute requiring refusal of a permit to furnish water to a municipal corporation unless the supply is the purest and most healthful obtainable is an unconstitutional exercise of the police power where the enforcement of the statute might result in depriving municipalities of all water supply.

[See note on this question beginning on page 475.]

Injunction — against public nuisance — right of individual.

2. To entitle one to sue to enjoin a public nuisance he must show that it causes special injury to himself or his property, of a character different in kind from that suffered by the general public.

[See 20 R. C. L. 476-478.]

Water — enjoining supply as nuisance.

3. A consumer cannot maintain an action to enjoin the furnishing of water unfit for culinary purposes as a public nuisance, if the water furnished is found to be safe, wholesome, sanitary, healthful, potable, and fit for human use.

Constitutional law — scope of police power.

4. The legislature cannot in the guise of police power interfere with a lawful and useful occupation or business which is not inherently, or because of the manner in which it is carried on, injurious to persons or property, or to the public health, convenience, comfort, safety, or morals.

[See 6 R. C. L. 218.]

Statute — amendment — effect on pending litigation.

5. An amendment of a statute forbidding the granting of licenses to furnish water to a municipal corporation unless the supply is the best obtainable will not affect an existing suit to enjoin the furnishing of a

supply without license, nor will it have a retroactive effect so as to affect the validity of a judgment rendered before the new law went into effect.

[See 25 R. C. L. 793, 795.]

— enforcement with unconstitutional provisions eliminated.

6. A statute cannot be enforced with an unconstitutional provision eliminated if it is apparent that necessary action would not have been taken under it by state officials, with the unconstitutional provision cut out, in view of other provisions of the statute.

[See 25 R. C. L. 1003.]

Nuisance — public — permission to individual to sue.

7. The state may grant special permission to an individual to act on its behalf in maintaining injunction suits to suppress public nuisances.

Injunction — statutory authority — when applicable.

8. Statutory authority to an individual to sue to enjoin the furnishing of a water supply without a permit does not apply unless the supply so furnished is dangerous to public health. — public hardship — refusal.

9. Injunction will not lie to prevent the furnishing of a municipal water supply without a permit where it would cause great hardship to the public without benefit to complainant.

[See 14 R. C. L. 357-359.]

APPEAL by plaintiff from a judgment of the Superior Court for Los Angeles County (Works, J.) in favor of defendants in an action brought to enjoin them from unlawfully supplying to plaintiff, and others, water

alleged to be polluted and unhealthful, and from continuing the supply until a permit had been secured from the state board of health. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Ingle Carpenter and Charles W. Fourl, for appellant:

The law of this state gives to the state board of health the same jurisdiction over the municipality engaged in supplying water for domestic purposes to its citizens that it does over the private firm or corporation engaged in that business.

State Bd. of Health v. St. Johnsbury, 82 Vt. 276, 23 L.R.A. (N.S.) 766, 73 Atl. 581, 18 Ann. Cas. 496; State ex rel. Hawes v. Mason, 153 Mo. 23, 54 S. W. 524; State ex rel. Terre Haute v. Kolssem, 130 Ind. 434, 14 L.R.A. 566, 29 N. E. 595; State ex rel. Atwood v. Hunter, 38 Kan. 578, 17 Pac. 177; Keefe v. People, 37 Colo. 317, 8 L.R.A. (N.S.) 131, 87 Pac. 791; 28 Cyc. 296; Odd Fellows' Cemetery Asso. v. San Francisco, 140 Cal. 226, 73 Pac. 987; Ex parte Beck, 162 Cal. 701, 124 Pac. 543; Re Montgomery, 163 Cal. 457, 125 Pac. 1070, Ann. Cas. 1914A, 130; Re Hoffman, 155 Cal. 114, 132 Am. St. Rep. 75, 99 Pac. 517; Re Ackerman, 6 Cal. App. 5, 91 Pac. 429.

The municipality must be considered in the control of the protection of the health of its citizens purely as an agency of the state, and therefore, both fundamentally and through the Constitution, subject to the general laws of the state upon this question.

Farmer v. Behmer, 9 Cal. App. 773, 100 Pac. 901; Davock v. Moore, 105 Mich. 120, 28 L.R.A. 783, 63 N. W. 424; Davidson v. Hine, 151 Mich. 294, 15 L.R.A. (N.S.) 575, 123 Am. St. Rep. 267, 115 N. W. 246, 14 Ann. Cas. 352; People ex rel. Lawlor v. Williamson, 135 Cal. 415, 67 Pac. 504; Pasadena School Dist. v. Pasadena, 166 Cal. 7, 47 L.R.A. (N.S.) 892, 134 Pac. 985, Ann. Cas. 1915B, 1039; Ex parte Braun, 141 Cal. 204, 74 Pac. 780; Sunset Teleph. & Teleg. Co. v. Pasadena, 161 Cal. 265, 118 Pac. 796; Fragley v. Phelan, 126 Cal. 383, 58 Pac. 923; Los Angeles City School Dist. v. Longden, 148 Cal. 380, 83 Pac. 246; People ex rel. Scholler v. Long Beach, 155 Cal. 604, 102 Pac. 664; Peffer v. Pennsylvania Water Co. 221 Pa. 578, 70 Atl. 870; McQuillin, Mun. Corp. § 894; Dudley v. Superior Ct. 13 Cal. App. 271, 110 Pac. 146; Clouse v. San Diego, 159 Cal. 434, 114 Pac. 573; Fellows v. Los Angeles, 151 Cal. 52, 90 Pac. 137; Stanislaus Water Co. v. Bachman, 152 Cal. 716,

15 L.R.A. (N.S.) 359, 93 Pac. 858; Com. ex rel. McCormick v. Russell, 172 Pa. 506, 33 Atl. 709.

The supplying of this polluted water is, according to the laws of this state, unlawful and a nuisance upon this plaintiff against which he is entitled to an injunction.

State v. Tower, 185 Mo. 79, 68 L.R.A. 402, 84 S. W. 10; Moses v. United States, 16 App. D. C. 428, 50 L.R.A. 532; Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; State v. Beardsley, 108 Iowa, 396, 79 N. W. 138; Train v. Boston Disinfecting Co. 144 Mass. 523, 59 Am. Rep. 113; Harrington v. Providence, 20 R. I. 233, 38 L.R.A. 305, 38 Atl. 1; 29 Cyc. 1165; North Point Consol. Irrig. Co. v. Utah & S. L. Canal Co. 16 Utah, 246, 40 L.R.A. 851, 67 Am. St. Rep. 607, 52 Pac. 174; Atty. Gen. v. Steward, 21 N. J. Eq. 340; Allen v. Stowell, 145 Cal. 666, 68 L.R.A. 223, 104 Am. St. Rep. 80, 79 Pac. 371; Missouri v. Illinois, 180 U. S. 208, 45 L. ed. 497, 21 Sup. Ct. Rep. 331, 346; Hollenbeck v. Marion, 116 Iowa, 70, 89 N. W. 210; Fisher v. Zumwalt, 128 Cal. 493, 61 Pac. 82; Judson v. Los Angeles Suburban Gas Co. 157 Cal. 168, 26 L.R.A. (N.S.) 183, 106 Pac. 581, 21 Ann. Cas. 1247; United States v. Luce, 141 Fed. 385.

A report on investigation of defendant's water supply, to its officers, is competent to be received in evidence as an admission of the officials of the city, and as notice to the city, of the pollution and unsanitary condition complained of by the plaintiff.

Farrell v. Dubuque, 129 Iowa, 447, 105 N. W. 696; Gray v. Rollinsford, 58 N. H. 253; Jones, Ev. § 268.

The Act of 1913 was valid and constitutional when enacted, and still is, as amended, a valid and constitutional law of this state.

Los Angeles County v. Spencer, 126 Cal. 670, 77 Am. St. Rep. 217, 59 Pac. 202, 385; Ex parte Whitley, 144 Cal. 167, 77 Pac. 879, 1 Ann. Cas. 13; Re Dart, 172 Cal. 47, L.R.A. 1916D, 905, 155 Pac. 63, Ann. Cas. 1917D, 1127; Ex parte Fiske, 72 Cal. 127, 13 Pac. 310; Ex parte Gerino, 143 Cal. 412, 66 L.R.A. 249, 77 Pac. 166; People v. Chong, 28 Cal. App. 121, 151 Pac. 553; Lanterman v. Anderson, 36 Cal. App.

472, 172 Pac. 625; *Ex parte McManus*, 151 Cal. 331, 90 Pac. 702.

Messrs. Albert Lee Stephens, W. B. Mathews, and William B. Himrod, for respondents:

The finding of the trial court as to the potability and wholesomeness of aqueduct water should be sustained, and the judgment of the court denying the plaintiff's application for an injunction, on the ground that such water is polluted and dangerous to health and the supplying of the same is a public nuisance, should be upheld.

Clopton v. Clopton, 162 Cal. 27, 121 Pac. 720; *Shannon v. Tooker*, 167 Cal. 484, 140 Pac. 10.

Plaintiff shows no right of action to enjoin the distribution of aqueduct water as a public nuisance.

Brown v. Rea, 150 Cal. 171, 88 Pac. 713; *City Store v. San Jose-Los Gatos Interurban R. Co.* 150 Cal. 277, 88 Pac. 977.

Providing and furnishing water by the city for the use of its inhabitants is a "municipal affair," with respect to which the charter controls.

Ex parte Braun, 141 Cal. 204, 74 Pac. 780; *People ex rel. Lawlor v. Williamson*, 135 Cal. 415, 67 Pac. 504.

The Act of June 13, 1913, contains an unlawful delegation of legislative authority, and is therefore void.

Schaezlein v. Cabaniss, 135 Cal. 466, 56 L.R.A. 733, 87 Am. St. Rep. 122, 67 Pac. 755; *Ex parte Cox*, 63 Cal. 21; *Merchants' Exch. v. Knott*, 212 Mo. 616, 111 S. W. 565; *State Bd. of Health v. St. Johnsbury*, 82 Vt. 276, 23 L.R.A. (N.S.) 766, 73 Atl. 581, 18 Ann. Cas. 496; *Sheldon v. Hoyne*, 261 Ill. 222, 103 N. E. 1021.

Shaw, J., delivered the opinion of the court:

This is an action to enjoin the city of Los Angeles and certain officers constituting its board of public service from continuing to supply water from the Los Angeles aqueduct to its inhabitants for domestic uses. The court, after an elaborate trial, gave findings and judgment for the defendants. The plaintiff appeals.

The complaint sets forth that the city has constructed an aqueduct whereby it carries water from the Owens river in the counties of Mono and Inyo, for a distance of 200 miles, to Los Angeles, and there distributes the same for domestic use to its in-

habitants, including the plaintiff and his family; that said water is polluted and unfit for human consumption, and that the city is so furnishing it without having obtained any permit to do so from the board of health of the state of California. The claim of the plaintiff is twofold: First, that the supplying of unfit water such as that described, for domestic use, is per se a public nuisance; and, second, that the city is without authority to furnish any kind of water for public use unless it has first obtained a permit from the state board of health. For the latter point plaintiff relies on the statute providing that the continuation of such supply may be enjoined at the suit of any person who receives water of that character for domestic use from the person sought to be enjoined. Stat. 1913, p. 793.

The court expressly found that the water furnished and supplied by the city through its aqueduct and distributing system "is safe, wholesome, sanitary, healthful, potable, and fit for human consumption;" and, further, that the city was not supplying to the plaintiff for domestic or other uses any water that was not fit for human consumption. These findings are fully supported by the great preponderance of the evidence. Indeed, it may be said that the evidence to the contrary is so inconsiderable that there is no serious conflict.

In view of these findings, it is clear that the court was justified in refusing to grant any relief based upon the theory that the plaintiff as a private individual was maintaining an action to abate or enjoin a condition which constituted a public nuisance. "A private person may maintain an action for a public nuisance, if it is specially injurious to himself, but not otherwise." Civ. Code, § 3493. To entitle a party to sue to enjoin a public nuisance, he must allege and prove facts showing that it causes special injury to him-

*Injunction—
against public
nuisance—right
of individual.*

self in person or property, and of a character different in kind from that suffered by the general public. *Brown v. Rea*, 150 Cal. 174, 88 Pac. 713; *City Store v. San Jose-Los Gatos Interurban R. Co.* 150 Cal. 279, 88 Pac. 977; *Spring Valley Waterworks v. Fifield*, 136 Cal. 15, 68 Pac. 108; *Code Civ. Proc.* § 731. Since the plaintiff is not injured at all, either specially or otherwise, he cannot, under the general law, maintain any action with respect to the continuance of the water service. Further, in that aspect the case is entirely without merit, since the thing complained of, the supplying of water unfit for public use, does not exist.

Water—enjoining supply as nuisance.

The only foundation upon which the plaintiff can sustain his action is found in the Act of 1913 aforesaid. This act makes it unlawful for any person or corporation, private or municipal, to furnish water to any person for domestic uses, "which is polluted or dangerous to health." It requires any person or corporation desiring to furnish water for domestic use, or, being already engaged in that business, who desires to continue so doing, to apply to the state board of health for permission to do so; directs that an investigation of the plant and water supply may be made, and that hearings may be had at the expense of the petitioner, whereupon, if the board finds that the water to be furnished is of a character which does not endanger the lives or health of human beings, and that it is, under all the circumstances and conditions, the purest and most healthful water obtainable or securable, it shall grant permission for such applicant to furnish, or continue to furnish, such water. The clause upon which the right of the plaintiff to maintain this action depends is, in effect, that any person or corporation whose supply of water for human consumption or domestic use is taken or received from any person or corporation, municipal or private, engaged in such water-furnishing business, without

having an unrevoked permit to do so as provided in the act, may maintain an action to enjoin such water-furnishing person or corporation from furnishing or continuing to furnish water for such purposes, or that it or he may be enjoined at the suit of the state board of health in the same manner.

The respondent contends that this act is unconstitutional so far as it applies to Los Angeles, and also that it is unconstitutional on general grounds as an unreasonable exercise of the police power.

With respect to the first proposition it is argued that any municipal corporation is authorized by the Constitution to establish and operate public works for supplying its inhabitants with water (article 11, § 19); that the Los Angeles charter confers upon that city the power to make all regulations necessary and expedient for the preservation of health and prevention of disease within the city, and to establish a health department with power to enforce such regulations; also to establish and operate waterworks for the purpose of supplying its inhabitants with water, and, in short, with full powers over the entire water system pertaining to that city; and that the subject of providing and furnishing water by the city for its inhabitants is a municipal affair, with respect to which the charter is the exclusive law. In this behalf attention is called to the fact that by an amendment of the charter approved on January 16, 1917, adopted under the provisions of §§ 6 and 8 of article 11 of the Constitution as amended in 1914, the city has become entirely independent of the state with respect to its municipal affairs, so that a general law is of no force therein as to such affairs, whether the charter of the city contains provisions regarding it or not. *Civic Center Asso. v. Railroad Commission*, 175 Cal. 441, P.U.R.1917E, 697, 166 Pac. 351. The claim is that the supplying of water to the inhabitants of the city of Los Angeles is a munic-

ipal affair, and therefore a matter in which the legislature cannot interfere, even for the purpose of protecting the health of the inhabitants of other portions of the state. It is also claimed that the provision is in violation of § 13, art. 11, of the Constitution, which prohibits the legislature from delegating to any special commission power to perform any municipal function, and that it is likewise void as a delegation of legislative power to the state board of health. These several contentions would open an interesting field of inquiry, but, because of our views upon another objection about to be mentioned, we do not think it necessary to determine whether they are well taken or not.

We are of the opinion that the Statute of 1913, so far as it provides for the injunction aforesaid, is unconstitutional, because it authorizes an unreasonable exercise of the po-

Constitutional law—police power—requiring municipal water supply to be the purest obtainable.

lice power of the state. It provides that every person, private corporation, or municipality engaged in furnishing

water for human consumption, and having over 250 service connections, shall apply to the state board of health for permission to continue the service; that if the board is, for any cause, unable to proceed at once, it shall issue a temporary permit which shall be good until its final action, and that it shall make a thorough investigation of all the conditions and circumstances, and may allow the applicant to be heard. At the close of the investigation the board must determine the matter, and if it "shall determine, as a fact, that the water being furnished or supplied to such human beings is such that, under all the circumstances and conditions, it does not endanger the lives or health of human beings, *and that under all the circumstances and conditions the water being supplied is the purest and most healthful obtainable or securable under all the circumstances and conditions* [sic], it shall

grant to petitioner a permit authorizing the petitioner to furnish or continue to furnish or supply such water to such human beings." § 2, subd. b. It further declares that the furnishing of water without such a permit is a public nuisance, and that it is the duty of the officers of the state to immediately abate the same in the manner provided by law. Subdivision "a" of § 2 requires the board of health to refuse a permit if it determines that the water being supplied may constitute a menace or danger to health or is unhealthful or unsanitary, and no power is given to the board to issue a permanent permit at all, except after it has determined that the water being supplied is the purest and most healthful obtainable under the circumstances.

The act gives the board no discretion. No matter how pure and healthful, short of absolute perfection, the water supply may be, nevertheless if better water can be obtained by any expenditure of money and effort of which the purveyor to the public use is capable the permit must be refused; the board has no power to grant any permission; the continuance of the water service at once becomes a public nuisance; it is the bounden duty of the proper state officials to immediately stop it; and any consumer forthwith is invested with the right and power to maintain an action to enjoin the continuance of such water service.

It seems obvious from the mere statement of the case that such a law, at least so far as it applies to a water service already in operation, must be held to be unreasonable and invalid. The climate of this state is so arid, the rainfall so light and variable, and the intervals of drought so long, that the denizens of practically every community, from a village having 250 service connections up to the largest city, have and can have no private water supply, but are compelled to depend upon some kind of public water service. It is safe to say that in the majority of such places the water

served is not detrimental to the health of the inhabitants. There can be little doubt that in a large number of such cases it would be possible for those engaged in the public water service to find somewhere available, water of a better quality than that which is being supplied. If such fact could be established, and even if it could not be shown that better water was not obtainable, then, under this law, no permit to continue the original service could be issued by the board, and any consumer could at once enjoin the further service and immediately deprive himself and all other inhabitants of the region of any water from that source until the better quality of water was secured and delivered to them. In the practical result the inhabitants would be deprived of any water at all in all such cases. Apparently this part of the law is based on the theory that it is better for the urban population of the state that they should die of thirst than that they should quench it with ordinary healthful water which is not the very purest that can possibly be obtained. The law in this respect amounts to absolute prohibition of a business lawful in itself and not injurious to health.

The legislature is possessed of the entire police power of the state, except as its power is limited by the provisions of the Constitution. But it cannot, under the guise of the police power, unreasonably interfere with a lawful and useful occupation or business which is not inherently, or because of the manner

—scope of police power.

in which it is carried on, injurious to persons or property, or to the public health, convenience, comfort, safety, or morals. *Ex parte Whitwell*, 98 Cal. 73, 81, 19 L.R.A. 727, 35 Am. St. Rep. 152, 32 Pac. 870; *Ex parte Sing Lee*, 96 Cal. 354, 24 L.R.A. 195, 31 Am. St. Rep. 218, 31 Pac. 245; *Los Angeles County v. Hollywood Cemetery Asso.* 124 Cal. 349, 71 Am. St. Rep. 75, 57 Pac. 153; *Ex parte McCapes*, 157 Cal. 29, 106 Pac. 229; *Re Dart*, 172 Cal. 59,

L.R.A. 1916D, 905, 155 Pac. 63, Ann. Cas. 1917D, 1122. A statement of the precise points decided in some of these decisions will show the practical application of the rule. In *Ex parte Whitwell*, an ordinance forbidding any person to maintain a hospital for insane persons in any building not constructed of brick, iron, or stone, or in any building not surrounded by a high brick or stone wall, or within 400 yards of any dwelling or school, was held to be an unreasonable exercise of the police power. It was said that the restrictions had no reasonable relation to the object of protecting the public interest, or the safety, convenience, or comfort of the persons concerned. In the *Sing Lee Case*, it was declared that an ordinance prohibiting the carrying on of a public laundry in a town, except in certain specified blocks thereof, without a written permit from the trustees, was void. In *Los Angeles County v. Hollywood Cemetery Asso.* an ordinance prohibiting the establishing of cemeteries within the limits of a county without the permission of the board of supervisors was held void. In the *McCapes Case*, it was held that a statute prohibiting any person from building a fire on his own land for burning brush or any other purpose without a written permit from some state or district fire warden was an unreasonable restriction upon the right to use property. The business of furnishing water for the domestic use of inhabitants of any particular territory is a lawful one. To say that a person who is engaged in furnishing such water shall immediately cease doing so, although the water he is furnishing is healthful and safe, until he shall have procured some better quality of water which it is possible for him to obtain, is an unreasonable restriction upon a lawful occupation, and it is a case in which the restriction has no relation whatever to the preservation of the public health, comfort, or convenience, which is obviously the object to which the statute is directed; but, on the contrary, its

enforcement would cause far more inconvenience and distress to persons and injury to the public interest than the thing at which it was aimed. Upon the principles we have just discussed, this feature of the law is clearly void.

The subsequent policy of the legislature indicates that it was of the opinion that this particular prohibition of the law was invalid. The legislature of 1915 amended the law (Stat. 1915, p. 1282) by eliminating the clause providing that no permit shall be granted unless the water being furnished was the purest and most healthful obtainable under the circumstances and conditions. To the suggestion that the amendment of the law would affect the action pending so as to allow an injunction which otherwise should have been

Statute—
amendment—
effect on pend-
ing litigation.

refused, the answer is that amendments to the law do not operate upon an

existing suit in a case like the present, nor have retroactive effect so as to affect the validity of a judgment rendered before the new law came into existence. *Vanderbilt v. All Persons*, 163 Cal. 513, 126 Pac. 158; *Ex parte Sparks*, 120 Cal. 400, 52 Pac. 715. The judgment appealed from was rendered before the amendment of 1915 was enacted.

The appellant answers the objections to this clause of the law by the suggestion that if it should be found unconstitutional that clause can be eliminated without destroying the entire section, and that without it the statute is valid and enforceable. This point is without merit. It cannot be supposed that the state board would issue a permit in the face of such an imperative mandate against

—enforcement
with unconsti-
tutional provisions
eliminated.

it, or that any municipality or person in the state would expect to be able to

obtain a permit from a state board which was forbidden to issue it under the circumstances existing. To direct that an injunction should issue under such circumstances, because by eliminating a material por-

tion of the law it could be made valid, would be in the nature of judicial legislation of a retroactive character.

There is another reason which fully justifies the affirmance of the judgment. We have said that a private person cannot maintain an action to enjoin a public nuisance unless it is specially injurious to himself. The plaintiff in this case is taken out of the operation of this rule solely because of the permission given to him by the state in this act to maintain this action on its behalf, without showing special injury to himself.

The state may, of course, grant this permission to any citizen to act in its behalf. But it must be presumed that the legislature did not intend to change in any other respect the principles of equity regarding injunctions, and consequently that, when a citizen applies to a court of equity for relief under such authority, his rights are no greater with respect to the merits of the case and the duty of a court of equity to grant relief than in any other action of equitable cognizance.

The general principles of equity governing the issuance of injunctions in such a case must be the same, and like reasons must be shown as in other cases of the same character. The primary object of the Act of 1913, under which the plaintiff sues on behalf of the state, was to prevent the supplying of water for human use which was unhealthful and unsanitary, and thereby to preserve and protect the general health of the people of the state. The power to grant or refuse a permit was given to the state board of health solely with the object of preventing the use of water detrimental to health. The substance of any action to enjoin such supply must therefore be the prevention of the use of water which is dangerous to health. As we have already shown, the plaintiff wholly failed to prove such a case.

Nuisance—pub-
lic—permission
to individual to
sue.

Injunction—
statutory au-
thority—when
applicable.

(— Cal. —, 183 Pac. 348.)

The water which is the subject of this controversy is found by the court, upon evidence which is full and satisfactory, to be safe, wholesome, sanitary, and fit for human consumption. So far as the substantial merits of the action is concerned, it is wholly without foundation. The plaintiff is driven to rest exclusively upon his technical right under the act, to enjoin the continuance of the water supply simply because the state has issued no permit therefor. The established fact is that there is no occasion for interference by the state or by any other person. The only right is the bare technical right to insist that a permit be obtained before the city delivers any more water to its inhabitants for human consumption. It is obvious, therefore, that the issuance of an injunction by the court to stop the city from supplying such water to its inhabitants would cause the greatest imaginable inconvenience, both to the city and to its inhabitants, and would be of no benefit whatever to the plaintiff. The refusal of such injunction would deprive the plaintiff of no right beneficial to himself or others, and would put him to no inconvenience whatever. Under these conditions a court of equity is not bound

—public hardship—refusal.

to grant an injunction. "When an injunction to restrain a nuisance will produce great public or private mischief, a court of equity is not bound to grant it merely for the purpose of protecting a technical or unsubstantial right." 2 Beach, Inj. § 1067. "The court may properly be guided by the consideration of the relative convenience of the parties; and if it appears that the benefit resulting to the plaintiff from the granting of the writ will be slight as compared to the injury to the defendant, the relief may be denied, and the plaintiff left to the pursuit of his remedy at law." 1 High, Inj. § 740. Further authorities are set forth in *Peterson v. Santa Rosa*, 119 Cal. 391, 51 Pac. 557. See also *Jacob v. Day*, 111 Cal. 571, 44 Pac. 243.

In this case the right of the plaintiff, such as it is, is wholly technical and unsubstantial, and to enforce it would produce very great mischief, both public and private, not only to himself, but to many of his fellow citizens within the city, and to the municipality as well. The court in its discretion was fully authorized to deny the injunction under such circumstances.

The judgment is affirmed.

We concur: Angellotti, Ch. J.; Olney, J.; Wilbur, J.; Lennon, J.; Melvin, J.; Lawlor, J.

ANNOTATION.

Validity of statute prescribing standard of purity of water furnished for human consumption.

It is well settled that a company engaged in furnishing a public water supply is bound to furnish reasonably pure and wholesome water, and is liable on principles of negligence for its failure to do so. See the note to *Stubbs v. Rochester*, 5 A.L.R. 1396. It appears, however, that but two cases have passed on the validity of a statute designed to fix the standard of purity of water so furnished. In the reported case (*FROST v. LOS ANGELES*, ante, 468) a statute requiring that

tion shall be "the purest and most healthful water obtainable or securable," and requiring a permit based on an approval by the state board of health of the water to be furnished, is held to be invalid so far as it denies a permit to a company designing to furnish water which is in fact wholesome and fit for human consumption.

A contrary holding was made in *State Bd. of Health v. St. Johnsbury* (1909) 82 Vt. 276, 23 L.R.A. (N.S.) 766, 73 Atl. 581, 18 Ann. Cas. 496. In that

case the court sustained a statute authorizing the state board of health to prohibit the use of water which, in its opinion, was so impure as to endanger the public health, and providing that an order made by the board should be conclusive. It was held that the statute did not violate the constitutional guaranty of personal liberty. The court said: "If the mode adopted by the state for the protection of the public health and safety of its local communities proves to be objectionable, inconvenient, or even distressing to some, if nothing more can reasonably be affirmed against the statute, the answer is that it was the duty of the constituted authorities primarily to keep in view the welfare and safety of the many, and not to permit their interests to be subordinated to the wishes or the convenience of the few. But there is, of course, as said in *Jacobson v. Massachusetts* (1905) 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. Rep. 358, 3 Ann. Cas. 765, a sphere within which the individual may assert the supremacy of his own will, and rightfully deny the authority of the government to interfere with its exercise. It is equally true, however, that in every case where the constituted authorities are charged with the duty of conserv-

ing the welfare and safety of the general public, the rights of the individual in respect of his liberty may at times, under the pressure of great danger, be subjected to such restraint, to be enforced by reasonable rules and regulation, as the safety of the general public may demand. And it is not for the courts to determine as to the mode likely to be most effective to protect the public against disease, unless that which the legislature has done comes within the rule that if a statute purporting to have been enacted for the protection of the public health, the public safety, or the public morals, has no just relation to those objects, or is unquestionably a plain, palpable invasion of constitutional rights; in which case it is the duty of courts so to adjudge, and thereby give effect to the Constitution. But the statute under consideration cannot be said to be palpably in conflict with the Constitution, state or Federal; nor can it be confidently asserted that the means prescribed by it have no just relation to the protection of the public health and the public safety. It must be held therefore, as the case is presented, that the board had authority, if properly exercised, to restrain the defendants as it did."

M. J. Q.

J. N. NAHHAS et al., Appts.,

v.

J. W. BROWNING et al., Respts.

California Supreme Court (In Banc) — August 19, 1919.

(— Cal. —, 183 Pac. 442.)

Damages — confinement to interest.

1. The damages for wrongfully taking and withholding property in a replevin action are not confined to interest if the value of the use of the property exceeds the interest.

[See note on this question beginning on page 478.]

Replevin — dismissal of action — effect on damages.

2. The dismissal of a replevin action upon destruction of the property by fire does not require the assessment of damages for the taking as for a conversion, rather than upon the replevin bond.

[See 23 R. C. L. 916.]

Damages — for wrongful replevin — taking and withholding.

3. The damages for wrongfully taking property in replevin include an allowance for the taking and withholding of the property.

[See 23 R. C. L. 908.]

Appeal — conclusiveness of finding of damages.

4. A special verdict fixing the value of the use of the property in replevin is conclusive upon appeal if the evidence is not in the record.

Damages — replevin — interest and special damages.

5. A defendant in replevin is not entitled, upon failure of the suit, to recover interest on the value of the property taken, if special damages for the taking and withholding are awarded.

[See 23 R. C. L. 911, 912.]

APPEAL by plaintiffs from a judgment of the Superior Court for Colusa County (Weyand, J.) vacating a judgment in their favor in a suit on a replevin bond. *Reversed.*

The facts are stated in the opinion of the court.

Mr. George Freeman for appellants.
Mr. Thomas Rutledge for respondents.

Lennon, J., delivered the opinion of the court:

The plaintiffs herein sue on a replevin bond, Browning, the plaintiff in the replevin action, and Baldon and Morris, his sureties, being joined as defendants. The property replevied consisted of a harvesting outfit. It was destroyed by fire while in the possession of Browning, who thereafter dismissed the replevin suit. The plaintiffs thereupon instituted this action and recovered judgment on a verdict awarding damages in the sum of \$3,695. The verdict of the jury was accompanied by answers to certain questions submitted by the court, which indicated that the sum of \$3,695 had been arrived at by adding the item of \$920, representing the plaintiffs' damage for the loss of the use of the property, to the item of \$2,775, representing the value of the property at the time it was replevied.

On the defendants' motion, the court, by an order purporting to be made pursuant to the provisions of § 663 of the Code of Civil Procedure, vacated the judgment on the ground that it was inconsistent with and not supported by the so-called special verdict, and entered judgment for the plaintiffs in the sum of \$2,775, with interest from the date of the replevin at 7 per cent yearly. The plaintiffs thereupon prosecuted this appeal upon a bill of exceptions containing the pleadings, the verdict, the original judgment, and the

order appealed from, but which does not set forth or purport to set forth any of the evidence received in the case.

In making the order complained of, the lower court apparently proceeded upon the theory that the plaintiffs' cause of action was to be viewed solely as one for wrongful conversion, and, pursuant to this theory, it applied the rule of damages prescribed by § 3336 of the Civil Code, and therefore eliminated the item of \$920, representing the plaintiffs' damage

for the loss of the use of the property.

In this the court was in error. By dismissing his action in replevin, Browning could not, and did not, deprive the plaintiffs of their right to recover such damages as they could have recovered in that action had it been prosecuted to judgment. *Mills v. Gleason*, 21 Cal. 274, quoted with approval in *Clary v. Rolland*, 24 Cal. 147, 152. It is expressly provided in 667 of the Code of Civil Procedure that "if the property [involved in a replevin action] has been delivered to the plaintiff, and the defendant claim a return thereof, judgment for the defendant may be for a return of the property or the value thereof, in case a return cannot be had, and damages for taking and withholding the same."

A return of the property could not have been had in the replevin suit here in question. Had that action been carried to judgment, defendants, plaintiffs herein, would therefore have been entitled to a

Replevin—dismissal of action—effect on damages.

judgment for the value of the property, not as damages for its conversion, but as a substitute for and in lieu of the property, and would, in addition, have been entitled to a judgment for damages for the taking and withholding the property. Such, then, would have been the measure of the damages of the plaintiffs herein, had the replevin action proceeded to judgment, and such, therefore, should be the measure of their recovery on the bond. 34 Cyc. 1582-1585; 2 Sedgw. Damages, 9th ed. pp. 1433, 1434; Talcott v. Rose, — Tex. Civ. App. —, 64 S. W. 1009; Sopris v. Lilly, 1 Colo. 266.

Ordinarily, loss of use and other injuries resulting from the taking and withholding of personal property may be compensated by allowing the successful party in a replevin suit to recover interest on the value of the property from the time of the taking. There is no good reason, however, for holding that he is confined to interest as damages, if he can establish the fact that the value of the use of the property of which he was deprived exceeds the interest. Hunt v. Thompson, 19 Wyo. 523, 120 Pac. 181, 122

Pac. 624; 2 Sedgw. Damages, 9th ed. p. 1046. In the absence of a record showing the evidence received in the case, the so-called special finding of the jury is conclusive upon this appeal that the damage for taking and withholding the property was shown to be \$920, an amount in excess of the interest. Special injury resulting from the taking and withholding of the property having been duly alleged in the complaint, plaintiffs are entitled to recover the sum of \$920 assessed as damages for such injury, together with the value of the property, with interest on the total sum from the date of the entry of the original judgment. They are not, however, entitled to interest on the value of the property from the date of the taking to the date of the judgment. 2 Sedgw. Damages, 9th ed. p. 1048; Freeborn v. Norcross, 49 Cal. 313; Garcia v. Gunn, 119 Cal. 315, 51 Pac. 684.

The judgment is reversed, with directions to the lower court to enter judgment in accord with the views herein expressed.

We concur: Angellotti, Ch. J.; Wilbur, J.; Lawlor, J.; Shaw, J.; Olney, J.; Melvin, J.

ANNOTATION.

Right to damages as distinguished from interest for loss of use of property taken in replevin.

- I. General rule:
 - a. In general, 478.
 - b. Contrary doctrine, 481.
 - c. Local variations of the rule, 481.
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I. General rule.

a. In general.

The successful defendant in replevin is entitled to the value of the use of

the property taken, when that value is shown.

California.—NAHHAS v. BROWNING (reported herewith) ante, 476.

Connecticut.—Adams v. Wright (1902) 74 Conn. 551, 51 Atl. 537 (wagon).

Georgia.—Bank of Blakely v. Cobb (1908) 5 Ga. App. 289, 63 S. E. 24; Underwood Typewriter Co. v. Veal (1912) 12 Ga. App. 11, 76 S. E. 645 (typewriter).

Idaho.—Sebree v. Smith (1888) 2 Idaho, 359, 16 Pac. 915 (mules); Cun-

Damages—for wrongful replevin—taking and withholding.

Appeal—conclusiveness of finding of damages.

Damages—replevin—interest and special damages.

—confinement to interest.

ningham v. Stoner (1905) 10 Idaho, 549, 79 Pac. 228 (sheep).

Illinois.—Butler v. Mehrling (1854) 15 Ill. 488 (as stating the rule).

Iowa.—Hartley State Bank v. McCorkell (1894) 91 Iowa, 660, 60 N. W. 197.

Maine.—Washington Ice Co. v. Webster (1873) 62 Me. 341, 16 Am. Rep. 462 (obiter).

Massachusetts.—Boston Loan Co. v. Myers (1887) 143 Mass. 446, 9 N. E. 805 (household furniture and piano).

Michigan.—Burt v. Burt (1879) 41 Mich. 82, 1 N. W. 936 (horse, wagon, and harness); Hutchinson v. Hutchinson (1894) 102 Mich. 635, 61 N. W. 60 (team of horses).

Minnesota.—Peerless Mach. Co. v. Gates (1895) 61 Minn. 124, 63 N. W. 260 (threshing machine); Williams v. Wood (1895) 61 Minn. 194, 63 N. W. 492 (threshing machine); Qualy v. Johnson (1900) 80 Minn. 408, 83 N. W. 393 (horses, wagons, etc.); Nash v. Larson (1900) 80 Minn. 458, 81 Am. St. Rep. 272, 83 N. W. 451.

Missouri.—Kreibohm v. Yancey (1900) 154 Mo. 67, 55 S. W. 260 (machines, etc.); Anchor Mill. Co. v. Walsh (1887) 24 Mo. App. 97 (wagons and harness); Gurley Bros. v. Bunch (1908) 130 Mo. App. 665, 108 S. W. 1109 (horse); Kieselhorst Piano Co. v. Porter (1914) 185 Mo. App. 676, 171 S. W. 949 (piano); Forsee v. Zenner (1917) — Mo. App. —, 198 S. W. 975 (team).

Nebraska.—Schrandt v. Young (1901) 62 Neb. 254, 86 N. W. 1085 (sheep).

New Hampshire.—Dickinson v. Lovell (1857) 35 N. H. 9.

New York.—Allen v. Fox (1873) 51 N. Y. 562, 10 Am. Rep. 641 (horse); Ditmars v. Sackett (1894) 81 Hun, 317, 30 N. Y. Supp. 721 (horses, cattle, etc.).

Oklahoma.—Thomas v. First Nat. Bank (1912) 32 Okla. 115, 121 Pac. 272, Ann. Cas. 1914A, 376 (horses); First State Bank v. Howell (1913) 41 Okla. 216, 137 Pac. 657 (mules).

Tennessee.—Stanley v. Donoho (1886) 16 Lea, 492 (oxen and wagon).

Vermont.—McGrath v. Wilder (1905) 77 Vt. 431, 60 Atl. 801 (heifer).

Wyoming.—Hunt v. Thompson (191) 19 Wyo. 523, 120 Pac. 181, 122 Pac. 624 (team of mares, etc.).

"The measure of damages in such cases is the value of the use of the property during its detention, to be estimated by the ordinary market price of the use of such property." Stanley v. Donoho (Tenn.) *supra*.

The damages are the value of the property when assessed and prior depreciation and value of use, less estimated wear and tear, etc., where the statute provides that "the court or jury may assess the value of the property taken, and the damages for taking and detaining the same, from the time such property was taken or detained from defendant until the day of the trial of the cause." Kreibohm v. Yancey (Mo.) *supra*.

Woodburn v. Cogdal (1866) 39 Mo. 228, and Miller v. Whitson (1867) 40 Mo. 101, apparently eliminating damages for use, except interest, were overruled as decided under a wrong theory in Chapman v. Kerr (1883) 80 Mo. 158. So the prior case of Hutchins v. Buckner (1877) 3 Mo. App. 595, may also be disregarded.

Under the Georgia statute, the defendant "has the election of recovering the highest value of the property between the conversion and the trial, without hire or interest, or of recovering the value at the time of the conversion, with interest or such hire as he may be able to prove." Bank of Blakely v. Cobb (1908) 5 Ga. App. 289, 63 S. E. 24, *supra*.

Where the plaintiffs replevied horses, cattle, and farming utensils, and, "the defendants not having required the return of the property," it was sold by the plaintiffs a few days later, the court said: "The greater part of the property at the sale was bid in for the defendants, and went into their possession immediately, and was retained by them down to the time of the trial. This property having a usable value, the correct rule of damages as to that portion thereof which was not retained by the defendants was what it was worth at the time of the trial and the value of its use during the time of its detention. Allen

v. Fox (N. Y.) supra. But as to that portion of it which was bid in for the defendants and retained by them, the correct rule was the value of the property and interest thereon from the time it was taken to the time of the trial." *Ditmars v. Sackett* (N. Y.) supra.

In a case of machinery, tools, etc., used in a factory for printing cloths, the court said: "In contemplation of law, his claim for compensation (independently of the return of the goods or their equivalent in money, as secured by the bond) would be made up of, first, interest on the money value [from the time of the demand under the writ of return]; second, the general inconvenience and loss resulting from the interruption of his possession; and, third, the expense, trouble, and delay attending the operation of replacing everything and restoring the establishment to its original condition." *Stevens v. Tuite* (1870) 104 Mass. 328.

In *Bruce v. Learned* (1808) 4 Mass. 614, it was held that, except as provided by statute, the actual damages are to be allowed, and where the jury, in case of a horse, found less than 6 per cent, the court sustained the verdict.

Judicial explanations.

"In an action in replevin, where the property sought to be recovered has a usable value and that value amounts to more than interest on the value of the property, a court would be justified in assessing damages for the amount of the usable value of the property, and that would be the proper measure of damages, and not interest on the value of the property." *Cunningham v. Stoner* (1905) 10 Idaho, 549, 79 Pac. 228, supra.

"Interest on the value of the property is no criterion of the damage sustained by the defendant by reason of being deprived of the use of it. The property was household furniture in daily use, and necessary to his comfort. It is evident that the restoration of the property, with interest on its value, would not furnish an adequate indemnity to the defendant for the wrong done in taking it out of his possession." *Boston Loan Co. v. My-*

ers (1887) 143 Mass. 446, 9 N. E. 805, supra.

In *Allen v. Fox* (1873) 51 N. Y. 562, 10 Am. Rep. 641, supra, a case of a horse, where it was held that whether the property is returned or not the damages for detention are the same, the property being valued at the time of trial, the court said: "With this rule in view, what should be the measure of damages for the detention? In many cases, interest on the value from the time of the wrongful taking would be a proper measure. It would be, generally, in all cases where the property detained was merchandise kept for sale, grain, and all other articles of property useful only for sale or consumption. In such cases, if the owner recover the interest on the value of his property from the time he was deprived of it, he will generally have a complete indemnity unless the property has depreciated in value, in which case the depreciation must be added to the interest on the value, taken as it was before the depreciation, and the two items will furnish the amount of the damage. This damage, together with the property or its value at the time of the trial, will give the owner as complete indemnity as the law is generally able to give any person seeking redress for a wrong. But the same measure of damages would not generally furnish the owner an indemnity in case the property claimed had a value for use, or, in other words, a usable value, such as horses, cows, carriages, and boats. In such case, the direct damage which the owner suffers is the loss of the use, and the value of the use should be the measure of damage."

"While it is the ordinary rule that for a wrongful taking of personal property the value of the thing, with interest from the time of the taking, will be the measure of recovery, yet there are many exceptions to the rule; one being where the property has a distinct 'usable value.' And horses broken and trained to do work would have, under ordinary circumstances, such 'usable value,' and, where such property has been wrongfully taken by one, and detained from another, such

other has the right to recover as damages the reasonable value of the use of such property during the period of its detention; and this value is to be estimated by the ordinary market price of the use of such property." *Thomas v. First Nat. Bank* (1912) 82 Okla. 115, 121 Pac. 272, Ann. Cas. 1914A, 376, supra.

"Ordinarily interest upon the value during the time the successful party was deprived of the property is the proper measure of damages for the detention, but it is not always or necessarily so. Where the property is valuable for its use, the value of its use may be recovered instead of interest." *Hunt v. Thompson* (1911) 19 Wyo. 523, 120 Pac. 181, 122 Pac. 624, supra, the court pointing out that under the Wyoming statute the damages recoverable were those which were "right and proper," and distinguished *Just v. Porter* (1887) 64 Mich. 565, 31 N. W. 444, and *Becker v. Staab* (1901) 114 Iowa, 319, 86 N. W. 305, *infra*, I. c., as decided under a statute requiring an election between a return and value.

In *McGrath v. Wilder* (1905) 77 Vt. 431, 60 Atl. 801, supra, the court said, in case of a heifer: "If the heifer had been in the possession of the defendant during the time she was detained upon the replevin writ, he would have had the benefit of her increase in value, and in addition to this, he would have had the use of her. By the replevin he has been deprived of this use, and the value of this use, in so far as appears, represents his actual damage for the taking and detention, and he is entitled to this sum without any reduction for her increase in value."

b. Contrary doctrine.

It seems to have been the earlier view that the interest was the measure of damages.

Thus, in case of a raft of logs, the court said: "These damages ordinarily consist of the interest on the value of the goods when taken, from the time of taking till the judgment rendered. There are, however, cases where the jury may be allowed to give more than this interest. Where a writ of replevin is sued out fraudulently, and without

color of right, the jury would be warranted in giving even exemplary damages, in the same manner as they might do for a wanton or malicious trespass. . . . But I am not aware that in any other instances the measure of damages has been allowed to exceed the interest." *M'Cabe v. Morehead* (1841) 1 Watts & S. (Pa.) 513.

c. Local variations of the rule.

Under the Michigan statute, where the defendant waives a return of the property, and asks for its value, "there is no provision made for the recovery also of damages for the detention of the property," and the defendant is limited to the value at the time of the taking, with interest, and is not entitled to the value of the use. *Just v. Porter* (1887) 64 Mich. 565, 31 N. W. 444 (shingles) followed in *Nitz v. Bolton* (1888) 71 Mich. 388, 39 N. W. 15 (logs).

Similarly, it was formerly held in Nebraska that it is only where a return is had that the defendant is entitled to damages for the detention; otherwise, he is entitled to the value of the property, with interest from the time of taking. *Romberg v. Hughes* (1886) 18 Neb. 579, 26 N. W. 351; *Aultman, M. & Co. v. Stichler* (1897) 21 Neb. 72, 31 N. W. 241. And see also *Moore v. Kepner* (1878) 7 Neb. 291; *Dodge v. Runnels* (1886) 20 Neb. 33, 28 N. W. 849.

See also *Garrett v. Wood* (1865) 8 Kan. 231, *infra*, III.

But this rule was modified in *Schrandt v. Young* (1901) 62 Neb. 254, 86 N. W. 1085, holding that the "measure of the damages for detention recoverable by a defendant in replevin may be stated thus: He may recover (1) if there is no special value attaching to the use of the property, interest; (2) if the value of use of the property exceeds the interest, then such value, without regard to whether the property is returned, but, in such case, no interest; (3) if loss, deterioration, or depreciation occur while the property is withheld, then the amount of such loss, damage, or depreciation, to be conditioned, however, upon return of the property, the alternative judgment for the value being fixed as of the date

of the taking. Moreover, the damages for detention must be such as grow out of the detention, and are connected with or incident to the contest over possession."

In *Hartley State Bank v. McCorkell* (1884) 91 Iowa, 660, 60 N. W. 197, the defendant was allowed the value of a horse at the time of taking and the value of its use, that being more than interest.

But it was later held that if the defendant proves the value when taken, and elects to treat the conversion as then occurring, he can only recover such value and interest. *Powers v. Benson* (1903) 120 Iowa, 428, 94 N. W. 929 (horses, cattle, etc.); *Colean Implement Co. v. Strong* (1905) 126 Iowa, 598, 102 N. W. 506 (horses). It was similarly held in the earlier case of *Becker v. Staab* (1901) 114 Iowa, 319, 86 N. W. 305, where the question, however, was not as to the use, but as to certain expenses.

In *Newberry v. Gibson* (1904) 125 Iowa, 575, 101 N. W. 428, however, it was held that if the defendant takes the value of horses at the time of trial, he is entitled to damages, that is, to the value of their use.

II. Where no special damages shown.

a. In general.

Where there is no evidence of damages, the defendant is entitled to interest on the value from the time of taking. *Barnes v. Bartlett* (1833) 15 Pick. (Mass.) 71; *Berthold v. Fox* (1868) 13 Minn. 501, Gil. 462, 97 Am. Dec. 243; *Suydam v. Jenkins* (1850) 3 Sandf. (N. Y.) 614.

See also the opinions expressed in the following cases quoted from in I. a, *supra*: *Allen v. Fox* (1878) 51 N. Y. 562, 10 Am. Rep. 641; *Thomas v. First Nat. Bank* (1912) 32 Okla. 115, 121 Pac. 272, Ann. Cas. 1914A, 376; *Hunt v. Thompson* (1911) 19 Wyo. 523, 120 Pac. 181, 122 Pac. 624.

Probably this is the ground of the decision in *Washington Ice Co. v. Webster* (1887) 125 U. S. 426, 31 L. ed. 799, 8 Sup. Ct. Rep. 947.

In *Morris v. Baker* (1856) 5 Wis. 389, the court said as to furniture, etc.: "The defendants were deprived of the use of it for some weeks. And it was

perfectly right and proper that they should be paid for this use by receiving interest upon its value while it was thus out of their possession, as well as damages for the depreciation of the property, or injury done it by the plaintiff, and the necessary expense of placing the furniture in its former position, fitted for use."

Interest was allowed as damages in the following cases, the decisions not pointing out whether or not this was done on account of absence of proof of value of use: *Webb v. Phillips* (1897) 26 C. C. A. 272, 54 U. S. App. 54, 80 Fed. 954 (logs); *Pace v. Neal* (1900) 92 Ill. App. 416 (corn); *Hurd v. Gallaher* (1862) 14 Iowa, 394 (patterns, engines, etc.); *Kentucky Land & Immigration Co. v. Crabtree* (1904) 118 Ky. 395, 80 S. W. 1161, 4 Ann. Cas. 1133 (logs); *Wood v. Braynard* (1830) 9 Pick. (Mass.) 322 (whether under statute or not is not clear); *Rowley v. Gibbs* (1817) 14 Johns. (N. Y.) 385 (goods); *Collins v. Houston* (1890) 138 Pa. 481, 21 Atl. 234 (lumber).

b. Theory of no damages.

Some of the cases hold that where there is no proof of special damages the defendant is entitled to no damages for detention.

In *La Vie v. Crosby* (1903) 43 Or. 612, 74 Pac. 220, it was held that the assessment should be at the time of verdict, with damages for detention, and that where there was no evidence of the value of use there could not be interest from the time of taking, as this would be double damages in the case of the hops in question, which had increased in value. The court said: "The value of property, being assessed at the time the verdict was rendered, would necessarily exclude the allowance of interest as damages, except possibly for the retention of money in specie; but damages for the use of property that could be employed might be awarded."

Perhaps it was on the same theory that no allowance for interest was made in *Clement v. Duffy* (1880) 54 Iowa, 632, 7 N. W. 85, where it was held that the defendant was entitled to the value of wheat taken, threshed, and marketed by the plaintiff, estimat-

ed at the time of trial, less expense of threshing and marketing, it having advanced since the taking, and it was held error to estimate the value at the time of taking.

Where the value of hay taken and sold by the plaintiff was assessed at a time subsequent to its wrongful taking, the defendant was entitled to its value, but (his counsel admitted) not to interest between the taking and the assessment. *Atherton v. Fowler* (1878) 46 Cal. 323.

In *Hammond v. Thompson* (1918) 54 Mont. 609, 173 Pac. 229, it was held that in the absence of proof of usable value no damages for use could be given. But it does not clearly appear whether or not the court meant to allow interest on the value, nor when the value was assessed.

In *Halbert v. San Saba Springs Land & Live-Stock Assn.* (1895) — Tex. Civ. App. —, 34 S. W. 636, it was held that damages for sheep should be the value at the time of trial, with interest, where no other damages are shown. (It may be noted that it was held in *McLeod Artesian Well Co. v. Craig* (1897) — Tex. Civ. App. —, 43 S. W. 934, that the time of assessment of the value varies in different cases between the time of detention and the time of trial; and that it was held in *Talcott v. Rose* (1901) — Tex. Civ. App. —, 64 S. W. 1009, that, "in an action to recover on a replevin bond, the measure of damages is the value of the property replevied at the date of trial, and such special damages as may be alleged and proven.")

In *Bartlett v. Brickett* (1867) 14 Allen (Mass.) 62, the court said: "The cases in which 6 per cent upon the value of the goods replevied has been allowed as damages, in analogy to the rule in other cases of unlawful detention of property, will be found to be cases where the defendant was entitled to a return, and where the chattels replevied were merchandise or other property capable of physical use and enjoyment. That rule has no just application to the case of securities for money, bearing interest."

III. Both value of use and interest.

The defendant is not entitled to both value of use and interest on the value of the property from the time of taking, as this would be double damages. *Garcia v. Gunn* (1897) 119 Cal. 315, 51 Pac. 684; *NAHHAS v. BROWNING* (reported herewith) ante, 476; *McCarty v. Quimby* (1874) 12 Kan. 494; *Frey v. Drahos* (1878) 7 Neb. 194 (as stating the rule); *Smith v. Roby* (1871) 6 Heisk. (Tenn.) 546 (where the property is returned).

Probably this is what is meant in *Garrett v. Wood* (1865) 3 Kan. 231, where it was held that if the defendant gets the value of the property he is not entitled to damages for the detention, as this would be compensating him twice for the same injury.

But where the statute provided that "the judgment shall be that the goods be returned to the defendant, or, on failure, that the defendant recover their value, with interest thereon, and damages for the detention," it was held that "the jury should be instructed to ascertain the value of the property at the time when it was seized under the writ of replevin . . . and upon this valuation they are to give interest from the time of the seizure under the plaintiff's writ . . . But the defendant is also entitled to damages for the detention of the property from him by the plaintiff. . . . The damage to the defendant, if any, by the loss of the use and enjoyment or hire of the property, may, of course, be allowed by the jury." *Mayberry v. Cliffe* (1869) 7 Coldw. (Tenn.) 117.

In case of a flock of sheep, the court said, in reversing a judgment in favor of the defendant, that if a return could not be had the defendant was entitled to the value of the original flock and their increase, less losses, "together with a sum equal to the amount of legal interest upon such values from the time appellant became possessed of the original band, and the increase, respectively, as damage for taking and withholding the property, or for the value of its use; for to this much, at least, the rightful owner is always entitled in an action of this kind. From the balance of the value of the

entire flock and the wool at the time of trial, if in the possession of appellant, and if not, the amount received therefor by him, or the amount he could have received, appellant was entitled to deduct his proper legitimate expenses in the care and support of the sheep, their shearing, and the disposition of the wool; and the remainder, if any, should have been added as damages to the amount already deducted equal to interest, making respondent's entire damages for the taking and withholding of the sheep, or for the value of their use. . . . If the value of the flock to be returned was less at the time of the trial than the aggregate value of the original band and the increase (the necessary losses being deducted), together with legal interest upon the value of the original band and of the increase from the time appellant became possessed of each, respectively, until the trial, then certainly she was entitled to the difference, in addition to a return, and after deducting such difference, if any, from the value of the wool, appellant should have been allowed from the balance his proper necessary expenditure, and the remainder, if any, added to the difference just stated, should have been awarded to respondent as damages." *Buckley v. Buckley* (1877) 12 Nev. 423. Beatty, J., concurring in result, said, *inter alia*: "We are entirely agreed that the rule of the statute is plain; that aside from such special damages as may be recovered for depreciation in the value of the property between the time of taking and the trial, the owner is not entitled to recover both interest on its value and the value of its use. We agree that he may have interest, at least, and, if he proves that the value of the use is greater than the interest, that he may recover that in the place of, but not in addition to, interest. What we differ about

is the practical operation of the rule, announced in the majority opinion, that the defendant, if she was the owner of the sheep, was entitled to recover at least the value of the original flock and of the increase, together with interest on such values. In my opinion this is allowing double damages—interest, and value of use."

IV. *Miscellaneous.*

In *Parker v. Simonds* (1844) 8 Met. (Mass.) 205, the defendant, entitled to horses, household goods, etc., recovered in a replevin suit the statutory 12 per cent damages and costs, and, in a suit on the bond, was held entitled to the value as set out in the bond with 6 per cent interest from the time of the judgment in replevin.

It may be noted that it was held in *Wirt v. Kutz* (1910) 15 N. M. 500, 110 Pac. 575, that a statute allowing "double damages for the use" of the property from the time of delivery does not, where sheep are taken, allow double damages for the wool taken from the sheep during detention.

In *Dora v. Hight* (1838) 15 Me. 20, it was held that where the plaintiff replevies goods which were lawfully seized by the defendant as a collector of taxes, and judgment is rendered for a return of the goods, the defendant is entitled to damages equal to 6 per cent on the penalty of the bond, as that is the statutory rule in execution, and "the authority, under which the defendant, as collector of taxes, took the chattels in controversy, was in effect a process of execution."

It may be noted that the obscure case of *Gould v. Hayes* (1898) 71 Conn. 86, 40 Atl. 930, "does not," we are assured in *Adams v. Wright* (1902) 74 Conn. 551, 51 Atl. 537, "attempt to state the items of damages which the defendant might recover." B. B. B.

CARRIE SWANBROUGH, Plff. in Err.,

v.

ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA.

Colorado Supreme Court (In Banc)—April 7, 1919.

(— Colo. —, 181 Pac. 204.)

Insurance — exception — automobile races.

1. The term, "riding or driving races," within an exception of liability in an accident insurance policy, includes automobile races.

[See note on this question beginning on page 493.]

— construction — time when terms were used.

2. The term, "riding or driving races," against liability for accidents in which, a policy of accident insurance contains an exception, must be construed in the light of the common and general understanding of the term at the time the policy was written.

[See 14 R. C. L. 936.]

Evidence — judicial notice of automobile races.

3. Judicial notice is taken that for

many years automobile and bicycle races have been as common as, if not more so than, horse races.

[See 15 R. C. L. 1057.]

Insurance — construction against insurer.

4. The rule by which ambiguous language in an insurance policy is construed most strongly against the insurer does not apply if the language is not ambiguous.

[See 14 R. C. L. 931.]

(Teller and Burke, JJ., dissent.)

ERROR to the District Court for Denver County (Class, J.) to review a judgment in favor of defendant in an action brought to recover the amount alleged to be due on a benefit certificate. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Dayton & Denious and O'Donnell, Graham, & O'Donnell for plaintiff in error.

Messrs. Archibald A. Lee and Watt G. Shelden, for defendant in error:

The words, "riding or driving races," used in the contract, are to be construed according to the common and ordinary meaning naturally given them by the average man at the date of the contract, unless they have been given a contrary legal construction or have acquired a different meaning by usage; and to establish this would, of course, require evidence.

1 Joyce, Ins. 2d ed. § 216; Johnson v. New York, 186 N. Y. 139, 116 Am. St. Rep. 545, 78 N. E. 715, 9 Ann. Cas. 824, 20 Am. Neg. Rep. 694; Bogart v. New York, 200 N. Y. 379, 93 N. E. 937, 21 Ann. Cas. 466; Shepard v. Jacobs, 204 Mass. 110, 26 L.R.A.(N.S.) 442, 134 Am. St. Rep. 648, 90 N. E. 392; 14 Cyc. 1076; State v. Thurston, 28 R. I. 265, 66 Atl. 580; Taylor v. Goodwin, L. R. 4 Q. B. Div. 228, 48 L. J. Mag. Cas.

N. S. 104, 40 L. T. N. S. 458, 27 Week. Rep. 489; Com. v. Crowninshield, 187 Mass. 221, 68 L.R.A. 245, 72 N. E. 963; 28 Cyc. 24; Hannan v. St. Clair, 44 Colo. 134, 96 Pac. 822; Phillips v. Denver City Tramway Co. 53 Colo. 458, 128 Pac. 460, Ann. Cas. 1914B, 29; Kent v. Cobb, 24 Colo. App. 264, 133 Pac. 424; Gibson v. Dupree, 26 Colo. App. 324, 144 Pac. 1183; Dale v. Denver City Tramway Co. 97 C. C. A. 511, 173 Fed. 787, 19 Ann. Cas. 1223; Mahoney v. Maxfield, 102 Minn. 377, 14 L.R.A.(N.S.) 251, 113 N. W. 904, 12 Ann. Cas. 289; Curley v. Electric Vehicle Co. 68 App. Div. 18, 74 N. Y. Supp. 35; People v. Ellis, 88 App. Div. 471, 85 N. Y. Supp. 120; Trout Brook Ice & Feed Co. v. Hartford Electric Light Co. 77 Conn. 338, 59 Atl. 405; Indiana Springs Co. v. Brown, 165 Ind. 465, 1 L.R.A.(N.S.) 238, 74 N. E. 615, 6 Ann. Cas. 656, 18 Am. Neg. Rep. 392; McFern v. Gardner, 121 Mo. App. 1, 97 S. W. 972; McIntyre v. Orner, 166 Ind. 57, 4 L.R.A.(N.S.) 1180, 117 Am. St.

Rep. 359, 76 N. E. 750, 8 Ann. Cas. 1087; *Gifford v. Jennings*, 190 Mass. 54, 76 N. E. 233; *Doran v. Thomsen*, 74 N. J. L. 445, 66 Atl. 897; *People v. Schneider*, 139 Mich. 673, 69 L.R.A. 345, 103 N. W. 172, 5 Ann. Cas. 790; *Christy v. Elliott*, 216 Ill. 31, 1 L.R.A.(N.S.) 215, 108 Am. St. Rep. 196, 74 N. E. 1035, 3 Ann. Cas. 487; *Upton v. Windham*, 75 Conn. 288, 96 Am. St. Rep. 197, 53 Atl. 660, 13 Am. Neg. Rep. 1; *Routledge v. Rambler Automobile Co.* — Tex. Civ. App. —, 95 S. W. 749; *Hall v. Compton*, 130 Mo. App. 675, 108 S. W. 1122; *Hartley v. Miller*, 165 Mich. 115, 33 L.R.A.(N.S.) 81, 130 N. W. 336, 1 N. C. C. A. 126; *Maher v. Benedict*, 123 App. Div. 579, 108 N. Y. Supp. 228; *Fonsler v. Atlantic City*, 70 N. J. L. 125, 56 Atl. 119; *Harris v. Nashville, C. & St. L. R. Co.* 14 L.R.A.(N.S.) 261, note; *Berry, Automobiles*, 1st ed. 1909, § 47; *Berry, Automobiles*, 2d ed. § 589; *State, Hoxsey, Prosecutor, v. Paterson*, 39 N. J. L. 490.

The contract is unambiguous and needs no interpretation.

Brown v. Knights of Protected Ark, 43 Colo. 289, 96 Pac. 450; *Barclay v. London Guarantee & Acci. Co.* 46 Colo. 558, 105 Pac. 865; *Standard Life & Acci. Ins. Co. v. McNulty*, 85 C. C. A. 22, 157 Fed. 224; *Delaware Ins. Co. v. Greer*, 61 L.R.A. 137, 57 C. C. A. 188, 120 Fed. 916; *Blunt v. Fidelity & C. Co.* 145 Cal. 268, 67 L.R.A. 793, 104 Am. St. Rep. 34, 78 Pac. 729; *Furrey v. General Acci. Ins. Co.* (*Grinnell v. General Acci. Ins. Co.*) 80 Vt. 526, 15 L.R.A.(N.S.) 206, 130 Am. St. Rep. 1012, 68 Atl. 655, 13 Ann. Cas. 515; *Mutual L. Ins. Co. v. Murray*, 111 Md. 600, 75 Atl. 348.

Scott, J., delivered the opinion of the court:

Edward W. Swanbrough was a member of the Order of United Commercial Travelers of America, a fraternal benefit society, and carried a benefit certificate therein. He was killed in an automobile accident on the 25th day of September, 1914.

The plaintiff in error, plaintiff below, widow and beneficiary of Swanbrough, brought this suit to recover on his benefit certificate. The benefit certificate was in the following words:

"This certificate witnesseth that Edward W. Swanbrough has been

duly enrolled in the Grand Commercial Army, and is a member in good standing of Pikes Peak Council, No. 15, at Denver, Colorado.

"He is hereby insured in a sum not exceeding sixty-three hundred (\$6,300) dollars, provided he shall sustain, during the continuance of his membership, and while in good standing, bodily injury effected through external, violent, and accidental means, which alone shall occasion death immediately or within six months from the happening thereof, subject to the provisions, conditions, and requirements of the constitution of the Order of United Commercial Travelers of America. He is further entitled to all the rights and privileges of membership accruing to him under the constitution, and he is hereby recommended to the fraternal courtesy of the brotherhood wheresoever dispersed."

"In witness whereof we have affixed our signatures and the Seal of the Supreme Council in the name of the beneficent Father of All, this 21st day of August, 1908."

This certificate was qualified by the following exemptions: "Benefits under this article shall not cover nor extend to any death, disability, or loss received while the insured member is acting as an aviator or balloonist, sailor, or soldier, or is playing professional baseball, or is under the influence of liquor or narcotics in any degree; nor shall such benefits cover or extend to any death, disability, or loss resulting from fighting, riding or driving races, overexertion (unless in an effort to save human life), riot, the moving or transportation or use of gunpowder or dynamite or other explosive substances, medicinal or surgical treatment (except when the surgical treatment is made necessary by the accident), mining, the intentional taking of medicine or drugs, the violation of any law, immoral conduct, intentionally self-inflicted injuries (fatal or otherwise), self-destruction (while sane or insane), inhaling of gas or asphyxia-

tion (voluntary or involuntary, conscious or unconscious), murder or disappearance, injuries (fatal or otherwise) intentionally inflicted by others (except where such injuries are inflicted for the sole purpose of burglary or robbery, or by an insane person, the intent to commit burglary or robbery to be established by the claimant, and the insanity to be established by a court having competent jurisdiction), or from voluntary exposure to danger; nor shall benefits cover or extend to any one of the following conditions, whether caused by accidental means or not; to wit: Appendicitis, fits, epilepsy, mental infirmity, ivy poisoning, ptomaine poisoning or other poisoning, bite or sting of an insect, or any infection (unless the infection is introduced into, by, and through an open wound, which open wound must be caused by external, violent, and accidental means, and be visible to the unaided eye), hernia, orchitis (inguinal adenitis, venereal diseases, cerebral or meningeal or spinal hemorrhage, heat prostration, sunstroke, or sunburn.)

The certificate was also made subject to a rule of construction as follows: "This certificate, the constitution, by-laws, and articles of incorporation of said order, together with the application for insurance signed by said insured member, shall constitute the contract between said order and said insured member, and shall govern the payment of benefits, and any changes, additions, or amendments to said constitution, by-laws, or articles of incorporation, hereafter duly made, shall bind said order and said insured member and his beneficiary or beneficiaries, and shall govern and control the contract in all respects."

It seems that the provisions of the certificate were based on like provisions of the constitution and by-laws of the society. The defense of the society was that Swanbrough met his death while driving a race, and by voluntary exposure to danger, both prohibited by the terms of the exemptions to the certificate.

The only testimony in the case was that of the plaintiff, whose testimony may be epitomized as follows: "I was present when Mr. Swanbrough was killed in an automobile accident on September 25, 1914, at Overland park track. I saw the accident. It occurred in the course of a race in which Mr. Swanbrough was running an automobile. I was in the grand stand. I do not know how fast he was running. He was running around the mile track in front of the grand stand. There were about a half dozen other automobiles in the race. I had seen the car on the morning of the race, and knew at that time that Mr. Swanbrough was going to enter one or more races at Overland park that afternoon. It was in the course of one of these races that Mr. Swanbrough was killed. It was the second race he had driven that afternoon."

At the close of plaintiff's testimony the defendant society moved a nonsuit, which motion was sustained by the court, and the case was dismissed. This judgment is before us for review.

The specific exceptions relied on by the defendant are: "Nor shall such benefits cover or extend to any death, disability, or loss resulting from fighting, riding or driving races, nor," etc., and, "or from voluntary exposure to danger," etc. The sole contention of the plaintiff is that the words, "riding or driving races," refer exclusively to horse racing and horse races, and not to automobile races or similar contests; that this is the common and ordinary understanding of the ordinary person.

No decided case is cited to sustain this contention, but many definitions of the words "races," "riding," and "driving" are set forth, covering a period from the time of Jehu to modern times, and which are urged as supporting that view.

The certificate was written in 1908, and we think the term, "rid-

ing or driving races," must be considered in the light of the common and general understanding of the term at that time. It is a very broad and general expression, and, unless it can be said to have been generally confined in its common use to the technical or exclusive meaning of riding or driving horse races, we cannot so limit it.

While, before the invention and general use of automobiles, bicycles, motor cycles, and other means of locomotion, there may have been some justification for the contention that the term, "riding and driving races," should be held to refer to horse races only, such a contention cannot be justified at this period of history. Courts cannot hold themselves ignorant of the common knowledge that now and for many

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years last past automobile and bicycle races are as common, if not much more so, than horse races. This fact is not only common knowledge, but the terms, as applied to "driving" and "racing" with automobiles and bicycles, have been generally written in city ordinances, state statutes, and so treated in judicial decisions.

Neither can we overlook the fact, which is common knowledge, that automobile racing is as dangerous, in that accidents are as frequent and the results as serious, at least, as horse racing, and was so long prior to the writing of the certificate. Then by what authority may we construe the general term to be limited to horse racing,

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automobile
races.**

any more than we may limit it to automobile racing? Clearly the broad term, "driving races," as commonly understood, may include automobile races as well as horse races.

In 18 Enc. Britannica, p. 916, we have a very general account of automobile racing, from which we quote: "Progress in the improve-

ment of design was slow until the year 1894, when a great impetus was given to the French industry by the organization, by the *Petit Journal*, of a trial run of motor vehicles from Paris to Rouen. The measure of success attained by the cars caused considerable surprise, and in the year 1895 a race was organized from Paris to Bordeaux and back, a distance of 744 m., when the winning vehicle covered the journey at a mean speed of 15 m. per hour. From that date onward until 1908 racing played an important part in the development of the motor car; in fact it is not going too far to say that up to 1904 it played a vitally important part therein."

And again: "But it stood out in bold relief when an English car wrested the international trophy from its French rivals in 1902. The Automobile Club of Great Britain and Ireland (now the Royal Automobile Club) at once secured parliamentary sanction for the use of certain roads in Ireland for a limited period, and proceeded to organize a race worthy of the issue at stake. The race was won by the Mercedes car, the latest production of the famous house of Daimler."

The terms, "driver" and "driving," as applied to an operator of an automobile, were and have been in common use in general conversation, in newspapers, in statutes of regulation, and in judicial opinions, for many years before the date of the certificate in question. It is so used in the Denver Municipal Code of 1906, and in our state statute (Laws 1913, chap. 114). It is so defined in 28 Cyc. p. 24. It has been so used without question or quibble in the decisions of our own appellate courts, long prior to the issuance of the certificate in question.

In the case of *Hannan v. St. Clair*, 44 Colo. 134, 96 Pac. 822, published in the same year that the certificate was written, it was said, among other references to the "driver" of the automobile: "The testimony was, we think, sufficient to sustain the judgment. It clearly showed

negligence on the part of the driver of the automobile. The driver was on the wrong side of the street."

See also *Kent v. Treworgy*, 22 Colo. App. 441, 125 Pac. 128; *Kent v. Cobb*, 24 Colo. App. 264, 133 Pac. 424; *Gibson v. Dupree*, 26 Colo. App. 324, 144 Pac. 1183; *Phillips v. Denver City Tramway Co.* 53 Colo. 458, 128 Pac. 460, Ann. Cas. 1914B, 29.

The term has been so used by the appellate courts of other states without exception, and, in so far as we have been able to ascertain, without question.

It is said in *Berry on the Law of Automobiles*, 1916 ed. § 204: "The words, 'ride or drive,' as used in a statute providing a penalty for 'riding or driving' faster than a common pace in the compact part of any town, are not limited in their application to persons riding or driving animals. Anything ridden or driven comes within the purview of the act. The words apply to the operation of automobiles, and it is not material that automobiles were unknown to the legislators at the time the act was passed."

It was held as early as 1879 by the court of Queen's bench, *Taylor v. Goodwin*, L. R. 4 Q. B. Div. 228, construing a statute prohibiting "furiously driving a carriage," that one may be convicted for "furiously driving a bicycle." It was said by Mellor, J.: "I am of opinion that the decision of the magistrates was right. The words of the section are, 'If any person riding any horse or beast, or driving any sort of carriage, shall ride or drive the same furiously so as to endanger the life or limb of any passenger.' The expressions used are as wide as possible. It may be that bicycles were unknown at the time when the act passed, but the legislature clearly desired to prohibit the use of any sort of carriage in a manner dangerous to the life or limb of any passenger. The question is whether a bicycle is a carriage within the meaning of the act. I think the word 'carriage' is large enough to include a machine such as a bicycle

which carries the person who gets upon it, and I think that such person may be said to 'drive' it. He guides as well as propels it, and may be said to drive it as an engine driver is said to drive an engine. The furious driving of a bicycle is clearly within the mischief of the section, and seems to me to be within the meaning of the words, giving them a reasonable construction."

So here it is clearly the object of the exemption to exclude liability in case of hazardous risks. Particularly is this made apparent by the contract provision of nonliability in case of "voluntary exposure to danger."

Swanbrough was an automobile salesman. The society was a salesmen's society, and his certificate was under class A, containing the specified exemptions. In the light of his necessary understanding of the subject at the time, we cannot say that he did not read the exemption in the light of the plain language in which it was written.

The only case decided by any of our appellate courts called to our attention, wherein the precise principle of construction was involved, is that of *State v. Thurston*, 28 R. I. 265, 66 Atl. 580. This case was reported in 1907, and construed a penal statute enacted in 1901. The court said:

"Gen. Laws, chap. 74, § 5, as amended by Pub. Laws, chap. 925, November 26, 1901, provides: 'Every person who shall ride or drive faster than a common traveling pace in any of the streets of Newport or Providence or in the compact part of any town or village in the state, or in any road leading from Pawtuxet to the compact part of Providence, shall, unless justifiable cause be made to appear for such riding or driving, be fined not less than five dollars nor more than twenty dollars or imprisoned not exceeding ten days for each offense.' . . .

"The language used in this section is exceedingly broad: 'Every person who shall ride or drive fast-

er than a common traveling pace.' The words, 'ride or drive,' are not confined to animals; they are not limited in any manner whatsoever. Anything capable of being ridden or driven comes within the purview of the act. It is argued that the words, 'ride or drive,' are apt words in a statute designed to limit the fast driving of horses upon the highways of the state. They are apt, but they are not restricted to horses by the terms of the section. They are also apt in the case of bicycles, motorcycles, or automobiles when ridden or driven. In construing statutes of this kind it is usual and proper to consider the scope and purpose of the act, and the danger or mischief that it was intended to guard against. The act was evidently passed for the protection of the public against the dangers incident to fast riding and driving of any sort, not only of the kind with which the legislators were familiar at the time, but also any kind of dangerous riding or driving."

As inimitably described by Lew Wallace, his hero, Ben Hur, was driving a race; 2,000 years later Barney Oldfield, midst like plaudits of the multitude, was driving a race—the one driving a chariot race; the other driving an automobile race. Both races alike were hazardous to the driver. Neither intervening time nor the fact that the carriage of the one was propelled by Arabian horses of pure blood, while the carriage of the other was propelled by most delicately adjusted mechanical power, can alter the plain understanding that each was engaged in the driving of a race. Neither can all the definitions written in the centuries between change the common understanding of men that linked together in thought these men engaged in driving races. This is not only the fact, but it is the common understanding of the fact, according to the usage and custom of the times.

So that we cannot in reason, nor in the exercise of any just power, insert by construction in the exemp-

tion clause of the certificate, and before the word "races," any definitive or descriptive word. In this case it is as reasonable for us to so insert the word "automobile" as the word "horse." We must construe the contract as of the plain meaning that its words imply.

Counsel urge the application of the rule which obtains in this court, applicable to purely benefit accident policies, as well as to the ordinary accident policy, that where there is ambiguity in the policy, all provisions, conditions, or exceptions which may tend to work a forfeiture of the policy, or limit or defeat liability thereunder, should be construed most strongly against the insurer and most favorably toward the insured; more definitely, that when the exemption from liability is reasonably capable of two different constructions, that one most favorable to the insured should be adopted.

But the language in the exemption here considered is not ambiguous, —construction against insurer. nor is it reasonably capable of two different constructions.

We said in *Brown v. Knights of Protected Ark*, 43 Colo. 289, 96 Pac. 450: "If the contract were ambiguous or doubtful and were fairly subject to different interpretations, it would be construed most strongly against the insuring association. But courts are required to enforce these contracts as they are written; in this respect they do not materially differ from other contracts; when they are voluntarily entered into and their terms are reasonably plain, the courts have no alternative; the fact that a particular provision may operate harshly or inequitably in particular cases does not justify a judicial disregard or reconstruction of the same."

It was said in *Standard Life & Acci. Ins. Co. v. McNulty*, 85 C. C. A. 22, 157 Fed. 224: "The natural obvious meaning of the provisions of a contract should be preferred to any curious hidden sense which nothing but the exigencies of a hard

case and the ingenuity of a trained and acute intellect would discover. Delaware Ins. Co. v. Greer, 61 L.R.A. 137, 57 C. C. A. 188, 193, 120 Fed. 916, 921. The reasonable and probable meaning of a stipulation in an agreement should be preferred to one that is irrational and improbable. Pressed Steel Car Co. v. Eastern R. Co. 57 C. C. A. 635, 637, 121 Fed. 609, 611."

It is certain that the parties to this contract excepted from indemnity injuries sustained while the insured was driving a race, and to say that he was not driving a race when he met his death is to distort the meaning of the English language, as commonly and generally understood.

In Delaware Ins. Co. v. Greer, 61 L.R.A. 137, 57 C. C. A. 188, 120 Fed. 916, the court said: "Contracts of insurance, however, are not made by or for casuists or sophists, and the obvious meaning of their plain terms is not to be discarded for some curious, hidden sense, which nothing but the exigency of a hard case and the ingenuity of an acute mind would discover."

In order that fraternal insurance societies may be preserved, and their membership as a whole protected, it is as imperative that each member shall fairly observe the rules of the society and the requirements of his contract of insurance, as that the society should meet its obligations when such requirements are observed by the insured.

The judgment is affirmed.

Teller, J., dissenting:

The majority opinion treats the words "riding" and "driving" as present participles, governing "races," while to my mind they are clearly adjectives qualifying the noun "races." The former construction is based in the opinion wholly on the fact that persons operating automobiles are properly described as "driving" them, and that automobile races were common when the certificate in question was issued.

This entirely overlooks the con-

tention of plaintiff in error that the exemption clause, as a whole, makes the second named construction necessary.

The first provision of the exemption clause is that the benefits promised shall not extend to death, etc., "while the insured member is acting as aviator," etc., "or is playing professional baseball," etc. It should be noted that this clause expressly exempts from benefits members injured "while" doing specified acts, present participles being used with the auxiliary verb "is," forming sentences grammatically complete and requiring no construction.

In the next line the construction changes, and it is provided that such benefits shall not "cover or extend to any death, disability, or loss resulting from fighting, riding or driving races, overexertion (unless in an effort to save human life), riot, the moving or transportation or use of gunpowder," etc.

Here there are excluded from the exemption specified acts or events, designated in each class by one word, a noun, governed by the preposition "from," but followed by a class of events not expressed by one word, as before, but by a present participle and its object, which participle, "moving," is, according to the rules of good English, preceded by the article "the," and followed by the preposition "of," e. g., "the moving of gunpowder." Further along in this clause we find, "the intentional taking of medicine or drugs," etc.

Why should it be supposed that one who thus wrote according to good usage should in a preceding line have written bad English? How does it happen that the language is not "the riding or driving of races," if the writer was using the two words as participles? Again, why should the writer adopt the barbarous locution "from driving races," when he everywhere else in the instrument shows a knowledge of good English, and introduces his present participles with the conjunction "while?" Ordinary

usage requires that the phrase be "driving in a race," if "driving" be used as a participle.

The word "races," without qualification, always and everywhere is taken to mean horse races. If one is mentioned as "following the races," or "playing the races," everyone understands that horse races are meant. There are two kinds of horse races,—one in which the participating horses are ridden, and the other in which they are driven. All other races are designated by the name of the class to which they belong, e. g., automobile races, boat races, and foot races. This usage is general, if not universal.

To treat "riding" and "driving" as participial adjectives is to give this clause its ordinary and natural meaning, and make it grammatical and harmonious. This is the meaning which the words had in policies long before automobiles were invented.

The construction adopted by the majority opinion makes "races" include all speed contests which may be ridden or driven; but no reason is apparent why other races, e. g., yacht races, boat races, swimming races, etc., should not be included in the list.

The fact that insurance policies or certificates like the one in this case are sold on solicitation by agents of the insurer, who is responsible for the language used, is a potent reason for applying the rule that, in case of doubt as to the meaning of an instrument, such doubt should be resolved against the one who drew it. Such a doubt exists here, as is shown by the difference of opinion by members of the court.

In a case recently decided by this court (*Finding v. Ocean Acci. & G. Corp.* — Colo. —, 177 Pac. 142), the opinion, written by the writer of the majority opinion in this case, contains the following: "In *Wood on Fire Insurance*, at § 59, it is said: 'It is the duty of the insurer to clothe the contract in language so

plain and clear that the insured cannot be mistaken or misled. . . . Having the power to impose conditions, and being the party who draws the contract, he must see to it that all conditions are plain, easily understood, and free from ambiguity. . . . Failing to employ a clear and definite form of expression, the benefit of all doubts will be resolved in favor of the assured.'"

From *Preferred Acci. Ins. Co. v. Fielding*, 35 Colo. 19, 83 Pac. 1013, 9 Ann. Cas. 916, the opinion quotes as follows: "It is now a well-recognized rule that, where the terms of a policy of insurance are not clear or are capable of two constructions, the one which is most favorable to the insured will be adopted."

If the language under consideration is not capable of two constructions, and so within the rule thus stated, there could be no reason for an extended discussion of it in the majority opinion.

The judgment should be reversed.

Burke, J., dissenting:

I am of the opinion that the conclusion reached by Justice Teller in this case in his dissenting opinion is the correct one, and that his reasoning is irrefutable from the standpoint of grammatical construction. But, as grammatical construction is often disregarded by the courts if a different construction will give effect to the intention of the parties as disclosed by a consideration of the entire instrument (*Jackson v. Topping*, 1 Wend. 388, 19 Am. Dec. 515), it seems to me that illustration will here serve us better than argument.

The language in this policy over which this contention arises either means "resulting from riding or driving in any races," or "resulting from any riding or driving races." It is common usage, when speaking of an automobile race, to speak of "driving" such a race, whereas no one ever speaks of an automobile race as "a driving race." Hence, if the first interpretation is correct,

the accident in question came within the exception; if the second, then it did not. To reach either conclusion requires careful analysis and construction. The meaning of this clause in this policy is, therefore, to say the least, a matter of grave doubt. When such a doubt exists as to the interpretation of such a con-

tract, it must be resolved in favor of the assured, as has been held by this court. *Finding v. Ocean Acci. & G. Corp.* — Colo. —, 177 Pac. 142; *Preferred Acci. Ins. Co. v. Fielding*, 35 Colo. 19-26, 83 Pac. 1013, 9 Ann. Cas. 916.

Hence the judgment should be reversed.

ANNOTATION.

Accident insurance: scope and effect of provision as to "riding or driving races."

It will be observed that the majority of the court in the reported case (*SWANBROUGH v. UNITED COMMERCIAL TRAVELERS*, ante, 485) rejected the beneficiary's contention that the provision of the accident policy, reading, "nor shall such benefits cover or extend to any death, disability, or loss resulting from . . . riding or driving races," should be construed to refer to horse races only, and construed the provision to include automobile races, and to preclude a recovery for the insured's death occurring while he was driving in an automobile race. The majority's conclusion that it was as reasonable to insert the word "automobile" as the word "horse" before the word "races" appears sound, as does also its conclusion that the language in the exemption was not ambiguous and not capable of different constructions, so that no occasion existed for applying the rule which requires policies to be most strongly construed against the insurer in case of ambiguous phraseology. It will be noted, however, that a dissenting opinion was filed in the case, based on a technical grammatical construction of the provision.

This case appears to be the first to have construed an exemption of the kind under consideration.

Attention, however, is called to *Smith v. Aetna L. Ins. Co.* (1904) 185 Mass. 74, 64 L.R.A. 117, 202 Am. St. Rep. 326, 69 N. E. 1059, where it was held that steeple-chase riding by one

who gave his occupation as a cotton merchant was a voluntary exposure to unnecessary danger, within the meaning of an accident policy exempting the insurer from such exposure. The court in that case said: "There can be no question that the danger was unnecessary, and that the exposure to it was voluntary. There was nothing in the description of the occupation of the plaintiff, contained in the policy, nor in anything else contained in the policy, which included steeple-chase riding, or which showed that the plaintiff engaged in it. We do not mean to say that an accident policy containing a provision like that contained in the policy in this case, against voluntary exposure to unnecessary danger, debars the insured from recovery if injured while engaged in the common sports and amusements. But in steeple-chase riding the liability to accident is much greater than in the ordinary sports and amusements. The fact that the race in which the plaintiff was injured was for amateurs makes no difference. Neither does the circumstance that the defendant's agent was aware that the plaintiff occasionally rode steeple-chase races make any difference. The liability to the defendant depends on the terms of the policy, and whether an accident sustained in steeple-chase riding comes within them. For reasons already given, we do not think that it does." J. T. W.

JENNIE C. BARNES et al.

v.

GEORGE A. UPHAM.

Connecticut Supreme Court of Errors—June 11, 1919.

(98 Conn. 491, 107 Atl. 300.)

Mortgage — duty of second mortgagee to give notice.

1. The holder of a second mortgage on property which has been assigned by the mortgagor is under no obligation to give notice to the mortgagor of proceedings to foreclose the first mortgage in order to enforce his personal liability on the second mortgage note.

[See note on this question beginning on page 499.]

— foreclosure — notice to assignor of equity of redemption.

2. A mortgagor who has assigned the equity of redemption is not entitled to notice of proceedings to foreclose the mortgage.

[See 19 R. C. L. 527.]

— enforcement of notes — tender of mortgage.

3. A mortgagee need not tender an assignment of the mortgage in order to recover on the mortgage notes.

[See 19 R. C. L. 509-513.]

(Gager, J., dissents in part.)

CROSS APPEALS from a judgment of the Superior Court for Fairfield County (Curtis and Warner, JJ.) in favor of plaintiffs in part only, in an action on four promissory notes; plaintiff Barnes appealing from so much of the judgment as barred her from recovery; and defendant appealing from the judgment against him and from the sustaining of a demurrer to the answer filed by him. *Affirmed.*

Statement by Beach, J.:

The complaint is in four counts. The first, second, and fourth counts are on notes executed and delivered by the defendant. The third count is on a note originally executed by the plaintiff to one Partree, which the defendant afterward agreed in writing to assume and pay.

In addition to the usual admissions and denials, special defenses were pleaded. The first special defense, covering all four counts, was that all of the indebtedness in question had been attached in the hands of the defendant by garnishment proceedings in an action still pending and undetermined in the superior court. This defense was eliminated by making the garnishee a party to the action, and is not now insisted upon.

A second special defense to the first count alleges that on the date of the note the defendant owned certain real estate in Waterbury sub-

ject to a first mortgage; that the note counted on was secured by a second mortgage of these premises; that the defendant afterward parted with his equity in said premises; that thereafter, and while the plaintiff still held the note and the second mortgage, proceedings to foreclose the first mortgage were brought, to which the plaintiff was a party and defendant not; that plaintiff failed to redeem and gave defendant no notice of the pendency of the action, but permitted the second mortgage security for the note to be extinguished, though it was of great value. Under this defense it is alleged that the defendant was damaged in the sum of \$3,000.

By way of counterclaim, a second special defense to the third and fourth counts alleged that the note given by the plaintiff to Partree was a mortgage note; that in the assignment of the note back to the plaintiff the security was also assigned;

and that, if the defendant is compelled to pay the note, he is entitled to an assignment of the mortgage security. The same claim—that it is a mortgage note, and, if the defendant is compelled to pay, he is entitled to an assignment of the mortgage as security—is asserted as to the note described in the fourth count.

A third special defense to the third and fourth counts alleged that the plaintiff has pledged the notes in question, which are still held by pledgee; that the defendant has been notified by pledgee and will be liable to the pledgee if compelled to pay the plaintiff. This defense also was eliminated by making the pledgee a party, and is no longer relied on.

All of the special defenses were successfully demurred to.

The Citizens' National Bank of Waterbury—the plaintiff creditor referred to in the first special defense and the pledgee referred to in the third special defense to the third and fourth counts—was made a party to the action and filed a pleading stating its claim as creditor and pledgee.

The cause went to trial on the defendant's admissions and denials, and judgment was rendered against the defendant on the first, third, and fourth counts for \$10,501.01, payable in part to the plaintiff and in part to the pledgee bank; and against the plaintiff on the second count. Both parties appealed. Other facts are sufficiently stated in the opinion.

Messrs. Foster & Morgan, for plaintiff Barnes:

Simply because a debt is garnished, a creditor cannot thereby be prevented from bringing an action.

Neszery v. Beard, 224 Mass. 305, 112 N. E. 1012; Ladd v. Jacobs, 64 Me. 347.

A mortgagee can bring an independent action on a mortgage note.

2 Jones, Mortg. 7th ed. § 1220.

While the pledgee of such a note as is here in question has the right to sue for the recovery of so much of it as will pay the principal debt of the pledgeor to the pledgee, the pledgeor

has such an ownership in the note as will permit her to sue upon it.

Grimm v. Warner, 45 Iowa, 106; St. Paul Nat. Bank v. Cannon, 46 Minn. 95, 24 Am. St. Rep. 189, 43 N. W. 524.

Messrs. Bronson, Lewis, & Hart, for defendant:

Defendant upon payment of his debts is entitled to demand and receive as an accompaniment to the notes, the mortgage securities therefor.

Langdon v. Buell, 9 Wend. 80; Green v. Hart, 1 Johns. 580; Jackson ex dem. Norton v. Willard, 4 Johns. 41; Jackson ex dem. Barclay v. Blodget, 5 Cow. 202; Carpenter v. Longan, 16 Wall. 271, 21 L. ed. 313; National Live Stock Bank v. First Nat. Bank, 203 U. S. 296, 51 L. ed. 192, 27 Sup. Ct. Rep. 79; Lipscomb v. Talbott, 243 Mo. 31, 147 S. W. 798; 2 Jones, Mortg. §§ 805, 817; Holmes v. Gardner, 50 Ohio St. 167, 20 L.R.A. 333, 33 N. E. 644; Paine v. French, 4 Ohio, 318; Parker v. Randolph, 5 S. D. 549, 29 L.R.A. 36, 59 N. W. 722; Matthews v. Warner, 112 U. S. 600, 28 L. ed. 851, 5 Sup. Ct. Rep. 312; Walker v. Schreiber, 47 Iowa, 529.

Where the mortgagee voluntarily releases the security or allows it to be lost by his own laches or neglect, and under such circumstances that the subsequent foreclosure of the mortgage by suit upon the note would work an injustice to the mortgagor or the maker of the note, or a fraud on the rights of any person having an interest, such release or loss of security will operate to discharge the mortgage to the extent of the value of such security or release the maker of the note to that extent.

2 Jones, Mortg. § 728; Grow v. Garlock, 97 N. Y. 81; Lickbarrow v. Mason, 2 T. R. 70, 100 Eng. Reprint, 38, 4 Eng. Rul. Cas. 756; Hern v. Nichols, 1 Salk. 289, 91 Eng. Reprint, 256.

Beach, J., delivered the opinion of the court:

The second special defense to the first count is based on the theory that the defendant, after having parted with the equity of redemption, was entitled to notice of the pendency of the proceedings for the foreclosure of the first mortgage, and that it was the duty of the second mortgagee, if she elected not to redeem, to give such notice in case she desired to hold the defendant on the note. Neither of these propositions is sound. In the first

place, the defendant, by a conveyance of the equity, had parted with his entire interest in the premises.

**Mortgage-
foreclosure-
notice to
assignor of
equity of
redemption.**

As the record title stood, he had no interest in the premises sufficiently to give him a standing in the foreclosure proceedings, and therefore was not in law entitled to notice.

Nor was the second mortgagee under any equitable obligation to give the defendant notice.

The case is not analogous to that of a pledgee who allows the pledge to be taken out of his hands on the demand of a stranger without notifying the pledgor to give him an opportunity to defend. Independently of the fact that the plaintiff never had physical custody of the premises, the security which she held had been already, by the defendant's own act, subjected to be taken on foreclosure before the second mortgage was executed. Consequently, both the parties to the second mortgage knew that the first mortgage was liable to be foreclosed, and that the security of the second mortgage was liable to be extinguished by such foreclosure. Admittedly, it was not the duty of the plaintiff to protect the defendant against the extinguishment of the security of the second mortgage note. The defendant knew all the facts, and the plaintiff was legally and equitably entitled to assume that, if he chose to part with the equity and with his right to notice of foreclosure proceedings, he would protect his own interests in his own way. The answer does not expressly allege whether the defendant has or has not done so by requiring the grantee of the equity to assume and agree to pay the second mortgage note. But the material consideration is that he had full knowledge of the risk which he ran when he parted with the equity in the premises. Presumably he received a satisfactory consideration for assuming that risk. At any rate, he

was not dependent upon, and therefore was not entitled to, any assistance from the second mortgagee in looking after his own interests.

The second special defense to the third and fourth counts stands on the claim that, as a condition of recovery on the mortgage notes, the plaintiff must tender or offer an assignment of the mortgage security. That is not our law. The mortgagee has always been permitted to bring foreclosure, ejectment, or an action on the note. 2 Swift's Dig. 167. He is not bound to tender or offer a release of the mortgage until the debt is satisfied. —enforcement of notes—tender of mortgage.

Resort to a court of equity in order to compel a release is no longer necessary, for by § 5105, Gen. Stat., the execution and delivery of a release of the mortgage, after written request and satisfaction thereof, is required under a penalty for failure to do so.

Turning now to the plaintiff's appeal from the judgment for defendant on the cause of action stated in the second count, the finding of facts is that the note for \$1,900, described in the second count, was assigned by the plaintiff to a third party to secure an indebtedness of \$500, that the plaintiff has not paid the \$500 for which the note was pledged as collateral security, and that the note was not in the possession of the plaintiff at the time of the trial, but is now "in the hands of some other person, and was produced upon notice by her to counsel of defendant, having passed by indorsement through the hands of several parties, and neither the Waterbury Coal & Lumber Company (the original pledgee) nor the true holder of the note is a party to the case."

The finding that the plaintiff was not the "true holder" of this note justifies and requires the conclusion that the plaintiff had not sustained the burden of proving her ownership.

There is no error.

Prentice, Ch. J., and Roraback and Wheeler, JJ., concur.

Gager, J., dissenting in part:

While I concur in the result reached by the majority of the court so far as the disposition of the case upon the pleadings is concerned, I must, with great deference to the other members of the court, record my dissent with respect to the discussion of the second special defense to the first count, and the legal propositions upon which the case is decided so far as this defense is concerned. By the pleadings it appears that the defendant owned the property subject to a first mortgage. Contrary to the assumption in the opinion, it does not appear, either expressly or by implication, that the defendant himself gave this mortgage. The defendant, while such owner, gave a second mortgage to the plaintiff to secure the note sued on in the first count of the complaint. Thereafter the defendant parted with his equity. The first mortgagee then brought foreclosure, making the plaintiff, the second mortgagee, a party, but not making the defendant, who had parted with his equity, a party defendant in the foreclosure suit. The present defendant, having parted with his equity of redemption, was not a necessary party in the foreclosure of the first mortgage, and was not made a party. Unless he gave the first mortgage, which does not appear, he was not even a proper party. The service of process in the foreclosure suit made the present plaintiff chargeable with notice that the defendant had no legal notice of the pendency of the foreclosure suit in which the interest in the property being foreclosed, mortgaged by him to the second mortgagee, was liable to be taken away, leaving the defendant still personally liable on the second mortgage note.

The answer also alleges that the present plaintiff, who was a defendant as second mortgagee in the foreclosure suit, gave no notice to the present defendant of the pendency

of this foreclosure suit, and "either knowingly and wilfully, or by her carelessness and neglect," allowed her second mortgage to be extinguished by her failure to redeem, without giving notice to the defendant of the pendency of the foreclosure.

The trial court sustained the demurrer to the answer upon the ground that these facts did not constitute a defense to the note. With this conclusion I agree. Whether the claim undertaken to be set forth in the second special defense to the first count now under discussion is sound or unsound, it is not, as a matter of pleading, a defense to the note, but is the basis of a counterclaim for damages suffered by the defendant through the negligence of the plaintiff, and should have been pleaded as such. The plaintiff and defendant had made two contracts, one evidenced by the note and one by the conveyance for security. The defendant complained of a violation of an equitable duty under the second contract. One right of action cannot be a bar to another right of action. It may be used by way of counterclaim and is available only in that way. *Cooper v. Simpson*, 41 Minn. 46, 4 L.R.A. 194, 16 Am. St. Rep. 46, 42 N. W. 601; *Taggard v. Curtenius*, 15 Wend. 155. Hence the ruling of the trial court upon the pleadings was right.

The majority opinion goes much further. It assumes that the statement of facts as a defense in bar is proper pleading, and, as is quite unnecessary for the determination of this case, takes the broad ground that under the circumstances stated the plaintiff owed no duty to give notice to the defendant of the pendency of the foreclosure and the danger of loss of the interest in the property mortgaged by him to her to secure the note sued upon while the plaintiff still continued to look to him for the payment of the note. No authorities are cited in support of this proposition. This is not conclusive; but, as I read the cases, they point the other way.

The allegation is that the plaintiff wilfully or negligently permitted the loss of the security without notifying the defendant so that the defendant, if he saw fit, could save all or a part of the value of the security furnished by him and standing in the plaintiff's name. The alleged loss to the defendant was \$3,000. The plaintiff then held a mortgage title on this land of the value of \$3,000. Equity will not permit her to wilfully or negligently suffer this title, vested in her, which represents substantial value to the defendant, to be wiped out without notice to him, and then enforce payment on the note without allowance to the defendant by way of counterclaim for the damages the negligence has caused him. The defendant, having parted with his equity, became a stranger to the title, having first carved out an interest in the property to secure the plaintiff's note. Upon subsequent payment of the note, he was entitled to be subrogated to the rights of security which the plaintiff held. If these rights had disappeared through the negligence of the plaintiff, the result is that the security and the note have become dissociated; the security, without fault on the part of the second mortgagor, the present defendant, going to the benefit of the first mortgagee under his foreclosure, and the note remaining in the hands of the second mortgagee as a personal claim in full against the maker.

I am unable to subscribe to a doctrine that involves such a result, and the correct disposition of this case does not require such a decision. The opinion seems to admit in substance that such is the rule in the case of a pledge, but that the present situation is not analogous to that pledge, and that the rule does not apply in the case of a real estate mortgage. I do not see any difference so far as this distinction is urged. In both cases the security in the hands of the creditor is held in trust for the payment of the debt. That there is no such distinction

seems to have been held in *New London Bank v. Lee*, 11 Conn. 112, 27 Am. Dec. 713.

I admit that it was not the duty of the plaintiff to protect the defendant against the extinguishment of the security of the second mortgage note. I do not admit that she could wilfully or negligently permit this to be done without notice to her mortgagor who otherwise, to her knowledge, had no notice that such extinguishment would take place, so that he might protect himself if he saw fit.

A mortgagor has a perfect right to convey his equity of redemption, and, having done so, has the right to have the mortgaged property applied to the payment of the mortgage debt so far as necessary for his protection against personal liability for the debt secured. *Jones, Mortg.* 7th ed. §§ 676, 678a. In *Townsend Sav. Bank v. Munson*, 47 Conn. 399, Munson mortgaged sufficient land to a bank to secure payment of his note and afterward conveyed the equity to Wood; upon his assumption of the note the bank released its claim on part of the security. The court held that there remained in Munson the right to have both the note and Wood's agreement protected by that security, and said:

"If the bank compels him to pay the note, it must restore the security to him; unless it is able to do this, it must content itself with the proceeds of the land retained."

In *Worcester Sav. Bank v. Thayer*, 136 Mass. 459, our case of *Townsend Sav. Bank v. Munson*, supra, is cited with approval. The rule above stated is adopted, and it is held that the assumption of the mortgage by the purchaser of the equity does not affect the mortgagor's rights, and that the fact that the mortgagee released in good faith will not protect him. In other words, the mortgagor is under no obligation to make any indemnity contract with his vendee, as is suggested in the majority opinion. This does not affect his rights against his mortgagee. The court in that case said:

"While there is a difference between a contract that the assignee of the equity shall actually pay the mortgage debt, and a contract that the estate shall remain charged with the debt, so that the assignee must necessarily pay it if he would protect his property, in either case the mortgagor is entitled to the benefit of this security."

See also *North Ave. Sav. Bank v. Hayes*, 188 Mass. 137, 74 N. E. 311.

Of course, a mere transfer of the equity leaves the land charged with the debt. In *Jones on Mortgages*, vol. 2, § 879, it is said:

"After a mortgagor has sold his equity of redemption, he has the same right as any third person to purchase and take an assignment of the mortgage, and upon payment of a prior encumbrance he is entitled to be subrogated to the rights of the holder of such encumbrance; and this right of subrogation is not defeated by his having taken a second mortgage as security for the payment of the original mortgage debt.

"If the mortgagee, with knowledge of the mortgagor's right to have the property applied to the payment of the mortgage debt, does anything to impair this right, as, for instance, if he releases a portion of the mortgaged premises, he must suffer the loss himself, by being deprived to that extent of his

right of recourse to the mortgagor, who, in such case, stands in the position of a surety."

See *Hart v. Chase*, 46 Conn. 207.

The mortgagor in such case, having ceased to be interested as owner in the land he mortgaged, is entitled, upon payment of his note, to have returned to him the security he placed in plaintiff's hands; that the security was created by deed rather than delivery of physical possession can make no difference. If the plaintiff by her act, whether in good faith or not, without the consent of the defendant, has become unable to turn back the security received, the plaintiff must, by way of counterclaim or set-off, allow as against the amount due on the note the damage caused the defendant by her inability to turn back the security. If the plaintiff would have been liable in the way stated upon a voluntary release without defendant's consent, she cannot be permitted to work the same result by wilfulness or negligence. She is equally liable when, having notice herself that the security is in danger from foreclosure of a prior mortgage, and being chargeable with notice that the defendant is not a party to the foreclosure suit, she wilfully or negligently fails to give the defendant notice of the pending foreclosure.

ANNOTATION.

Duty to notify mortgagor who has parted with title to mortgaged real property of proceedings to enforce prior lien.

There is a difference of opinion as to the position occupied by a mortgagor who has conveyed his equity of redemption to one who has not assumed the mortgage, some cases holding that he occupies the relation of surety, others that he does not. The better rule has been stated to lie between these two extremes, and is that where the grantee does not assume the mortgage, but merely takes subject thereto, the grantor occupies, to the extent of the value of the land, the

position of surety, and is entitled to the rights arising from that relation by having the mortgage discharged primarily from the proceeds of the land. 19 R. C. L. p. 383, § 155. The consequences of the mortgagor's character as surety are usually shown in cases in which the mortgagee has extended time for payment or released a part of the mortgaged premises. To the extent of the injury suffered by the mortgagor he is, upon the suretyship theory, thereby released.

In the reported case (*BARNES v. UPHAM*, ante, 494) there was no affirmative action by the mortgagee which was made the basis of the mortgagor's defense, but only an omission to protect the security by redemption or by notifying the mortgagor so that he might take whatever action he regarded as desirable. A search has failed

to disclose any other cases in which this state of facts was presented. The theory—contrary to that taken by the majority opinion—that the mortgagor has suffered damage by such omission, which he is entitled to have applied in exoneration of his liability on his note, is ably presented in the dissenting opinion.
W. A. E.

NELLIE T. BOYD, Admr., etc., of W. T. Boyd, Deceased, et al., Appts.,
v.
LILLIAN M. GOSSER.

Florida Supreme Court — August 9, 1918.

(— Fla. —, 82 So. 758.)

Appeal — reversal on weight of evidence — genuineness of signature.

1. The appellate court may reverse a finding of the chancellor that a disputed signature was genuine if the demonstrative evidence, consisting of measurements and comparisons of the disputed signatures with genuine ones, shows them to be forgeries, although witnesses have testified that they saw them made by the one whose signatures they purported to be, and that he acknowledged that he made them.

[See note on this question beginning on page 507.]

— findings of chancellor — conclusiveness.

2. The findings of the chancellor on the evidence will not be disturbed by the appellate court unless such findings of fact are clearly shown to be erroneous.

[See 2 R. C. L. 203.]

— rejection of evidence — error.

3. It is not reversible error to refuse to permit photographs of genuine and alleged forged signatures to be projected upon a screen for purposes of comparison, if a number of genuine signatures are before the court as well as those alleged to have been forged, and also a number of photographs of genuine signatures and the questioned ones.

[See 2 R. C. L. 253-256; 10 R. C. L. 1154.]

On Rehearing.

Evidence — forgery — similarity of signatures.

4. The genuineness of a signature may be ascertained by comparison of the disputed signature with an admittedly genuine one, and when upon such

comparison the two signatures are so much alike in the many features of their construction that they agree or correspond in lines, angles, slant, and space occupied, the fact of such correspondence is deemed to be evidence of highly probative value that one is a tracing of the other, or a drawing from a model.

[See 10 R. C. L. 994 et seq.]

Evidence — handwriting expert — opinion.

5. The testimony of a handwriting expert as to the genuineness of a questioned document cannot be treated as a mere opinion where it consists of a detailed statement of facts revealed by mechanical instruments and scientifically established to the degree of demonstration.

[See 11 R. C. L. 587, 621, 622.]

Definition — preponderance of evidence.

6. Preponderance of the evidence is a phrase which, in the last analysis, means probability of the truth.

[See 10 R. C. L. 1012.]

Headnote 2 by WEST, J.

Headnote 4 by ELLIS, J.

(Whitfield and West, JJ., dissent from the rehearing opinion.)

APPEAL by defendants from a decree of the Circuit Court for Hillsborough County (Robles, J.) in favor of complainant in consolidated suits brought to compel specific performance of an alleged written contract for the sale of certain real estate. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. James F. Glen and Kenneth I. McKay for appellants.

Messrs. Whitaker, Himes, & Whitaker, for appellee:

Where the findings of the chancellor upon conflicting testimony are challenged before the appellate court, the latter court should affirm the decree if fairly supported by the evidence, although the reviewing court might have drawn a different conclusion from the facts, and although the testimony is of such a character that different minds and different judges might reasonably disagree as to the proper conclusion to be arrived at.

Chrislip v. Teter, 43 W. Va. 356, 27 S. E. 288; Johns v. Bowden, — Fla. —, 73 So. 603; West v. Daniels, 57 Fla. 548, 49 So. 154; Johnson v. Elliott, 64 Fla. 318, 59 So. 944.

In an equity case, a decree based largely or solely upon questions of fact, decided upon conflicting testimony, should not be reversed so long as the testimony supports the decree, unless the evidence clearly shows that it was erroneous.

Dixon Lumber Co. v. Jennings, 63 Fla. 405, 57 So. 615; Brannon v. Blume, 61 Fla. 505, 55 So. 549; Herrin v. Abbe, 55 Fla. 769, 18 L.R.A.(N.S.) 907, 46 So. 183; Gove v. Nautilus Hotel Co. 68 Fla. 490, 67 So. 112; Viser v. Willard, 60 Fla. 395, 53 So. 501; Slorah v. Wilcox, 59 Fla. 601, 52 So. 12; Bank of Jasper v. Tuten, 62 Fla. 423, 57 So. 238; Terra Ceia Estates v. Taylor, 68 Fla. 261, 67 So. 170.

The evidence relied upon by the defendants, although competent so far as its admissibility is concerned, is of the weakest and lowest degree known to the law and insufficient to outweigh the complainant's testimony.

Johnston v. Linder, 168 Iowa, 441, 143 N. W. 410; 6 Enc. Ev. 404; 3 Jones, Ev. ¶ 556; Black v. Black, 30 N. J. Eq. 224; Fuller's Estate, 222 Pa. 182, 70 Atl. 1005; Re Mara, 137 N. Y. Supp. 151; Re Foster, 34 Mich. 26; Dresler v. Hard, 12 L.R.A. 457, note; 11 R. C. L. 587.

The genuineness of the execution of the contracts was proven and established by the testimony of witness, a bookkeeper of deceased.

Thalheim v. State, 38 Fla. 189, 20

So. 938; Hopkins v. State, 52 Fla. 39, 42 So. 52; Wooldridge v. State, 49 Fla. 137, 38 So. 3; Pittman v. State, 51 Fla. 94, 8 L.R.A.(N.S.) 509, 41 So. 385; Jones, Ev. 545; Fuller's Estate, 222 Pa. 182, 70 Atl. 1006; Johnson v. Linder, 168 Iowa, 441, 143 N. W. 416; Johnson v. Aetna L. Ins. Co. 158 Wis. 56, 147 N. W. 32, Ann. Cas. 1916E, 603; 11 R. C. L. 587.

The alleged photographic reproductions of enlargements of one genuine signature of W. T. Boyd and of the signatures to two disputed contracts cannot be considered by the court.

Corbet v. Union Dime Sav. Inst. 67 Misc. 175, 122 N. Y. Supp. 268; Tome v. Parkersburgh Branch R. Co. 39 Md. 36, 17 Am. Rep. 561; Re Taylor, 10 Abb. Pr. N. S. 318.

The administrators of a deceased party cannot introduce in their behalf the alleged declarations of the intestate.

Duvall v. Hambleton, 98 Md. 12, 55 Atl. 431; Re Welch, 110 Cal. 605, 42 Pac. 1089; Dozier v. McWhorter, 117 Ga. 786, 45 S. E. 61; Egan v. Grece, 79 Mich. 629, 45 N. W. 74; Strode v. Meyer Bros. Drug Co. 101 Mo. App. 627, 74 S. W. 379; State v. Allen, 56 S. C. 495, 35 S. E. 204; 16 Cyc. 1195; John O'Brien Lumber Co. v. Wilkinson, 123 Wis. 272, 101 N. W. 1051; Upchurch v. Mizell, 50 Fla. 456, 40 So. 29.

West, J., delivered the opinion of the court:

Two suits of the same character between the same parties were, by order of the chancellor, consolidated. The object of each of the suits is the specific performance of an alleged contract in writing, between the complainant and the defendants' decedent, for the sale of certain real estate in the city of Tampa. The contracts are substantially the same in form and substance.

In the bill appearing first in the record the contract is as follows:

Tampa, Fla., Hillsborough Co.,
2-25-12.

It is hereby agreed between Mrs. L. M. Gosser, party of the first part,

and W. T. Boyd, party of the second part, that said party of the first part has paid the sum of \$2,800, and \$200 paid for rent of said residence No. 120 West Palm avenue shall be added to this payment as cash, making total \$3,000 paid by party of the first part to the party of the second part for dwelling house No. 120 West Palm avenue and one storehouse No. 122 West Palm avenue, now leased to B. H. Goldwire for the term of five years, the party of the first part to receive all rents on said store and lease to be transferred to party of the first part, and insurance on the property, and when abstract and warranty deed are presented in the proper form for the property No. 120 West Palm avenue and No. 122 West Palm avenue. It is understood that when said papers are presented with perfect title and on or before January 23, 1913, a further sum of \$300 is to be paid to W. T. Boyd, both payments amounting to \$3,300, which is total price for said property.

Mrs. L. M. Gosser.
W. T. Boyd.

It is alleged that the consideration agreed to be paid for the described property, except the sum of \$300, has been paid; that the complainant was let into possession of said property and is now in possession thereof, and she offers to bring into court, and to pay when and as the court may direct, the unpaid balance due under the terms of said contract. There is a prayer for specific performance and for general relief.

The answer admits the death of W. T. Boyd on a date prior to the time of the institution of the suits, and contains the following averments:

"Second. These defendants admit that on or about February 25, 1912, the said W. T. Boyd was seised and possessed of the premises described in the bill of complaint, but deny that he desired to sell the same to the complainant, and deny that on or about the said time, or at any other time, he entered into a written agreement for the sale thereof to

the complainant as set forth in the said bill of complaint, and deny that he ever at any time signed or executed the agreement mentioned in the said bill of complaint, or any agreement for the sale of the said premises to the complainant, and these defendants allege that there is in the possession of the complainant an agreement in the form mentioned in the said bill of complaint and which purports to have thereon the signature of the said W. T. Boyd, but these defendants allege that the said signature is a forgery and that the same was either made by the complainant or procured to be made by her by tracing from a genuine signature of the said W. T. Boyd, as is more particularly set forth hereinafter.

"Third. These defendants deny that the complainant paid to the said W. T. Boyd the sum of \$3,000, as recited in the aforesaid paper, having thereon the forged signature of the said W. T. Boyd, on account of the purchase price of the premises therein mentioned, and deny that the complainant made any payments of money whatsoever to the said W. T. Boyd on account of or to be applied to the purchase of the said premises."

Similar averments are contained in the bill and answer of the second suit. To the answers general replications were filed and testimony was taken. Upon the hearing a final decree was entered in favor of the complainant, and from that decree this appeal was taken.

The decisive question in each case is admittedly one of fact, namely, whether or not the evidence sustains the chancellor's decree.

An expert witness testified that in his opinion the signatures of W. T. Boyd to the contracts, the specific performance of which is sought, were forgeries, but there is much apparently credible positive evidence in the record to the effect that the signatures are genuine, and that defendants' decedent, during his life, stated on numerous occasions to a number of persons that he had sold

the property to the complainant. There is also testimony in the record to the effect that the contracts had, at the time the bills were filed, been performed to the extent and in the manner alleged in the bills.

Counsel for appellants have presented orally and by briefs, with commendable zeal and ability, an argument for a reversal of the decree upon the theory that it is not supported by the evidence, but this court is thoroughly committed to the proposition that the findings of the chancellor on the evidence will

Appeal—
findings of
chancellor—
conclusiveness.

not be disturbed unless such findings of fact are clearly shown to be erroneous.

Brickell v. Ft. Lauderdale, — Fla. —, 78 So. 681; *Manasse v. Dutton Bank*, — Fla. —, 78 So. 424; *Mickens v. Mickens*, — Fla. —, 78 So. 287; *Smith v. O'Brien*, — Fla. —, 78 So. 14; *Simpson v. First Nat. Bank*. — Fla. —, 77 So. 204. We have carefully examined all the evidence. No useful purpose would be served in setting it out in this opinion. There is ample evidence to sustain the decree. Applying the foregoing rule, it inevitably follows that this contention cannot be sustained.

Error is assigned upon the refusal of the chancellor to permit counsel for the defendants to undertake to illustrate at the final argument that the signatures to the contracts and certain receipts were forgeries made by tracings, by projecting enlarged images or photographs thereof in juxtaposition with enlarged images or photographs of genuine signatures upon a screen so as to show the line quality of the questioned signatures as distinguished from the line quality of the genuine signatures. Upon this point the decree is as follows: "At the final hearing of said cause, during the argument of counsel, and after the special master had filed his report of the testimony, counsel for the defendants applied to the court to go to some moving picture establishment in the city of Tampa, Florida, to permit, at said point, the

counsel for the defendants, through the use of a moving picture machine and its operator, to cause to be projected upon the screen of the establishment an enlargement of certain plates filed in evidence as defendants' exhibits Nos. A1, A2, A3, and A4, to illustrate the contention of the defendants that the two contracts involved in the said suits were forgeries, to which application the complainant, through her counsel, objected on the grounds that the application was not seasonably made, that the court was not warranted in granting the same, and that the said proposed test could not be made applicable to all of the writings in dispute or to the genuine signatures of W. T. Boyd, deceased, filed in evidence; and the court being of the opinion that the said application was neither authorized nor that the court, in the exercise of its discretion, should grant the same, said application was denied, to which ruling counsel for the defendants then and there excepted."

The original contracts, as well as a number of the signatures of Boyd which were admittedly genuine, were before the court. There were also in evidence a number of photographs of the genuine and of the questioned signatures, some of which were enlarged and others of the same size as the originals. In this situation, even if the proposed illustration was admissible, which we do not now decide, it was not reversible error to refuse the application.

From what has been said, it follows that the decree must be affirmed.

Browne, Ch. J., and Taylor, Whitfield, and Ellis, JJ., concur.

A rehearing having been granted, Ellis, J., on July 1, 1919, handed down the following additional opinion:

Upon the first hearing of this case we affirmed the decree of the chancellor by applying the rule so often announced by this court that the

findings of the chancellor on the evidence will not be disturbed unless such findings of fact are clearly shown to be erroneous. We stated in the opinion that there was much apparently credible positive evidence in the record to the effect that the signatures to the two documents involved were genuine. Both the rule and the statement of fact are correct, but the error in the conclusion arrived at upon the first hearing consisted in treating the

testimony of the witness William J. Kinsley, the expert on handwriting, as merely opinion evidence.

It was something more than the mere opinion of the witness. It was a detailed statement of facts relating to the questioned signature of W. T. Boyd which was appended to the two documents; facts which were revealed by the use of mechanical instruments, and scientifically established to the degree of demonstration. These facts we deem to be wholly irreconcilable with the evidence of witnesses who testified to the genuineness of W. T. Boyd's signature, which testimony, although apparently credible, is not by any means indubitable when considered in the light of the facts established by the scientific investigations of the expert on handwriting. When so considered this "apparently credible positive evidence" loses much, if not all, its character, and "if the salt hath lost its savor, wherewith shall it be salted?"

It was said in *Re Gordon*, 50 N. J. Eq. 397, 26 Atl. 268: "Handwriting is an art concerning which correctness of opinion is susceptible of demonstration."

The learned judge writing the opinion said: "I am fully convinced that the value of the opinion of every handwriting expert as evidence must depend upon the clearness with which the expert demonstrates its correctness."

The demonstration, when the signature of a person since deceased is attacked as a forgery, consists, as

in this case, of an accumulation of a great mass of facts relating to the formation of letters; the field covered by both the admittedly genuine and questioned signatures; the spacing of the letters, both capitals and small letters; the angles on which they were formed; their relative positions in the signatures; their proportions, slant, alignment, and outline; the surface of the paper which, under the microscope, shows whether the line upon which the questioned signature rests was drawn before or after the name was written or before or after the paper was folded; the conformity in detail of two signatures, so that when superimposed they show no variation or divergence in a line or direction of a line. All these facts, when established, may confirm the testimony of apparently credible witnesses who testify to the genuineness of the questioned signatures, or establish to the degree of demonstration the falsity of it. In *Re Rice*, 81 App. Div. 223, 81 N. Y. Supp. 68, affirmed in 176 N. Y. 570, 68 N. E. 1123, it appeared from the photographs and enlargements adduced by an expert that the four signatures to a will were absolutely identical, so that they could be superimposed without showing the slightest divergence in the length or direction of a line. This, the court said, demonstrated conclusively that they were not genuine, but tracings. See also *Osborn*, *Questioned Documents*, p. 299; *Green v. Terwilliger* (C. C.) 56 Fed. 384; *Stitzel v. Miller*, 250 Ill. 72, 34 L.R.A. (N.S.) 1004, 95 N. E. 53, Ann. Cas. 1912B, 412. In the note to the last-cited case which appears in Ann. Cas. 1912B, 417, many cases are referred to as upholding the proposition that it is very improbable that two signatures written by a person in the ordinary course of business will be exactly alike so that one will cover the other when superimposed, and the fact that one signature is the facsimile of another is evidence that one was traced from the other,

-forgery-
similarity of
signatures..

or both traced from a third. The cases cited are: McDonogh's Succession, 18 La. Ann. 419; Day v. Cole, 65 Mich. 129, 31 N. W. 823; Hunt v. Lawless, 7 Abb. N. C. 113; Re Rice, 81 App. Div. 223, 81 N. Y. Supp. 68; Re Burtis, 107 App. Div. 51, 94 N. Y. Supp. 961; Re Burtis, 43 Misc. 437, 89 N. Y. Supp. 441; Hanriot v. Sherwood, 82 Va. 1.

In *Re Burtis*, 107 App. Div. 51, 94 N. Y. Supp. 961, it was said: "Concededly, if one's signature conforms in every particular to another, one of them must be a forgery, because for all practical purposes no person can write his name twice exactly alike."

See also: "The conclusion of a handwriting expert as to the genuineness of a signature, standing alone, would be of little or no value, but supported by sufficiently cogent reasons his testimony might amount almost to a demonstration." *Venu-to v. Lizzo*, 148 App. Div. 164, 132 N. Y. Supp. 1066.

See also 8 Wigmore, Ev. § 2014; *McKay v. Lasher*, 121 N. Y. 477, 24 N. E. 711.

In *Osborn's Questioned Documents*, p. 281, the author says: "No two genuine signatures can be exactly alike, but such a statement should be understood to be true, speaking microscopically, and not as the carpenter measures, because by examining a great number of genuine signatures of certain exceptional writers signatures can be found which are nearly identical."

It is not contended that the two signatures of W. T. Boyd to the documents of December 4, 1911, and February 25, 1912, are microscopic duplicates of each other, but there is such great similarity in proportions, spacing, slant, alignment, and outline as to convincingly show that the two signatures were the work of a copyist, one who drew from a model, and when these signatures are compared under a magnifying glass with the signature of W. T. Boyd upon the back of the note for \$1,000, dated 12/4/11, and

signed by L. M. Gosser (complainant's exhibit XX16) the conclusion becomes irrefutable.

The improbability that a man of Mr. Boyd's education, business training, habits, and physical infirmities, which the evidence showed him to be, could at three different times, at dates covering a period of about two and one-half months, write his name to three legal documents, in the usual easy and free manner in which a man of affairs signs such documents, with such similarity as to be almost facsimile, so that when superimposed they correspond almost line for line, angle for angle, slant for slant, space for space, takes the matter beyond the range of reasonable conjecture, even though the genuineness of the signatures may be testified to by eyewitnesses apparently credible.

The comparison of handwriting for the purpose of ascertaining the characteristic or structural differences is one of the recognized means of arriving at the truth when the question is the genuineness of the signature. And it is generally conceded that if one signature coincides with another, one of them is a drawing or tracing, something made according to pattern or a model; and as a man, when signing his name to a contract, never takes such pains with his signature,—certainly in this case there is no evidence that Boyd did,—it follows that one of the signatures, at least, is not the writing of the person whose signature it purports to be. See *Ames, Forgery*, chap. IV. See also the views upon this proposition as expressed by Professor Benjamin Peirce, formerly of Harvard College, as reported in 4 *Am. L. Rev.* p. 649.

So we have in this case upon the one side the law of mathematical probabilities, and upon the other the law of moral probabilities. "Preponderance of the evidence" is a phrase which, in its last

Definition—
preponderance
of evidence.

analysis, means probability of its truth. In a cause where there is conflicting moral evidence, the jury in the one case, the chancellor in the other, is required to decide accordingly as the weight of the evidence preponderates in favor of one proposition or the other. That is to say, having no personal knowledge of the transaction under investigation, they must, by the application of common knowledge and experience, decide which set of witnesses or line of evidence raises the greater probability of its consistency with truth.

In the use of demonstrative evidence one relies upon the evidence of his own senses. It is, therefore, evidence of the highest rank. It is the ultimate test of truth. To this class belongs mathematics, because a proposition in mathematics may be established by the evidence of one's own senses. Moral evidence depends for its value upon veracity on the one hand and credulity upon the other; so in testing the truth of a witness's statement one must, therefore, draw upon his fund of common knowledge and experience of men and affairs, if, like a prudent man who "looketh well to his going," he would decide in accordance with that which seems most probable.

In the case at bar we have the uncontradicted evidence of the expert on handwriting. The questioned signatures and photographs of them are before the court, as well as signatures admittedly genuine and photographs of them, some enlarged for convenience of comparison; and the means were at hand for measurements and other comparisons embracing the whole field of examination. So that the facts to which the expert witness testified concerning the characteristics and construction of the signatures are matters within the field of demonstrative evidence. These facts, being established by evidence of the first rank, are strongly presumptive of the further fact that the signa-

tures in question are tracings or drawings by a hand other than the person whose signatures they purport to be, and this presumption is supported by the mathematical law of probabilities as well as the common experience and knowledge of man. As against this the complainant offered the testimony of witnesses who claimed to be eyewitnesses to the making of the questioned signatures by Mr. Boyd, and others who testified that Mr. Boyd had remarked to them in conversation casually that he had sold the property in question to Mrs. Gosser. It is not my purpose to quote this testimony to show its many inherent discrepancies and weaknesses. Such, for instance, as the testimony of W. R. Newman, the railroad agent, "over warehouse," who said that while on a visit to Tampa on May 11, 1912, he called to see Mrs. Gosser and loaned her \$2,000 which he carried on his person, and for which he had worked during the years of his service to the railroad; that he never put his money in banks, but kept it in his trunk, and had it on his person at the time; that again, in June following, he made another loan to her of \$1,575, and later another loan of \$500; and on another occasion he borrowed \$5,000 from a laundryman in Norfolk and loaned that to Mrs. Gosser; that the laundryman gave him the money in currency "in the laundry," no one present, no security taken, some of which this witness sent to Mrs. Gosser by mail in a package as merchandise, and some by express as merchandise, taking no security from Mrs. Gosser for the repayment of the loan. Applying the common knowledge and experience of men to this man's testimony, it tests the utmost capacity of the most credulous. Likewise the testimony of others who claimed to be eyewitnesses contains highly improbable statements, and just in the degree that such testimony is inherently improbable as measured by the test of common knowledge and expe-

rience, the probability that the questioned signatures are forgeries increases. In this view of the evidence we are of the opinion that the decree of December 27, 1916, was erroneous; that it was manifestly against the weight of the evidence and clearly erroneous.

So the decree is reversed.

Browne, Ch. J., and Taylor, J., concur.

Whitfield and West, JJ., dissent.

Whitfield, J., dissenting:

The chancellor specifically found "that W. T. Boyd, in his lifetime, made and entered into the two contracts in writing with the complainant," and "that the complainant, in the lifetime of the said W. T. Boyd, made to him the payments in the said bills of complaint alleged." While the evidence on these material

points is conflicting, there is ample evidence to sustain the specific findings, and such findings do not clearly appear to be contrary to, but to be in accordance with, the preponderating weight and probative force of the evidence, considered as an entirety. As a necessary consequence, the decree appealed from is "such a decree as the court below ought to have given," within the requirements of § 1707, General Statutes 1906, Florida Compiled Laws 1914.

West, J., dissenting:

Applying the well-settled rule that the findings of the chancellor on the evidence will not be disturbed unless such findings of fact are clearly shown to be erroneous, I am still of the opinion that there is ample evidence in the record to support the decree of the chancellor, as was held in the original opinion, and therefore dissent from the opinion filed upon the rehearing in the case.

ANNOTATION.

Review on appeal of evidence as to genuineness of disputed documents.

The reported case (BOYD v. GOSSER, ante, 500) in setting aside, on rehearing, a finding of the court below, in favor of the genuineness of a disputed document, is an unusual, and perhaps an extreme, instance of the persuasive force of an expert demonstration of the nonauthentic character of questioned handwriting. It should be noted that the appeal was from a decision of an equity judge, in reviewing which, on the facts, appellate courts feel at greater liberty to follow their own conclusions than they do in reviewing the verdict of a jury in an action at law; and that there was other evidence casting doubt upon the authenticity of the document in question.

This departure from the ordinary principle that the appellate courts will not revise a finding of fact where the evidence is conflicting has suggested the inquiry undertaken by this annotation as to the extent to which appellate courts have themselves as-

sumed to determine the genuineness of a disputed document. This issue of fact, as is pointed out in the reported case (BOYD v. GOSSER) and in *Bane v. Gwynn* (1900) 7 Idaho, 439, 63 Pac. 634, hereinafter set forth, differs from ordinary issues in that the appellate court, which usually has before it the disputed document itself and the standards of comparison, together with the instruction afforded by the expert testimony, is in as favorable a position to decide the issue as was the original trier of the facts, which is not the case where the conflicting evidence is given by witnesses whose manner of testifying, and whose appearance in the court room while under examination, may carry a conviction of truth or untruth which the written record cannot reveal.

This inquiry into the attitude of the appellate courts as evinced in the cases hereinafter set out has disclosed the fact that, while in some instances the courts have refused to enter upon

a comparison of the disputed handwriting with genuine writing for the purpose of setting aside the conclusion of the original trier of the facts (see *Re Jepson* (1918) — Cal. —, 172 Pac. 1107; *Burdick v. Hunt* (1873) 43 Ind. 381; *Sturdivant Bank v. Wright* (1904) 184 Mo. App. 164, 168 S. W. 355, set forth *infra*), in other cases the appellate court has been discovered to have made such comparison, sometimes agreeing and sometimes disagreeing with the decision of the original trier of the fact, sometimes holding that such trier erred in giving greater weight to the direct evidence in favor of the authenticity of the disputed document than to the conclusions based on the testimony of experts, and sometimes rejecting such conclusions in favor of the direct evidence.

There is not, and necessarily cannot be, any rule of decision on the point. Theoretically, of course, facts cannot lie, while eyewitnesses may be perjured, or honestly mistaken, in saying that they saw the disputed document written or signed by the person whose act it purports to be. But in order that facts may not mislead, their significance must be understood, and this significance may be appreciated only under the tuition of specialists. Hence the admissibility of expert testimony, the function of the expert being not to resolve an issue for the decision of which the trier of the fact has not the necessary training, but to supply the vicarious experience which will enable the trier to reach a correct conclusion. Such being the function of the expert, it is obvious that the aid which he may afford is a variable quantity, according to the extent of his perception of the various factors entering into the problem, and the correctness of his appreciation of their significance. In view of the fact that some of these factors, in the case of handwriting, must remain to a great extent unknown, such as the condition of the writer's health, or the emotions under the influence of which he may have been at the time, the dubitancy with which the reasoning of handwriting experts is ordinarily followed

is justifiable. No problem can be solved with mathematical certainty where some of its factors must remain imperfectly known. The jury sometimes do right in giving credence to the incredible, and the long arm of coincidence may set the doctrine of probabilities at naught. It is interesting to note that in the *Howland Will Case*, in which Professor Benjamin Peirce gave the famous testimony, based upon the mathematical law of probabilities, that the probability of two signatures of the same person being exactly alike was so infinitesimal as to be "practically an impossibility," which has been the ~~lower~~ anchor of several judicial decisions, genuine signatures of various individuals made in the ordinary course of business were exhibited, which certainly contradicted the broad assertion that exact identity of signatures of the same person cannot possibly occur. See 1 Moore on Facts, p. 617, footnote, referring to (1870) 4 Am. L. Rev. 650, 654.

Hence there is, and can be, no rule that the conclusion which the data supplied by the expert tend to establish is to be preferred to the conclusion to which other evidence in the case points, or vice versa.

The decisions reviewed.

In *Luco v. United States* (1859) 23 How. (U. S.) 515, 16 L. ed. 545, the United States Supreme Court affirmed a judgment of a district court finding an alleged grant to be a forgery, the court saying: "The signature of Pio Pico and his rubric, when compared with a large number of his authentic signatures found in the archives and those made on the same day in which the grant in question is dated, are found to differ in many particulars from that found on this paper. His official signatures are remarkable for their uniformity. Many excellent judges have carefully scrutinized and compared these signatures, and declare the signatures in question are forgeries. Two of them express the opinion that the person who wrote the body of the instruments made the signatures also. We have ourselves been able to compare these signatures by means of photographic copies, and

fully concur (from evidence '*oculis subjecta fidelibus*') that the seal and the signatures of Pico on this instrument are forgeries; and we are the more confirmed in this opinion by the testimony of Pico himself, found on the record."

In *Richardson v. Green* (1894) 9 C. C. A. 565, 15 U. S. App. 488, 61 Fed. 423, the circuit court of appeals, on an appeal from the district court in an equity suit seeking the cancellation as a cloud on title of certain instruments alleged to be forged, reviewed the evidence and affirmed the finding of the lower court that the instruments in question were forgeries, stating: "We have reached this conclusion from a comparison of the acknowledged handwriting of said Philanda Terwilliger with that exhibited in the signatures of said instrument. We have been guided in reaching this conclusion by our own inspection, guided somewhat by the evidence of the experts in the case. There are quite a number of circumstances, independent of this comparison of handwriting, which lead to the same conclusion."

In *Anderson v. Wilburn* (1847) 8 Ark. 155, an action of debt by attachment in which the defendant interposed a plea of non est factum, where the plaintiffs produced two witnesses, both of whom testified that they were acquainted with the handwriting of the defendant and that they believed the signature to the instrument was in his handwriting, and also introduced two letters from the defendant to one of the plaintiffs, in each of which he virtually acknowledged the debt, but insisted upon having the writ discontinued upon the ground of his utter inability to pay it, it was held that, the jury having found in favor of the defendant, the court below should have granted a new trial.

In *Wilson-Ward Co. v. Farmers' Union Gin Co.* (1910) 94 Ark. 200, 126 S. W. 847, the appellate court affirmed the finding of the chancellor that the defendants signed the identical note sued on, saying: "The original note has been brought up for our inspection and we are clearly convinced that

they signed it. They are mistaken in saying that they did not sign the note, they are mistaken in saying that they signed on the face of the note instead of on the back, and they are mistaken in saying that something was erased from the note or that any change was made in it, for an inspection of the original note shows conclusively that it was not changed, by erasure or otherwise."

In *Williamson v. King* (1912) 105 Ark. 697, 150 S. W. 395, an action on a note which defendants claimed to have been forged, the court upon appeal affirmed the finding of the chancellor in favor of the plaintiff, saying: "Some of the appellants while on the witness stand were asked to write their names on slips of paper, and these have been brought into the record here. The original note sued on is also brought here for our inspection. After a careful examination of it and a consideration of all the evidence, we are of the opinion that the finding of the chancellor to the effect that the note was genuine is not clearly against the preponderance of the evidence. The appellants were evidently mistaken as to the instrument they signed. In our opinion an inspection of the note shows that it would have been almost impossible for one to have forged the signatures thereto in the manner that they appear thereon. . . . There is no testimony in the record of experts or others tending to show how such forgery would have been possible."

In *Wright v. Carillo* (1868) 22 Cal. 596, the court said that so much, in cases involving the genuineness of a signature, depends upon the manner of the witnesses in testifying to enable a court to judge of the extent of credit to be given to their evidence; and on the comparison of admittedly genuine signatures and other evidence of a like character which is not and cannot be brought before an appellate court, that they would hesitate long before setting aside a verdict or finding upon the point.

In *Re Jepson* (1918) — Cal. —, 172 Pac. 1107, a case involving the authenticity of an alleged will, the evidence

of genuineness consisted of the testimony of a subscribing witness, who was a brother-in-law of the proponent, that the entire document, with the exception of the signatures of the attesting witnesses, was in the handwriting of the decedent, and of his wife, who gave corroborating testimony concerning the execution of the paper and also declared her opinion that the handwriting was that of the decedent, and additional opinion evidence that the paper was in the handwriting of the decedent, given by another witness familiar with the decedent's handwriting and by an expert on handwriting. On the other side, opinion evidence given by the contestants that the signature was not genuine was supported by that of two other witnesses, one an expert. It was held that a finding that the will was written "entirely in the handwriting of the testator by his own hand, and was dated and subscribed by him," would not be set aside on appeal, the court saying: "This mere statement should suffice to show that the case presents a question, simply, of a conflict of evidence, upon which the trial court's determination of the issue of fact must be deemed conclusive here. The appellants argue with great earnestness and apparent conviction that the evidence offered by the respondent is unworthy of belief, and should have been rejected. No rule of appellate practice is more firmly settled than that the weight of evidence is for the jury or the court passing on the facts. It is true, of course, that testimony may be so obviously false or so inherently improbable as to require its rejection. But no such situation is presented here. Viewing, for the moment, the opinion evidence alone, we could not say that the court below should have rejected the testimony of the witnesses who declared that, in their view, the signature was that of the decedent. Photographic copies of the will and of exemplars of Jepson's admitted handwriting are contained in the transcript, and differences between the subscription of the alleged will and signatures appearing on other writings of Jepson are pointed out. But these differences

do not appear to us to be any greater or more significant than the variations between different handwritings of conceded authenticity. Even if they were more marked than they are, we should still be in no position to pass upon the genuineness of the handwriting with that degree of certainty which would be required to overthrow a finding of the trial court. A court of appellate jurisdiction cannot be expected to assume the role of a handwriting expert, for the purpose of setting aside a finding made by the trial court, and based, not only upon its own inspection and comparison of the original writings, but upon the opinions of witnesses peculiarly qualified, either by special study of the subject or by familiarity with the handwriting of the decedent. But beyond all this, we have the direct testimony of Hettler, which, as above stated, is corroborated in some degree, that he saw Jepson sign the paper. There was nothing on the face of the evidence for respondent to compel its rejection by the trial court."

In *Castor v. Bernstein* (1906) 2 Cal. App. 703, 84 Pac. 244, it was held that where the verdict of the jury, which in effect was that a signature was a forgery, was the result of a comparison made by them of the signatures to the respective instruments, the case was in legal effect the same as if there had been a conflict between testimony of witnesses in reference thereto, and that if the court was of the opinion that in its determination of this conflict the jury did not give sufficient consideration to the question, and that its verdict was not justified by the evidence, it was its duty to set the verdict aside and grant a new trial.

In *People v. Driggs* (1910) 14 Cal. App. 507, 112 Pac. 577, an appeal from a judgment pronounced upon a verdict finding the defendant guilty of the crime of forgery in counterfeiting the lessor's signature upon a lease, it was said that the weight and effect of opinions of experts or the results of comparison were matters for the jury, but the court added: "After an examination of the various exhibits which are on file in this court, we feel able to

say that no reasonable doubt can exist as to who wrote the signature upon the lease."

In *Tourtelotte v. Brown* (1903) 18 Colo. App. 335, 71 Pac. 638, an action to establish as a claim against an estate a note purporting to have been signed by the decedent, witnesses who testified that they were familiar with her writing gave it as their pronounced opinion that the signature to the note was hers, while others were of the opinion that it was not. A number of experts who knew nothing of her handwriting testified from a comparison of the signature with others which were acknowledged to be genuine that they believed this one to have been written by her. The husband of the payee testified that the note was written by him and signed by the maker in his presence at his house on a certain day, while a foster son of the maker and his wife, who at that time resided upon a ranch 6½ miles distant from the payee's house, both testified that on such day the alleged maker was at their house upon the ranch. The appellate court held that there was abundant evidence to sustain a verdict for either party, and that the conclusion of the jury that the signature was a forgery was binding upon it.

In *Paulk v. Creech* (1910) 8 Ga. App. 738, 70 S. E. 145, the court said: "When the court struck the eighth paragraph of defendant's answer and exhibit B . . . there were only two issues remaining in the case. The first was whether the notes were signed by the deceased or were forgeries. As we have already said, the genuineness of the signature of the purported maker could be very well established by comparison of the signatures, alleged to be forgeries, with other signatures of the deceased which were proved to be genuine. The notes were not attested by a witness, and therefore this character of evidence was not secondary in its nature. The jury had all the papers testified to have been signed by Harper, as well as the notes alleged to be forgeries, before them for their inspection and examination. They found the signa-

ture of Harper to the two notes to be genuine. That is an end to that portion of the case."

In *Bane v. Gwinn* (1900) 7 Idaho, 439, 63 Pac. 634, in which the question was as to the genuineness of a note purporting to have been executed by a person since deceased, in which the testimony on both sides seems to have been given by bankers, merchants, and other persons having occasion to do business with the decedent, the banker who testified that the signature was genuine also gave various reasons for and explanations of the ground upon which his opinion was based. Numerous exhibits consisting of checks, orders, and other papers purporting to bear the signature of deceased were also introduced and received in evidence, as were certain photographs of papers and signatures. The jury found that the signature was genuine, but upon appeal to the supreme court the judgment was reversed as being against the weight of evidence. The court, after reviewing the evidence, said: "In view of this condition of the testimony, it is contended by the respondents that the appellate court should not disturb the verdict of the jury. The rule contended for is, we are inclined to think, sometimes invoked or recognized by courts to avoid responsibility; but, be that as it may, it is subject to exceptions. The rule is based upon the theory that, in the trial of a case depending wholly upon questions of fact, the trial court, having the witnesses before it, hearing their testimony, observing the manner of testifying, and being enabled to observe their appearance and deportment while under examination, is better qualified to judge of the weight to be given to their testimony than is an appellate court, which simply takes the testimony from the record; but when the testimony is by deposition, or, as in the case under consideration, is mere matter of opinion, and the evidence upon which such opinion is based is before the appellate court, the reason for the rule is not apparent. There is no question of credibility of witnesses in this case. The elaborate arguments presented by some of the

witnesses upon both sides in support of the grounds upon which they base their conclusions, while they exhibit careful study and industrious research, are still mere matters of opinion. A most elaborate and instructive dissertation upon this question of expert testimony in regard to handwriting will be found in an article upon the celebrated Howland Will Case (1870) 4 Am. L. Rev. 625. In that case some of the most eminent scientists of the United States, including such men as Professor Eben N. Horsford, at one time professor of chemistry of Harvard College; Professor Benjamin Peirce, formerly of Harvard College, at the time superintendent of the coast survey; Professor Agassiz, whose reputation is as wide as the dominion of civilization; Dr. Oliver Wendell Holmes—are found giving diverse opinions with a most startling degree of positiveness. In fact, we think we are not far from expressing the consensus of judicial opinion when we say that of all testimony upon which courts are called to pass, that of expert witnesses upon questions of handwriting is the most unsatisfactory. . . . That a man of the disposition and habits of the decedent should have executed a note of an amount sufficient, if not to defeat, to at least greatly embarrass, the carrying out of his wishes and purposes as expressed in his last will, made only a few days before, and should, moreover, never mention the fact to his friend and adviser, the man whom he had not only intrusted implicitly with his affairs for years, but whom he had selected to carry out his wishes in regard to the disposition of his estate after he was gone, is a conclusion so utterly inconsistent with all the record shows us of the life and habits of the decedent as to require something more to support it than the opinion of experts, such as is shown by this record. . . . This is not, strictly speaking, a case of 'conflict of evidence.' The only conflict is in the difference of opinion of the various witnesses upon the question of handwriting. There does not appear to be any appreciable conflict upon any other evidence in the case,

and we cannot affirm a judgment based upon a verdict which, in our view, is so contrary to the evidence in the case."

In *Metz v. Brodfuehrer* (1918) 282 Ill. 626, 118 N. E. 1048, a suit to remove as cloud on title a trust deed and a warranty deed alleged to have been executed by complainants, but claimed by them to be forgeries, in which the evidence bearing upon the genuineness of the signatures seems to have been given by the interested parties, no expert evidence being offered, and a number of checks, notes, and other instruments bearing admittedly genuine signatures were introduced in evidence for the purpose of comparison, and the original documents were transmitted to the appellate court, such court, upon examining them, came to the conclusion that the trial court erred in finding that the questioned instruments were forgeries.

In *Rokker v. Stephenson* (1896) 66 Ill. App. 469, in which the only question involved was whether the plaintiff in error had signed a lease, the court said: "We have carefully examined the testimony given upon the trial, and are of the opinion that there is no such preponderance of evidence in favor of the defendant below as would warrant a reversal of the finding of the court. In saying this we bear in mind that the judge before whom the cause was tried had an opportunity for comparing the admittedly genuine signature of plaintiff in error with that disputed, which we have not."

In *Ray v. Hunter* (1905) 122 Ill. App. 466, the appellate court declined to disturb a finding of the trial court, to which the cause had been submitted for trial without a jury, that the signature to a note was not genuine, saying: "The error chiefly relied upon is that the finding of the court upon the facts is against the evidence, and the weight of the evidence. Upon the last trial upwards of one hundred witnesses testified upon the issue as to the genuineness or falsity of the signature to the note in suit. Some forty-five of them were called by the plaintiff, and about sixty by the defendant. Among these were bankers,

merchants, and others who had been engaged in or transacted business with Hunter. Several professional experts in handwriting also testified at length, and with the aid of photographic representations, both actual and enlarged, reproduced upon glass and ordinary plates, of the signature in question, and other signatures of Hunter admitted to be genuine and attached to documentary evidence, explained and attempted to justify their respective theories. In connection with their testimony, large and powerful lenses were used, of which the trial court had the benefit. We have carefully and thoroughly read and considered all the testimony contained in the record, and have inspected the original note and other documentary evidence. After considering such of the oral evidence as is clearly competent, and in the light thereof, and the character, capacity, opportunities, and intelligence of the respective witnesses, so far as is shown by the record, we are unable to say that the greater weight of the expert evidence as to the genuineness of the signature to the note in suit is manifestly with the appellant. Neither can it fairly be said that such evidence, when considered in connection with the facts and circumstances attending the entire transaction, clearly tend to show that the signature was that of appellee. . . . Furthermore, and notwithstanding we have had the benefit of an inspection of the original note and other documents introduced in evidence, we have not enjoyed the superior advantages possessed by the learned trial judge, who not only saw and heard the witnesses while they were testifying, but had as well the opportunity to observe the demonstrations of the professional expert witnesses, and was thus better able to understand, appreciate, and weigh their testimony."

In *Burdick v. Hunt* (1873) 43 Ind. 381, it was held that whether the name on a note was the signature of a certain person or not was a question for the jury who tried the case, and that the supreme court would not undertake to decide it by an examination

and comparison of the signature with one concededly genuine.

In *Borland v. Walrath* (1871) 33 Iowa, 130, the court, in holding that a finding that a signature was not genuine, based upon the testimony of the putative signer, was not against the weight of evidence, said: "The evidence as to the genuineness of the signature, based upon the comparison of handwriting and of the opinion of experts, is entitled to proper consideration and weight. It must be confessed, however, that it is of the lowest order of evidence, or of the most unsatisfactory character. It cannot be claimed that it ought to overthrow positive and direct evidence of credible witnesses, who testify from their personal knowledge. It is most used and is most useful in cases of conflict between witnesses, as corroborating testimony. On the one hand, we have the signature to the mortgage sustained as genuine by the certificate of acknowledgment and by the comparison of handwritings, upon which are based opinions of experts; on the other, we have the positive evidence of the defendant, whose credibility is not doubted, corroborated in a degree by other testimony. In our opinion the preponderance is in favor of defendant. We are free to admit that we are not without doubts, and it is probable that questions of this character can never be determined with absolute conviction of certainty. We feel, however, that it is safer to give credit to the positive evidence of a credible witness than to disregard it upon presumptions that are not of the highest order. We may say just here that a comparison made by us of the signature in question with defendant's genuine writing, used for that purpose before the referee, all of which is before us, has had a tendency to strengthen the conclusion we have just announced in the minds of some members of this court."

In *Blakesburg Sav. Bank v. Burton* (1912) 156 Iowa, 671, 137 N. W. 916, an action on a promissory note transferred to the equity side for the purpose of an accounting, the evidence on behalf of the plaintiff showed subsequent conversations between the de-

fendant and officers of the plaintiff bank tending to indicate his knowledge of the existence of the note and his liability thereon; and six witnesses of business experience who were acquainted with defendant's signature and had done business with him for many years testified that the signature upon the note was his. The evidence on behalf of the defendant was that the signature was not his, but that it was placed upon the note by his son, a codefendant, without the father's authority, and the testimony of a handwriting expert that the signature was not defendant's. Other admitted signatures were put in evidence for the purpose of comparison and were, with the note itself, before the appellate court, together with photographic copies thereof, including a photograph of the disputed signature in magnified form. The appellate court, after a consideration of the entire evidence, came to the conclusion that the fair preponderance was with the plaintiff, and affirmed the decision in his favor, adding: "Our comparison of the signatures leads us in the same direction, although we would hesitate to find the facts from such comparison alone."

In *Johnston v. Lindner* (1915) 163 Iowa, 441, 143 N. W. 410, the court affirmed a decree finding a deed to be genuine where such finding was supported by positive and direct evidence of its execution, notwithstanding the expert testimony and a comparison of the signature with genuine signatures indicated that it was a forgery.

In *Baird v. Shaffer* (1917) 101 Kan. 585, L.R.A.1918D, 638, 168 Pac. 836, the appellate court refused to reverse a judgment based on a verdict finding a will to be a forgery, where expert testimony and opinion evidence tended to prove that the signature of the will was not genuine, that it differed materially from other signatures of the decedent, the authenticity of which was admittedly genuine or sufficiently proved; and this, although the three witnesses to the will all testified positively that the decedent had signed the will in their presence, and that they signed it as witnesses at her request, in her presence, and in the presence of

each other, where one witness for the plaintiff testified that one of the attesting witnesses told him privately that the will was a "frame-up," and the person by whom the alleged will was drawn was a common laborer, who had never had experience in writing wills, and who had never seen a will, and the decedent was shown to be a woman of intelligence and business sagacity, who had accumulated an estate approximating \$30,000 in value, and one of the principal beneficiaries under the pretended will was a woman whom the testatrix disliked so much that she did not want to die in her house, and the other principal beneficiary was also shown to have been disliked and distrusted by her. The court also seems to have made its own comparison of the signatures, saying: "The difference between the admittedly genuine signatures and the signature to the will was so obvious that any jurymen—any layman of common intelligence and ordinary capacity for observation—would readily discover it." Further on it remarked, however, that the credence to be given to the testimony of expert witnesses "is for the discriminating good sense of the triers of the fact to determine."

In *Spooner v. Best* (1880) 8 Ky. L. Rep. 185, the appellate court, reversing the judgment below, held that where both the clerk before whom a superseas bond was executed, and his deputy, swore positively to the fact that the bond was executed at the time it bore date, and detailed circumstances transpiring at the time from which they were able to make such statement without regard to the indorsement on the bond, and these witnesses stood unimpeached and their testimony contradicted, such testimony was not to be overthrown by expert evidence that the date had been altered.

In *Carpenter v. Carpenter* (1902) 23 Ky. L. Rep. 2180, 66 S. W. 814, the only testimony tending to establish the genuineness of a disputed signature was that of two witnesses that such signature resembled that of the person whose signature it purported to be, while on the other hand the genuineness of the signature was denied by

both the defendants, and a disinterested witness gave testimony tending to show the nonexistence of the note in question. It was held that a judgment in favor of the defendant was supported by the weight of evidence and could not be disturbed.

In *Howard v. Creech* (1907) 31 Ky. L. Rep. 201, 101 S. W. 974, the appellate court refused to disturb a finding in favor of the genuineness of the signature of a deed, where the expert evidence in relation thereto was conflicting, and it appeared to the court upon a comparison of the original deed, which accompanied the record, with a genuine writing in evidence, that the signature was genuine.

The appellate court will not disturb a verdict finding on conflicting evidence that a purported will offered for probate was not signed by the decedent. *Gilbert v. Griffith* (1910) — Ky. —, 126 S. W. 1104.

In *Ligon v. Smith* (1910) 140 Ky. 202, 130 S. W. 1092, the court reversed the decision of the court below that the maker's signature to the note in question was not genuine, based upon the testimony of experts, for reasons which appear in the following excerpt: "A number of witnesses, experts, testified that in their opinion the signature was not the handwriting of the person who signed certain genuine documents in evidence in the case. Their testimony was based upon a supposed dissimilarity in the writing, and to some extent, but mainly upon their belief that the signature in dispute was not written either with a pen and ink, or with a lead pencil, but that it was an impression from a carbon paper made by tracing or writing the name upon other paper above the carbon and the note on which it was placed. This testimony is divisible into groups. One, of those who by comparison undertook by a kind of analysis to distinguish between the genuine and the disputed writings; and the other, of those who claimed that the disputed signature was made by an impression upon carbon paper. Of the first class it is enough to say that when they give their reasons for declaring the disputed signature to be

spurious, they are not borne out by the facts. Mrs. Ligon did not always form her letters in the same way. The genuine signatures examined by the experts differed in some features from the disputed. But other genuine signatures brought into the record disclose that Mrs. Ligon did sometimes make the letters in question precisely as was done in the signature in question. We do not regard the opinions of the experts very highly on that score. The matter seems simple enough, as we have all the original papers bearing the signatures before us, that the court feels warranted in forming and relying on its own opinion as to handwriting. The signature was not in ink. Whether it was by lead pencil or by carbon impression is not so clear, nor does it matter if Mrs. Ligon wrote it. Witnesses familiar with her writing, and her intimate friends with whom she corresponded and who knew the characteristics of her writing, unhesitatingly and emphatically declare the signature genuine. There was little motive for appellant to have forged the signature, and none apparently for anybody else to have done it. Mrs. Ligon was clearly indebted to her husband for \$1,300 advanced for her. In view of her failing health and childless state, it was natural for her to have given her husband an evidence of debt, expressing the truth, by which he would be reimbursed from her estate what he had put into it for her, before it was distributed to strangers to his blood. Mr. Ligon is a man in comfortable circumstances, engaged in a profitable business, and there appears no incentive for him to have forged the note. The circumstances negative the suggestion that he has criminally fabricated his deceased wife's signature to take \$200 from her estate."

In *Bonta v. Bonta* (1917) 175 Ky. 26, 193 S. W. 648, an action to enforce the payment of a note by the estate of the alleged maker, in which the evidence on both sides seems to have been opinion evidence, writings containing the genuine signature of the alleged maker were admitted in evidence, thus giving to the jury an op-

portunity to compare those signatures with the signature on the note in question. The court refused to reverse a finding of the jury on an issue out of chancery that the note was not signed by the alleged maker, saying that the question of genuineness was peculiarly one for the jury.

In *Bell v. Norwood* (1834) 7 La. 95, the appellate court expressed its agreement with the court below in holding that the execution of a note was sufficiently proved where it was positively sworn to by a witness whose credibility was not impeached, although his evidence was opposed by the opinion of two witnesses who stated that the signature differed in some respects from the common signature of the alleged signer.

In *Robinson v. Arnet* (1840) 15 La. 263, where the defendant denied upon oath the genuineness of his signature to the note in suit, it was held that testimony of witnesses who only expressed their belief or knowledge of the genuineness of the signatures in dispute from a similarity or likeness to signatures of the same person which they had seen, which was uncorroborated by circumstantial evidence tending to establish the execution of the note in question, was insufficient to support a verdict for the plaintiff.

In *McDonogh's Succession* (1866) 18 La. Ann. 418, a majority of the court affirmed a finding that a holographic codicil was not genuine, notwithstanding five witnesses familiar with the decedent's handwriting testified to a belief in its genuineness, where two witnesses likewise familiar with his handwriting pronounced the paper a forgery, although some of the reasons they gave proved to have been erroneous, and experienced chirographers pronounced under oath that there was no appearance of tracing in the codicil, and that the handwriting of the codicil appeared to be genuine, where there was evidence that the signature very closely resembled that on a lease which the proponent was shown to have had in his possession shortly before the production of the codicil, which was not until nearly ten years after the decedent's death, and

the proponent failed to prove his alleged relationship to the deceased or any motive on the part of the decedent to make so large a bequest to him.

In *Gaines's Succession* (1886) 38 La. Ann. 123, the court affirmed a finding against the genuineness of an alleged will, where in addition to evidence showing the improbability that the decedent would have diverted from her direct descendants so large a share of her estate in favor of the beneficiaries under the will propounded, to whom she was not bound by ties of affinity or affection, testimony was given by four experts, three of whom had been selected and appointed by the district judge, to the effect that the signature was not genuine, although upon cross-examination it was ascertained that they had been mistaken in some of their elements or modes of comparison, and two witnesses who were familiar with the decedent's handwriting failed to recognize the document in question as genuine, and there were certain differences between the writing in the alleged will and the genuine handwriting of the decedent, as to the significance of which the members of the appellate court differed.

In *Drysdale's Succession* (1911) 127 La. 890, 54 So. 138, the court reversed an order allowing the probate of a will, where the reasoned testimony of experts, called as witnesses by the opponent, was to the effect that the signature was a forgery, and such testimony was corroborated by the failure of the proponent to explain how he acquired a knowledge of the existence of the will and the place where it was to be found, although the case was remanded for the purpose of enabling him to do so, and it was not shown by whom the will, which was typewritten, was drawn, and it contained internal evidence of a want of intimate acquaintance with the affairs of the alleged testatrix,—and decedent was shown to have stated on her deathbed that she had never made a will,—notwithstanding it was supported by the testimony of the attesting witnesses who were shown to have been employees and creatures of the pro-

ponent, and whose credibility was impeached.

In *White's Succession* (1913) 182 La. 890, 61 So. 860, the court reversed the judgment of the court below finding an alleged holographic will to be genuine, where the two experts in the case disagreed and the lay evidence given by witnesses who were best acquainted with the decedent and her handwriting preponderated in favor of the proposition that the will was a forgery, and the alleged will, which was produced by persons largely interested therein, was said by them to have been hidden beneath the lining of a dictionary and to have been discovered only by an accidental dropping of the book which burst the covering and revealed the document.

In *Teutonia Bank & T. Co. v. Heaslip* (1916) 138 La. 860, 70 So. 861, the court refused to interfere with a judgment in favor of the defendant in a suit against an indorser of a promissory note, where both the lay witnesses and the handwriting experts disagreed as to the genuineness of the signature, and the appellate court, upon a comparison of such signature with the admitted signatures of the indorser, came to the conclusion that the indorsement on the note was not made by him.

In *Walker's Succession* (1918) 142 La. 955, 77 So. 889, the court set aside a judgment sustaining the opposition to the probate of a will, having come to the conclusion from a comparison of the will with the decedent's handwriting, and upon other evidence tending indirectly to establish its authenticity, that the will was genuine.

In *Palmer v. Blanchard* (1915) 113 Me. 380, 94 Atl. 220, Ann. Cas. 1917A, 809, an action on certain promissory notes alleged to have been made by defendant's decedents, the court, on motion for a new trial, set aside a verdict in favor of the defendant upon the ground that the testimony of the handwriting expert for the defense that the signatures to the notes were not genuine, based on a comparison of the appearance of the signatures in respect to form with standard writing, and upon an alleged difference in

age of the signatures with respect to time of writing, was not supported by the reasons given by him for it, a reading of his testimony in comparison of the disputed signatures with the admitted handwriting of defendant's decedent showing that the differences and peculiarities pointed out by the expert also existed in the admitted signatures, and that the standards differed from each other the same as the disputed signatures differed in some respects from some of the standards, and that the differences were only such as may be discovered in the different writing of most people, and such testimony being opposed, not only by the opinion of the two experts called by the plaintiff, but also by the testimony of the two subscribing witnesses.

In *Day v. Cole* (1887) 65 Mich. 129, 31 N. W. 823, a suit in equity which turned upon the genuineness of an alleged assignment, the appellate court, from an examination of the disputed signatures, reversed the decree below and accepted as correct a theory propounded by the defendant that the signature to the assignment was copied from a signature to a letter by making a tracing with a sharp-pointed instrument, with the aid of which an outline was made upon the alleged assignment with pencil, followed by the use of pen and ink. The court said: "I am satisfied the signature is a forgery. All the facts seem to point in that direction; but the one thing that fastens conviction upon my mind above all others is this: these two signatures are too evenly alike to be both genuine. As before said, the tracing of one fits so accurately to the other as to show no perceptible difference, except in length, to the naked eye. This difference is accounted for by the pencil lining. Several signatures, 'R. Gardner,' admitted to be genuine, are in the case. A tracing of no one of these fits anywhere near any other; nor will a tracing of the assignment signature, or of the one in exhibit 128, cover any of them. It does not seem hardly possible that one, without design, can write his name twice so exactly alike in spaces between and

height of the letters, and their slope or angles, as that a tracing of one will accurately measure the other in every respect. Indeed, numerous experiments show that it cannot be done when it is sought to be done. Such a perfect coincidence as in the case of these two signatures in this cause is at least highly improbable, and but barely possible, if attainable at all. There is in my mind but one explanation for this remarkable and striking similarity; and that is that, while exhibit 128 was in the hands of Cole, this signature to the assignment was copied and manufactured therefrom by someone. And I am satisfied that it was done by tracing and outlining, so that virtually, with some slight inaccuracies, the signature upon 128 was transferred to the assignment. There is too much method shown in the latter signature, and the method has exposed, to my mind, that it is not the genuine signature of a business man, like Gardner, writing in a hurry, and without thought of the manner of making or the form of such signature, but the cunning imitation of a forger, whose cunning has yet been the means of detecting the forgery."

In *Roy v. First Nat. Bank* (1903) — *Miss.* —, 33 So. 411, s. c. on suggestion of error (1903) — *Miss.* —, 33 So. 494, an action against an indorser of a note, a judgment in favor of plaintiff was reversed, where the expert evidence was in conflict and the indorser positively testified that he never signed, and the maker refused to testify.

In *Sanders v. North End Bldg. & L. Asso.* (1903) 178 Mo. 674, 77 S. W. 833, the court refused to disturb a verdict for the plaintiff in an action on certain promissory notes alleged to have been signed by the president of the defendant association, where there was evidence that he had been shown the notes and had said that they were good, and the jury had genuine writing as a standard of comparison, although the defendant brought an expert in handwriting and three other witnesses acquainted with his handwriting to testify that the signatures to the note in suit were not the pres-

ident's signatures, the court saying: "Upon this showing it cannot fairly be said that there is no substantial evidence to support the verdict and judgment. The case made by the plaintiff, in chief, was by no means clear or strong or convincing, but there was evidence sufficient to take the case to the jury. . . . The verdict may not have been such as this court would have found if it had been the trier of the facts, but the jury returned it and the trial court approved it, there is substantial evidence to support it, and therefore this court will not interfere."

In *Weber v. Strobel* (1917) — *Mo.* —, 194 S. W. 272, it was held that a verdict that an alleged will was not genuine was sufficiently sustained by the evidence, where three experts testified without hesitation that the signature of the will was not by the same hand as the admitted signatures of the decedent, each pointing out in detail the points of difference between them, and persons familiar with the decedent's handwriting testified to the same effect, and one witness stated that after the decedent was taken to the hospital he said he had not made a will,—although the due execution of the will was attested by the two witnesses to it, one of whom was the attorney who wrote it, and who also testified that the will was signed in a hurried manner on the head of a barrel or on a box where the testator had no place to rest his arm, and by the testimony of witnesses who knew the handwriting of the decedent, and by a handwriting expert, who testified by comparing the signature to the will with the admitted signature of the decedent that the handwriting was the same, but who also stated that in testifying in other cases he had in some instances been mistaken in statements he had made in court as to handwriting.

In *Futhey v. Potts* (1918) — *Mo.* —, 204 S. W. 180, an action in equity to cancel a deed on the ground that the grantor's name had been forged thereto, in which the evidence as to the genuineness of the signatures, the character of which does not appear in

the report of the case, was conflicting, it was held that the case was one for an application of the rule that the supreme court will yield to the chancellor, who had all the witnesses before him and saw their demeanor, and saw the deeds themselves.

In *Sturdivant Bank v. Wright* (1904) 184 Mo. App. 164, 168 S. W. 355, the court declined to interfere with a verdict in favor of defendant in an action on certain promissory notes which the defendant denied having signed, notwithstanding much expert evidence to the contrary, saying: "It is true that most of the witnesses called and placed upon the stand by plaintiff as experts, and there were a number of them, gentlemen of unimpeachable character and undoubted standing in the community, testified unequivocally that in their opinion the signatures to the notes were the signatures of the same persons who had signed the papers admittedly signed by defendants, although some of these witnesses admitted, while stating that as their conclusion, that there were variances and discrepancies between the signatures that might throw doubt upon their identity. The learned and industrious counsel for plaintiff has brought into our court the note as well as the various papers said to have been signed, in fact we may say admitted to have been signed by defendants, and ask us, on an inspection of them, to determine that the verdict of the jury is contrary to the evidence in the case. We cannot do that for several reasons. In the first place, that would assume that the members of this court were experts in the determination and judgment of handwriting. Whether we are or not is a fact upon which we have not been examined and qualified. It would be unfair to defendants to have us now, in the capacity of experts, pass upon the genuineness of signatures. Counsel for defendants would have no opportunity whatever to examine us as to our qualifications as experts. In the next place, if we did assume to be experts in the determination of handwriting, and should say that in our opinion these signatures were identical and made by the same parties,

that would be mere opinion evidence, and would be on a matter of fact that can only be determined by a jury. That is as much beyond our power as it was beyond the power of the learned trial judge. While the testimony in this case may be said to be strongly in favor of the identity of these signatures on the notes with the signatures of defendants on papers admittedly signed by them, the question was one not only primarily, but ultimately, for the determination of the jury; a fact to be passed upon by them. No opinions of experts are controlling, however persuasive or however positive that testimony may be. It is for the jury to determine the weight and the credit to be given to witnesses so testifying. They can judge that from their manner of testifying, from their appearance, from their conduct on the stand. The conclusion of the jury on that, affirmed as it is by the action of the learned trial judge in overruling the motion for a new trial, is conclusive upon this court. Moreover, beyond the positive denial of the defendants, there were other facts in evidence which tended to support that denial. These have been very briefly referred to. But the jury undoubtedly took them into consideration in arriving at their verdict. We cannot say that this is a case where the physical facts, the known laws of nature, are against the verdict. Counsel refers us to cases where verdicts have been overturned on that ground, but this is no such case."

In *Risse v. Gasch* (1895) 43 Neb. 287, 61 N. W. 616, the court refused to interfere with a verdict finding a will not to be genuine which practically disinherited testator's widow and son in favor of the children of a brother with whom decedent was shown not to have been on good terms, and which was claimed to have been drawn and executed in a certain city to which, according to the testimony of testator's widow and son, decedent had not been except upon another occasion, where persons acquainted with decedent's signature testified to a belief that it was not his, and papers bearing admittedly genuine signatures were put

in evidence, and there was testimony that decedent in his last sickness expressed a desire to make a will and said to a neighbor who was present that he had no will; notwithstanding the lawyer by whom the instrument was drawn gave evidence of its execution and the two attesting witnesses likewise attested its genuineness, one of such witnesses, however, being the decedent's brother above referred to, and the other, one who admitted, on cross-examination, that he did not remember the circumstance of having signed his name to the paper and could not say that he ever knew the deceased, and that the only thing he was sure of was that the signature was his and that he signed it at the request of someone. The court said: "Had we been the jury we might have reached a different conclusion, but how can we say that the conclusion reached by the jury under this evidence is the wrong one? Or, rather, how can we say that the jury's conclusion is unsupported by sufficient competent evidence? We did not see nor hear the witnesses testify. We had no opportunity of observing their demeanor while upon the stand. So far as their evidence is concerned we have before us but the lifeless record in which the testimony of one witness, if consistent with itself, weighs just as much as the testimony of another. Except the signature in writing attached to the paper alleged to be the will of the deceased, and which is in German characters, we have never seen any signature or handwriting of the deceased. The jury had before it numerous papers on which the handwriting and signature of the deceased appeared, and which handwriting and signature were indisputably genuine. The jury had an opportunity to compare the admittedly genuine handwriting of the deceased with that alleged to be his on the paper alleged to be his will. We have not even that opportunity. The original papers bearing the genuine handwriting and signature of the deceased introduced in evidence on the trial have not been brought here for our inspection. We have before us typewritten copies of them. That

someone appeared before Enking and signed the paper in evidence, Carl Julius Gasch, in German, and represented himself to be that person and published this paper to be his last will and testament, we think is highly probable; but was that person Carl Julius Gasch, or Julius Gasch, the man who died in Adams county in 1888? We do not know. The jury said in effect by their verdict that the person who signed the paper was not the identical Carl Julius Gasch, or Julius Gasch, who died in Adams county in 1888, and whose widow and son are the defendants in error here; and, as that finding is not unsupported by sufficient competent evidence, we are not at liberty to disturb it. Twelve jurors, wholly disinterested in the results of this case, have said on their oaths that the signature to the paper in controversy was not the signature of Carl Julius Gasch, who died in Adams county in 1888, and that he was not present in Fond du Lac, Wisconsin, on the 15th of June, 1875. This court is not invested with authority by the Constitution or laws of this state to set aside this finding, if it has for its support competent evidence, even though we might be of opinion that had we been the triers of the case we would have reached a different conclusion. To have disputed questions of fact put at issue in actions at law tried and determined by a jury is one of the rights guaranteed by the Constitution of the state to its citizens. But another thought occurs in this connection. This trial was presided over by a learned judge who had sixteen years of experience as a judge. During that time there had probably been tried before him a thousand jury cases. He heard this testimony; he saw these witnesses testify; he observed their demeanor upon the stand; and he has, by overruling the motion of the plaintiff in error for a new trial, stamped upon this finding the seal of his approval. The verdict of the jury, then, fortified as it is by the evidence, by the oaths of the jurors, and by the approval of the trial judge, binds and concludes this court, and the judgment

of the district court must therefore be and is affirmed."

In *Re O'Connor* (1917) 101 Neb. 617, 164 N. W. 570, the court refused to reverse a judgment on a verdict in favor of the contestants of a will alleged to have been forged where expert witnesses expressed the opinion that the deceased did not write the disputed instrument and gave reasons for their conclusion, and there was evidence to cast suspicion on the testimony of the proponent, who was the sole beneficiary, although, on the other hand, the signatures of the attesting witnesses, who were dead, were identified, and there was testimony tending to corroborate proponent's story of the execution of the will and of his possession thereof during decedent's lifetime. It is interesting to note that one member of the court dissented from the others as to the conclusions to be drawn from the expert testimony.

In *Brown v. Mutual Ben. L. Ins. Co.* (1880) 32 N. J. Eq. 809, it was held, in affirming a decree of the chancellor on the advice or opinion of the vice chancellor in favor of the validity of a mortgage sought to be foreclosed, that expert evidence against the genuineness of the signature of the mortgagor to the power of attorney under which the mortgage was given, and of the subscribing witness thereto, was weaker in degree of certainty than the direct evidence of the subscribing witness who swore to the genuineness of both signatures and whose credibility was in no way impeached.

In *Wright v. Flynn* (1905) 69 N. J. Eq. 753, 61 Atl. 973, the appellate court affirmed a decree admitting to probate a will the genuineness of which was in question, where the testimony of the attesting witnesses, one of whom would be only remotely benefited by the establishment of the will, and the other not at all, was not impeached, although a handwriting expert claimed that the two signatures appearing in the will were traced from some other paper.

In *DuBois v. Baker* (1864) 30 N. Y. 355, the verdict of a jury against the validity of a note, rendered on conflict-

ing evidence, was held to be conclusive.

In *Meyers v. Hunt* (1892) 44 N. Y. S. R. 273, 17 N. Y. Supp. 637, an action upon a promissory note alleged to have been made by defendant's testator, but which defendant claimed was a forgery, in which the executor failed to produce any of the decedent's handwriting to compare with the signature of the note in dispute, and the plaintiff produced one specimen which the jury compared with the note, it was held that their verdict, based upon that inspection and comparison, could not be interfered with.

In *Silver v. Elias* (1901) 34 Misc. 760, 68 N. Y. Supp. 851, the appellate court granted a new trial of an action on a promissory note because of the improbability of the plaintiff's explanation of the transaction, and the fact that he was contradicted by his own witnesses in essential details, and because a comparison of the alleged signatures at the end of the note and indorsed upon its back, greatly differed from the original signature to the verification of the defendant's answer.

In *Card v. Moore* (1902) 68 App. Div. 327, 74 N. Y. Supp. 18, affirmed without opinion in (1903) 173 N. Y. 598, 66 N. E. 1105, in which an agreement was attacked as a forgery in respect to the signature of a party thereto and the date thereof, it was held that a finding that the agreement bore its true date was entirely justified, where the two witnesses to the agreement, one of whom was the typewriter who prepared it, positively testified to its execution on that day, and four other witnesses gave very strong corroborative testimony as to its execution, notwithstanding that an expert testified that the typewritten agreement, both upon careful inspection and under the scrutiny of the microscope, showed that the date had been tampered with, the court saying: "The testimony of an expert, however eminent, based upon the appearance of the paper of some age, when that appearance might be due to other causes than those inferred from visual examination and microscopic scrutiny, should not prevail with us

against positive testimony of the witnesses in this case, credited by the special term, so as to require at our hands a reversal of its finding."

It should be noted in connection with the New York cases following, that under the provisions of § 2586 of the Code of Civil Procedure, the appellate division, upon an appeal from a decree of the surrogate's court upon the facts, sits more as a trial court upon the facts than as a court of review (*Re Rice* (1903) 81 App. Div. 223, 81 N. Y. Supp. 68), and accordingly that it is the duty of the appellate division to determine not simply whether the determination of the surrogate's court is supported by evidence, but whether or not the correctness of such decision is reasonably free from doubt and entirely satisfactory (*Re Burtis* (1905) 107 App. Div. 51, 17 N. Y. Anno. Cas. 136, 94 N. Y. Supp. 961).

In *Re Rice* (N. Y.) *supra*, the appellate division came to the conclusion that the surrogate was right in pronouncing an alleged will to be a forgery, principally for the reason that upon a critical examination of the four signatures it was found that they corresponded almost exactly, although the person alleged to have made them was upwards of eighty years of age, while such similarity did not appear in the concededly genuine signatures introduced in evidence. This decision is affirmed without opinion in (1903) 176 N. Y. 570, 68 N. E. 1123.

In *Re Burtis* (N. Y.) *supra*, the appellate division set aside as not reasonably free from doubt a determination of the surrogate's court that a signature to an alleged will was a forgery, where the alleged witnesses thereto, although more or less discredited by the cross-examination, or by other evidence and circumstances, gave positive testimony as to the genuineness of the signature, and the expert testimony was in conflict. The court said: "A large number of expert witnesses, so-called, were called, who testified that the alleged signature was a forgery, and about an equal number were called by the proponent, who testified with equal positiveness

that such signature was genuine. Without passing upon the merits of the testimony of those learned gentlemen, we are of the opinion that their evidence left the question in dispute quite as involved in doubt as before their evidence was given. The contestants assert that the signature to the alleged will is a tracing of the name written by the deceased at the beginning and in the body of the will. Concededly, if one's signature conforms in every particular to another, one of them must be a forgery, because for all practical purposes no person can write his name twice exactly alike. Such similarity is not claimed to exist in the case of the two signatures in question, but rather it is insisted that the tracing is poorly done and that such discrepancies as concededly exist are the result of poor workmanship. Concededly, if the alleged tracing were exact in all its details a forgery would have been proven, but the alleged tracing is so imperfect that the conclusion is in doubt. In this case, as in all other similar cases, the experts upon handwriting are at variance. A very large number of reputable bankers, business associates of the deceased and others, express the opinion that the signature to the will offered for probate is a forgery, while, on the other hand, practically an equal number of men accustomed to making comparisons of signatures and determining as to their genuineness express it as their opinion that the signature to the will in question is that of Albert G. Burtis, the alleged testator. Some of these attempt to explain or support the opinion expressed by them by diagrams, measurements, and other tests. Others declare that they can best judge of the genuineness of such signature by comparing it with signatures concededly genuine, in an off-hand way and without reference to the particular lines, or what may be called the technical features of the signature. Almost without exception these men declare that in their opinion the signature to the will in question is that of Albert G. Burtis, the alleged testator. The conflict in the expert testimony.

so-called, is so great that it would be futile for this court to attempt to learn from it whether or not the signature in question was genuine or a forgery. If it depended upon that evidence we cannot say that the issue is free from doubt, or that we are entirely satisfied with the decision of the learned surrogate. As between the two classes of experts, the mind of the court might incline to one or the other; but in view of the conflict of testimony in that regard, and in view of the conflict as to the other circumstances respecting the proponent, and the other facts to which attention has been called, we think this court ought not to say that the issue as to whether or not the signature to the will in question is genuine or a forgery is free from doubt and that it is entirely satisfactory. We do not deem it appropriate or proper to indicate what, in our opinion, the final decision in this case should be as to the genuineness of the signature to the will in question, or as to the other questions of fact raised by the pleadings and which may become important in any future trial. It is only held upon this appeal that in our opinion the questions involved are in serious doubt, and that we are not entirely satisfied with the decision of the learned surrogate. We do not intend to hold or intimate that the decision of a surrogate's court admitting or rejecting a will for probate may not be affirmed, notwithstanding it may be incapable of accurate demonstration that such decision is correct, but we adhere to the rule, as enunciated in the cases to which attention has been called, that when the appellate court is in doubt and is not entirely satisfied with the decision of the surrogate, the questions of fact should be sent to a jury under the provisions of § 2588 of the Code of Civil Procedure. It would seem that in view of all the circumstances disclosed by the evidence in this case, especially in view of the fact that the body of the will in question was written by the decedent; that six months before practically the same disposition was made of his property in a will concededly written and signed by him, although

informally executed; and in view of all the other circumstances to which attention has been called, this court should not say that the issue as to the genuineness of the signature to the will offered for probate is free from doubt, and that it is entirely satisfied with the determination of the learned surrogate in that regard." A minority, however, seem to have been convinced by the testimony given by experts for the contestant.

In *State Bank v. Greenberg* (1905) 95 N. Y. Supp. 508, the court reversed a judgment in favor of plaintiff in an action upon a promissory note in which the defense was forgery, where the authenticity of the note was upheld by a single witness in whose testimony was found much inconsistency and improbability, and some of the exhibits used upon the trial, and particularly samples of the handwriting of the two defendants, were not attached to the return.

In *Heaphy v. Metropolitan L. Ins. Co.* (1908) 25 App. Div. 420, 49 N. Y. Supp. 466, the court reversed a judgment on a verdict in favor of the beneficiary in an action on a life insurance policy, the application for which contained false statements, but which the beneficiary claimed had not been signed by the insured, where the beneficiary and the examining doctor contradicted one another as to whether the disputed signature was made by the insured at the time of the physical examination, and an expert in handwriting, upon a comparison of the disputed signature with one admitted to be genuine, expressed the opinion that the two signatures were written by the same person. The court said: "This species of evidence, it is true, would not prove altogether convincing, standing by itself; and we should not, if such were the case, deem it of sufficient weight to authorize us to interfere with the verdict; but upon the argument the original application was submitted to the court for personal examination, and we have availed ourselves of the opportunity thus afforded to examine and compare the two signatures with great care; and such examination and comparison have pro-

duced upon our mind the conviction that beyond all peradventure the two signatures were written by one and the same person, and that consequently, if the signature to subdivision A was written by Charles D. Heaphy, he must also have signed his name to subdivision C."

In *Sullivan v. Foote* (1909) 120 N. Y. Supp. 61, it was held that there was no such preponderance of the evidence in favor of the plaintiff in an action upon a promissory note against an alleged accommodation signer as to warrant a reversal, where the defendant testified that he had not signed the note, and the name as written upon the note differed from nine conceded signatures, and such evidence was opposed only by the deposition of the payee, who received the benefit of the note, that it was signed by the defendant.

In *Townsend v. Perry* (1911) 146 App. Div. 225, 130 N. Y. Supp. 951, in which the plaintiff set up a claim to the property of certain deceased persons, based upon a contract made by his mother with such persons, whereby the mother surrendered her son to such persons in consideration of their agreement to educate him and give him the same share of their estate as he would receive had he been their own son, a majority of the appellate court were of the opinion that a decision in favor of the plaintiff was not supported by the evidence, where the direct and circumstantial evidence as to the genuineness of the documents was weak and the question whether such contract was ever executed depended almost entirely upon the opinion of witnesses as to whether the signatures thereto were genuine, and professional experts, who testified with great particularity and analytical acuteness as to these signatures and the documents, generally united in the opinion that the whole business was a forgery, although persons acquainted with the handwriting of the decedents testified to the genuineness of the documents, and there was a doubt raised by expert testimony as to the age of the paper upon which the contract in question was written.

A new trial resulted in favor of the defendant, and a judgment dismissing plaintiff's complaint upon the merits was affirmed upon appeal in (1913) 158 App. Div. 889, 143 N. Y. Supp. 1146. A new trial, subsequently obtained upon newly discovered evidence, resulted in another verdict in favor of the plaintiff, but upon appeal, in (1917) 177 App. Div. 415, 164 N. Y. Supp. 441, the court expressed the conviction that the paper writing relied upon by the plaintiff was a fabrication and forgery, and dismissed the complaint upon the merits, saying: "Not alone does the great preponderance of the expert testimony offered upon the trial establish the spuriousness of the instrument, but a mere comparison of the signatures upon the instrument with the genuine signatures of Cyrenius C. Townsend, his wife, and of plaintiff's mother, clearly demonstrates, even to the layman, that the former are but clumsy forgeries."

In *People ex rel. Hansen v. Waldo* (1914) 163 App. Div. 665, 148 N. Y. Supp. 985, on certiorari to review a decision of a police commissioner dismissing the relator from the police force because he had written an anonymous letter to the commissioner of police and denied it, the determination of the police commissioner was annulled and the petitioner reinstated, where the only direct evidence against him was the testimony of an expert on handwriting, founded on his comparison of the letter with certain writings of the relator, where no opportunity was afforded for cross-examination of this witness, and the court's own comparison of the exhibits did not convince them of the correctness of the expert's conclusion, and, on the other hand, the relator denied the writing of the letter and produced witnesses acquainted with his handwriting who expressed the opinion that he did not do so.

And in *People ex rel. Mara v. Waldo* (1914) 166 App. Div. 890, 150 N. Y. Supp. 985, affirmed without opinion in (1915) 215 N. Y. 625, 109 N. E. 1089, the court likewise reinstated a police officer who had been dismissed for writing an anonymous letter to the

police commissioner in relation to police matters, and in denying that he had done so, where the only direct evidence tending to show that the letter was written by the relator was the evidence of a handwriting expert, and no reason or motive was disclosed for the relator's having written it, and it appeared as a fact that the conditions complained of in the letter did not actually exist.

In *Dambroff v. Bank of United States* (1917) 163 N. Y. Supp. 86, an action by a depositor against the bank to recover the amount paid out by the latter on checks declared by the plaintiff to be forgeries, the appellate court reversed an order of the trial court setting aside a judgment for the plaintiff entered on verdict of the jury, where plaintiff's positive testimony that he had never signed the checks was unimpeached either by direct testimony or surrounding circumstances, notwithstanding opinion evidence was given by the manager and cashier of the bank and an outside handwriting expert, based on a comparison of the disputed checks with conceded signatures of the plaintiff, that the disputed checks were signed by the plaintiff.

In *Marshall v. Thomas* (1909) 81 Ohio C. C. 363, it was held, upon a writ of error from a judgment entered upon a verdict in favor of the defendant in an action upon two promissory notes, that the verdict of the jury was manifestly against the weight of the evidence, where the genuineness of the signatures was attested by witnesses who were bank officials and of long experience in the examination by comparison of handwritings, and an expert testifying for the defendant was improperly permitted to indulge in argumentative statements, mere inferences, and speculations.

In *Young's Estate* (1911) 59 Or. 348, 116 Pac. 95, Ann. Cas. 1913B, 1310, the supreme court reversed a decree of the circuit court and reinstated the decree of the county court against the validity of a proposed will, upon the ground that such will and the letters and exhibits produced by proponents to sustain it were forgeries. The court, after reviewing various circum-

stances impeaching the credibility of the attesting witnesses, points out an identity in the signature of the proposed will with the signatures of two other forged wills, proceeds to review the characteristics of the handwriting in the will and the letters and exhibits presented by proponent for comparison, and concludes by saying: "There are many other marked differences between these exhibits and his genuine writing, but it is useless to prolong this opinion by citing examples. There is a marked resemblance in these documents, in some respects, to the genuine writings of deceased, but such resemblance is the essence of every forgery. The imitation is clever, but that is all. It is a fact known to everybody that the handwriting and spelling of an uneducated man do not vary greatly. What he has learned with difficulty and does with difficulty he usually does in the same manner every time. Unlike the skilful penman he is unable to make the same letter several times in different ways, and unlike the educated man he does not correct his mistakes in spelling. And if the differences between the genuine writings of deceased and those relied upon by proponent were the only evidence in this case, they would be sufficient to stamp all these documents as forgeries. But they do not stand alone. Witnesses of the highest respectability, who are familiar with Young's handwriting—clerks, bankers, and public officials—testify that proponent's exhibits are forgeries. Experts of long experience bear the same testimony, the preponderance in the weight of evidence of this character being largely in favor of contestants."

In *McWilliams's Estate* (1918) 259 Pa. 526, 103 Atl. 365, the supreme court affirmed on the opinion of the judge below a decree dismissing a petition for an issue devisavit vel non and sustaining the decision of the registrar admitting a will to probate, where the only evidence against the positive testimony of its genuineness was the testimony of two experts on handwriting that a different pen and a different ink were used in writing

the fifth paragraph of the will, while an examination of the will, especially the signature of the testator and that of the witnesses, showed as marked a difference as to the color of the ink as existed between the fifth paragraph and the balance of the body of the will. The court said: "The evidence of these two experts does not corroborate any testimony on the part of the contestants and is not sufficient in itself, when taken alone, to prove that this fifth paragraph was added to this will by Harry E. Ruff after its execution by the testator. Our notion of the law is that expert testimony such as was offered in this case cannot be received as independent testimony to establish the facts or conclusions sought by the contestants to be established or drawn. Such testimony can only be received as corroborating other direct or positive evidence as to some fact in issue."

In *Wingfield v. Little* (1918) — S. D. —, 168 N. W. 716, the court refused to reverse a judgment for defendant in an action on a promissory note, saying: "The sole issue herein was whether respondent signed the note sued on. He swore that he did not; and while, without being able to see and hear the witnesses, it might seem to us that his unsupported statement was overcome by the testimony of the witnesses called by appellant, the question of the weight to be given his testimony was a question peculiarly for the jury. There was evidence which fairly warranted the verdict of the jury. Hence, under the well-established rule of this jurisdiction, such verdict will not be disturbed."

In *Talbot v. Dillard* (1899) 22 Tex. Civ. App. 360, 54 S. W. 406, an action against a surety on a promissory note which the defendant denied having signed, his testimony being strongly supported by circumstances testified to by other witnesses and also by the testimony of one expert that the signature was not genuine, it was held that the trial court erred in basing a judgment for the plaintiff upon the testimony of one expert witness that the signature was genuine and its own comparison of signatures, in the face

of the much stronger and more satisfactory evidence against the genuineness of the signature.

In *State v. Smalls* (1911) 63 Wash. 172, 115 Pac. 82, a conviction for perjury in a civil action based upon a note and mortgage was held to be sufficiently sustained by testimony where the direct testimony of one witness was corroborated by expert evidence of alteration in the note and mortgage.

In *Pratte v. Voisard* (1918) 57 Can. S. C. 184, 44 D. L. R. 170, the supreme court of Canada (Davies, J., dissenting) reversed a judgment of the Quebec court of King's bench, and reinstated a judgment of the trial court setting aside a will as fraudulent, largely upon a comparison of the handwriting made by members of the court, where, in addition to the expert testimony, there were other circumstances casting doubt upon the authenticity of the alleged will, although the person supposed to have forged it took only a small legacy thereunder, and the provision for her was such as the decedent would be likely to have made, and disinterested witnesses testified to having seen a document of similar appearance which the decedent told them was his will.

In *Re Cochran* (1919) — Can. —, 47 D. L. R. 1, the supreme court of Canada, in affirming the judgment of the supreme court of Nova Scotia, accepted as conclusive the agreed testimony of two experts that two letters, purporting to have been written by different persons, were in the same handwriting, which conclusion stamped them as spurious and fraudulent.

In *Rex v. Law* (1909) 19 Manitoba L. R. 259, a criminal prosecution for publishing a defamatory libel in which the only evidence to connect the accused with the libel was the opinion of two experts after making a comparison between the admitted writing and that contained in the letters, while the accused denied under oath that she had written the defamatory letter and called two experts who gave equally as positive evidence that the letters in question had not been written by the accused, it was held by *Perdue, J.*,

that there was not sufficient evidence to go to the jury.

In *Deschenes v. Langlois* (1906) Rap. Jud. Quebec 15 B. R. 388, an action against an attesting witness of certain promissory notes by one who had discounted them in reliance upon his attestation, the court affirmed a decision of the court below in favor of the defendant, notwithstanding the testimony of an expert, based on a systematic comparison of the manner of formation of the letters, that the signature on the notes was genuine. The appellate court, from its own comparison of the disputed signature with a genuine signature, was of the opinion that the signature on the note was not that of the defendant.

In *Banque Nationale v. Tremblay* (1913) Rap. Jud. Quebec 46 C. S. 304, an action upon a promissory note the execution of which was denied under oath by the maker, but was sworn to by the indorser, it was held that proof by comparison of handwritings made by a single expert was not sufficient to establish a preponderance of evidence in favor of the plaintiff.

Observations upon the foregoing cases.

In a few of the above cases, where decisions of the lower courts were affirmed on conflicting evidence as to the genuineness of documents, it did not appear that the disputed documents were before the appellate court, and the conflict was in the testimony of witnesses. In a few only of the cases which involved the inspection and consideration of disputed documents did the appellate court decline to consider them. Therefore, as the result of the examination and comparison of the cases in which disputed documents

are in the record on appeal, while it may seem difficult to draw any safe rule with respect to the extent to which an appellate court can properly go in deciding for itself as to the genuineness of disputed documents which are in the record and open to its inspection, it is at least certain that in a majority of these cases the court did actually examine and consider the documents in dispute.

That the appellate court in such instances did not regard its inspection of the documents as extrajudicial or merely incidental, or for any reason ineffectual as evidence affecting its determination of the case, is clearly shown from the fact that in fully half of the instances in which such documents were inspected and considered the court, after making such inspection and reviewing the other evidence in the case, reached a decision contrary to the verdict of the jury or the finding of the lower court, and reversed the judgment thereon. Also in most of the other cases where such documents were in the record, but in which the decision of the lower court was affirmed, the question was determined after inspecting and considering the documents.

In the light of the precedents here reviewed it is, perhaps, reasonable to conclude that the strict rule against a review of conflicting evidence by an appellate court is more apt to be relaxed where, on the issue of the genuineness of disputed documents, the court has the documents before it in the record, with such other explanatory documentary data as may be needed for an independent judgment on the question.

E. S. O.

C. C. TIPSWORD, Resp't.,

v.

WILLIAM POTTER et al., Appts.

Idaho Supreme Court—July 2, 1918.

(31 Idaho, 509, 174 Pac. 183.)

Master and servant — invitee of servant — rights.

1. A servant has no right to bring anyone into his employer's house

Headnotes by BUDER, Ch. J.

to live with him without the master's consent, and it requires no notice from the employer to make this prohibition upon the servant effective.

[See note on this question beginning on page 530.]

Appeal — refusal of nonsuit — error.

2. Where there is some evidence tending to support the complaint, it is not error to deny a motion for a nonsuit or for a directed verdict.

[See 2 R. C. L. 198.]

Master and servant — possession by servant.

3. The occupation of a master's premises by his servant is in law the occupation of the master. The servant has no hostile possession, no independent right to possession.

[See 16 R. C. L. 579.]

Assault — ejection of trespasser.

4. In order to justify the use of force in ejecting a trespasser from premises where he entered peaceably, it must be shown that he was first requested to depart, and either that he refused to or did not comply with the request after being allowed a reasonable time to do so.

[See 2 R. C. L. 557, 558.]

— right of owner.

5. Where there is evidence sufficient to warrant the jury in finding that a trespasser refused to leave the premises, the owner is entitled to an in-

struction that, if the former refused to leave upon demand, the latter had a right to eject him, using such force as was reasonably necessary so to do.

[See 2 R. C. L. 557, 558.]

Trespass — ejection — force.

6. When a trespasser refuses to leave the premises or defiantly stands his ground armed with a deadly weapon, the occupant may at once resort to physical force to remove him, subject, of course, to the qualification of reasonableness that there can be no killing of the trespasser unless necessary in self-defense or to prevent a felony.

[See 2 R. C. L. 558.]

Arrest — release — effect.

7. When a private person arrests another for a criminal offense committed in his presence, and thereafter releases him from custody upon an agreement that, if the latter should not be turned over to a peace officer, he would not return to the former's premises, such release does not alone amount to a waiver of any right of the latter to recover for any assault or battery committed by the former.

APPEAL by defendants from a judgment of the District Court for Bonner County (Dunn, J.) in favor of plaintiff, and from an order denying a motion for new trial, in an action brought to recover damages for personal injuries alleged to have resulted from an assault and battery upon him by defendants. *Reversed.*

The facts are stated in the opinion of the court.

Mr. G. H. Martin for appellants.

No brief filed on behalf of respondent.

Budge, Ch. J., delivered the opinion of the court:

Respondent brought this action for damages for personal injuries alleged to have resulted from an assault and battery upon him by appellants. The answer denied the material allegations of the complaint, and, as an affirmative defense, alleged that on the date in question respondent was a trespasser in a house upon premises belonging to appellant William Potter. Demand was made that respondent leave the premises, whereupon he

went into an adjoining room, procured a loaded rifle, made an assault upon appellant therewith, and threatened and attempted to shoot him, and thereupon appellant choked respondent until he dropped the gun, and then ejected him from the premises, using no more force than was reasonably necessary. The case was tried to a jury, and a verdict returned in favor of respondent. This appeal is from the judgment and from an order denying a motion for a new trial.

The assignments of error attack the sufficiency of the evidence and the giving and refusal to give certain instructions. The evidence is

conflicting and there is some evidence tending to support respondent's complaint. A review of the evidence at this time is unnecessary. We are satisfied that the court committed no error in denying the motion for nonsuit and the motion for a directed verdict.

The plaintiff requested the following instruction: "The court instructs the jury that, if it appears from the evidence that the Butts were occupying the house where the combat in controversy in this case took place, without any agreement to pay rent and as a gratuity, and so long as they were employed by the defendant William Potter in working in and about his ranch, then they would not be tenants, and would have no right to take plaintiff in as a lodger or boarder against the consent of said Potter, and the said Potter would have the right at any time to demand that plaintiff leave said premises, and if plaintiff refused or did not do so, said Potter would have the right to remove said plaintiff from said premises, using such force as was reasonably necessary so to do."

The court refused to give the instruction as requested, but modified it by inserting after the words, "lodger or boarder," the words, "after notice from said Potter not to do so," and by striking out the word "refused" and inserting the words, "not complied with with reasonable promptness under the facts in evidence." The inclusion of the words, "after notice from said Potter not to do so," was error. The

Master and
servant—
possession by
servant.

occupation of a master's premises by his servant is in law the occupation of the master; the servant has no hostile possession, no independent right to possession; his possession is the master's possession. Bowman v. Bradley, 151 Pa. 351, 17 L.R.A. 213, 24 Atl. 1062; Lane v. Au Sable Electric Co. 181 Mich. 26, 147 N. W. 546, Ann. Cas. 1916C, 6 A.L.R.—84.

1108; Bertie v. Beaumont, 16 East, 34, 104 Eng. Reprint, 1001; De Briar v. Minturn, 1 Cal. 450; School Dist. v. Batsche, 106 Mich. 330, 29 L.R.A. 576, 64 N. W. 196; Davis v. Williams, 130 Ala. 530, 54 L.R.A. 749, 89 Am. St. Rep. 55, 30 So. 488; Chatard v. O'Donovan, 80 Ind. 20, 41 Am. Rep. 782; Homan v. Redick, 97 Neb. 299, L.R.A. 1915C, 601, 149 N. W. 782; Mead v. Owen, 80 Vt. 273, 12 L.R.A. (N.S.) 655, 67 Atl. 722, 13 Ann. Cas. 231; 16 R. C. L. p. 579, § 54; Bourland v. McKnight, 4 L.R.A. (N.S.) 698, and note (79 Ark. 427, 96 S. W. 179); Bookhout v. Vuich, 101 Wash. 511, 172 Pac. 740; Mackenzie v. Minis, 132 Ga. 323, 23 L.R.A. (N.S.) 1003, 63 S. E. 900, 16 Ann. Cas. 723.

Potter was under no obligation to notify Butts, who was occupying the house as his servant or employee, not to receive respondent upon the premises. A servant has no right to bring anyone in to his employer's house to live with him without the master's consent, and it requires no notice from the employer to make this prohibition upon the servant effective. Tucker v. Burt, 152 Mich. 68, 17 L.R.A. (N.S.) 510, 115 N. W. 722.

The modification of the instruction by striking out the word "refused" and inserting the clause, "not complied with with reasonable promptness under the facts in evidence," was likewise erroneous.

No other inference can be drawn from the record than that the occupancy of Butts was that of a servant, and that respondent was a trespasser. In order to justify the use of force in ejecting a trespasser from premises

Assault—
ejection of
trespasser.

where he entered peaceably, it must be shown that he was first requested to depart, and either that he refused to or did not comply with the request after being allowed a reasonable time to do so. 2 R. C. L. 557, § 36; 5 C. J. 634, § 29; 3 Cyc. 1045; Emmons v. Quade, 176 Mo. 22, 75 S. W. 103; Parrish v. State, 32 Tex.

Crim. Rep. 583, 25 S. W. 420; Rex v. Howard, 1 Haw. 40; Redfield v. Redfield, 75 Iowa, 435, 39 N. W. 688; Breitenbach v. Trowbridge, 64 Mich. 393, 8 Am. St. Rep. 829, 31 N. W. 402.

There is, however, evidence in the record sufficient to have warranted the jury in finding that respondent refused to leave at all. Appellant was therefore entitled to the instruction that, if respondent refused to leave upon demand, appellant had a right to eject him, using no more force than was reasonably necessary.

When a trespasser refuses to leave the premises, or defiantly stands his ground armed with a deadly weapon, the occupant may at once resort to physical force to remove him. State v. Davis, 80 N. C. 351, 30 Am. Rep. 86; Shain v. Markham, 4 J. J. Marsh, 578, 20 Am. Dec. 232; Morgan v. Durfee, 69 Mo. 469, 33 Am. Rep. 508; Watson v. Hastings, 1 Penn. (Del.) 47, 39 Atl. 587; Woodman v. Howell, 45 Ill. 367, 92 Am. Dec. 221; Breiten-

bach v. Trowbridge, *supra*; Redfield v. Redfield, 75 Iowa, 435, 39 N. W. 688. This, of course, is subject to the qualification of reasonableness, and that there can be no killing of the trespasser unless necessary in self-defense or to prevent a felony. State v. Dixon, 7 Idaho, 518, 63 Pac. 801.

The court did not err in refusing to give the instruction set forth in the fourth assignment of error. Appellant cites no authorities and none have been found which go to the extent of holding that, if a private person arrests another for a criminal offense committed in his presence, and thereafter releases him from custody upon an agreement that, if the latter should not be turned over to a peace officer, he would not return to the former's premises, such release would alone preclude a recovery for any assault or battery committed in making the arrest.

The judgment is reversed, and a new trial granted. Costs are awarded to appellants.

Morgan and Rice, JJ., concur.

ANNOTATION.

Right of master to remove one who is upon premises under invitation or license from servant.

A search has failed to disclose any case other than the reported case (TIPSWORD v. POTTER, ante, 527) passing upon the right of a master to remove one upon the master's premises under license from a servant. It seems clear, as held in that case, that a servant cannot authorize a third person to go or be on the master's premises so as to preclude the master from removing him. This being true, the general rule seems applicable that, after a request to leave and refusal to

comply, the master may remove such person and to effect such removal may use force. The force that may be used is, in some cases, stated to be such force as is necessary to effect the removal, and, in other cases, such force as is reasonably necessary. Whatever expression is used, the courts agree that the owner is not limited to the precise degree of force necessary to effect the removal, but may use such force as may reasonably appear to be necessary.

W. A. R.

NELLIE LOVE
v.
MODERN WOODMEN OF AMERICA, Appt.

Illinois Supreme Court — June 18, 1918.

(259 Ill. 102, 102 N. E. 183.)

Insurance — mutual benefit — waiver of proof of loss — local lodge.

1. The clerk of a local camp of a mutual benefit association with authority to receive and transmit dues and assessments and furnish blanks for proof of death has no authority to waive proof of death by denying liability for a loss.

[See note on this question beginning on page 535.]

— mutual benefit — what constitutes contract.

2. The insurance contract of a mutual benefit society consists of its constitution and by-laws, application for membership, and the benefit certificate.

[See 14 R. C. L. 840.]

— provision for proof of death — binding effect.

3. A provision of a mutual benefit certificate that the beneficiary shall furnish proofs of death before bringing action, so that the insurer may investigate the claim and ascertain its liability, is binding.

APPEAL by defendant from a judgment of the Appellate Court, First District (Eberhardt, J.) affirming a judgment of the Municipal Court of Chicago in plaintiff's favor in an action brought to recover the amount alleged to be due on a mutual benefit certificate. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Truman Plantz, George G. Perrin, and A. W. Fulton, for appellant:

The contract in question is composed of the application, the benefit certificate, and the by-laws.

Grand Lodge, A. O. U. W. v. Jesse, 50 Ill. App. 101; Alexander v. Parker, 144 Ill. 355, 19 L.R.A. 187, 33 N. E. 183; Lehman v. Clark, 174 Ill. 287, 43 L.R.A. 648, 51 N. E. 222; Fullenwider v. Supreme Council, R. L. 180 Ill. 621, 72 Am. St. Rep. 239, 54 N. E. 485.

Plaintiff as beneficiary in the benefit certificate in question is bound by the by-laws of defendant, as they are part of the contract.

1 Bacon, Ben. Soc. 3d ed. § 81; Benes v. Supreme Lodge, K. L. H. 231 Ill. 139, 14 L.R.A. (N.S.) 540, 121 Am. St. Rep. 304, 83 N. E. 127; Hexom v. Knights of Maccabees, 140 Iowa, 41, 117 N. W. 19; Miller v. National Council, K. L. S. 69 Kan. 234, 76 Pac. 880; Fry v. Charter Oak L. Ina. Co. 31 Fed. 197.

A provision in the contract that proofs of death must be filed with insured before suit can be brought is binding.

Independent Order of Mut. Aid v. Paine, 17 Ill. App. 572; American Cent. Ins. Co. v. Birds Bldg. & L. Asso. 81 Ill. App. 253; Rockford Ins. Co. v. Seyferth, 29 Ill. App. 513; Hart v. Fraternal Alliance, 108 Wis. 490, 84 N. W. 851; Nance v. Oklahoma F. Ins. Co. 31 Okla. 208, 38 L.R.A. (N.S.) 426, 120 Pac. 948; Dwelling House Ins. Co. v. Jones, 47 Ill. App. 261; Morris v. Dutchess Ins. Co. 67 W. Va. 368, 68 S. E. 22.

A condition precedent in an insurance contract must always be complied with.

Larkin v. Modern Woodmen, 163 Mich. 670, 127 N. W. 786; Conley v. Supreme Court, I. O. F. 158 Mich. 190, 122 N. W. 567; Robinson v. Templar Lodge, 117 Cal. 370, 59 Am. St. Rep. 193, 49 Pac. 170; Pool v. Brotherhood of R. Trainmen, 143 Cal. 650, 77 Pac. 661; Union Fraternal League v. Johnston, 124 Ga. 902, 53 S. E. 241; Eighth v. Brotherhood of R. Trainmen, 113 Iowa, 681, 83 N. W. 1051; Supreme Council, O. C. F. v. Forsinger, 125 Ind. 52, 9 L.R.A. 501, 21 Am. St. Rep. 196, 25 N. E. 129; Rosenberg v. People's

Surety Co. 140 App. Div. 436, 125 N. Y. Supp. 257.

There could be no waiver of proofs of death by one not having authority to bind the company.

American Cent. Ins. Co. v. Birds Bldg. & L. Asso. 81 Ill. App. 258; Forest City Ins. Co. v. School Directors, 4 Ill. App. 145.

An agent cannot bind his principal by his unauthorized acts.

Loeffler v. Modern Woodmen, 100 Wis. 79, 75 N. W. 1012; Rundell v. Anchor F. Ins. Co. — Iowa, —, 101 N. W. 519; Hollis v. State Ins. Co. 65 Iowa, 454, 21 N. W. 774; Driscoll v. Modern Brotherhood, 77 Neb. 282, 109 N. W. 158; Supreme Lodge, K. H. v. Oeters, 95 Va. 610, 29 S. E. 322; Chapple v. Sovereign Camp, W. W. 64 Neb. 55, 89 N. W. 423; Royal Highlanders v. Scovill, 66 Neb. 213, 4 L.R.A.(N.S.) 421, 92 N. W. 206; Supreme Lodge, K. H. v. Jones, 35 Ind. App. 121, 69 N. E. 718; Hexom v. Knights of Maccabees, 140 Iowa, 41, 117 N. W. 21; Modern Woodmen v. Tevis, 54 C. C. A. 293, 117 Fed. 375; Globe Mut. L. Ins. Co. v. Wolff, 95 U. S. 326, 24 L. ed. 387; Field v. National Council, K. L. S. 64 Neb. 226, 89 N. W. 773; Kocher v. Supreme Council, C. B. L. 65 N. J. L. 649, 52 L.R.A. 861, 86 Am. St. Rep. 687, 48 Atl. 544; Modern Woodmen v. Owens, 60 Tex. Civ. App. 398, 130 S. W. 860; Bixler v. Modern Woodmen, 112 Va. 678, 38 L.R.A.(N.S.) 571, 72 S. E. 704; McWilliams v. Modern Woodmen, — Tex. Civ. App. —, 142 S. W. 641; Lathrop v. Modern Woodmen, 56 Or. 440, 106 Pac. 328, 109 Pac. 81; Loudon v. Modern Brotherhood, 107 Minn. 12, 119 N. W. 425.

The verdict of the coroner's jury was admissible in evidence and was prima facie proof of the facts stated therein.

United States L. Ins. Co. v. Vocke (United States L. Ins. Co. v. Kielgast) 129 Ill. 557, 6 L.R.A. 65, 22 N. E. 467; Metzradt v. Modern Brotherhood, 112 Iowa, 522, 84 N. W. 498; Pyle v. Pyle, 158 Ill. 289, 41 N. E. 999; Mutual L. Ins. Co. v. Hayward, — Tex. Civ. App. —, 27 S. W. 36; Walther v. Mutual L. Ins. Co. 65 Cal. 417, 4 Pac. 413; Supreme Lodge, K. H. v. Fletcher, 78 Miss. 377, 28 So. 872, 29 So. 523; 3 Elliott, Ev. § 2390; Sharland v. Washington L. Ins. Co. 41 C. C. A. 307, 101 Fed. 206.

Messrs. Kretzinger, Rooney, & Kretzinger for appellee.

Cartwright, J., delivered the opinion of the court:

The appellant, the Modern Woodmen of America, issued its benefit certificate, dated November 29, 1909, signed by C. W. Hawes, head clerk, to Nathan D. Love, a member of the local camp in Chicago, for \$1,000, payable on his death to his wife, the appellee Nellie Love. Less than two months afterward he died, on January 15, 1910, and she brought this suit on the certificate in the municipal court of Chicago, stating her claim to be for \$1,000, as beneficiary. The certificate provided that no action should be maintained upon it until after proofs of death had been filed with the head clerk and passed upon by the board of directors. The by-laws contained a similar provision, and provided further that the proofs should be executed in the form prescribed by the board of directors and upon blanks furnished by the head clerk. The certificate also provided that it should be null and void if Love should within one year commit suicide, or his death should result, directly or indirectly, from his intemperate use of intoxicating liquors. The appellant's affidavit of merits set up that the appellee had not made proofs of death, nor filed the same with the head clerk, and therefore the suit was brought before any right of action had accrued to her, and that Love committed suicide, and his death resulted indirectly from the intemperate use of intoxicating liquor. There was a trial and a verdict for the appellee for \$1,000. Judgment was entered on the verdict, and the appellate court for the first district affirmed the judgment and granted a certificate of importance.

Proofs of death, as required by the contract of insurance, were not furnished or sent to the head clerk, or passed upon by the board of directors of the defendant. Notwithstanding the failure to comply with the contract, the plaintiff claimed a right to maintain her action, on the ground that the defendant had de-

nied liability and therefore waived the proofs. William P. Dowd was clerk of the local camp of which Love was a member, and two or three days after the death of Love he went to the residence of the widow, filled out a preliminary notice of the death, and told her to come to his office in the Ashland block, and he would have John Harris help her fill out the death proofs without any cost to her. Four or five days afterward the plaintiff went to Dowd's office, and he furnished her with blanks for the proofs and took her into the adjoining room of John Harris, an attorney and notary public, who solicited new members for the defendant. Dowd introduced her to Harris and requested him to assist her. Harris said he would help her fill out the papers and act as notary public, and it would not cost her anything. She testified that Dowd told her, when she came to his office, that he was sorry for her trouble, but he knew there would not be any use, and she would not get the insurance, because her husband committed suicide; or, as she stated on cross-examination, he told her that if her husband had committed suicide she could not get anything on the certificate. She also testified that Harris told her he knew very well she would not get the insurance without she turned it over to a lawyer. Dowd denied that he made any such statement to the plaintiff as she testified to. Harris had no authority to do anything about the proofs, and was not an agent for any purpose connected with the claim, but merely assisted the plaintiff, as a notary, to save expense to her; but he denied that he made the statements claimed, and testified that while he was writing and filling out proofs he said it was questionable whether the claim would be allowed. The judgment of the appellate court settled the controverted question of fact, and it must be regarded as a fact that Dowd denied liability absolutely and without the qualification stated by plaintiff on

cross-examination. The remaining facts as to proofs were not in controversy. Harris filled up parts of the blanks, swore the plaintiff to one of them, and advised her concerning others. She went to the coroner to have one of the blanks filled, and then went to the undertaker to have another filled, and then took the proofs to her attorney and left them with him. The proofs were only partially completed, and the suit was begun on March 2, 1910. In the evening of March 3d or the morning of March 4th the proofs, so far as they were made out, were left on the desk of Dowd by a boy, and on March 5th Dowd mailed them to the plaintiff, requesting her to have the forms for the officiating clergyman and attending physician filled out. He asked her to give the matter prompt attention, so that he could forward the death proofs to the head office at Rock Island. That was after the suit had been begun, and nothing further was done about the proofs.

The instruction of the court to the jury on the question of waiver of proofs of death was quite involved and not clear, but it advised the jury that if proofs of death were not filed with the head clerk and the plaintiff's claim submitted to the board of directors for action she could not recover; but if Dowd, as clerk of the local camp in Chicago, had the duty to furnish the blanks for the proofs to be filled out by the beneficiary, and when they were returned it was his duty to furnish them to the head clerk, and he stated to the plaintiff that the defendant would not pay the claim, because the deceased had committed suicide, then, in contemplation of law, Dowd, as clerk of the local camp, represented and acted as agent of the defendant, and what Dowd did and said amounted to a waiver on the part of the defendant of the provision that no suit should be commenced unless proofs of death were sent to the head clerk and the board of directors passed upon the proofs and the claim, and the verdict should

be for the plaintiff, unless the jury believed the insured committed suicide, in which case the verdict should be for the defendant.

The constitution and by-laws, the application for membership, and the benefit certificate together constituted the contract of insurance.

**Insurance—
mutual benefit—
what constitutes
contract.**

Alexander v. Parker, 144 Ill. 355, 19 L.R.A. 187, 33 N. E. 183; Lehman v. Clark, 174 Ill. 279, 43 L.R.A. 648, 51 N. E. 222.

The provision that plaintiff should furnish proofs of death, so that the defendant could investigate the claim and ascertain its liability, was binding. That view of the law was taken by the court in instructing the jury, and is not questioned. The hypothesis of fact stated in the instruction that it was the duty of Dowd, as clerk of the local camp, to furnish blanks to be filled out by the beneficiary, and when returned to him to furnish them to the head clerk, was proved, and the jury were instructed that if such was his duty he was authorized, in law, to waive proofs of death by denying liability. It is here contended that the instruction was right, because the relation of the local camp to the head camp was that of agency. The law of agency applies to fraternal benefit associations just as it applies to other principals and their agents.

It is true that a local camp is agent of the head camp as to some things; but it is not true that it is a general agent, authorized to do everything that the head camp or its officers may do. The subordinate lodge of a benefit association, authorized to receive or collect dues and transmit them to the association, is the agent of the association for that purpose, and its acts within the scope of the agency are binding on the association. So if a subordinate lodge, with full knowledge of a fact which would render a certificate void, continues to receive dues

from a member, the right to forfeit the certificate on account of that fact is waived. A subordinate lodge receiving dues and paying them over to the principal lodge necessarily treats the insurance as in force. The member pays his dues through the subordinate lodge, and if the agent has knowledge of a fact which would work a forfeiture of the certificate it should refuse to receive further dues. The receipt of a payment after an act which might constitute a forfeiture is a common method of waiving a forfeiture, and the knowledge of the agent is the knowledge of the principal. That rule applies where there is a right to suspend a member for failure to promptly pay his dues, and where the local lodge accepts dues from a member in good health, who is delinquent, but has nothing to do to be reinstated except to pay his dues. High Court, I. O. F. v. Schweitzer, 171 Ill. 325, 49 N. E. 506; Coverdale v. Royal Arcanum, 193 Ill. 91, 61 N. E. 915; Grand Lodge, A. O. U. W. v. Lachmann, 199 Ill. 140, 64 N. E. 1022; Court of Honor v. Dinger, 221 Ill. 176, 77 N. E. 557; Jones v. Supreme Lodge, K. H. 236 Ill. 113, 127 Am. St. Rep. 277, 86 N. E. 191. In every such case the local lodge is acting within the scope of its agency, and its acts are binding on the association. The rule is the same in the case of a regular insurance company, where the agent is fully authorized to act for the company in respect to proofs of loss, or to ascertain and adjust the loss, and his acts are within the scope of his agency. Dwelling House Ins. Co. v. Dowdall, 159 Ill. 179, 42 N. E. 606; Citizens' Ins. Co. v. Stoddard, 197 Ill. 330, 64 N. E. 355. It has never been held that an agent may bind his principal by acts not within the rule or beyond the scope of his agency.

Dowd was clerk of the local camp, and was authorized, as such, to receive and transmit dues and assessments, and his acts in respect to his agency would bind the defendant.

He was also furnished with blanks for proofs of death which he was to give to beneficiaries, and when filled out in compliance with the contract he was to send them to the head clerk. That was the extent of his authority, and he had no more right to deny liability than he would have had to admit liability. He performed the acts which he was authorized to perform, so far as he was given an opportunity. The proofs were not made when suit was brought, and the blanks, partly completed, were left on his desk after the beginning of the suit. The court erred in informing the jury that

Dowd's duty and authority to furnish blanks to beneficiaries, and to send them, when completed, to the head clerk, conferred upon him power to waive proofs of death by denying liability. Neither he nor the local camp had any authority to adjust the claim or determine its legality, or decide whether the defendant would or would not pay it. On the admitted facts the suit was prematurely brought, and the judgments of the Appellate Court and Municipal Court are reversed.

—mutual benefit
—waiver of proof
of loss—local
lodge.

Judgment reversed.

ANNOTATION.

Waiver of proof of death or injury by subordinate lodge of mutual benefit society.

- I. Acts constituting waiver by subordinate lodge:
 - a. Failure to send for forms for proofs of death, 535.
 - b. Failure to make proofs of death, 537.
 - c. Denial of membership, 538.
- II. Acts not constituting waiver by subordinate lodge, 539.

- I. Acts constituting waiver by subordinate lodge.
 - a. Failure to send for forms for proofs of death.

The cases are in accord in holding that where the local lodge of a mutual benefit association is required by the by-laws to send a formal notice to the supreme body on the death or injury of the insured in order to have the official blank forms for proofs of death or injury forwarded, and the local lodge refuses to send this notice, the requirement of furnishing proof of death or injury is waived. *Supreme Tent, K. M. v. Ethridge* (1909) 43 Ind. App. 475, 87 N. E. 1049; *Gellatly v. Minnesota Odd Fellows' Mut. Ben. Soc.* (1880) 27 Minn. 215, 6 N. W. 627; *Kelly v. Ancient Order of Hibernians L. Ins. Fund* (1911) 113 Minn. 355, 129 N. W. 846; *Rosenstein v. Court of Honor* (1913) 122 Minn. 310, 142 N. W. 331; *Winter v. Supreme Lodge, K. P.* (1902) 96 Mo. App. 1, 69 S. W. 662;

Miller v. Sovereign Camp, W. W. (1909) 140 Wis. 505, 28 L.R.A. (N.S.) 178, 138 Am. St. Rep. 1095, 122 N. W. 1126; *Page v. Modern Woodmen* (1916) 162 Wis. 259, L.R.A. 1916F, 438, 156 N. W. 187, Ann. Cas. 1918D, 756.

In *Supreme Tent, K. M. v. Ethridge* (1909) 43 Ind. App. 475, 87 N. E. 1049, it appeared that the by-laws of the defendant organization provided that on the death of a member notice thereof should be sent to the supreme record keeper by the record keeper of the local tent, and that the supreme record keeper should thereafter send the blank forms for proofs of death to the record keeper of the local tent. The death of the insured was not affirmatively proven, but he had disappeared from his home and diligent search failed to locate him. The local organization denied liability and refused to send the notice necessary to obtain the blank forms for proofs of death. It was held that such action was a waiver of the provision requiring such proofs. The court said: "It may well be inferred from the evidence that the local tent was as well informed of all the material facts concerning the death of the assured as was the appellee, and had such knowledge of the facts on which the jury decided that the assured was dead that

it was incumbent upon the appellant's agent in the premises, the local tent, to give the notice to the supreme tent, and to procure from it the blank forms for proofs of the death. The failure of the appellant to perform its duty under its by-laws in this respect could not deprive the beneficiary of her right to payment under the certificate."

It appeared in *Gellatly v. Minnesota Odd Fellows' Mut. Ben. Soc.* (1880) 27 Minn. 215, 6 N. W. 627, that the by-laws of the defendant society provided that proofs of death were to be made on blanks furnished by the society with the seal of the lodge. The beneficiary after the death of the insured demanded blanks from the local secretary under the provisions of such by-laws. The secretary refused to issue them. Thereupon plaintiff prepared other proofs of death which did not bear the seal of the lodge. It was held that the defendant could not question the sufficiency of the proofs without the seal, as it had refused through its authorized agent to issue the forms as prescribed in the by-laws.

In *Kelly v. Ancient Order of Hibernians L. Ins. Fund* (1911) 113 Minn. 355, 129 N. W. 846, it appeared that the insured had disappeared from his home and all efforts to locate him were in vain. After a lapse of thirteen years the beneficiary demanded payment of the amount due. The by-laws of the defendant organization provided that the local secretary should notify the grand secretary of the insured's death, whereupon blanks for making proofs of death should be forwarded to the local secretary. The demand of the beneficiary for the blank forms was refused by the local secretary, and all liability was denied. It was held that the local organization, by its action, had waived the requirement of proofs of death. The court said: "The order was created for a benevolent purpose—to provide for those dependent upon its members. Construed from this point of view, the contract takes notice of the ignorance of those likely to be selected as beneficiaries. Instead of requiring them to be on the alert and to take the

initiative, the burden is imposed on the local secretary, when he has knowledge of the decease of a member, to prove up the case and secure the money. The association ought not to be permitted to take advantage of its own neglect and refuse payment on the ground that the beneficiary did not sooner compel payment."

The by-laws involved in *Rosenstein v. Court of Honor* (1913) 122 Minn. 310, 142 N. W. 331, provided that on the death of a member the officers of the local lodge were to investigate and make a report to the supreme recorder. On the receipt of that report the supreme recorder was required to forward blank forms for proofs of death to the local lodge. The local lodge refused to furnish the beneficiary with the necessary blank forms for proof of death. The court held that the requirement of furnishing the proofs was waived by the refusal of the local organization to act and its denial of liability. The court said: "The evidence discloses the bare fact that the supreme recorder forwarded blank forms of proof, presumably to the local recorder. Nothing more on the part of the association. The testimony of the claimant that he applied to the local recorder for the proper blanks and was unable to obtain them is undisputed. The officers of the association, so far as the record shows, neither took any steps themselves to have the proofs prepared, nor gave the claimant any opportunity to do so. . . . Upon the facts shown by the evidence, the contention of the appellant that the claim of the respondent is barred as a matter of law because he failed to furnish proofs in the prescribed form cannot be sustained."

In *Winter v. Supreme Lodge, K. P.* (1902) 96 Mo. App. 1, 69 S. W. 662, an action to recover on a certificate of membership issued by defendant association in which plaintiff was named as beneficiary, it was shown that a by-law provided that proofs of death should be made on blank forms secured from the board of control. The insured disappeared, and when the beneficiary became convinced of his death he applied to the local organization

for blank forms which were refused. It was held that the association had waived the proofs of death.

A waiver of proofs of death was held to have been made in *Miller v. Sovereign Camp, W. W.* (1909) 140 Wis. 505, 28 L.R.A. (N.S.) 178, 133 Am. St. Rep. 1095, 122 N. W. 1126, an action to recover a death benefit, the insured having been absent for seven years. The by-laws provided that notice should be given the secretary of the local chapter, who should thereupon send for blank forms for proofs of death. The plaintiff gave notice to the secretary and requested that officer to obtain the necessary forms, which he refused to do. The court said: "In refusing to send the blanks, an officer of the defendant, presumably duly authorized, stated that proof of absence could not be received as proof of death, and that the validity of the claim made could not be recognized unless actual death could be shown. The defendant, no doubt in conformity with the provisions of its constitution, had blanks upon which to make proofs of death that would be satisfactory to it. The plaintiff could hardly be expected to know what was required in this regard. There was a denial of liability, if plaintiff proposed to rely on the presumption of death resulting from absence. Under these circumstances, the defendant waived its right to insist on proofs of death as a condition precedent to the beginning of suit."

In *Page v. Modern Woodmen* (1916) 162 Wis. 259, L.R.A. 1916F, 438, 156 N. W. 137, Ann. Cas. 1918D, 756, it was held that the action of the local organization in refusing to send for blank forms for proofs of death constituted a waiver of defendant's provision that such proof be furnished. The insured had disappeared and had not been heard from for a period of seven years when the beneficiary requested the local organization to send for the necessary forms. The court said: "Upon the facts shown, the court correctly held that defendant's refusal, through its officers, to furnish plaintiff blanks for proof of death upon her request, and notice of Page's presumed death

by reason of his not having been heard from for over seven years, constituted a waiver of the defendant's requirement that proof of death shall be made on blanks to be furnished by defendant before action can be brought to recover on the benefit certificate."

b. Failure to make proofs of death.

The by-laws of some mutual benefit societies provide that the proofs of death or injury are to be made out by the subordinate lodge and forwarded to the supreme body. In such case no duty rests on the beneficiary to furnish the proofs, and if the local body neglects or refuses to make them, they are waived. *Murphy v. Independent Order, S. D. J. A.* (1900) 77 Miss. 830, 50 L.R.A. 111, 27 So. 624; *Anderson v. Supreme Council, O. C. F.* (1892) 135 N. Y. 107, 81 N. E. 1092.

In *Murphy v. Independent Order, S. D. J. A.* (Miss.) supra, the action was to recover on a benefit certificate. The by-laws provided that proofs of death were to be furnished by the officers of the local organization, and on the death of the insured the plaintiff demanded that such proofs should be made out, but the officers refused the request, denying all liability. It was held that their action was a waiver by the association, which could not later avoid payment, because proofs of death had not been furnished, or because the proofs as furnished were irregular. The court said: "It is said that the proof of death was not made by the proper officers, nor in the proper mode. The appellant did all she could. The officers required by the constitution to make it out and forward it refused to do so. It cannot be that a wilful failure of these officers to do their duty in the matter can cause a forfeiture of appellant's rights, she not being in fault."

In *Anderson v. Supreme Council, O. C. F.* (N. Y.) supra, it appeared that the procedure in presenting claims for death benefits was for the subordinate council of the local chapter to investigate and forward proofs of death to the supreme council. No duty was imposed on the beneficiary to present proofs of death. The plaintiff, the beneficiary under a certificate, called

on the secretary of the subordinate or local council, and he assured her everything would be all right. The court held that under the circumstances there had been a waiver by the local council of the requirement for proofs of loss, and no further duty devolved on the plaintiff. The court said: "We think it is reasonably clear, from an examination of the scheme for the administration of the relief fund and of the laws governing the payment of death claims, that no duty is cast upon a claimant to furnish proofs of death as a prerequisite to maintaining an action on the certificate, and that the plaintiff was not required to do more than to notify the officers of the subordinate council of her husband's death. The duty was therefore cast upon the council to make the investigation and proofs for the information of the supreme council."

c. Denial of membership.

It is well established that, where the local organization denies that the insured was a member because of his failure to pay an assessment or premium, the representatives of the insured are not required to furnish proofs of death or injury, and a failure to do so does not bar a recovery. *Order of Chosen Friends v. Austerlitz* (1898) 75 Ill. App. 74; *United Brotherhood, C. & J. v. Fortin* (1903) 107 Ill. App. 306; *Ancient Order of Pyramids v. Drake* (1903) 66 Kan. 538, 72 Pac. 239; *Muel-ler v. Grand Grove, U. A. O. D.* (1897) 69 Minn. 286, 72 N. W. 48; *Barrett v. Grand Lodge, A. O. U. W.* (1909) 63 Misc. 429, 117 N. Y. Supp. 125.

In *Order of Chosen Friends v. Austerlitz* (Ill.) supra, it appeared that the by-laws of an association provided that the subordinate council should immediately forward to the supreme recorder a notice of a member's death. The subordinate council denied any liability on the ground of the nonpayment of assessments, and refused to forward notice of the death of the insured, although it was informed of the fact. The court held that this action by the local organization was a waiver of the requirement of proofs of death.

In *United Brotherhood, C. & J. v.*

Fortin (1903) 107 Ill. App. 306, an action was brought to recover a death benefit. The insurer denied liability on the ground that deceased was not in good standing, by reason of his nonpayment of dues. The beneficiary's testimony showed that she consulted with the financial secretary of the local union as to proofs of death, and he denied all liability of the association. The secretary was the agent of the local union in respect to death claims, assessments, and proofs of loss. The court held that his action waived the requirement of proofs of death and said: "In short, he was the financial accountant standing between the member and the union, charged with the duty of protecting the rights of each. Defendant in error had no right to intrude herself into a meeting of the local union for the purpose of presenting her claim. She must be content to lay the same before some one of its officers who had authority to receive it. In our opinion, the financial secretary is that officer, and that, by his denial of all liability, she was excused from the necessity of presenting such certificate. The agent of such a corporation, charged with the duty of receiving proofs of death, prima facie, has the power to waive the presentation of such proofs by refusing to recognize any liability upon the part of his principal."

In *Ancient Order of Pyramids v. Drake* (1903) 66 Kan. 538, 72 Pac. 239, the by-laws governing the benefit certificates sued on provided that on the death of a member the scribe of the local council should notify the royal scribe, and the latter should thereupon furnish blank forms for proofs of death. The association denied any liability on the ground that the deceased had forfeited his membership by reason of nonpayment of assessments, and it refused to send notice to the royal scribe to obtain the blank form for proofs of death. The court held that this action was a waiver of the provision requiring proofs of death and said: "The evidence shows that plaintiff made strenuous but unsuccessful efforts to procure blanks upon which to make

proofs of death. Demands were made upon the scribe and upon the royal scribe for such blanks, and the demands were refused. . . . Our attention has not been called to any action in this connection that plaintiffs could reasonably have been expected to take that they did not take. Under such circumstances the failure of plaintiffs to comply more strictly with the by-laws cannot avail the defendants."

In *Mueller v. Grand Grove*, U. A. O. D. (1897) 69 Minn. 236, 72 N. W. 48, it appeared that the by-laws of the defendant society provided for payment of death benefits within ninety days after presentation of proof of death. Subsequent to the insured's death a letter was sent to defendant's secretary, giving notice of the death and requesting the necessary forms for proofs of death. These were refused by the secretary, since the subordinate grove contended that the insured had been dropped for nonpayment of assessments. The court held that the neglect or refusal of the subordinate grove to send the blank forms was a waiver of the provisions of the by-laws requiring proofs of death, but that the letter was sufficient notice and proof of death.

In *Barrett v. Grand Lodge*, A. O. U. W. (1909) 63 Misc. 429, 117 N. Y. Supp. 125, it appeared that the defendant organization adopted a by-law prohibiting its members from engaging in the liquor business, and subsequent to the adoption of the by-law the local lodge refused to receive premiums from the insured, because he was so engaged. Shortly after the refusal to accept the premiums the insured died, and the beneficiary sued to recover the amount due, but no notice of death was given or proofs of death filed. It was held that the local organization, by refusing the premiums, denied all liability and waived the right to be given notice of death.

II. Acts not constituting waiver by subordinate lodge.

Proofs of death were held not to have been waived in *Allman v. United Commercial Travelers* (1919) — Mo. —, 213 S. W. 429, wherein it appeared

that the constitution of the defendant organization provided that notice of death should be given to the defendant within ten days after death, and proofs should be filed within sixty days thereafter, and that "no officer, member, or agent of any subordinate, grand, or the supreme council of this order is authorized or permitted to waive any of the provisions of the constitution of this order." The notice was not given within the ten days, and after the forfeiture of the certificate the local organization obtained an affidavit from the plaintiff as to what had occurred prior to her husband's death. Subsequent to this the local organization attempted to compromise the claim with the plaintiff, but both of these actions were unauthorized by the supreme council. The court held that these acts of the local organization did not amount to a waiver, since the constitution denied the right to a subordinate order to waive the provision respecting notice and proofs of death. The court said: "By the contract itself it is provided that the failure to give the notice required thereby shall work an immediate forfeiture. There is no ambiguity in the language. The parties had the power to give this effect to the violation of the provision for notice; and, since they have given it this effect, this court can no more strike this stipulation from the contract than it could insert it had the parties omitted it. . . . The constitution of the order provides that no officer, member, or agent of any subordinate council can waive any provisions of the constitution of the order relating to insurance. This is a part of the contract sued on, and is a valid stipulation. . . . It follows that neither the evidence of the attendance of members of the local council at Allman's funeral, nor Getting's letter to respondent, was competent upon the question of waiver."

In the reported case (*LOVE v. MODERN WOODMEN*, ante, 531) it appeared that the secretary of the local organization had authority to receive and transmit assessments and to furnish blanks for proofs of death. It is held

that the officer having such powers could not waive proofs of death by denying liability, as neither he nor

the local camp had authority to adjust or determine the legality of the claim.
E. C. B.

**SPIEGEL'S HOUSE FURNISHING COMPANY, Plff. in Certiorari,
v.
INDUSTRIAL COMMISSION OF ILLINOIS et al.**

Illinois Supreme Court—June 18, 1910.

(288 Ill. 422, 123 N. E. 606.)

Evidence — verdict of coroner's jury.

1. The verdict of a coroner's jury as to the cause of death of an employee is not admissible in evidence in a proceeding to secure compensation for his death under the Workmen's Compensation Act.

[See note on this question beginning on page 548.]

— hearsay — statement as to cause of death.

2. Testimony of witnesses as to what an employee dying from injury told them as to the cause of the injury is incompetent in an action to recover compensation for his death, because hearsay.

[See 10 R. C. L. 958, 986.]

Workmen's compensation — review by court — lack of evidence.

3. An order of the industrial accident board awarding compensation under the Workmen's Compensation Act cannot be reviewed by the courts for insufficiency of evidence unless there is no competent evidence in the record tending to support the order.

Evidence — judgment — against one not party.

4. A judgment is not admissible

against a litigant, either as *res judicata* or as an estoppel by verdict, unless he was a party to it.

[See 10 R. C. L. 1116; 15 R. C. L. 1012.]

— testimony in other suit.

5. The testimony of a witness in a suit prosecuted to final judgment is not admissible against any third person in another suit who was not a party to such judgment.

[See 10 R. C. L. 970.]

Judgment — stare decisis — change of rule.

6. Rulings on the admissibility of certain documents in evidence should be changed when the ends of justice and the public good will be better served by the change.

[See 7 R. C. L. 1008.]

CERTIORARI to the Circuit Court for Cook County (Torrison, J.) to review a judgment affirming an award of the Industrial Commission in favor of applicant in a proceeding by her under the Workmen's Compensation Act to recover for the death of her intestate. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Frank M. Cox and Albert N. Powell, for plaintiff in certiorari:

The burden is on the applicant to prove by the greater weight of competent testimony that the injury arose out of and in the course of the employment.

Chicago & A. R. Co. v. Industrial Bd. 274 Ill. 336, 113 N. E. 629; Squire-Dingee Co. v. Industrial Bd. 281 Ill. 359, 117 N. E. 1031.

Whether or not there is any competent evidence in this record to support the award is a question of law to be passed upon by this court.

Parker-Washington Co. v. Industrial Bd. 274 Ill. 498, 113 N. E. 976; Northern Illinois Light & Traction Co. v. Industrial Bd. 279 Ill. 565, 117 N. E. 95; Chicago Dry Kiln Co. v. Industrial Bd. 276 Ill. 556, 114 N. E. 1009, Ann. Cas. 1918B, 645; H. G. Goelitz Co. v.

Industrial Bd. 278 Ill. 168, 115 N. E. 855; Big Muddy Coal & I. Co. v. Industrial Bd. 279 Ill. 237, 116 N. E. 662.

If the award in this case is "founded on hearsay or other improper or insufficient evidence, it was the duty of the circuit court on certiorari to remand the proceeding to the Industrial Board for proper proceedings."

Victor Chemical Works v. Industrial Bd. 274 Ill. 11, 113 N. E. 173, Ann. Cas. 1918B, 627; Ohio Bldg. Safety Vault Co. v. Industrial Bd. 277 Ill. 96, 115 N. E. 149, 14 N. C. C. A. 224.

Statements of deceased relating to the cause of his injury are not competent evidence.

Peoria Cordage Co. v. Industrial Bd. 284 Ill. 90, L.R.A.1918E, 822, 119 N. E. 996, 17 N. C. C. A. 245; Morris & Co. v. Industrial Bd. 284 Ill. 67, L.R.A. 1918E, 919, 119 N. E. 944; Chicago & A. R. Co. v. Industrial Bd. 274 Ill. 336, 113 N. E. 629; Chicago Packing Co. v. Industrial Bd. 282 Ill. 497, 118 N. E. 727.

Unless by an inquiry the circumstances indicate to the coroner that the deceased came to his death by violence, casualty, or any undue means, he has no authority to hold an inquest on the body.

Peoria Cordage Co. v. Industrial Bd. supra; Albaugh-Dover Co. v. Industrial Bd. 278 Ill. 179, 115 N. E. 834; Morris & Co. v. Industrial Bd. 284 Ill. 67, L.R.A.1918E, 919, 119 N. E. 944.

It is not within the province of a coroner's jury to fix liability of anyone, growing out of the death of an injured person, except so far as the finding required by the statute to be made may have such effect.

Ibid.; Novitsky v. Knickerbocker Ice Co. 276 Ill. 102, 114 N. E. 545; Devine v. Brunswick-Balke-Collender Co. 270 Ill. 504, 110 N. E. 780, Ann. Cas. 1917B, 887.

The verdict of a coroner's jury acting within its statutory powers is competent evidence; but it is only prima facie, and not conclusive.

Novitsky v. Knickerbocker Ice Co. 276 Ill. 102, 114 N. E. 545; United States L. Ins. Co. v. Vocke (United States L. Ins. Co. v. Kielgast) 129 Ill. 557, 6 L.R.A. 65, 22 N. E. 467; Armour & Co. v. Industrial Bd. 273 Ill. 590, 113 N. E. 138; Morris & Co. v. Industrial Bd. 284 Ill. 67, L.R.A.1918E, 919, 119 N. E. 944; Peoria Cordage Co. v. Industrial Bd. 284 Ill. 90, L.R.A.1918E, 822, 119 N. E. 996, 17 N. C. C. A. 245; De-

vine v. Brunswick-Balke-Collender Co. 270 Ill. 504, 110 N. E. 780, Ann. Cas. 1917B, 887; Foster v. Shepherd, 258 Ill. 164, 45 L.R.A.(N.S.) 167, 101 N. E. 411, Ann. Cas. 1914B, 572.

Petitioner had the right to impeach the verdict in question by showing that it was based exclusively upon hearsay.

Peoria Cordage Co. v. Industrial Bd. 284 Ill. 90, L.R.A.1918E, 822, 119 N. E. 996, 17 N. C. C. A. 245.

The testimony of a witness given at an inquest may be used to impeach his testimony in a suit at law involving the same subject-matter.

Knights Templars & M. Life Indemnity Co. v. Crayton, 209 Ill. 550, 70 N. E. 1066; Park v. Modern Woodmen, 181 Ill. 223, 54 N. E. 932; Consolidated Ice Mach. Co. v. Keifer, 134 Ill. 481, 10 L.R.A. 696, 23 Am. St. Rep. 688, 25 N. E. 799; Chicago City R. Co. v. McLaughlin, 146 Ill. 353, 34 N. E. 796; United States L. Ins. Co. v. Vocke (United States L. Ins. Co. v. Kielgast) 129 Ill. 557, 6 L.R.A. 65, 22 N. E. 467.

Mr. Norman G. Collins, for defendants in certiorari:

If it appears from the record that there is any competent evidence to support the finding of the Industrial Commission, the said finding is conclusive.

Big Muddy Coal & I. Co. v. Industrial Bd. 279 Ill. 235, 116 N. E. 662.

The coroner's verdict is competent evidence in a proceeding under the Workmen's Compensation Act, and is prima facie evidence, tending to prove the cause of death, of the facts therein recited, showing that the deceased received his injury in the course of his employment.

Armour & Co. v. Industrial Bd. 273 Ill. 590, 113 N. E. 138; Morris & Co. v. Industrial Bd. 284 Ill. 67, L.R.A. 1918E, 919, 119 N. E. 944; Devine v. Brunswick-Balke-Collender Co. 270 Ill. 504, 110 N. E. 780, Ann. Cas. 1917B, 887; Ohio Bldg. Safety Vault Co. v. Industrial Bd. 277 Ill. 96, 115 N. E. 149, 14 N. C. C. A. 224.

The findings contained in the coroner's verdict are not contrary to or outside the statutory functions of the coroner's jury.

Armour & Co. v. Industrial Bd. supra; Morris & Co. v. Industrial Bd. 284 Ill. 67, L.R.A.1918E, 919, 119 N. E. 944.

The coroner's verdict is not subject to collateral attack by showing that there was no competent evidence to sustain it.

Harris v. Lester, 80 Ill. 307; Kern v. Strasberger, 71 Ill. 303; Thomson v. Morris, 57 Ill. 333; Goudy v. Hall, 80 Ill. 109; Kanorowski v. People, 113 Ill. App. 468; 23 Cyc. 1062.

The depositions taken at the coroner's inquest were not competent evidence.

Knights Templars & M. Life Indemnity Co. v. Crayton, 209 Ill. 550, 70 N. E. 1066.

Declarations made by deceased to his attending physician in so far as they related to the injury to his arm, his suffering, symptoms, and the like, were competent evidence.

Chicago & A. R. Co. v. Industrial Bd. 274 Ill. 336, 113 N. E. 629.

The fact that the injuries arose out of and in the course of employment may be shown by circumstantial evidence.

Ohio Bldg. Safety Vault Co. v. Industrial Bd. 277 Ill. 96, 115 N. E. 149, 14 N. C. C. A. 224; Peoria R. Terminal Co. v. Industrial Bd. 279 Ill. 352, 116 N. E. 651, 15 N. C. C. A. 632.

Duncan, J., delivered the opinion of the court:

The circuit court of Cook county confirmed an award by the Industrial Commission under the Workmen's Compensation Act (Hurd's Rev. Stat. 1917, chap. 48, §§ 126-152h), on the application of Katherine Jarrett Cloyes, administratrix of the estate of Harry J. Cloyes, deceased, and certified that the cause, in its opinion, is one to be reviewed by this court.

The evidence produced before the Industrial Commission was in substance the following: Harry J. Cloyes was a regular employee of Spiegel's House Furnishing Company. The last day he worked for his employer was Tuesday, June 20, 1916. The next day he was not feeling well, and remained at his home and took medicine for a cold. He had fever, his temperature being about 100 degrees, and it so continued until Thursday, when a physician was called for the first time. The physician thought probably that he had "grippe," but called again on Friday, when Cloyes showed him an abrasion on his arm, over which a scab had formed about the size of a nickel, and there was a slight redness of the skin around the scab.

The doctor did not that day attribute the condition of his patient to the injury on his arm. On Saturday the doctor found the skin around the scab was much redder in appearance and that it had spread in every direction. He testified that it was apparent that the injury was caused by an external blow, and that the trouble was infection from the injury on the arm, and that the arm was swollen; that on Sunday the patient's condition was worse, and continued to grow worse until Monday, when he was sent to a hospital and an operation was performed on the same day; that he died two hours after the operation, and that his death was caused by septicemia, produced by infection of the wound.

No one saw Cloyes receive the injury, and he did not tell his employer or any of his fellow employees about receiving it. The only proof that the injury arose out of and in the course of his employment was (1) the testimony of his widow and of his physician that he told them he received his injury at his employer's store, while passing through a narrow aisle, while showing customers goods in plaintiff in error's store, and by striking his arm, just above the elbow, against the sharp corner of a dresser; and (2) the coroner's verdict reciting that Cloyes came to his death June 26, 1916, from septicemia, due to an infected wound of the right arm, received at Spiegel's House Furnishing Company while in the employ of said company as a salesman, by striking his arm against a dresser. Plaintiff in error objected to the evidence of the widow and the physician and the coroner's verdict as hearsay evidence and as incompetent.

Cloyes left surviving him as dependents a minor son and his widow. He and plaintiff in error were both operating under the Compensation Act, and his widow gave plaintiff in error notice in apt time that Cloyes claimed to be injured and the time and manner that he claimed to be injured.

The plaintiff in error offered the

transcript of the testimony taken before the coroner's jury for the sole purpose of showing that the verdict was based on the same hearsay evidence of the same witnesses heard before the Industrial Commission, and on no other testimony. That evidence clearly proved its contention that it was hearsay testimony, and the same, in substance, as the evidence of the widow and the physician, which was objected to as hearsay and as incompetent.

The sole question raised in this case is whether or not there is any competent evidence in the record showing that the death of Cloyes was caused by an injury which arose out of and in the course of his employment. The oral testimony bearing upon that question, heard before the arbitrator, and the Industrial Commission over the plaintiff in error's objection, was hearsay and incompetent. That testimony consisted of

Evidence—
hearsay—
statement as to
cause of death.

statements of the witnesses of what the deceased told them about when, where, and how he received the injury, and what he was doing at that time. No one testified who had any knowledge of those facts, except from the statements made to them by the deceased. Declarations made by one injured to his attending physician are admissible when they relate to the part of his body injured, his suffering, symptoms, and the like, but not if they relate to the cause of the injury. This rule is more rigorously enforced when applied to lay witnesses. *Chicago & A. R. Co. v. Industrial Bd.* 274 Ill. 336, 113 N. E. 629.

If the coroner's verdict in this case is held to be competent evidence, it is as clear as any proposition can well be made that plaintiff in error is to be held liable upon the declarations of Cloyes, now deceased, made at a time when he was a real party in interest and in his own interest, and without the sanction of an oath, and under circumstances that the declarations could

not possibly be met or refuted by plaintiff in error by other evidence, or even by the right of cross-examination. This is so because the circuit court and this court, under our Compensation Act, can only pass upon questions of law, and cannot reverse the order of the Industrial Commission for insufficiency of the evidence, unless we can say that there is no competent evidence

Workmen's compensation—
review by court—
lack of evidence.

in the record tending to support such order. It is equally clear that there was no competent evidence before the coroner's jury or the Industrial Commission showing or tending to show that the injury to the deceased arose out of and in the course of his employment, unless we hold that the unsupported verdict of the coroner's jury is competent evidence for such purpose. Plaintiff in error was not a party to the proceedings before the coroner's jury, was not present and had no right to be present or represented in that proceeding, had no choice or right of choice in the selection of the jury, did not cross-examine and had no right to cross-examine the witnesses before that jury, or to contradict the evidence tending to prove the liability against it which it is claimed the verdict of that jury now establishes. To hold that that verdict has that effect is to condemn plaintiff in error without a hearing, and to violate the most elementary and sacred rules for the administration of justice between private individuals, guaranteed by our laws and our Constitutions, both state and national.

Evidence—
verdict of
coroner's jury.

The injustice and the out-and-out viciousness of such a holding will more strikingly appear to all minds, if we but consider that we may at any time have another state of facts in a case that would defeat the rights of the widow and children of the deceased injured employee by a similar holding. Let us suppose that the deceased party was killed outright by revolving machinery

while at work at his employment, and was never able to state how the injury occurred; that the superintendent of the employer and one other fellow employee were the only eyewitnesses to the injury; that the superintendent made declarations of the facts that showed deceased was not injured while working at his employment, or by reason of such employment, and died before he could testify; that a coroner's jury was impaneled, and the declarations of the deceased superintendent were put in evidence before the jury by some attorney representing the employer, and that the widow's and children's interests were not there represented, and that the fellow employee did not testify before the coroner's jury, and that the coroner's jury returned a verdict that deceased was killed by some other agency not connected with his employment, and completely exempted the employer from all blame or connection with the death of the employee. We can readily understand that, if the verdict of the coroner's jury furnishes such convincing proof of the facts therein found as is evinced by this record, the widow and children in the case just supposed might be defeated in the contest before the Industrial Commission by the introduction of the coroner's verdict, although the fellow employee might appear and testify, and particularly if the employer was able to offer the testimony of several witnesses whose testimony tended strongly to impeach his evidence. On a review of such a case, this court and the circuit court would be powerless, under the law, to weigh the evidence and to pass on its weight. It is apparent that the result of holding a coroner's verdict competent evidence in such a case will result in substituting coroner's verdicts and holdings that the injury to the deceased employee arose out of and in the course of his employment for those of the Industrial Commission, and in direct contravention of the very spirit and

express provisions of the Workmen's Compensation Act.

The foregoing conclusions cast no reflection upon the coroner or his juries. They are not supposed to be men educated in the law. They do their duty as they understand it. The chief blame for such results cannot be placed on the Industrial Commission. Such results have been made possible by the previous holdings of this court, in many cases of various character, that the verdict of a coroner's jury is admissible in such cases between private citizens as prima facie evidence to establish any fact or facts which our statute requires such juries to find when impaneled by the coroner, if such fact or facts are material in the trial of such cases. Our statute requires that every coroner, whenever and as soon as he knows or is informed that the dead body of any person is found or lying within his county, supposed to have come to his or her death by violence, casualty, or any undue means, shall repair to the place where the dead body is, take charge of the same, forthwith summon a jury, and swear them to diligently make the inquiries required by the statute and to deliver to him a true inquest thereof. The jurors are required to inquire how, in what manner, and by whom or what the said body came to its death, and of all the facts of and concerning the same, together with all material circumstances in any wise related to or connected with said death, and to make up and sign a verdict or true inquest.

For almost thirty years, as already indicated, this court has held that the verdict of the coroner's jury was admissible either for the plaintiff or the defendant in a civil suit, for the purpose of showing prima facie some fact or facts found by the jury and appearing on the face of the inquest, when the proof of such fact or facts is material to some issue in the civil suit. We have held that such verdicts were competent to prove prima facie suicide of the assured in suits on insurance

policies. *United States L. Ins. Co. v. Vocke* (*United States L. Ins. Co. v. Kielgast*), 129 Ill. 557, 6 L.R.A. 65, 22 N. E. 467; *Grand Lodge, I. O. M. A. v. Wieting*, 168 Ill. 408, 61 Am. St. Rep. 123, 48 N. E. 59; *Knights Templars' & M. Life Indemnity Co. v. Crayton*, 209 Ill. 550, 70 N. E. 1066. In *Pyle v. Pyle*, 158 Ill. 289, 41 N. E. 999, the case was a bill to construe a will, and on the issue of insanity of the testator the coroner's verdict that testator suicided was held admissible. The issue in a suit for damages for assault and battery was whether or not defendant was guilty of unlawful, wilful, and wanton conduct, and the holding was that the verdict of the coroner's jury that the defendant fired the shot that killed the deceased, but was justified in the act, was competent on that issue. *Foster v. Shepherd*, 258 Ill. 164, 45 L.R.A. (N.S.) 167, 101 N. E. 411, Ann. Cas. 1914B, 572. In other suits for negligently causing death it has been frequently held that the inquest of the coroner is admissible to show prima facie how and by what means the deceased came to his death, and any other matter properly before the coroner and appearing on the face of the inquest. *Novitsky v. Knickerbocker Ice Co.* 276 Ill. 102, 114 N. E. 545; *Stollery v. Cicero Street R. Co.* 243 Ill. 290, 90 N. E. 709. It is said in the *Novitsky* Case that it is not within the province of the coroner's jury to fix the civil liability of anyone growing out of an accident resulting in death, except in so far as the finding required to be made by the statute may have such effect. In *Devine v. Brunswick-Balke-Collender Co.* 270 Ill. 504, 110 N. E. 780, Ann. Cas. 1917B, 887, for negligently causing the death of a child in driving an auto truck, the holding is that the verdict of the coroner's jury, finding that the driver of the truck "was blameless for this unfortunate occurrence, and we therefore recommend his discharge from further custody," was admissible, because the question whether or not the driver was

blameless was an essential matter before the coroner's jury for their investigation, and a proper matter to be included in their verdict.

Under the Workmen's Compensation Act, our holdings have been that the coroner's verdict at the inquest on the body of the employee is admissible in evidence in a case for compensation for death of the employee; and is prima facie evidence tending to prove the cause of death and of the facts therein recited, showing that the employee received his injury in the course of his employment. *Armour & Co. v. Industrial Bd.* 273 Ill. 590, 113 N. E. 138; *Ohio Bldg. Safety Vault Co. v. Industrial Bd.* 277 Ill. 96, 115 N. E. 149, 14 N. C. C. A. 224; *Morris & Co. v. Industrial Bd.* 284 Ill. 67, L.R.A.1918E, 919, 119 N. E. 944. In the last case cited it is held that the statute made it the duty of the coroner to hold an inquest, when informed that it was supposed the deceased had come to his death by casualty, and that casualty means chance, accident, contingency, etc. In *Albaugh-Dover Co. v. Industrial Bd.* 278 Ill. 179, 115 N. E. 834, the holding is that where the employee dies of tuberculosis of long standing, and there is no supposition that he came to his death by violence, casualty, or any undue means, the coroner was not authorized to hold an inquest, and that the verdict of the coroner's jury was not admissible. In *Peoria Cordage Co. v. Industrial Bd.* 284 Ill. 90, L.R.A.1918E, 822, 119 N. E. 996, 17 N. C. C. A. 245, it was positively held that a finding by a coroner's jury that the death of an employee resulted from an injury while in the discharge of his duty as an employee of a certain employer is beyond the province of the coroner's jury. It was further held in that case that, in any case where the coroner is authorized to act, his authority is limited to an inquiry into the physical facts, and to obtaining evidence for the apprehension of any person implicated in the commission of a crime, and the verdict of his jury is not admissible

to fix civil liability, "except in so far as a legitimate finding of physical facts may have that effect." It is apparent that this decision is not in accord with the principles announced and with the conclusions reached in *Armour & Co. v. Industrial Bd.* and *Morris & Co. v. Industrial Bd.* supra; but we think that the above holdings in that case state the law as it should be, except so far as it is qualified by the above clause in quotation marks.

The decisions of this court prior to the *Peoria Cordage Co.* Case have been uniform in their holdings. The departure in that case from those holdings resulted by reason of the conclusion of this court that our former decisions were wrong in principle, although uniform and consistent with the views of the court therein announced. The court is of the opinion that it should be no longer the policy of this state and the holding of this court that a coroner's verdict or inquest should be admissible as evidence in civil suits for the purpose of establishing personal liability against any individual in cases where the death of any person is charged, or to establish a defense to such a suit, or for the purpose of establishing other issues between private litigants of the nature indicated in the cases just reviewed. Therefore all of the foregoing cases, and all other cases of this court containing similar holdings, are, as to such holdings, expressly overruled. We are moved to do this for several reasons. A review of the above cases clearly discloses that many of the cases, if not all of them, have been largely controlled by the admission in evidence of the verdicts of the coroner's jury, and in many of them such verdicts have furnished the sole evidence to establish liability. As a consequence of such practice there has resulted in this state a race and scramble by litigants to secure a favorable coroner's verdict that would influence or control in case a civil suit should be brought to establish a claim by reason of death. It is not intimated

here that plaintiffs prosecuting such suits have offended more in this particular practice than defendants who are sued in such suits, and it is believed that the facts would disclose that both are alike guilty. It cannot be questioned that as a result of such practice the coroner's verdict in many cases has been, and will continue to be, a mere trap or device for the purpose of catching the unwary in such suits, and that public interests intended to be served by coroners' inquests may not be so well guarded as they otherwise would be.

The allowance of coroners' verdicts as evidence in civil suits is wrong in principle, and necessarily results in much injustice to litigants. A coroner, under our law, has no judicial power. Such power is vested by the Constitution in the courts thereby created. *Peoria Cordage Co. v. Industrial Bd.* supra. At common law the office of coroner was judicial in its nature. But if he were a judicial officer, invested with judicial powers and duties, we are unwilling to further indorse the holding that any litigant should be bound by the verdict of a coroner's jury, in whose inquest he had no right to participate and did not do so. The most solemn finding or judgment of a court is not admissible against a litigant, either as *res judicata* or as an estoppel by verdict, unless he was a party to that judgment. *Chicago Title & T. Co. v. National Storage Co.* 260 Ill. 485, 103 N. E. 227. The rule has always been recognized that no person shall be affected by any judicial investigation to which he is not a party, unless his relation to some of the parties was such as to make him responsible for the final result of the litigation. 1 Freeman, Judgm. § 154.

It is a well-known and well-recognized rule that the evidence of a witness or witnesses, dead or alive, in any suit, although prosecuted to final judg-

—judgment—
against one not
party.

—testimony in
other suit.

ment, is not admissible against any third party in another suit who was not a party to such judgment. The main ground upon which this rule is based is that such third party had no right of cross-examination of such witness or witnesses. The evidence of witnesses before the coroner's jury, dead or living, is not admissible against either party in a civil suit for damages, and for the same reasons above given. *Pittsburgh, C. & St. L. R. Co. v. McGrath*, 115 Ill. 172, 3 N. E. 439; *Knights Templars' & M. Life Indemnity Co. v. Crayton*, 209 Ill. 550, 70 N. E. 1066. If the evidence of the witnesses before the coroner's jury is not receivable against a party in the civil suit growing out of the death of the party over whose body the inquest is held, and the judgment and findings of a court in another suit concerning the same death are not admissible, there is no sound reason, in our judgment, why the inquest of a coroner ought to be admissible to prove, *prima facie* or otherwise, any issue in such case.

So far as we have investigated, only two other states in this country, Iowa and Mississippi, have adopted the same rule as has this court with reference to the admissibility of the inquest of the coroner's jury as evidence in such cases. *Metzradt v. Modern Brotherhood*, 112 Iowa, 522, 84 N. W. 498; *Mittelstadt v. Modern Woodmen*, 143 Iowa, 186, 136 Am. St. Rep. 765, 121 N. W. 803; *Tomlinson v. Sovereign Camp, W. W.* 160 Iowa, 472, 141 N. W. 950; *Supreme Lodge, K. H. v. Fletcher*, 78 Miss. 377, 28 So. 872, 29 So. 523. In the Iowa cases, the admissibility of the verdict or inquest was not questioned by the parties. In the Iowa case last above cited, the court indicates that it might have ruled otherwise if objections to the evidence had been raised. The decided weight of the authorities in this country is against the admissibility of such a verdict as evidence. *Ætna L. Ins. Co. v.*

Milward, 68 L.R.A. 285, note 296; *State use of Grice v. Cecil County*, 54 Md. 426; *Dougherty v. Pacific Mut. L. Ins. Co.* 154 Pa. 385, 25 Atl. 789; *Memphis & C. R. Co. v. Womack*, 84 Ala. 149, 4 So. 618; *Krogh v. Modern Brotherhood*, 153 Wis. 397, 45 L.R.A. (N.S.) 404, 141 N. W. 276; *Wasey v. Travelers' Ins. Co.* 126 Mich. 119, 85 N. W. 459; *Cox v. Royal Tribe*, 42 Or. 365, 60 L.R.A. 620, 95 Am. St. Rep. 752, 71 Pac. 73; *Germania L. Ins. Co. v. Ross-Lewin*, 24 Colo. 43, 65 Am. St. Rep. 215, 51 Pac. 488; *Sullivan v. Seattle Electric Co.* 51 Wash. 71, 130 Am. St. Rep. 1082, 97 Pac. 1109; *Re Dolbeer*, 149 Cal. 227, 86 Pac. 695, 9 Ann. Cas. 795; *Chambers v. Modern Woodmen*, 18 S. D. 173, 99 N. W. 1107; *Walden v. Bankers' Life Asso.* 89 Neb. 546, 181 N. W. 962; *Boehme v. Sovereign Camp, W. W.* 98 Tex. 376, 84 S. W. 422, 4 Ann. Cas. 1019.

No court, we believe, has gone farther than this court to maintain the maxim or doctrine of *stare decisis*, when the questions decided affect the validity and control the construction of contracts, or where the rules announced have become rules of property. Rulings on the admissibility of certain documents as evidence of the character here considered, or mere questions of procedure, ought to be followed, unless they are manifestly wrong, but may and should be changed, when the ends of justice and the public good will be better served. *Rich v. Chicago*, 59 Ill. 286; 2 *Lewis's Sutherland*, Stat. Constr. §§ 480-514.

It will not be necessary to further discuss the questions raised relating to the coroner's verdict in question, as the court holds, for the foregoing reason, that the verdict was not admissible in evidence for any purpose. There is no competent evidence in the record tending to prove that the injury to the deceased arose out of and in the course of his employment.

The judgment of the Circuit Court is reversed and the award set aside, and the cause is remanded to

that court for such further proceedings authorized by law as may be desired.

ANNOTATION.

Admissibility of finding of coroner to show cause of death in workmen's compensation cases.

In a decision by the English court of appeal, it was held that the verdict of the coroner's jury was not admissible to prove the death of the employee. *Bird v. Keep* [1918] 2 K. B. 692. The court said: "In my opinion, the finding of the coroner's jury was not admissible in the present case. It merely amounted to the opinion of the coroner's jury as to the cause of death upon the evidence adduced before them. This is irrelevant to the issue involved in the present proceedings, and the cause of death has to be determined for the purpose of this arbitration, upon the evidence adduced before the county court judge."

The decision of the Illinois supreme court in the reported case (*SPIEGEL'S HOUSE FURNISHING CO. v. INDUSTRIAL COMMISSION*, ante, 540) that the verdict of a coroner's jury as to the cause of death of an employee is not admissible in evidence, in a proceeding to secure compensation for his death under the Workmen's Compensation Act, apparently settles the question in the only American jurisdiction in which the question has arisen. This decision clears up the doubt which had existed as to the law upon this question, created by the conflicting decisions of *Morris & Co. v. Industrial Bd.* (1918) 284 Ill. 67, L.R.A.1918E, 919, 119 N. E. 944 and *Peoria Cordage Co. v. Industrial Bd.* (1918) 284 Ill. 90, L.R.A. 1918E, 822, 119 N. E. 996, 17 N. C. C. A. 245, both of which were handed down on the same day.

The earlier decision of the Illinois supreme court in *Victor Chemical Works v. Industrial Bd.* (1916) 274 Ill. 11, 113 N. E. 173, Ann. Cas. 1918B,

627; *Ohio Bldg. Safety Vault Co. v. Industrial Bd.* (1917) 277 Ill. 96, 115 N. E. 149, 14 N. C. C. A. 224; *Armour & Co. v. Industrial Bd.* (1916) 273 Ill. 590, 113 N. E. 138, and *Morris & Co. v. Industrial Bd.* (Ill.) supra, must be considered as overruled, and the decision in *Peoria Cordage Co. v. Industrial Bd.* (Ill.) supra, is reaffirmed, and the principle that the coroner's verdict is not admissible is established without any of the restrictions which might be read into the decision of the court in the latter case.

The decisions of the Illinois appellate court in *Lavin v. Wells Bros. Co.* 204 Ill. App. 303, and *Vose v. Central Illinois Pub. Service Co.* (1918) 212 Ill. App. 105, in which it was held that the verdict of the coroner's jury was admissible in evidence, must also be considered as overruled by the later decisions of the supreme court.

It had already been held by the supreme court that the verdict of the coroner was not admissible in a case in which he was not authorized to hold an inquest. *Albaugh-Dover Co. v. Industrial Bd.* (1917) 278 Ill. 179, 115 N. E. 834.

As has already been stated, there appears not to have been any controversy upon this question in any other jurisdiction.

In *Leary v. McIlvain* (1919) 263 Pa. 499, 106 Atl. 785, the report of a physician, filed by the coroner, stating that death was probably due to bodily injuries, was apparently taken into consideration by the court without any question as to its admissibility.

W. M. G.

MARGARET H. RIFFE et al.
v.
LULA B. WALTON et al., Appts.

Kansas Supreme Court—July 5, 1919.

(105 Kan. 227, 182 Pac. 640.)

Executor and administrator — effect of family settlement.

1. Family settlements of estates are favorites of the law and when fairly made should not be disturbed by those who entered into them.

[See note on this question beginning on page 555.]

Descent — agreement contrary to statute.

2. No rights of creditors being involved, it is competent for the widow and the heirs of an intestate to enter into an agreement for the distribution of an estate upon a plan different from that prescribed by the Statute of Descents and Distributions.

[See 9 R. C. L. 130.]

Appeal — finding of trial court — conclusiveness.

3. In the family settlement involved herein, no disposition or allotment was made of a certain tract of land in which the surviving widow owned a one-half interest. She signed the partition agreement but did not execute a conveyance of her interest in the tract, and the claim was made and evidence offered tending to show that she orally agreed to accept certain properties as dower and in full satisfaction of her interest in the estate, including the unpartitioned tract, and

also that by the use and enjoyment of these properties for years, as well as by certain acts and declarations, she was estopped to claim an interest in that tract. There was conflicting evidence on these questions, some of which was oral, and the trial court determined that the widow did not surrender or agree to surrender her interest in the tract, and that she had not by any of her acts or declarations estopped herself to assert title to the tract. It is held, that the decision of the trial court upon the disputed questions of fact is conclusive upon this court.

[See 2 R. C. L. 204.]

Estoppel — transfer of title to land.

4. An owner of land cannot be deprived of it under the doctrine of estoppel unless the facts giving rise to estoppel are established by clear and convincing evidence.

[See 10 R. C. L. 779.]

Headnotes 1-3 by JOHNSTON, Ch. J.

(Burch and Porter, JJ., dissent.)

APPEAL by defendants from a judgment of the District Court for Clark County (Day, J.) in favor of plaintiffs in an action brought for the partition of certain real estate. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. O. M. Rogers, K. D. Cross, F. C. Price, and Cale W. Carson, Jr., for appellants:

The court should decide for itself what the facts establish, uninfluenced by the findings of the trial court.

Mason v. Harlow, 92 Kan. 1042, 142 Pac. 243; Mathewson v. Campbell, 91 Kan. 625, 138 Pac. 637; Cheney v. Hovey, 56 Kan. 637, 44 Pac. 605; Robinson v. Melvin, 14 Kan. 484; Record v. Ellis, 97 Kan. 754, L.R.A.1916E, 654, 156 Pac. 712, Ann. Cas. 1917C, 822.

The trial court erred in finding that Missouri Walton, at the time of her death, owned a five-ninths interest in the land, and that it passed, by her will, to the executor for the benefit of her four living children.

Burns v. Burns, 87 Kan. 19, 123 Pac. 720; Ruch v. Biery, 110 Ind. 444, 11 N. E. 312; Smith v. Tewalt, 9 Ind. App. 646, 37 N. E. 294; Fleming v. Kerr, 10 Watts, 444; Jones v. Carter, 4 Hen. & M. 184; Goodno v. Hotchkiss, 237 Fed. 686; Pom. Eq. Jur. 3d ed. § 850; Burnes

v. Burnes, 132 Fed. 485; Foote v. Foote, 61 Mich. 181, 28 N. W. 90; Brown v. Baxter, 77 Kan. 97, 94 Pac. 155, 574.

The circumstances and evidence in the case show that Missouri Walton claimed only a life estate in the Kansas land.

Larned v. Larned, 98 Kan. 328, 158 Pac. 3; Fort v. Allen, 110 N. C. 183, 14 S. E. 685; Cosper v. Nesbit, 45 Kan. 457, 25 Pac. 866; Enterprise Carriage Mfg. Co. v. Cruzan, 63 Kan. 411, 65 Pac. 647; Dalzell v. Dalzell, 170 Ky. 297, 185 S. W. 1107; Taylor v. Dedman, 166 Ky. 370, 179 S. W. 216; Walton-Wilson-Rodes Co. v. McKittrick, 141 Ky. 415, 132 S. W. 1046; Hanley v. Foley, 18 B. Mon. 519; Powers v. Scharling, 76 Kan. 855, 92 Pac. 1099; Bank of Denton v. Jesch, 99 Kan. 797, 163 Pac. 150; James v. Lane, 103 Kan. 540, 175 Pac. 387; Seawell v. Young, 77 Ark. 309, 91 S. W. 544; Ater v. Smith, 245 Ill. 57, 91 N. E. 776, 19 Ann. Cas. 105; Gomel v. McDaniels, 269 Ill. 362, 109 N. E. 996; Goodman v. Winter, 64 Ala. 410, 38 Am. Rep. 13; Bichel v. Oliver, 77 Kan. 696, 95 Pac. 396; Floyd v. Sharp, 19 Ky. L. Rep. 1253, 43 S. W. 253.

As the ancestor was estopped from asserting an interest, so are those now claiming under her will.

Floyd v. Sharp, *supra*; Hessey v. Hessey, 94 Ky. 387, 22 S. W. 648; Rhodes v. Rhodes, 18 Ky. L. Rep. 916, 38 S. W. 706; Ellis v. Campbell, 84 Ark. 584, 106 S. W. 939.

Parties may be estopped from claiming title to land which they never actually conveyed by deed.

Crimmins v. Morrissey, 36 Kan. 447, 13 Pac. 748; Jenkins v. Dewey, 49 Kan. 49, 30 Pac. 114; Poole v. French, 83 Kan. 281, 111 Pac. 488; Burgess v. Hixon, 75 Kan. 205, 88 Pac. 1076; McCullough v. Finley, 69 Kan. 706, 77 Pac. 696; McCabe v. McCabe, 96 Kan. 702, 153 Pac. 509; Brown v. Baxter, 77 Kan. 97, 94 Pac. 155, 574; Walworth v. Abel, 52 Pa. 370; McMahan v. McMahan, 13 Pa. 376, 53 Am. Dec. 481; Taylor v. Phillips, 30 Vt. 238; Freeman v. Peter, 97 Kan. 63, 154 Pac. 270; Duffy v. Duffy, 243 Ill. 476, 90 N. E. 697; Hardcastle v. Holmes, 71 Kan. 860, 80 Pac. 962; Shay v. Bevis Rock Salt Co. 72 Kan. 208, 83 Pac. 202; Bennett v. Arrowsmith, 101 Kan. 143, 165 Pac. 812; Van Zanten v. Van Zanten, 269 Ill. 491, 109 N. E. 986.

If the widow, under the oral partition, took a life estate only with re-

mainder to the eight children and their heirs, there could have been no partition at the suit of the children during her lifetime, because such children were not in possession nor entitled thereto as against her life estate. Nor could the widow, holding a life estate, bring partition, because she would not be a cotenant with the children.

Love v. Blauw, 61 Kan. 496, 48 L.R.A. 257, 78 Am. St. Rep. 334, 59 Pac. 1059; Johnson v. Brown, 74 Kan. 346, 86 Pac. 503; Ryan v. Cullen, 89 Kan. 879, 133 Pac. 430; Shafer v. Covey, 90 Kan. 588, 135 Pac. 676; Edwards v. Latimer, 183 Mo. 610, 82 S. W. 109; Uden v. Patterson, 252 Ill. 385, 96 N. E. 852; Conklin v. Conklin, 165 Mich. 571, 131 N. W. 154.

Messrs. S. W. Adams and W. W. Harvey, for appellees:

This court should decline to disturb the findings of fact made by the trial court.

Cheney v. Hovey, 56 Kan. 637, 44 Pac. 605; Railroad Comrs. v. Missouri P. R. Co. 71 Kan. 193, 80 Pac. 53; McCabe v. McCabe, 96 Kan. 702, 153 Pac. 509; West v. Brugger, 103 Kan. 494, 175 Pac. 673; Stafford v. Tibbetts, 104 Kan. 224, 178 Pac. 618.

Upon the death of John E. Walton the title to one half of the land sought to be partitioned in this action passed to his widow, Missouri McGlasson Walton, in fee.

McKinney v. Stewart, 5 Kan. 384; Dodge v. Beeler, 12 Kan. 524; Thompson v. Meredith, 28 Kan. 635.

An assignment or allotment of dower is not a conveyance of title, and does not operate upon or affect the title.

Casky v. Casky, 5 Ky. L. Rep. 769; Bettis v. McNider, 137 Ala. 588, 97 Am. St. Rep. 59, 34 So. 813; 14 Cyc. 880; 10 Am. & Eng. Enc. Law, 2d ed. 124.

Missouri McGlasson Walton was not estopped by any act shown by the evidence in this cause, from retaining and asserting her title to the Kansas land.

Chellis v. Coble, 37 Kan. 558, 15 Pac. 505; Carithers v. Weaver, 7 Kan. 110; Hagerty v. Goodlad, 70 Kan. 735, 79 Pac. 664; Farm Land Mortg. & Debiture Co. v. Hopkins, 63 Kan. 678, 66 Pac. 1015; Clark v. Coolidge, 8 Kan. 189; King v. Mead, 60 Kan. 539, 57 Pac. 113; Gray v. Zellmer, 66 Kan. 514, 72 Pac. 228; Ergenbright v. Henderson, 72 Kan. 29, 82 Pac. 524; Palmer v. Meiners, 17 Kan. 478; Kraft v. Baxter, 38 Kan. 351, 16 Pac. 739; Northrop v. Andrews, 39 Kan. 567, 18 Pac. 510;

Manhattan State Bank v. Haid, 97 Kan. 297, 155 Pac. 57; **Leslie v. Harrison Nat. Bank**, 97 Kan. 22; **Larned v. Larned**, 98 Kan. 323, 158 Pac. 3; **Wyatt v. Wilhite**, 192 Mo. App. 551, 183 S. W. 1107; **Drury v. Gorrell**, 44 App. D. C. 518; **Davis Trust Co. v. Price**, 77 W. Va. 678, 88 S. E. 111; **Powell v. Powell**, 267 Mo. 117, 183 S. W. 625; **Barnes v. Cole**, 77 W. Va. 704, 88 S. E. 184; **Bush v. Chenault**, 175 Ky. 598, 194 S. W. 777; **Rossetti v. Benavides**, — Tex. Civ. App. —, 195 S. W. 208; **Flynn v. Pack-er**, 256 Pa. 186, 100 Atl. 741; **Haefele v. Brackett**, 95 Wash. 625, 164 Pac. 244; **Texas L. Ins. Co. v. Huntsman**, — Tex. Civ. App. —, 193 S. W. 455; **Boston & A. R. Co. v. Reardon**, 226 Mass. 236, 115 N. E. 408; **Williams Wagon Works v. Small**, 19 Ga. App. 600, 91 S. E. 920; **Craig v. Rupcke**, 274 Ill. 626, 113 N. E. 928; **Whitcomb v. Worthing**, 30 Cal. App. 629, 159 Pac. 613; **Battle v. Claiborne**, 133 Tenn. 286, 180 S. W. 584; **Sanford v. Lewis**, 167 Ky. 459, 180 S. W. 776; **Carey v. Walk-er**, 172 Iowa, 236, 154 N. W. 425; **Por-onto v. Sinnott**, 89 Vt. 479, 95 Atl. 647; **Daniel v. Dayton Coal & I. Co.** 132 Tenn. 501, 178 S. W. 1187; **Fisher v. Mechanics' & M. Nat. Bank**, 89 Misc. 587, 153 N. Y. Supp. 786; **Miller v. More**, 170 Cal. 557, 150 Pac. 775; **Treat v. Treat**, 170 Cal. 329, 150 Pac. 53, 57; **Dunbar v. Meadows**, 165 Ky. 275, 176 S. W. 1167; **Wall v. Louisville & N. R. Co.** 143 Ga. 417, 85 S. E. 325; **Brant v. Virginia Coal & I. Co.** 93 U. S. 326, 23 L. ed. 927.

Johnston, Ch. J., delivered the opinion of the court:

This was an action by a number of the heirs of John E. Walton, deceased, to secure the partition of a tract of 1,760 acres of land in Clark county, Kansas, which was owned by him at the time of his death.

He died intestate and left surviving his widow, five sons, and four daughters, all of whom had then reached their majority. His estate consisted of 1,040 acres of land in Missouri, which had been occupied for some time by his son George as a tenant, and several tracts in Kentucky, amounting to 2,013 acres, also nineteen shares of bank stock, each of the par value of \$100, and advancements made to some of his children, and a few promissory notes, the amount of which is not

given. Under the law of Kentucky, one half of the personal estate after payment of debts and costs of administration descended to the widow, and the remainder share and share alike to the children. The real property in Kentucky descended to the children, subject to the dower of the widow, which consisted of one third of the rents and profits derived from the same during her lifetime. Under the law of Missouri then in force, the widow was given one third of the rents and profits of the real estate during her lifetime as dower, and the children took the title thereto in equal shares subject to the dower interest. Within a few days after the decease of John E. Walton, the widow and children met at her home for the purpose of making a family settlement and a distribution of the estate under a mutual agreement. Their purpose was to ascertain what advancements and allowances had been made by Walton in his lifetime, and also to make an assignment of dower interest to the widow, and a partition of the property after the release of dower. This was not accomplished at the first meeting, but at a second one, held shortly after the first, an agreement was reached. The property partitioned among the children was of the value of about \$72,000, and the division was made on the basis that each child should receive \$8,000 in property or money. Two of the sons, George and John, were each charged with advancements of \$2,000, one of the daughters, Margaret, was charged with \$3,000, and another daughter, Laura, was charged with \$1,000, and an allowance of \$1,500 was made to the son William. It was agreed that George should take the Missouri land at a value of \$20,000, and for the balance over his share he should execute a note for \$12,000 secured by trust deed on the land, the interest thereon to be paid to the widow during her lifetime, and at her death the principal to be divided equally among the nine children or their heirs. Napoleon was to take a tract

of land in Kentucky, valued at \$10,000; Thomas, certain Kentucky land, valued at \$10,400; William, another tract in Kentucky, valued at \$12,000; and John, a tract of Kentucky land, valued at \$10,500; the daughter Laura was to take a tract of Kentucky land, valued at \$4,500; Daisy and Margaret together took a tract of Kentucky land, the value of which was placed at \$10,800; and Alice was to receive her share in money. Those who took property which exceeded the value of \$8,000 were required to pay the excess into a fund to be paid to those receiving property of less value than \$8,000, and to those who received no property at all, and in that way the shares of the children were equalized. It was agreed that there should be assigned to the widow as dower the town home and what is called the homestead farm of 264 acres, together with the annual interest on the note executed by George for \$12,000, amounting to \$600, the dividends on the bank stock, and the rents and profits from the Kansas land, but no division or disposition of the title to this land was made or agreed upon. While the partition agreement and instruments of conveyance were being prepared, Napoleon was accidentally killed, and the former agreement was modified so that the lands which were allotted to him were to be conveyed to the widow. The partition agreement was reduced to writing and signed by the children and the widow. Deeds were executed conveying the lands to those to whom they were allotted, and these instruments were signed by the widow as well as by the other heirs. The grantees have held the possession and ownership of the tracts so allotted since that time, without hindrance or interference by the widow or any of the other heirs. Until her death the widow held possession of the town house and the homestead farm, and received the rents and profits therefrom, and also has received the interest on the \$12,000 note, the dividends on the bank

stock, and such rents and profits as were derived from the Kansas land, which appear to have been of no consequence until about 1912. Since that time rents of a substantial amount have been received from that property. The widow died testate in 1915, and by her will disposed of all her property, making gifts of a religious and charitable nature, and specific bequests to some of her children and grandchildren, and provided also that the residue should be equally divided among her surviving children.

Upon the evidence the trial court found the recited facts, and also found that no attempt was made to partition or divide the Kansas land or the other property allotted to the widow when the family agreement was made, and that the Kansas land was thought to be of little value and was then renting for no more than enough to pay the taxes, and that neither the widow nor heirs understood the Law of Descents and Distributions of Kansas, or that the widow inherited one half of the Kansas land. It was further found that there was no disposition or request upon the part of the children or any of them that the mother should give up any title or interest she had in the Kansas land, and that she never agreed to surrender or convey her title to the land.

The court adjudged that the widow held a half interest in the Kansas land at the time of her death, as well as the share which would have gone to her son Napoleon if he had lived, and partition was adjudged upon that basis.

In their appeal from the decision defendants insist that the estate was settled and the rights of the widow in it were finally determined by the family settlement; that she accepted the share allotted to her and recognized and treated the agreement as binding upon her until her death, a period of seventeen years. There was no charge of fraud in the pleadings, and no evidence of misrepresentation or unfairness brought out in the testi-

mony. It is true, as defendants contend, that the law looks with favor upon compromise agreements for the settlements

Executor and administrator—
effect of family
settlement.

of estates voluntarily and fairly made by members of a family, although the property has been disposed of upon a plan different from that prescribed in the Statute of Descents and Distributions, or different from that which might have been adjudged by a court of equity if presented to it. Where the rights of creditors

Descent—
agreement contrary to statute.

do not interfere, such a distribution may be accomplished, even if no formal conveyances are made, through the application of the doctrine of estoppel. *Crimmins v. Morrisey*, 36 Kan. 447, 13 Pac. 748; *McCullough v. Finley*, 69 Kan. 705, 77 Pac. 696; *Brown v. Baxter*, 77 Kan. 97, 94 Pac. 155, 574; *Poole v. French*, 83 Kan. 281, 111 Pac. 488; *McCabe v. McCabe*, 96 Kan. 702, 153 Pac. 509; *Freeman v. Peter*, 97 Kan. 63, 154 Pac. 270.

It has been held that, where the widow and each of the children make a division of an estate satisfactory to themselves, in which all parties concerned have acquiesced, and retained the shares so allotted for a long period of years, they will be estopped from thereafter objecting to the arrangement.

"The parties to such an arrangement executed would be forever equitably estopped from disturbing it, as amongst themselves, upon the most familiar principles of justice. And why shall the arrangement be broken up by a mere intermeddler? Family arrangements are favorites of the law, and when fairly made are never allowed to be disturbed by the parties, or any other for them." *Walworth v. Abel*, 52 Pa. 370.

Even where a homestead was exchanged for other property and the conveyance was invalid because it was not signed by the wife, the doctrine of equitable estoppel was applied. It was held that, while the

transfer was insufficient, the parties who made the insufficient transfer, had accepted and enjoyed the use and benefits of the property received in exchange for the homestead, and were estopped to assert that the transfer was insufficient. *McAlpine v. Powell*, 44 Kan. 411, 24 Pac. 353; *Shay v. Bevis Rock Salt Co.* 72 Kan. 208, 83 Pac. 202.

The widow not only signed the partition agreement, but she also participated in the oral negotiations and settlement, agreed to accept certain properties in lieu of the dower interest she held. Further than that, she united with the heirs in carrying out the partition agreement, and had the use and benefit of property assigned to her as dower for seventeen years. The amount or value of the share set apart to her as dower, it is said, was much less than the share to which she was entitled under the law, but, if the settlement was fairly made and covered all the property, it cannot be set aside because that assigned to her may have been less than she was entitled to under a statutory distribution; as defendants contend, the property allotted to her appears to have been sufficient to enable her to live comfortably and in a manner in keeping with her station in life. There is much in the testimony to the effect that she was satisfied with the allotment made. Each of the children took the share allotted to him or her in severalty, and the mother joined in the instruments conveying such shares and in carrying out the provisions of the agreement. The difficulty in the case arises largely over the omission of the parties to partition the Kansas land and the conflict in the evidence as to the intention of the widow to relinquish or surrender her title to that land. Several witnesses testified to having heard her say that she only acquired a life interest in the land. One stated that he heard her say that she inherited a half interest in it, but was only claiming a life estate, and that that was the agreement she had made with her

children. There were other witnesses who testified that on many occasions, especially from 1904 down until her death, she referred to the Kansas land, saying that she owned a half interest in it and also Napoleon's interest in the tract. As to the oral agreements made in the family settlement, the trial court said: "It is difficult to ascertain from the evidence with accuracy all of the matters which transpired at these meetings. Of the ten persons who participated in the meetings, six of them are now dead, and those now living appear to have taken rather minor parts in the discussions, and appear unable to relate distinctly all that transpired. No notes or minutes were made of the meetings, or, if there were, they were not preserved."

In view of the finding of the trial court upon the conflicting evidence, it cannot be held that the widow was estopped to claim title to her half interest in the Kansas land.

Estoppel—transfer of title to land. An owner of land cannot be deprived of it under the doctrine of estoppel unless the facts giving rise to estoppel are established by clear and convincing proof. It cannot be done by this court upon disputed facts, where the trial court has found that the evidence did not prove relinquishment or estoppel. It is conceded that a half interest in the Kansas land descended to the widow upon the death of her husband. She never executed a conveyance of it to the heirs or to anyone else. The trial court, upon the conflicting evidence, has found that she was never requested to give up any interest or title she had in the land, and had never agreed to surrender or convey her title to anyone. It is true that defendants in their evidence have made a strong case of acquiescence and of conduct upon which to base an equitable estoppel against her, and, if the trial court had found for the defendants, its finding might have been sustained under the rule of the authorities mentioned. But there was strong

evidence to the contrary, much of which was oral, and the trial court has determined the conflict in favor of the plaintiffs, holding upon what appears to be sufficient testimony that there was no acquiescence, no surrender or relinquishment of title to the Kansas land, and consequently no estoppel. Although the family met to partition the entire estate, the Kansas land and some other property was not in fact partitioned. It is evident from the testimony that all of the interested parties regarded it to be of little value, as it then earned no more than enough to pay the taxes imposed on it. An attempt was made to have some of the children accept it as a part of their allotment, but none of them was willing to take it. The evidence offered in behalf of plaintiffs warrants the inference that the Kansas land was purposely left for future settlement and division. Under the agreement the widow was given the possession and use of all the Kansas land, but she owned one half of it in her own right, and was entitled to the possession of that extent as well as the one-ninth interest which she inherited from her son Napoleon. The taking of possession of her own property afforded no ground for estoppel. The evidence of plaintiffs tends to show that there was no intention of the parties to transfer the title to the Kansas land or to make a partition of it in that family settlement, and this was partly due to the fact that it was regarded to be insignificant in value, and partly because none of the children was willing to accept it as his or her share. It was therefore left for disposition at some future time, and in the meantime the widow was given the possession and use of the children's half interest, which at the time appeared as likely to be a burden as a benefit. Apart from these considerations, a number of witnesses gave testimony to the effect that the widow had claimed to own a half interest as well as Napoleon's share, and stated that she could dispose of that part of the estate as

she pleased. The evidence is in conflict as to the scope of the family settlement, the intention of the parties in making it, and as to acts and declarations upon which equitable estoppel is claimed.

Appeal—
finding of trial
court—con-
clusiveness.

The disputed questions of fact having been determined by the trial court, its decision, according to a long-established rule, is conclusive upon this court.

The judgment of the District Court is affirmed.

Burch, J., dissenting:

The partition agreement, reduced to writing at the time of the undisputed family settlement, and adopted and acted on at the time, and for years afterwards, fixed the rights of the parties. The Kansas land was not overlooked. It was included in the partition agreement, and the

widow was given a dower interest, which was a life estate, such as she took in other property. Because the Kansas land was of unknown value, it was not partitioned at the time, but the widow's estate, a life estate, having been carved out, and having been accepted as certainly as the Kentucky dower was accepted, she had no interest in the remainder. The oral evidence consisted of recollections harmonizing with present pecuniary interest, in view of the greatly increased value of the land. A writing acted on is as binding as a writing signed, and the oral evidence could no more overthrow the family settlement, evidenced by writing and carried out, than it could overthrow a writing signed.

Porter, J., concurs in the dissent.

Petition for rehearing denied, September 30, 1919.

ANNOTATION.

Family settlement of intestate's estate.

I. Validity of agreement:

- a. General rule, 555.
- b. Application of rule, 556.
- c. Effect of fraud or misrepresentation, 563.

II. Construction of agreement, 565.

I. Validity of agreement.

a. General rule.

The law looks with favor on family compromises or agreements for the settlement of intestates' estates, and, when no rights of creditors intervene, such agreements, if free from fraud, are upheld and enforced by the courts.

United States. — *Burnes v. Burnes* (1904) 132 Fed. 485, affirmed in (1905) 70 C. C. A. 357, 137 Fed. 781.

Alabama. — *McCaa v. Woolf* (1868) 42 Ala. 389.

Arkansas. — *Pate v. Johnson* (1854) 15 Ark. 275; *Mooney v. Rowland* (1897) 64 Ark. 19, 40 S. W. 259; *La Cotts v. Quertermous* (1907) 84 Ark. 610, 107 S. W. 167; *Felton v. Brown* (1912) 102 Ark. 658, 145 S. W. 552.

Colorado. — *Waterhouse v. Churchill* (1902) 30 Colo. 415, 70 Pac. 678.

Connecticut. — *Hotchkiss's Appeal* (1915) 89 Conn. 420, 95 Atl. 26.

District of Columbia. — *Hilton v. Rackey* (1911) 37 App. D. C. 83.

Georgia. — *Harris v. Seals* (1859) 29 Ga. 585; *Desverges v. Desverges* (1861) 31 Ga. 753; *Alderman v. Chester* (1865) 34 Ga. 152.

Idaho. — *Gwinn v. Melvin* (1903) 9 Idaho, 202, 108 Am. St. Rep. 119, 72 Pac. 961, 2 Ann. Cas. 770.

Illinois. — *Comer v. Comer* (1887) 120 Ill. 420, 11 N. E. 848.

Indiana. — *Shuee v. Shuee* (1884) 100 Ind. 477.

Iowa. — *Douglas v. Albrecht* (1906) 180 Iowa, 132, 106 N. W. 354.

Kansas. — *Brown v. Baxter* (1908) 77 Kan. 97, 94 Pac. 155, 574. And see the reported case (*RIFFE v. WALTON*, ante, 549).

Kentucky. — *Sieve v. Steinride* (1886) 8 Ky. L. Rep. 347, 1 S. W. 672.

Michigan. — *Needham v. Gillett* (1878) 39 Mich. 574; *Roth v. Rubert* (1913) 176 Mich. 484, 142 N. W. 749.

Minnesota. — *Granger v. Harriman* (1903) 89 Minn. 303, 94 N. W. 869.

Mississippi.—*Henderson v. Clarke* (1854) 27 Miss. 436.

Missouri.—*McCracken v. McCaslin* (1892) 50 Mo. App. 85; *Griesel v. Jones* (1906) 123 Mo. App. 45, 99 S. W. 769; *Bell v. Farmers' & T. Bank* (1915) 188 Mo. App. 383, 174 S. W. 196; *Richardson v. Cole* (1900) 160 Mo. 372, 83 Am. St. Rep. 479, 61 S. W. 182.

New Hampshire.—*Hibbard v. Kent* (1844) 15 N. H. 516; *George v. Johnson* (1864) 45 N. H. 456; *Woodman v. Rowe* (1879) 59 N. H. 453.

New York.—*Howells v. McGraw* (1904) 97 App. Div. 460, 90 N. Y. Supp. 1; *Geiger v. Ryan* (1908) 123 App. Div. 722, 108 N. Y. Supp. 13; *Re Powell* (1919) 106 Misc. 212, 174 N. Y. Supp. 420.

Oklahoma.—*Vinson v. Cook* (1919) — Okla., 184 Pac. 97.

Oregon.—*Loughary v. Simpson* (1915) 75 Or. 219, 145 Pac. 1059.

Pennsylvania.—*Calhoun v. Hays* (1844) 8 Watts & S. 127, 42 Am. Dec. 275; *Conrad v. Conrad* (1908) 36 Pa. Super. Ct. 154; *Walworth v. Abel* (1866) 52 Pa. 370.

Rhode Island.—*Supreme Assembly, R. S. G. F. v. Campbell* (1891) 17 R. I. 402, 13 L.R.A. 601, 22 Atl. 307.

Vermont.—*Hubbard v. Ricart* (1831) 3 Vt. 207, 23 Am. Dec. 198; *Taylor v. Phillips* (1858) 30 Vt. 238; *Babbitt v. Bowen* (1859) 32 Vt. 437; *Reed v. Reed* (1884) 56 Vt. 492.

"Family agreements of this sort are looked upon with peculiar favor by the courts, and will be upheld unless there appears to be some gross injustice or fraud in connection therewith." *Loughary v. Simpson* (Or.) *supra*.

In *McCracken v. McCaslin* (Mo.) *supra*, the court said: "Where there are no creditors, and the heirs are of age, an administrator would be a mere naked trustee, and it would seem idle as well as a waste of the estate to go through the form and expense of administration against the will of the heirs, as evidenced by their settlement and distribution of the property among themselves. When under such circumstances a settlement and domestic distribution are made without fraud or mistake, there is no necessity for administration."

So where the widow and heirs of an intestate entered into an agreement settling his estate without administration, and there were no debts against the property, the court held that a subsequent suit by an administrator to recover a portion of the estate was not justified, saying: "If there be no creditors, the heirs have a complete equity in the property, and if they chose, instead of taking letters of administration, to distribute it by arrangement made and executed among themselves, where is the principle which forbids it? The parties to such an arrangement executed would be forever equitably estopped from disturbing it, as amongst themselves, upon the most familiar principles of justice." *Walworth v. Abel* (Pa.) *supra*.

In *Taylor v. Phillips* (1858) 30 Vt. 238, the court said: "When all the heirs of an estate are of age and legally competent to act, if they choose to settle up the estate and pay off the debts and divide the property among themselves without the intervention and expense of an administration, they have the legal power to do so, and neither the creditors nor debtors of the estate have a right to complain."

b. Application of rule.

In *Burnes v. Burnes* (1904) 132 Fed. 485, it appeared that one of two brothers who owned all their property in common died intestate. An agreement was entered into between the surviving brother and the widow and children of the intestate, by which the community property was used to form a corporation. The parties in interest then received allotments of stock in proportion to their interest, as set out in the agreement. Subsequently the validity of this settlement was attacked, but the court held that it was valid and binding on all the parties concerned. On a further appeal, in (1905) 70 C. C. A. 357, 137 Fed. 781, the decision was affirmed.

In *McCaa v. Woolf* (1868) 42 Ala. 389, the court held that a division of the property of an intestate by agreement between her two brothers and two sisters, who were the sole heirs at law and distributees of the estate,

they being all adults and there being no creditors, was valid and would be upheld by a court of equity.

In *Pate v. Johnson* (1854) 15 Ark. 275, the plaintiff sought to reform a family settlement of a decedent's estate on the ground of mistake. It appeared that in the distribution a charge of \$800 was made against the share of one son for a tract of land supposed to have been given to the son by his father. Later a deed was discovered, reciting the payment of \$1,000 as consideration for the transfer. The court, refusing a reformation because the recital of consideration was only *prima facie* and had been contradicted by parol, said: "Amicable and family settlements are to be encouraged, and when fairly made, as it is evident this was, strong reasons must exist to warrant interference on the part of a court of equity."

It appeared in *Mooney v. Rowland* (1897) 64 Ark. 19, 40 N. W. 259, that, in 1856, the common ancestor of the parties to the suit died intestate, and in 1870 a family agreement was made in which James Rowland, one of the heirs, orally agreed to quitclaim to the others his interest in the lands of his father, in consideration that he should not be called on for a sum of money belonging to the intestate's estate which had come into his hands. Twenty-five years later this action was brought by the children of James Rowland, they repudiating the settlement and seeking to recover his portion of the estate. It was held that the agreement would be enforced, since it had been acquiesced in for twenty-five years, and valuable improvements had been made on the strength of it. The court added that the consideration was sufficient to take the parol agreement out of the Statute of Frauds, and said: "This was a family settlement which, under the equity doctrine, will be upheld, where to annul it would entail upon the party seeking to uphold it an irreparable loss, unless by so doing some positive principle of law would be violated or disregarded; that is to say, when the

facts in evidence make it equitable to do so."

In *La Cotts v. Quertermous* (1907) 84 Ark. 610, 107 S. W. 167, it appeared that the widow and three children of an intestate had entered into an agreement dividing his estate between them, by which settlement the widow was allowed a certain portion of the estate in lieu of dower. One of the children was a minor, but after becoming of age she accepted her share of the estate in accordance with the agreement. The court held that, since the acceptance of her share after arriving at her majority was an affirmance of the agreement, the heir would be estopped from disputing her mother's right to her portion of the estate under the agreement, which was valid and binding on all the parties thereto.

In *Felton v. Brown* (1912) 102 Ark. 658, 145 S. W. 552, it appeared that after the death of her husband, who left no debts, a widow entered into an agreement with her children, by which the property of the decedent was divided among them without administration. The court held that this agreement was valid and enforceable, since by a statute (Kirby's Dig. § 15) such settlements are expressly authorized.

The plaintiff in *Re Strong* (1898) 119 Cal. 663, 51 Pac. 1078, sought a revocation of the letters of administration granted to the public administrator on the estate of the intestate, who had died some six years previous. It appeared that shortly after his death the four children of the intestate, who were the only heirs, entered into an agreement distributing the estate without administration, there being no debts against the property. The court, however, held that the agreement of the heirs was not sufficient to dispense with the rights of administration on the estate, and refused to revoke the letters issued.

In *Waterhouse v. Churchill* (1902) 30 Colo. 415, 70 Pac. 678, the sole question for determination was whether money of an intestate could be disposed of by agreement among the heirs without the appointment of an administrator, and the court held that

since the intestate left no debts the agreement was a valid one, and the heirs of one of the distributees who afterwards died could not object thereto.

In *Hotchkiss's Appeal* (1915) 89 Conn. 420, 95 Atl. 26, it appeared that in January, 1884, the widow and three children of an intestate entered into an agreement settling their interests in the intestate's estate, by which the widow agreed to transfer the children's share as soon as the estate was ready for distribution. The agreement was executed like a deed, but was not filed and recorded in the probate court until October, 1913, when one of the children found the paper among the effects of the widow, who had died. In December, 1913, the probate court ordered the appointment of distributors and made other orders with a view to making a distribution of the estate under the law. On this appeal from these orders, the court held that they were improper, since the statute gives distributees the privilege of dividing property among themselves, and distribution having been effected by the division or partition of the estate, actual conveyance was not essential to its validity.

But see *Dickinson's Appeal* (1886) 54 Conn. 224, 6 Atl. 422, wherein the court held that an agreement settling an intestate's estate among the persons entitled to it, although in writing and executed by parties all sui juris, would not preclude a decree of the probate court ordering a distribution of the property, unless there was a compliance with the statutory requirements as to execution, acknowledgment, and recording thereof.

But it has been held in Connecticut that before a distribution of an intestate's property by agreement or settlement can put an end to the jurisdiction of the probate court, the estate to be distributed must first be ascertained by the court. *Mathew's Appeal* (1900) 72 Conn. 555, 45 Atl. 170.

In *Hilton v. Rackey* (1911) 37 App. D. C. 83, it appeared that an agreement had been entered into between the widow and five children of an intestate, which provided that the widow

should manage the estate for one year, at the end of which time it was to be divided by giving one third to the widow in full settlement of her dower rights, and equally dividing the remainder among the children. This action was brought by the widow and two of the children for a partition sale of the realty. The defendant, another child of the intestate, attacked the agreement as being without consideration, and maintained that the widow was not entitled to any more than her dower interests in the property. The court upheld the agreement, saying: "The consideration for this contract was the amicable and economical settlement of the estate. It is a good and valid consideration. The contract is one which the courts will not only uphold, but encourage."

In *Harris v. Seals* (1859) 29 Ga. 585, the court held that a division by agreement of the heirs of an intestate, in which they followed the rule prescribed by the Statute of Distributions, was a good administration of the whole estate.

In *Desverges v. Desverges* (1861) 31 Ga. 753, it appeared that an intestate, who died in 1803, left certain property which was divided among his widow and two children by a settlement agreement executed between them in 1832. There was evidence tending to show an inequality in the division. In 1857, the plaintiff, a son of one of the children who had died, took out letters of administration de bonis non on the property of the intestate, and brought this action to recover the property allotted in the division to the other child. The plaintiff objected to any evidence of the division on the ground that such an agreement could not be set up at common law to bar the recovery by a regular administrator. The court affirmed the holding below that "after the lapse of twenty-seven years an administration would be presumed, and that such a defense was a good defense in this suit." This presumption was indulged in to protect the voluntary division, which was held to be conclusive on the plaintiff.

In *Alderman v. Chester* (1865) 34

Ga. 152, it appeared that the widow and two children of an intestate entered into a parol agreement, by which the widow was to select from the real and personal property so much as she might desire, and take therein a life estate with remainder in fee to the children. This she did, and shortly afterwards she married the defendant, who had previously entered into a contract with the widow and one of the children providing that, in consideration of the contemplated marriage, the property should be held by one of the children as trustee for the benefit of the widow, and that the estate should remain the separate property of the widow during her life. At her death the husband refused to surrender the property, and this action was brought to compel an accounting. The court held that the agreement, though parol, was valid and enforceable, since its part performance had taken it out of the statute, and those claiming under the widow were concluded by it.

It has been held that, where a family settlement is made and all the estate settled without administration, the parties who have converted the property are responsible therefor as against unpaid creditors. *Barron v. Burney* (1868) 38 Ga. 264.

See also *Turk v. Turk* (1847) 3 Ga. 422, 46 Am. Dec. 434, wherein it appeared that a widow and four children of an intestate had submitted the settlement of the estate to arbitrators, and had acquiesced in and executed the award. One of the sons paid out and delivered the property to the several distributees. Later a grandson of the intestate secured letters of administration on the estate of his ancestor, and brought this suit against the son who had acted as distributor, to recover the assets of the estate. The son defended on the ground that the family settlement raised a bar to a recovery of the whole of the assets of the estate. The court held that as a matter of practice the defendant could only avail himself of the settlement by filing a cross bill against all the distributees.

In *Gwinn v. Melvin* (1903) 9 Idaho, 202, 108 Am. St. Rep. 119, 72 Pac. 961,

2 Ann. Cas. 770, application was made for the appointment of an administrator of the estate of one Melvin who had died intestate six years before, with a widow and six children surviving. It appeared that the widow and children had continued in possession of the estate, paid the debts, and agreed on a family settlement of the proceeds without administration. The court refused to allow such appointment saying: "When the only duty devolving upon an administrator is distribution of the estate among the heirs, and they make a satisfactory distribution thereof themselves, administration is regarded as a useless ceremony."

In *Douglas v. Albrecht* (1906) 130 Iowa, 132, 106 N. W. 354, it was held that a settlement agreement between four children who were the sole surviving heirs of an intestate, providing for a distribution of the estate without administration, would, in the absence of debts, estop an administrator thereafter appointed from recovering the assets of the estate.

In *Shuee v. Shuee* (1884) 100 Ind. 477, the court upheld a family settlement between the widow and children of an intestate, although the portion allotted the widow in the distribution was much smaller than the amount to which she would have been entitled under the Law of Descent and Distribution.

But in *Bowen v. Stewart* (1891) 128 Ind. 507, 26 N. E. 168, 28 N. E. 73, wherein application was made by the heirs of an intestate to remove an administrator appointed without their consent, it appeared that after the death of the intestate his widow and five children had settled the estate by agreement without administration. Thereafter the county treasurer was appointed administrator, the intestate having been indebted to the county for a large amount. The court refused to remove the administrator, holding that "so long as there is a single creditor he has a right to demand that the estate shall be settled in the mode prescribed by the statute."

In *Brown v. Baxter* (1908) 77 Kan. 97, 94 Pac. 155, 574, it was held that

an agreement between the widow and descendants of an intestate in settlement of his estate was valid, and that each distributee became the owner in severalty of the portion which he received; and an acquiescence in the agreement, and a retention of the amount received thereby for a considerable length of time, were held sufficient to estop the parties from afterwards objecting to the arrangement.

In *Sieve v. Steinride* (1886) 8 Ky. L. Rep. 347, 1 S. W. 672, a family compromise of the respective rights of those interested in the estate of an intestate was upheld, the agreement being a fair one and tending to avoid a threatened litigation.

Where an intestate left no debts, and the heirs were all of full age, the court held that a family settlement of the estate, under which each received all that would have been allotted to him under an administration, would equitably estop any one of them from thereafter attempting to open or disturb the settlement. *Needham v. Gillett* (1878) 39 Mich. 574.

In *Roth v. Rubert* (1913) 176 Mich. 484, 142 N. W. 749, it appeared that on the death of an intestate an attempt was made among the heirs of his estate to effect an amicable adjustment of their conflicting claims. A nephew of the decedent, present at a previous meeting of the heirs, agreed to be bound by whatever the rest should decide, and a settlement was later carried through, a third party signing the agreement for the nephew. Subsequently an assignee of the nephew's interest appealed from an allowance of certain disputed claims which had been made in the course of the settlement, of which allowance the nephew was in ignorance. The court held that the nephew and his assignee were estopped to deny any provisions of the settlement agreement, which was valid and binding on all the parties thereto, and a permanent injunction was granted restraining the appeal.

In *Ormsbee v. Piper* (1900) 123 Mich. 265, 82 N. W. 36, it was held that an administrator duly appointed could not be denied the uncollected choses in action yet belonging to the

estate, on the ground that the widow and children of the intestate had agreed on a distribution without administration, and this was so although there were no debts against the estate.

And where two children, as the sole heirs of an intestate, agreed to a settlement of his estate among themselves, and no claims were presented against the estate, the court held that the agreement was valid and would give a distributee the right to bring action on a note due the estate which had been allotted to him in the agreement. *Granger v. Harriman* (1903) 89 Minn. 303, 94 N. W. 869.

In *Henderson v. Clarke* (1854) 27 Miss. 436, it appeared that, following the death of the intestate without children, his widow, brothers, and sisters divided the personal estate among themselves by agreement. This proceeding was attacked as void because made without an administration of the estate, but the court held that since it appeared that the debts of the estate had been paid the agreement would not be set aside.

And in *Griesel v. Jones* (1906) 123 Mo. App. 45, 99 S. W. 769, it was held that an agreement among the heirs of an intestate settling the estate without administration would be valid if there coexisted an absence of debts, legal age of the heirs, and a unanimity among them, as expressed by their agreement, to dispense with an administration.

In *Bell v. Farmers & T. Bank* (1915) 188 Mo. App. 383, 174 S. W. 196, it appeared that, following the death of an intestate, his heirs entered into a family settlement distributing all of his estate among themselves after the payment of debts, without administration. The court held that, the heirs being all adults, a determination, in view of such agreement, that an administrator was not entitled to the possession of the property, was proper.

In *Richardson v. Cole* (1900) 160 Mo. 372, 83 Am. St. Rep. 479, 61 S. W. 182, it appeared that after the death of an intestate, who was possessed of about \$17,000 in personal property and left no debts, the heirs, all being of legal age, agreed to a settlement

of the estate, and in pursuance thereof transferred all their interests to one of the heirs without administration. Twelve years later the public administrator took out letters of administration on the estate and brought action to recover the assets in the hands of the defendant. The court stated that under the circumstances it knew of no principle of law which forbade such a distribution, and added that it would be a mockery of justice to require the payment of the assets to the administrator, for him to pay them back to the defendant, minus the costs and commissions.

In *Hibbard v. Kent* (1844) 15 N. H. 516, it was held that a family settlement of an intestate's property, executed without fraud or mistake after the payment of debts, was valid and binding, and that the widow, who took part in the settlement, could not thereafter defeat it by procuring administration and bringing action for the property so distributed. The court added: "If all those interested in an estate, being of age and capable, will undertake its settlement without administration for that purpose, each receiving a share and giving a discharge, it would be very mischievous if anyone might afterwards, of his mere pleasure, defeat what has thus been done."

In *George v. Johnson* (1864) 45 N. H. 456, wherein it appeared that the heirs of an intestate had agreed to a settlement of his estate by three arbitrators, they to abide the result, and the award was duly complied with, the court refused to open the settlement.

In *Woodman v. Rowe* (1879) 59 N. H. 453, the plaintiff sought to set aside a settlement agreement executed before she became of age, between her mother and her guardian, whereby the estate of her father, who had died intestate, was settled without administration. It appeared that the settlement was a fair one, and the court held that the parties were bound thereby, the guardian having the right to bind the infant to such an agreement.

Where, in an action to partition real estate, it appeared that the rights of the parties were set out in a settlement

agreement and deed executed by them as the parties in interest in the intestate's property, the court stated that "the terms of that agreement and deed are controlling as to the interests of the parties as they were thereby declared to exist by such parties themselves." *Howells v. McGraw* (1904) 97 App. Div. 460, 90 N. Y. Supp. 1.

In *Geiger v. Ryan* (1908) 123 App. Div. 722, 108 N. Y. Supp. 13, an agreement between the widower and children of an intestate, by which a distribution of the estate was made, was held to be valid and binding on the parties.

In *Loughary v. Simpson* (1915) 75 Or. 219, 145 Pac. 1059, it was held that a settlement and distribution of the property of an intestate by the persons entitled thereto, in the absence of debts, left nothing on which an administrator could base an action for an accounting.

In *Calhoun v. Hays* (1844) 8 Watts & S. (Pa.) 127, 42 Am. Dec. 275, the plaintiffs sued in ejectment for a one-eighth part of the tract of land in which the defendants and plaintiffs claimed title as the heirs of their common ancestor, who had died intestate. The defendants alleged that by a family arrangement between all the heirs the plaintiffs had agreed to take their shares in money, and had accepted the defendant's note, released his claim, and been fully paid. The plaintiffs contended that they were not legally estopped by the writings signed on that occasion, and that they did not assent to the settlement or receive the money. It appeared from the evidence that the plaintiffs had received their share as agreed on in the settlement, and the court held that the agreement, having been a fair one, was valid and binding on all.

A voluntary agreement, whereby one of the parties to a family settlement of an intestate's estate accepted a lesser proportion of the estate than he was entitled to by law, has been held valid and binding. *Conrad v. Conrad* (1908) 36 Pa. Super. Ct. 154.

In Supreme Assembly, *R. S. G. F. v. Campbell* (1891) 17 R. I. 402, 13 L.R.A. 601, 22 Atl. 307, an attempt

was made to avoid a family settlement of an intestate's estate in which the parties beneficially interested had agreed to share alike, after deducting certain expenditures. Among the assets of the estate were different life insurance certificates, but as no one knew to whom they were payable, the agreement contemplated an equal division thereof irrespective of beneficiaries who might be named in the certificates. Subsequently this action was brought by one who was proved to be a beneficiary under the certificates. The court held that the mutual surrender by each of the interested parties of his chance to receive a larger share by designation in the certificates was a sufficient consideration for the agreement, which was binding on all who had entered therein.

In *Vinson v. Cook* (1919) — Okla. —, 184 Pac. 97, an order of the county court approving an agreement of settlement, made within the period for appeal from a decree of heirship, between the executor of the person adjudged to be the sole heir of an intestate and the unsuccessful contestants, was held not to be void, and to be a sufficient protection to the administrator in paying to the contestants, pursuant to its direction, the amount fixed by the agreement, although the administrator was not notified of the presentation of the petition for the order. The question arose upon an objection to a credit on account of such payment in the administrator's account. The court said that the order may have been erroneous, but was not subject to collateral attack.

But in *Allen v. Simons* (1852) 1 Curt. C. C. 122, Fed. Cas. No. 237, it was held that an agreement among the distributees of an intestate that the property should be managed by one of them for the joint benefit of all, without administration or payment of existing claims, was not enforceable in equity. Such an agreement would tend to defraud creditors, and, the court added, was plainly forbidden by public policy.

In an action for trespass to real property where the plaintiff set forth a title which was derived from a par-

tition agreement among the heirs of an intestate, the court held that a partition deed, in which all the heirs joined in settling an estate, was as valid a division as would be a partition under order of the probate judge. *Hubbard v. Ricart* (1831) 8 Vt. 207, 23 Am. Dec. 198.

In *Babbitt v. Bowen* (1859) 32 Vt. 437, it was held that an amicable settlement of the personal estate of an intestate by agreement among all the heirs, after payment of debts, was a valid distribution thereof.

In *Reed v. Reed* (1884) 56 Vt. 492, it was held to be competent for the heirs of an intestate to agree on a division of the estate among themselves, on a showing that there were no creditors of the estate; and the promise of one to pay another a certain sum for his proportion was held valid, since founded on good consideration.

Family settlements of the property of intestates are upheld, though the agreement provides for distribution on a plan different from that prescribed by statute. See the reported case (*RIFE v. WALTON*, ante, 549), wherein the court holds that an agreement between the widow and children of an intestate, whereby his estate is distributed in a manner different from that prescribed by the Statute of Descent and Distribution, is valid and binding on the parties thereto.

So in a case wherein it appeared that an intestate left a widow and two sons as his only heirs, and his property consisted of government bonds worth \$6,000, the court said that while under the law one third of such property would pass to the widow, and the remaining two thirds to the sons, still there was no reason why the parties might not make such distribution of the property as they thought proper. And an agreement that the widow should receive all the interest on the bonds during her life, and that at her death the bonds should be divided equally between the sons, was held valid and binding. *Comer v. Comer* (1887) 120 Ill. 420, 11 N. E. 848.

Likewise, where all the next of kin united in an agreement settling the estate of an intestate among themselves,

it was held that so long as the rights of creditors were not involved, and the settlement was not procured by fraud, it was valid, although the distribution, as agreed on, was different from that provided by statute, the court saying: "While it was the duty of the administrator to pay the debts and administration expenses of the deceased, and to distribute the remainder among the next of kin in accordance with the provisions of the statute regulating the distribution of personal property among the next of kin of intestates, it is within the power of the next of kin to agree among themselves for a distribution different from that provided by statute." *Re Powell* (1919) 106 Misc. 212, 174 N. Y. Supp. 420.

c. Effect of fraud or misrepresentation.

Family settlements of intestate's estates are invalid if tainted in their inception with fraud or misrepresentation. But the general tendency of the courts to uphold such agreements seems to have its effect here, and fraud or misrepresentation must be clearly and satisfactorily shown to vitiate the contract. *Ellison v. Smith* (1913) 107 Ark. 614, 156 S. W. 417; *Shuee v. Shuee* (1884) 100 Ind. 477; *Sieve v. Steinride* (1886) 8 Ky. L. Rep. 347, 1 S. W. 672; *Levy v. Levy* (1899) 51 La. Ann. 311, 25 So. 86; *Conrad v. Conrad* (1908) 36 Pa. Super. Ct. 154; *Geiger v. Ryan* (1908) 123 App. Div. 722, 108 N. Y. Supp. 13.

In *Ellison v. Smith* (Ark.) *supra*, the appellants sought the reversal of a decree canceling certain deeds because of fraudulent connivance and misrepresentations by them in relation thereto. The appellee had entered into a family settlement with the appellants, her brothers, in which a division was made of the estate of their father, who had died intestate. The division, however, was discriminatory, so that the appellee secured a much smaller portion than her rightful share. The court held that the imposition practised on the appellee by those whom she had the right to expect would treat her with the utmost fairness fully warranted a cancelation of the deeds which she had signed in the settlement, saying: "While family settle-

ments, when fairly made, require strong reasons to prevent their enforcement, a settlement such as is indicated by the evidence in this record could not be approved, because it shows conclusively that it is very unfair and unequal."

In *Shuee v. Shuee* (1884) 100 Ind. 477, the widow of an intestate sought relief from a contract of settlement entered into between her and the children of the intestate, in which she agreed to accept \$2,000 as her share of the estate. It appeared that previous to her husband's death she had received \$9,000 from him, for which she gave a receipt for "my share of division in the estate." At the time the family settlement was made, the widow was told that the \$9,000 which she had received would be charged to her in the final accounting. In her complaint the widow averred that the amount she had accepted for her share was much less than she was entitled to by law, and alleged further that she had been misled into making the settlement, partly by the statement above, which was made under mistake of law. The court held that there was no ground for annulling the settlement, saying: "We are of opinion that even eliminating from this settlement the favor in which it ought to stand as a family settlement, it should not fall under the condemnation of having been obtained by fraud, either actual or constructive." And, continuing, the court said: "Family settlements, when made in good faith and with full disclosure, are looked upon with favor in equity, and will be sustained by the courts, 'albeit, perhaps, resting upon grounds which would not have been considered satisfactory if the transaction had occurred between strangers.' All such agreements are favorably regarded in courts of equity, and are supported not only as beneficial in themselves, but as conducing to peace and harmony, and it is universally held that, in order to set aside such a settlement, overreaching fraud or mistake must be shown."

In *Sieve v. Steinride* (1886) 8 Ky. L. Rep. 347, 1 S. W. 672, it appeared that after the death of a wife her next of

kin asserted claims to her property which the husband denied, claiming that his wife and he had agreed that the property should go to the survivor of them. Under pressure of threatened litigation, a compromise settlement was entered into by which the husband and the wife's next of kin executed mutual deeds to one half of the property. An action was later instituted by the wife's next of kin to cancel their deed to the husband of one half of the property, on the ground that it was procured by misrepresentation, and that they were in ignorance of their rights at the time. The court held that the compromise, having been a fair one in which the plaintiffs were fully apprised of their rights, and being purposed to prevent threatened litigation, it would be enforced, saying: "A court of equity will not hesitate to enforce a family settlement based upon a just and fair compromise."

In *Levy v. Levy* (1899) 51 La. Ann. 311, 25 So. 86, the plaintiff averred that he had been imposed on by his children, who had joined with him in a family settlement of their mother's estate, which had been in community with that of her husband. The heirs had disagreed with their father in regard to the amount coming to them, and it was the source of constant quarrels until one of them drew up a memorandum as to the amount he thought should be allotted each heir, on which memorandum an act of settlement was drawn up and agreed to by all. The plaintiff maintained that wrongful charges had been made against him in the settlement, and that amounts which should have been collated by the heirs were withheld. The defendants set out the settlement agreement as a fair and just disposition of the estate. It was held that the plaintiff was concluded by the settlement as made by him, but on an application for a rehearing the court stated that under the circumstances the case should be remanded on this question of collation, otherwise reserving and enforcing the rights of the parties under the settlement.

In *Conrad v. Conrad* (1908) 36 Pa.

Super. Ct. 154, the plaintiff sought to cancel a family agreement disposing of an intestate's property, on the ground of fraud. It appeared that the plaintiff and the defendant, as the sole heirs and next of kin, had agreed to a settlement by which the former was to receive one sixth of the estate. There was evidence that at the time the agreement was made the plaintiff knew that he was entitled to one half of the estate, under the Intestate Laws. The court held that, since he had voluntarily agreed to accept a lesser proportion of the estate than he was entitled to by law, there was nothing on which to base a charge of fraud, and that the agreement was valid and binding on the parties.

In *Geiger v. Ryan* (1908) 123 App. Div. 722, 108 N. Y. Supp. 13, it appeared that following the death of an intestate her husband by her second marriage claimed one third of the personalty as widower, and in a settlement with her three children he divided two thirds of the personalty among them, and paid each a certain amount in addition, for their interest in the realty. The plaintiff herein, one of the daughters of the intestate, afterwards repudiated the settlement on the ground that the husband had fraudulently stated that he was the widower of the intestate. It was claimed that, by reason of a prior common-law marriage, the marriage of the intestate and the defendant herein was void. The court held that the second marriage had become valid at the death of the first husband, and that, no fraud being shown, the settlement was valid and binding.

In *Burnes v. Burnes* (1904) 132 Fed. 485, it appeared that one of two brothers who owned all their property in common died intestate, and on the urgent appeal of the surviving brother the widow and children of the deceased entered into an arrangement with him providing for the creation of a corporation to take the common property. A division was made by allotting the stock to the parties in interest. Twelve years after the agreement action was brought to set it aside, the plaintiff contending that

the acts of the surviving brother in inducing the agreement amounted to duress. It appeared that he had threatened to administer the estate as surviving partner unless the widow and children entered into the agreement. The court held that the settlement would not be set aside after twelve years had elapsed, on the ground of duress, and on a further appeal in (1905) 70 C. C. A. 357, 137 Fed. 781, the court, in affirmance, said: "For obvious reasons of public policy, compromises of conflicting claims by family settlements are encouraged by the courts, and they may not be avoided or disregarded for mere inadequacy of consideration, or except upon clear and convincing proof of grave fraud or mistake."

In *Griffing v. Gislason* (1906) 21 S. D. 56, 109 N. W. 646, it appeared that at a meeting of the parties interested in a decedent's estate the widow was informed that a will left by her husband was invalid, and that she would only be entitled to a small portion of the estate. At the solicitation of the others, and in ignorance of her rights as surviving wife, she then entered into a settlement agreement by which she was to share equally with the other heirs. The widow received nothing as consideration for her agreement to accept a much smaller portion than she was entitled to by law. The court held that since the widow was clearly mistaken as to her rights in her husband's estate, while the other heirs appeared to have understood that she was entitled to a larger portion, the agreement should be rescinded, consent having been given by mistake.

In an early Tennessee case, in which it appeared that an agreement had been made for a family distribution of an intestate's estate without administration, the court said: "As to the agreement to divide the property among them, without administering, we think such agreements do not deserve encouragement. They are seldom beneficial to the individuals concerned in them, produce lawsuits, and are often made the means of defrauding creditors." And a direction was

made that the circuit court issue letters of administration. *Wright v. Wright* (1827) Mart. & Y. (Tenn.) 43.

II. Construction of agreement.

In the construction of family agreements for the distribution of the property of intestates the courts, while seeking the real intent of the parties as revealed in the agreement, will, in the absence of fraud or mistake, adhere strictly to the terms thereof.

Arkansas.—*Turner v. Davis* (1883) 41 Ark. 270.

Connecticut.—*Baxter v. Gay* (1840) 14 Conn. 119.

Georgia.—*Williams v. Williams Co.* (1904) 122 Ga. 178, 106 Am. St. Rep. 100, 50 S. E. 52.

Iowa.—*Sloan v. Moffatt* (1875) 41 Iowa, 271.

Kansas.—*McCabe v. McCabe* (1915) 96 Kan. 702, 153 Pac. 509.

Kentucky.—*Dowell v. Dowell* (1910) 137 Ky. 167, 125 S. W. 283.

Pennsylvania.—*Cocker's Estate* (1892) 1 Pa. Dist. R. 158.

South Carolina.—*Ex parte Yown* (1882) 17 S. C. 532.

Tennessee.—*Buck v. Buck* (1874) 4 Baxt. 392.

An agreement in the nature of a family settlement which conveys the interests of the parties in an intestate's realty to a trustee for sale, the proceeds to be divided among the claimants, constitutes an equitable conversion of the realty into money. *Turner v. Davis* (1883) 41 Ark. 270. In that case it appeared that the sole parties in interest in the intestate's estate were a granddaughter and son-in-law. There were conflicting claims between the parties, and to avoid a pending action they conveyed their several interests in the realty (excepting specified portions) to a trustee to be sold by him, the proceeds to be equally divided between the two claimants. Subsequently, but before a sale by the trustee, judgment creditors of the son-in-law levied on and sold a portion of the real estate under an execution. This suit was brought by another judgment creditor to have the deed under the execution sale annulled and a commissioner appointed to sell the undivided half of the real-

ty and apply the proceeds to the satisfaction of the plaintiff's judgments. The court held that since the purpose of the agreement, which stood on the ground of a family settlement, was to dispose of the conflicting claims of the parties, it was evident from the terms of the agreement that they desired a sale and conversion of the property into money. And since the deed of trust was an equitable conversion of the land into money, it was held that no estate was left in the son-in-law which could be subjected to execution at law.

In *Baxter v. Gay* (1840) 14 Conn. 119, the plaintiff sought to recover \$50 under a parol agreement executed in 1833 between the heirs of an intestate on the division of the estate. By the settlement, the heirs agreed to divide the estate into three portions, each to take one portion, but as the part allotted the defendant was of greater value than that allotted the plaintiff the former agreed to pay the latter \$50. It was also provided that each of the heirs should execute a deed of his interest in the estate. The deed executed by the plaintiff was not joined in by her husband, and was consequently void. In 1837, a valid deed was executed by the plaintiff, and in 1838 this suit was brought. The defendant set out the Statute of Limitations which limited actions on parol contracts to three years from the time the right of action accrued, and alleged in addition that the contract was void under the Statute of Frauds. The court held that under the agreement a right of action did not accrue until the delivery of a valid deed, and, since three years had not elapsed from that time, the Statute of Limitations would not apply. And since the parol agreement had been executed by the parties, it was held valid and without the Statute of Frauds.

Where the heirs have entered into an agreement dividing the property of an intestate, and the interests of creditors are not involved, acts adopting the partition clothe each heir with a perfect equity to the part assigned to him, and after such a distribution each heir loses whatever title he had in

what has been assigned to the others, and has no interest therein which can be levied on by a subsequent judgment creditor. *Williams v. Williams Co.* (1904) 122 Ga. 178, 106 Am. St. Rep. 100, 50 S. E. 52.

In *Sloan v. Moffatt* (1875) 41 Iowa, 271, it appeared that a family settlement was made between the widower and four children of an intestate, by which the former was to receive \$1,366.66, estimated as one third of the estate, which was to be paid out of the proceeds of certain notes. It was further agreed that one of the children was to receive the sum of \$400 out of the proceeds of the notes, and the remainder was to be divided between two of the remaining children. The notes did not realize the amounts required to fulfil the terms of the agreement, and the widower claimed that his portion should be satisfied first, which would have nearly exhausted the amount realized. The court stated that there was nothing in the agreement to warrant such a contention, and held that the amount should be applied in the proportion of the respective claims of the distributees, as set forth in the settlement.

In *McCabe v. McCabe* (1915) 96 Kan. 702, 153 Pac. 509, the court held that a provision in the family settlement of an intestate's estate, recognizing the one-fourth interest of a son in certain property, and signed by the widow and two sisters, rendered it immaterial whether quitclaim conveyances of his sisters of their interests therein were made to him several years later, or not at all. And where the widow had, in accordance with the agreement, conveyed her interest in the lands to the son, subject to a life estate, it was held that a quitclaim deed recognizing his one-fourth interest therein would be superfluous.

In *Dowell v. Dowell* (1910) 137 Ky. 167, 125 S. W. 283, it appeared that an agreement had been entered into by the eight children of an intestate, whereby six of the children agreed that the remaining two should receive the more valuable portion of the estate, because of their services and

advances to the intestate. The court held that this settlement would estop the two latter children from subsequently asserting claims against the estate for the services rendered.

Where, by an oral family settlement between the widow and children of an intestate, it was agreed that the widow should remain in possession of and enjoy the estate, the court held that this agreement passed the corpus of the estate to the widow. *Cocker's Estate* (1892) 1 Pa. Dist. R. 158.

In *Ex parte Yown* (1882) 17 S. C. 532, it appeared that a man died intestate in 1863, leaving his widow and five sons of a former marriage as heirs. A family settlement was executed between the sons and the widow by which all agreed to share equally, the widow further covenanting that her share should revert to the others at her death without issue, provided that they should take care of her if she became needy in her lifetime. Deeds were executed in pursuance of the agreement, and in 1880 the widow died intestate without issue. The sons then commenced an action for partition of the land previously conveyed to the widow, whereon the sister of the widow petitioned for the proceeds of the partition sale. The court found that the second condition which the

children undertook, which was to care for the widow if she became needy, had not been fulfilled, and held that this failure to fulfil the agreement would prevent a reversion of the lands.

In *Buck v. Buck* (1874) 4 Baxt. (Tenn.) 392, the plaintiff sought to recover part of a crop of corn claimed by her as widow of the intestate. It appeared that a family settlement had been made disposing of the personal estate of the intestate, in which agreement it was provided that after taking out certain property allotted to the widow all the remaining effects and property should be divided amongst the children in equal parts. The plaintiff's claim was based on the contention that the corn crop was not comprehended in the agreement. The court held that the agreement extended to the growing crops, sustaining the following instruction: "If the parties undertook to make an agreement and division of the estate, and there is no other evidence than the written agreement itself, the presumption would be they intended to divide the whole estate, and if the parties were all of full age, and capable of contracting, they would be bound by their agreement, if it was not procured by fraud and oppression." R. E. B.

RE JAMES WALSH.

LONDON GUARANTEE & ACCIDENT COMPANY, Limited, Appt.

Massachusetts Supreme Judicial Court — June 4, 1917.

(227 Mass. 341, 116 N. E. 496.)

Workmen's compensation — allowance for disability — effect of subsequent insanity.

1. The subsequent insanity of an injured workman does not destroy his right to receive the allowance made under the Workmen's Compensation Act for a permanent partial disability resulting from an injury received in his employment.

[See note on this question beginning on page 570.]

— absence of evidence — knowledge of committee.

2. In determining what a common day laborer might have earned for the purpose of making an award under the Workmen's Compensation Act the com-

mittee of arbitration and the industrial accident board, on review, may act upon their own knowledge if no evidence upon the question has been introduced.

APPEAL by insurer from a decree of the Superior Court for Suffolk County affirming an award of compensation to claimant by the committee of arbitration and industrial accident board in a proceeding by him under the Workmen's Compensation Act to recover for injuries received by him. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. H. S. Avery, for appellant:

The compensation was not intended to furnish support for persons incapacitated for work for causes other than those arising out of and in the course of the employment.

Murphy's Case, 224 Mass. 592, 113 N. E. 283; *Weaver v. Maxwell Motor Co.* 186 Mich. 588, L.R.A.1916B, 1276, 152 N. W. 993, Ann. Cas. 1917E, 238; *Winn v. Adjustable Table Co.* 193 Mich. 127, 159 N. W. 372, 13 N. C. C. A. 612; *Sanderson's Case*, 224 Mass. 558, 113 N. E. 355.

Mr. Henry R. Brigham, for appellee:

The provisions of the statute under which this case arises, called the Workmen's Compensation Act, should be construed liberally for the protection of the injured employee.

Meley's Case, 219 Mass. 136, 106 N. E. 559; *Panasuk's Case*, 217 Mass. 589, 105 N. E. 368, 5 N. C. C. A. 688; *Donovan's Case*, 217 Mass. 76, 104 N. E. 431, Ann. Cas. 1915C, 778, 4 N. C. C. A. 549.

The compensation should be based upon the extent that the injured employee's earning capacity has been affected by the injury.

King v. Viscoloid Co. 219 Mass. 420, 106 N. E. 988, Ann. Cas. 1916D, 1170, 7 N. C. C. A. 254; *Durney's Case*, 222 Mass. 461, 111 N. E. 166.

Under the British Workmen's Compensation Act, the question of what a man is able to earn in some suitable employment or business after the accident, in cases where the injured employee is only partially incapacitated, but is not as a fact earning anything for some reason not connected with the accident, has been held to be within the discretion of the judge, and compensation awarded and allowed.

Roberts & Ruthven v. Hall, 5 B. W. C. C. 331; *Thayne v. Gray* [1915] W. C. & Ins. Rep. 64, 8 B. W. C. C. 17; *Curry v. Doxford* [1915] W. C. & Ins. Rep. 81, 8 B. W. C. C. 19; *McNally v. Furness, W. & Co.* [1913] 3 K. B. 605, 82 L. J. K. B. N. S. 1310, 109 L. T. N. S. 270, 29 Times L. R. 678 [1913] W. C. & Ins. Rep. 717, 6 B. W. C. C. 664; *Cargo Fleet Iron Co. v. Funck* [1916] W. C. & Ins. Rep. 87, 9 B. W. C. C. 318; *Harwood v. Wyken Colliery Co.* [1913]

2 K. B. 158, 82 L. J. K. B. N. S. 414, 108 L. T. N. S. 283, 29 Times L. R. 290, 57 Sol. Jo. 300, 6 B. W. C. C. 225; *Cory Bros. & Co. v. Hughes* [1911] 2 K. B. 738, 27 Times L. R. 498, 4 B. W. C. C. 291; *New Monkton Colliery Co. v. Toone* [1913] W. C. & Ins. Rep. 425, 109 L. T. N. S. 374, 57 Sol. Jo. 753, 6 B. W. C. C. 660; *Slater v. Blyth Shipbuilding & Dry Docks Co.* [1914] W. C. & Ins. Rep. 39, 7 B. W. C. C. 193.

Loring, J., delivered the opinion of the court:

The main question here is whether subsequent insanity defeats an employee's right to compensation under the Workmen's Compensation Act.

The employee, a boiler maker by trade, was injured on July 1, 1913. In the course of his work, as such, he had to climb ladders and to work on stagings. The result of the injury was that his right leg was shortened 2½ inches. In the opinion of the physician called by the insurance company (adopted by the arbitration committee and the board) that prevented him from doing the work of a boiler maker, but it left him "able to perform any ordinary, manual labor, such as shoveling or anything of this sort, just as well as other men." The weekly wages earned by him as a boiler maker came to \$15. The insurance company paid him one half of these wages until he had recovered from the injury, except for the shortening of his leg. When this happened the company refused to make further payments. Subsequently he became insane and thereby was prevented from doing any work. The arbitration committee found that the partial incapacity resulting from the shortening of the leg was a permanent one, that he could have earned \$7.50 a week as a laborer, and awarded him \$3.75 a week for the balance of 300 weeks, with leave to either party to apply under pt. 3,

§ 12, and under "the general provisions of the statute."

We are of opinion that subsequent insanity does not deprive an employee of compensation due him

Workmen's compensation—allowance for disability—effect of subsequent insanity. under the provisions of the Workmen's Compensation Act. Indeed the effect of subsequent insanity,

and the only effect of it, is to make greater the employee's need to have that compensation which, apart from the subsequent disability, justice required the employer to pay him. And the cases are to that effect. *Harwood v. Wyken Colliery Co.* [1913] 2 K. B. 158, 82 L. J. K. B. N. S. 414, 108 L. T. N. S. 283, 29 Times L. R. 290, 57 Sol. Jo. 300; *McNally v. Furness, W. & Co.* [1913] 3 K. B. 605, 82 L. J. K. B. N. S. 1310, 109 L. T. N. S. 270, 29 Times L. R. 678, 6 B. W. C. C. 664. See also in this connection *Cory Bros. & Co. v. Hughes* [1911] 2 K. B. 738, 27 Times L. R. 498, 4 B. W. C. C. 291.

The insurance company has argued that the subsequent insanity of the employee stands on all fours with the subsequent death of a dependent. The purpose of the Workmen's Compensation Act is to make a personal injury suffered by an employee an incident of the business in which he is employed when it arises out of and in the course of his employment. To accomplish that purpose it is provided by that act that as matter of justice the resulting burden shall be borne by the employer, without regard to the question of fault on the part of the employee. In carrying out that measure of justice the act provides that in case the injury results in the death of an employee compensation shall be made to those dependent upon him. It was decided in *Murphy's Case*, 224 Mass. 592, 113 N. E. 283, that the subsequent death of a dependent ends his right to compensation. But none of the considerations upon which that conclusion was reached exist in the case of a permanent partial incapacity

for work caused by an injury within the act and a subsequent total disability coming from an outside cause. In that case (as we have said) the only effect of the subsequent total disability is to make greater the employee's need to have that compensation which, under the act, justice required the employer to make to him.

The insurer relies upon what was said by the supreme court of Michigan in *Winn v. Adjustable Table Co.* 193 Mich. 127, 159 N. W. 373, 13 N. C. C. A. 612. In deciding that the loss of a third finger by reason of an injury within the Workmen's Compensation Act should be dealt with as the loss of a finger, and not as the loss of a whole arm, in a case where the employee, before the injury, had on that hand the thumb and third finger only, that court said: "It is impossible to know how much the claimant might have earned if suffering only from the partial disability, when, as a matter of fact, he cannot earn anything because of the total disability."

The decision in that case is not of consequence here. See in that connection *Branconnier's Case*, 223 Mass. 273, 111 N. E. 792. We are unable to agree with this reasoning. There is not a court day in the year when some jury is not passing upon a question of fact quite as difficult to decide as the question of what the claimant might have earned when suffering from partial disability only, when as matter of fact he was not able to earn anything because of a subsequent total disability. See in this connection *Barry v. New York Holding & Constr. Co.* 226 Mass. 14, 114 N. E. 953; *C. W. Hunt Co. v. Boston Elev. R. Co.* 199 Mass. 220, 85 N. E. 446. The decision made is fairly within what was said in *Maynard v. Royal Worcester Corset Co.* 200 Mass. 1, 85 N. E. 877.

We are of opinion, therefore, that subsequent insanity did not defeat the employee's right to compensation under the act.

The other objection taken by the

insurer is that there was no evidence as to what amount an ordinary laborer would have earned, and for that reason it was not open to the arbitration committee and the industrial accident board, on review, to make a finding that he would have earned \$7.50. As was said in *Carroll's Case*, 225 Mass. 203, 208, 114 N. E. 285, the proceedings before the committee and the board of re-

view ought not to be hampered by technicalities. We are of opinion that in determining the amount which can be earned by a day laborer the committee and board had a right to act upon their own knowledge.

—absence of
evidence—
knowledge of
committee.

The result is that the decree of the Superior Court must be affirmed, and it is so ordered.

ANNOTATION.

Insanity as affecting right of employee to compensation.

The decision in the reported case (*RE WALSH*, ante, 567) appears to be the only case passing upon the effect of subsequent insanity upon the right of an injured employee to continue to receive compensation.

An employee is entitled to compensation for incapacity from insanity caused by an accident or by an industrial disease, in case the statute awards compensation for such a disease. *Westminster Brymbo Coal & Coke Co. v. Evans* [1916] W. C. & Ins. Rep. (Eng.) 241, 86 L. J. K. B. N. S. 47, 115 L. T. N. S. 365, 9 B. W. C. C. 512.

Suicide while insane because of an accident may be found to be accidental. *Withers v. London, B. & S. C. R. Co.* [1916] 2 K. B. (Eng.) 772, 85 L. J. K. B. N. S. 1673, [1916] W. C. & Ins. Rep. 317, 115 L. T. N. S. 503, 32 Times L. R. 685, 61 Sol. Jo. 8, 9 B. W. C. C. 616, Ann. Cas. 1918B, 341; *Malone v. Cayzer* [1908] S. C. 479, 45 Scot. L. R. 351, 1 B. W. C. C. 27.

So, compensation is recoverable for death of a workman by throwing himself from a window, as the result of injuries arising out of and in the course of his employment, which deranged his mind so as to create an irresistible impulse to commit the act which caused death. *Sponatski's Case* (1915) 220 Mass. 526, L.R.A.1916A, 333, 108 N. E. 466, 8 N. C. C. A. 102.

In *Malone v. Cayzer* (Scot.) supra, it was held that a claim by a widow should not be dismissed on the ground of irrelevancy of her plea that an accident to her husband's eye which ren-

dered him nearly blind, and which so worked upon his nerves that he became insane and eventually committed suicide, was the cause of his death. The appellate court held that it was not clear that the chain of causation could be made out, but that the sheriff substitute should have made inquiry into the matters alleged.

But insanity cannot be inferred merely from the fact that a workman, who had received an injury to his eye and was suffering great pain, committed suicide, although there was no other reason except the injury advanced for the act. *Grime v. Fletcher* [1915] 1 K. B. (Eng.) 734, 31 Times L. R. 158, 84 L. J. K. B. N. S. 847, [1915] W. N. 43, 59 Sol. Jo. 233, 112 L. T. N. S. 840, 8 B. W. C. C. 69.

And the mere facts that a man had neurasthenia some two or three months after an injury to his thumb, and that he was depressed both before and after by reason of his inability to get back to his work, are not sufficient to show that his death, caused by suicide, was the result of insanity brought about by the accident. *Withers v. London, B. & S. C. R. Co.* (Eng.) supra. *Warrington, L. J.*, said: "That suicide may be the result of what in the statute is called 'personal injury by accident,' I have no doubt; but in order to make out that it is the result, you have first to prove that the suicide is the result or the effect of insanity, and that the insanity is the result of the injury."

In *Manziano v. Public Service Gas Co.* (1918) — N. J. L. —, 105 Atl. 484, the court seemed to imply that, if a

workman was shown to be insane, his death in an unknown manner might be presumed to be from suicide rather than from accident.

Pneumonia contracted by an employee who, because of prior injury, suffered a loss of memory while in charge of his master's team, and, in

attempting to get the horses to the stable, wandered from the wagon into a swamp and suffered exposure during the night, is not an injury arising out of his employment within the meaning of the act. *Milliken's Case* (1914) 216 Mass. 293, L.R.A.1916A, 337, 103 N. E. 898, 4 N. C. C. A. 512. W. M. G.

HENRY SCHROEDER, Appt.,

v.

H. C. GOHDE et al., Respts.

Minnesota Supreme Court—November 28, 1913.

(123 Minn. 459, 144 N. W. 152.)

Homestead — sale — gift of proceeds to wife.

Where a husband, in order to induce his wife to join in the sale of the family homestead, agrees that she shall receive the proceeds of the sale, the agreement is valid, and the transaction is not fraudulent as to creditors of the husband. They have no claim upon the homestead property, and this agreement as to the disposal of the land and its proceeds is of no concern to them.

[See note on this question beginning on page 574.]

Headnote by HALLAM, J.

APPEAL by plaintiff from a judgment of the District Court for Faribault County (Quinn, J.) in defendants' favor in an action brought to subject the proceeds of a sale of land to the payment of a certain judgment held by plaintiff against respondent H. C. Gohde. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Conant & Conant, for appellant:

Oral proof cannot be heard to ingraft an express trust on a conveyance absolute in its terms.

Pillsbury-Washburn Flour Mills Co. v. Kistler, 53 Minn. 123, 54 N. W. 1063; *Thomas v. Churchill*, 48 Neb. 266, 67 N. W. 182.

If the payment of part of the consideration raises a trust, it certainly cannot raise it beyond the proportion of the money paid.

Botsford v. Burr, 2 Johns. Ch. 408.

The mortgage, being greater than plaintiff's claim, is void only as against his claim.

Coons v. Lemieu, 58 Minn. 99, 59 N. W. 977.

The judgment being upon a claim which accrued prior to the making of the mortgage to Mrs. Gohde, the bur-

den is upon her to show that her right to that mortgage and money was superior to that of the judgment creditor.

Minneapolis Stock-Yards & Pkg. Co. v. Halonen, 56 Minn. 469, 57 N. W. 1135; *Shea v. Hynes*, 89 Minn. 423, 95 N. W. 214.

When, by unequivocal abandonment, the former owner of a homestead has evinced his intention of no longer treating it as his homestead, his right of exemption is lost, and the fact of abandonment may be conclusively proved by the fact that the owner has removed and acquired a new homestead elsewhere.

Donaldson v. Lamprey, 29 Minn. 18, 11 N. W. 119; *Kramer v. Lamb*, 84 Minn. 468, 87 N. W. 1024.

Whether the proceeds of exempt property are liable for debts always

depends upon the manner of dealing with it.

Blake v. Boisjoli, 51 Minn. 296, 53 N. W. 637.

Messrs. D. L. Morse and Putnam & Carlson, for respondents:

The homestead owner may give it away and good title will vest in the donee.

Ferguson v. Kumler, 27 Minn. 156, 6 N. W. 618; Furman v. Tenny, 23 Minn. 77, 9 N. W. 172; Bladwin v. Rogers, 28 Minn. 544, 11 N. W. 77; Horton v. Kelly, 40 Minn. 193, 41 N. W. 1031; Blake v. Boisjoli, *supra*; Keith v. Albrecht, 89 Minn. 247, 99 Am. St. Rep. 566, 94 N. W. 677.

The release of Louise Gohde's homestead rights therein constituted a valuable consideration as against her husband and all the world, and no creditor of his lost any rights through such contract, as they then had no rights whatever to the homestead, and her rights to the proceeds thereof had been fixed by the said contract between her and her husband.

15 Am. & Eng. Enc. Law, 2d ed. 595; 20 Cyc. 524; Allen v. Perry, 56 Wis. 178, 14 N. W. 8; Fiedler v. Howard, 99 Wis. 388, 67 Am. St. Rep. 865, 75 N. W. 163; Novelty Mfg. Co. v. Pratt, 21 Mo. App. 171; Burnham v. McMichael, 6 Tex. Civ. App. 496, 26 S. W. 887; Keyes v. Rines, 37 Vt. 260, 86 Am. Dec. 707; Officer v. Evans, 48 Iowa, 557; First Nat. Bank v. Eichmeier, 153 Iowa, 154, 133 N. W. 454.

The farm was the equitable property of the respondent, Louise Gohde, and she was entitled to the proceeds of the sale thereof, and the payment of such proceeds to her was not fraudulent as to the creditors of her husband.

Farnham v. Kennedy, 28 Minn. 365, 10 N. W. 20; Wolford v. Farnham, 47 Minn. 95, 49 N. W. 528.

The making of the new note created a new cause of action upon which the suit must be brought, and the only effect that the old note could have would be to furnish a consideration for the making of the new promise.

Martin v. Broach, 6 Ga. 21, 50 Am. Dec. 306; Coles v. Kelsey, 2 Tex. 541, 47 Am. Dec. 661; McCormick v. Brown, 36 Cal. 180, 95 Am. Dec. 170; Southern P. Co. v. Prosser, 122 Cal. 413, 55 Pac. 145.

The law presumes, in the absence of evidence to the contrary, that the date of the deed is the date of its delivery.

Schweigel v. L. A. Shakman Co. 78 Minn. 142, 80 N. W. 871, 81 N. W. 529;

Kammrath v. Kidd, 89 Minn. 380, 99 Am. St. Rep. 603, 95 N. W. 213; 9 Am. & Eng. Enc. Law, 2d ed. 152.

This is so, even though the date of the acknowledgment is subsequent.

Robinson v. Wheeler, 25 N. Y. 260; People v. Snyder, 41 N. Y. 402; Purdy v. Coar, 109 N. Y. 448, 4 Am. St. Rep. 491, 17 N. E. 352; 2 Greenl. Ev. § 297.

Hallam, J., delivered the opinion of the court:

About 1890, defendant Louise Gohde entered into a written contract to purchase 80 acres of land for \$1,520. She paid down \$200 of her own money. Thereafter, at different times, she made payments amounting to \$320 and interest. In 1894, the vendor gave a warranty deed conveying the land to her husband, the defendant Henry C. Gohde, and took back a purchase-money mortgage for \$1,000. Defendant Louise Gohde believed the deed was made to her, and did not learn otherwise until long afterwards. In 1896, defendants built a house and made other improvements upon the land, and thereafter occupied it as the family homestead down to and including the 1st day of March, 1911. During the whole period, from the time the land was purchased until the family left it, defendant Louise worked the farm with the assistance of the sons of defendants, and sometimes with hired help. The money used to make payments on the purchase price and to pay for improvements made was the product of her husbandry. Defendant Henry, prior to 1900, had other occupation, and, after 1900, had little capacity for labor by reason of the loss of a hand.

In September, 1910, defendants entered into a contract to sell the land to one Morell for \$7,600. Defendant Louise refused to sign the contract unless defendant Henry would agree that all of the proceeds of the sale should be paid to her. Defendant Henry so agreed, and in accordance with such agreement she signed the contract. A first payment of \$1,000 was then made, and that amount she received. In March, 1911, a second payment of \$600 was made to her, and a deed

was executed to Morell. A purchase-money mortgage was to be given for the balance. Defendant Louise refused to sign the deed unless the mortgage was made to her. Thereupon Morell executed to her the purchase-money mortgage for \$6,000. This mortgage was dated March 1, but was acknowledged March 7, 1911.

During 1910 and 1911, and prior thereto, plaintiff was a creditor of defendant Henry. He held a note for money loaned to one Bieri, in which defendant Henry had joined as surety. On October 3, 1911, the note being still unpaid, plaintiff recovered judgment against defendant Henry for the amount due, with interest. An execution was issued and returned wholly unsatisfied. This action was then brought for the purpose of subjecting the proceeds of the sale of the land to the payment of the judgment. The trial court gave judgment for the defendants, and plaintiff appeals.

This judgment should be sustained. Defendants contend that the land at all times, in equity and good conscience, belonged to defendant Louise, by reason of the manner in which it was purchased, operated, and paid for. There is some force to this contention, but we do not deem it necessary to rest our decision on this ground.

We are of the opinion that the contract which these defendants made when they were about to sell this land was a valid contract. Defendant Louise had a valuable homestead right in this land. The right had proved a profitable one for her. It had returned to her and her family a safe living and a profit. She was entitled to enjoy this right as long as she lived. Her husband could not take it from her. No creditors could lay hands upon it. Beyond a doubt her husband could have transferred this land to her, and no creditors could have complained. *Morrison v. Abbott*, 27 Minn. 116, 6 N. W. 455; *Keith v. Albrecht*, 89 Minn. 247, 99

Am. St. Rep. 566, 94 N. W. 677. This would have vested in her the right to the proceeds in the event of a sale. What the parties did do accomplished this same result in another way. When the defendant Henry, in order to induce his wife to join in the sale of the family homestead, agreed that she should receive the proceeds of the sale, he committed no fraud upon his creditors, and the agreement was valid both in law and in equity. This position is just and reasonable and is amply sustained by authority. *Blake v. Boisjoli*, 51 Minn. 296, 299, 53 N. W. 637; *Officer v. Evans*, 48 Iowa, 557; *Jones v. Brandt*, 59 Iowa, 332, 10 N. W. 854, 13 N. W. 310; *Citizens' Bank v. Bowen*, 25 Kan. 117; *Stinde v. Behrens*, 81 Mo. 254; *Kershaw v. Willey*, 22 Okla. 677, 98 Pac. 908; *Blum v. Light*, 81 Tex. 414, 16 S. W. 1090. The controlling fact in such a case is that creditors are no worse off than they were before. They had no claim upon the homestead property, and the agreement which these parties made was of no concern to them. "Creditors have no right to complain of dealings with property which the law does not allow them to apply on their claims." *Anderson v. Odell*, 51 Mich. 492, 493, 16 N. W. 870, 871.

Plaintiff contends that the transaction with Morell was not closed, and that the purchase-money mortgage was not given, until after defendants had given up possession of the land, on March 1, 1911; that it was then no longer their homestead, and that they could not deal with the portion of the price then unpaid as the proceeds of the sale of a homestead. We do not agree with this contention. The land was the homestead of defendants in September, 1910, when the defendant Henry agreed to give his wife the proceeds of the sale to induce her to sign the contract. It was their homestead in March, 1911, when he made the same agreement to induce her to sign the deed, and up to the time when the deed was in fact given.

Homestead—
sale—gift of
proceeds to wife.

We do not deem it important whether the mortgage was delivered simultaneously with the deed or not. It was part of the same transaction, and was equally the proceeds of the

sale of the homestead, whether it was delivered at the time the sale was closed, on March 1st, or a few days after the sale had been closed. Judgment affirmed.

ANNOTATION.

Agreement by husband that wife shall receive proceeds of sale of homestead as fraud on his creditors.

An agreement between husband and wife that the wife shall receive the proceeds of a sale of homestead property, in consideration of her joinder in a conveyance thereof, is not fraudulent as to creditors of the husband.

California.—*Wetherly v. Straus* (1892) 93 Cal. 283, 28 Pac. 1045.

Iowa.—*Officer v. Evans* (1878) 48 Iowa, 557; *Jones v. Brandt* (1882) 59 Iowa, 332, 10 N. W. 854, 13 N. W. 310.

Minnesota.—See the reported case (*SCHROEDER v. GOHDE*, ante, 571).

Missouri.—*Stinde v. Behrens* (1883) 81 Mo. 254.

Oklahoma.—*Kershaw v. Willey* (1908) 22 Okla. 677, 98 Pac. 908.

Texas.—*Blum v. Light* (1891) 81 Tex. 414, 16 S. W. 1090; *Allen v. Hall* (1882) 1 Tex. App. Civ. Cas. (White & W.) 741; *Montgomery v. Brown* (1883) 1 Tex. App. Civ. Cas. (White & W.) 755; *Gatewood v. Scurlock* (1893) 2 Tex. Civ. App. 98, 21 S. W. 55.

Vermont.—*Keyes v. Rines* (1864) 37 Vt. 260, 76 Am. Dec. 707.

In *Wetherly v. Straus* (Cal.) supra, it appeared that a wife had joined with her husband in the conveyance of a homestead on condition that she was to have the proceeds of the sale. She later procured a certificate of deposit for the proceeds received by her, and left the certificate with the defendant as bailee. In an action to recover the certificate, the defendant maintained that the money represented by the certificate had been transferred to the wife by her husband with intent to defraud his creditors, and that defendant was holding it pursuant to a writ of garnishment against the husband, which had been served on him. The court held that a verdict for the plaintiff was proper, saying: "The homestead from which the money was de-

rived was not subject to the claim of any creditor of the plaintiff's husband, and a transfer of it by the husband to her could not, under any circumstances, be held, as a matter of fact, to be with the intent to defraud his creditors."

In *Officer v. Evans* (Iowa) supra, wherein it appeared that a wife had agreed to join with her husband in the sale of a homestead on condition that he should convey to her the property received for the homestead, the court held that since the joinder of the wife was necessary to the validity of a conveyance of the homestead, and she was under no obligation to convey, she had a perfect right to fix the conditions on which she would consent to convey, and the agreement was not a fraud on creditors, since they occupied no worse a position than before.

Where a wife was given all the proceeds of a conveyance of homestead property, which included a new homestead and a separate plot of land, and she claimed that the consideration for the transfer of the proceeds to her was her consent to join in the execution of the deed of the old homestead, the court held that creditors of the husband could not subject the separate plot of land received by the wife to the payment of their debts, on the ground that the conveyance was fraudulent as to them. *Jones v. Brandt* (Iowa) supra.

In the reported case (*SCHROEDER v. GOHDE*, ante, 571) the court holds that, where a wife joins in the sale of homestead property pursuant to an agreement whereby she is to receive the proceeds of the sale, the creditors of the husband have no right to subject the proceeds to the payment of a

judgment against him, the agreement not being a fraud on their rights.

In *Stinde v. Behrens* (Mo.) *supra*, wherein it appeared that a wife had joined with her husband in a conveyance of homestead property on the express condition that the property to be received in consideration for the transfer should be conveyed to her, the court held that the conveyance to the wife was not a fraud on the creditors of her husband, saying: "The conveyance of the homestead . . . being valid as against creditors, and the interest of the wife therein being such that she could lawfully stipulate that the proceeds should be paid to her, as and for her own property, it cannot be said that any property which was subject to the demands of creditors has been withdrawn from their reach, and the conveyance to Mrs. Behrens [the wife] cannot, therefore, be said to be in fraud of creditors."

In *Kershaw v. Willey* (Okla.) *supra*, the plaintiff, suing in replevin for certain personalty levied on by defendant to satisfy a judgment outstanding against her husband, introduced evidence showing that the money invested by her in the property in question was the proceeds of a sale of homestead property, in which she had joined with her husband on the express agreement that such proceeds should become her property. The defendant maintained that the agreement was in fraud of creditors, and the property rightfully levied on, but the court stated that the defendant was overlooking the distinction, as to creditors' rights, between exempt and nonexempt property, and held for the plaintiff, saying: "The spirit of the Homestead Law is to protect the wife and family against the improvidence of the head of the family, as well as against urgent creditors, and no one can complain if the wife of an insolvent husband refuses to sign a deed for the sale of the homestead until her husband agrees that the money procured as the proceeds of such sale may be transferred to her, and the execution of such deed by her is ample consideration to support the transaction."

In *Allen v. Hall* (1882) 1 Tex. App.

Civ. Cas. (White & W.) 741, the court stated that since creditors had no interest in homestead property they could not complain of any disposition that might be made of it, and held that "if, before the sale is made, the husband makes a gift to his wife of the proceeds of the sale, to induce her to join in the sale, such proceeds would be the separate property of the wife, for the . . . obvious reason that at the time of the gift the creditors had no interest in the property and no right to subject it to the payment of their debts."

And see *Montgomery v. Brown* (1883) 1 Tex. App. Civ. Cas. (White & W.) 755, wherein the court held that "creditors have no interest in the homestead of a debtor, and agreement made between husband and wife with respect to the proceeds of the sale of the same, which did not affect other property subject to execution, would be valid as against creditors."

In *Blum v. Light* (1891) 81 Tex. 414, 16 S. W. 1090, the plaintiff sought to recover certain personal property which had been levied on in the execution of a judgment held by the defendants against her husband. It appeared that the plaintiff had joined with her husband in conveying their homestead property, on the express condition that she was to receive the proceeds of the sale as her own separate property, and it further appeared that the value of the homestead sold was in the personal property seized by the defendants. The court held that the agreement that the plaintiff should receive the proceeds of the sale of the homestead was not a fraud on the husband's creditors, but was founded on a valid consideration, and gave her the right to possession of the proceeds.

In *Gatewood v. Scurlock* (1893) 2 Tex. Civ. App. 98, 21 S. W. 55, wherein it appeared that the plaintiff's husband had agreed that she was to receive the proceeds of the sale of their homestead in consideration of her joinder in the conveyance thereof, the court, on the authority of *Blum v. Light* (Tex.) *supra*, held that the

agreement was not a fraud on the rights of creditors, and that the proceeds received by the wife pursuant to the agreement would not be subject to an execution in favor of the husband's creditors.

In *Keyes v. Rines* (1864) 37 Vt. 260, 86 Am. Dec. 707, an action by a husband's creditor to secure the proceeds of a sale of homestead property, it appeared that the proceeds were held by the wife pursuant to an agreement under which she had joined in the execution of a deed of their homestead property on condition that the proceeds of the sale be paid to her, to be kept by her for future investment in a homestead, free from any interference by her husband. The court, upholding the validity of the agreement

and asserting the inviolability of the fund as to the husband's creditors, said: "She had an interest in it [the homestead] by law, and refused to join in the deed with the husband unless the avails were to be hers. Her intent was that it should be hers, and not her husband's, so that neither he nor his creditors could apply it to his debts. He consented. Her execution of the deed was a good consideration, at least in part. It was a relinquishment of her interest in the land. If in part also it is to be deemed as a voluntary gift by the husband, this too may be justly upheld. He gives only what he has a right to give, viz., property exempt from his debts. His creditors cannot call that a fraud which can do them no injury." R. E. B.

HELEN L. GIFFORD, Respt.,

v.

T. G. PATTERSON et al., Appts.

STATE INDUSTRIAL COMMISSION, Respt.

New York Court of Appeals—November 30, 1917.

(222 N. Y. 4, 117 N. E. 946.)

Workmen's compensation — injury to night watchman when asleep.

Injury to a night watchman by falling down a chute in the building which he is employed to watch, when he falls asleep in a chair which he had placed near the chute, does not arise out of or in the course of his employment within the meaning of a Workmen's Compensation Act.

[See note on this question beginning on page 578.]

APPEAL by defendants from an order of the Appellate Division of the Supreme Court, Third Department, affirming an award of the State Industrial Commission to claimant, in a proceeding by her under the Workmen's Compensation Act to recover compensation for the death of her husband. *Reversed.*

The facts are stated in the opinion of the court.

Mr. Jeremiah F. Connor, for appellants:

The injuries which resulted in the death of Charles W. Gifford did not arise out of and in the course of his employment.

Saenger v. Locke, 220 N. Y. 556, L.R.A. 1918F, 225, 116 N. E. 367; Heitz v. Ruppert, 218 N. Y. 148, L.R.A. 1917A, 344, 112 N. E. 750; O'Neil v.

Carley Heater Co. 218 N. Y. 414, L.R.A. 1917A, 349, 113 N. E. 406; Pope v. Merritt & C. Derrick & Wrecking Co. 177 App. Div. 69, 163 N. Y. Supp. 655; Collins v. Brooklyn Union Gas Co. 171 App. Div. 381, 156 N. Y. Supp. 957; Re Houston, 9 N. C. C. A. 662, note; Eugene Dietzen Co. v. Industrial Bd. 279 Ill. 1, 116 N. E. 684, Ann. Cas. 1918B, 764, 14 N. C. C. A. 125; Bischoff

v. American Car & Foundry Co. 190 Mich. 229, 157 N. W. 34; Mann v. Glas-tonbury Knitting Co. 90 Conn. 116, L.R.A.1916D, 86, 96 Atl. 368, 12 N. C. C. A. 891; Keen v. St. Clement's Press, 7 B. W. C. C. 542; Barnes v. Nunnery Colliery Co. [1912] A. C. 44, 81 L. J. K. B. N. S. 213, 105 L. T. N. S. 961, 28 Times L. R. 135, 56 Sol. Jo. 159, 49 Scot. L. R. 688, 5 B. W. C. C. 195; Plumb v. Cobden Flour Mills Co. [1914] A. C. 62, 7 B. R. C. 128, 83 L. J. K. B. N. S. 197, 109 L. T. N. S. 759, 30 Times L. R. 174, 58 Sol. Jo. 184, 51 Scot. L. R. 861, 7 B. W. C. C. 1, Ann. Cas. 1914B, 495; Smith v. Crescent Belting & Packing Co. 37 N. J. L. J. 292; Spooner v. Detroit Saturday Night Co. 187 Mich. 125, L.R.A.1916A, 17, 153 N. W. 657, 9 N. C. C. A. 647.

Messrs. Merton E. Lewis, Attorney General, and E. C. Aiken for respondent Commission.

Mr. Bernard J. Isecke for respondent claimant.

Chase, J., delivered the opinion of the court:

Charles W. Gifford, a night watchman employed by T. G. Patterson, Inc., a corporation engaged in the business of manufacturing packing boxes, received injuries July 9, 1916, which resulted in his death. A claim was filed by his widow for compensation under the Workmen's Compensation Law. The State Industrial Commission (two of the commissioners dissenting) made her an award. The determination of the Commission has been affirmed by the appellate division of the supreme court. The material facts as found by the Commission are as follows:

"The duties of Charles W. Gifford were to watch the premises during the nighttime, and to go around the building for that purpose, and to regularly punch a time clock. In the front of the building there was a chute running from the second floor to the pavement, down which it was customary to send the goods to be put on the wagons.

"(2) On said date, at about 1:45 A. M., Charles W. Gifford was found by a policeman at the bottom of the chute, lying in a pool of blood. Prior to being so found Charles W. Gifford had obtained a chair and was sitting

in a doorway on the second floor at the top of the chute, it being a very warm night. He dozed off and lost his balance, and fell out of the window down the chute, carrying with him the chair on which he had been sitting. The fall caused a fracture of the right femur and elbow, and a gash in the head and an injury to the right hip. He was taken immediately to the hospital and died there on July 17th of shock occasioned by the said injury. The dozing in his chair by Charles W. Gifford just prior to the said fall was not an unreasonable act under the circumstances, and did not constitute an abandonment of his employment, but amounted, at the most, to negligence only.

"(3)

"(4) The injuries which resulted in the death of Charles W. Gifford were accidental injuries, and arose out of and in the course of his employment."

The statement in the last paragraph of the second finding and in the fourth finding are conclusions based upon such specific findings of fact. Such conclusions do not purport to be, and are not in fact, based upon presumptions authorized by § 21 of the Workmen's Compensation Law.

We think that as matter of law the conclusions of the Commission are not justified by the facts found. *Glatzl v. Stumpp*, 220 N. Y. 71, 75, 114 N. E. 1053. The duties of Gifford were to "watch the premises . . . and to go around the building for that purpose." The findings show that he abandoned his duty, and, after first obtaining a chair, sat therein on the second floor of the building at an open doorway, and, sitting therein, "dozed off" and fell down a chute and received the injuries from which he died. He was employed to watch the premises. Instead of doing so he prepared for himself a comfortable position and slept. If, in connection with his employment, he was authorized or permitted to procure a chair and spend a portion of his time therein "doz-

ing off" in the doorway, it was not shown before the Commission. His injury was not received as a natural incident of his work. It was not a risk connected with his employment or arising out of and in the course of his employment. The acts of Gifford as found by the Commission,

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instead of being in the course of his employment, were directly contrary to the object and purpose for which he was employed.

When an employee is injured through some act of his own not an incident to his employment, and not authorized or induced by his employer in connection with his employment, the injury does not arise

out of and in the course of his employment within the meaning of subd. 7, § 3, of the Workmen's Compensation Law. See *Heitz v. Rupert*, 218 N. Y. 148, L.R.A.1917A, 344, 112 N. E. 750; *Saenger v. Locke*, 220 N. Y. 556, L.R.A.1918F, 225, 116 N. E. 367; *Spooner v. Detroit Saturday Night Co.* 187 Mich. 125, L.R.A.1916A, 17, 153 N. W. 657, 9 N. C. C. A. 647.

The order should be reversed and the determination of the State Industrial Commission annulled, with costs against the State Industrial Commission in this court and in the Appellate Division.

Hiscock, Ch. J., and Cuddeback, McLaughlin, Crane, and Andrews, JJ., concur. Cardozo, J., not voting.

ANNOTATION.

Applicability of compensation acts to watchman.

Ordinarily, the duties of a watchman would seem to be such as would not expose him to serious danger of injury, but if he is injured while in the performance of his duty compensation is recoverable as in the case of any other workman.

Thus a watchman of railroad shops is entitled to compensation for injuries received in stumbling over a pile of scrap iron while in the performance of his duty. *Wabash R. Co. v. Industrial Commission* (1918) 286 Ill. 194, 121 N. E. 569.

So heart failure causing the death of a watchman with a weak heart, which is due to his exertion and excitement in performing his duty to give an alarm of fire, is within the Compensation Act providing compensation for death by accident in the course of employment. *Schroetke v. Jackson-Church Co.* (1916) 193 Mich. 616, L.R.A.1917D, 64, 160 N. W. 383.

And a watchman stationed to guard trenches dug to locate leaks in gas mains was held in *Manziano v. Public Service Gas Co.* (1918) 92 N. J. L. 322, 105 Atl. 484, to be within the operation of the statute, where he was found in the morning in the trench, asphyxiated, and there was no evidence to

show that he was insane, or that he voluntarily entered the trench for any purpose outside of his duty.

So in *Western Grain & Sugar Products Co. v. Pillsbury* (1916) 173 Cal. 135, 159 Pac. 423, an award of compensation was upheld where a night watchman disappeared from the place where he was at work, and the circumstances indicated that he might have been killed in the course of his employment. The court said: "Shay (the employee) was on the property which he was employed to watch, and the circumstances indicate that he was placed at the post of duty and in its performance."

Where there is evidence to support the inference that the deceased workman, who was found on a Sunday night, fatally injured, on the basement floor underneath a hole which had been cut in the first floor of the building, usually went upon Sunday evenings to the part of the building where he fell, and that at times, on Sunday evenings, he performed services in various parts of the building, the award of the Industrial Commission, based upon the conclusion of fact that the deceased accidentally sustained a personal injury which caused his

death, and that it was incidental to his employment, will not be disturbed. *Heileman Brewing Co. v. Shaw* (1915) 161 Wis. 443, 154 N. W. 631.

The mere fact that a watchman was engaged in procuring or preparing food at the time of the injury is not sufficient to preclude recovery of compensation.

Thus, a watchman on mine premises is not outside the Compensation Act merely because he was killed while procuring fuel to warm the cabin in which he was required to stay during his hours of duty, and to cook his food, the employer not furnishing any fuel, and the method of procuring it adopted by him being a reasonable method. *Ocean Acci. & G. Corp. v. Pallaro* (1919) — Colo. —, 180 Pac. 95.

So injury to a night watchman caused by the falling of a shanty into which he went to cook some food, as it was raining, may, in the absence of any prohibition against the use of a shanty, be considered as arising out of and in the course of his employment. *Morris v. Lambeth Borough Council* (1905) 22 Times L. R. (Eng.) 22.

And a watchman on a quay, who was on duty for twenty-one hours and was required to furnish his own food and drink, is entitled to compensation for injuries received while procuring refreshments. *Low v. General Steam Fishing Co.* [1909] A. C. (Eng.) 523, 78 L. J. P. C. N. S. 148, 101 L. T. N. S. 401, 25 Times L. R. 787, 53 Sol. Jo. 763.

Of course, if at the time of the injury the watchman was acting entirely outside the scope of employment, no recovery is allowable.

Thus a night watchman on a dock, who left his place of employment, went onto a boat for purposes of his own, and was drowned while returning to his place of employment, is not within the operation of the New York statute. *King v. Standard Oil Co.* (1918) 184 App. Div. 458, 171 N. Y. Supp. 1032.

So no compensation is recoverable for the death of a watchman in one building, who was injured by falling down an elevator shaft of another building, to which he had gone on business of his own and not on that of

the employer. *Borck v. Simon J. Murphy Co.* (1919) 205 Mich. 472, 171 N. W. 470.

And no compensation is recoverable for the death of a watchman in a building whose body was found at the foot of an elevator well, where it appeared that he could not get into the shaft at any place except the first floor, and he had no duties to perform upon that floor, and had been forbidden to use the elevator; in such a case, the injury could not be said to have arisen out of the employment. *Moyer v. Packard Motorcar Co.* (1919) 205 Mich. 503, 171 N. W. 403.

In connection with these cases, see the reported case (*GIFFORD v. PATTERSON*, ante, 576).

So, too, a night watchman whose duties required him to stay at a locomotive during the night, and keep the fire alive, was not acting within the scope of his employment when he took charge of a steam shovel, which duty he assumed voluntarily at the request of a fellow employee. *Robert Sherer & Co. v. Industrial Acci. Commission* (1917) 175 Cal. 615, 166 Pac. 318.

A night watchman goes outside of the employment contemplated by his employer when he makes use of a circular saw to cut a board with which to brace a door, the lock of which was defective. *Brusster v. Industrial Acci. Commission* (1917) 35 Cal. 81, 169 Pac. 258. The court said that although it might have been within the scope of the employee's duties to see that the doors of the premises were properly secured by locking, nevertheless his resort to the use of a circular saw for the purpose of making a board that would answer his purpose was entirely beyond the scope of his employment, and was not a resort to reasonable means for securing the end intended by him at the time.

If a watchman received injuries while protecting his employer's property, then he is within the protection of the act, although the injuries were received by an assault by intruders.

Thus a night watchman who is injured while engaged in protecting his employer's property, by being assaulted by a stranger, suffers injury by ac-

cident arising out of the employment. *Chicago Dry Kiln Co. v. Industrial Bd.* (1916) 276 Ill. 556, 114 N. E. 1009, Ann. Cas. 1918B, 645.

So a night watchman who is injured while protecting his employer's property from intruders suffers injury by accident arising out of the employment. *Hellman v. Manning Sand Paper Co.* (1916) 176 App. Div. 127, 162 N. Y. Supp. 335, affirmed per curiam in (1917) 221 N. Y. 492, 116 N. E. 1051.

Compensation has been awarded to the dependent of a night watchman whose dead body was found upon the premises of the employer, death having been caused by a gunshot wound inflicted by an unknown person, engaged, at the time of the murder, in committing burglary upon the premises. *Western Metal Supply Co. v. Pillsbury* (1916) 172 Cal. 407, 156 Pac. 491, Ann. Cas. 1917E, 390.

A similar conclusion upon a somewhat similar state of facts was arrived at in *Mechanics' Furniture Co. v. Industrial Bd.* (1917) 281 Ill. 530, 117 N. E. 986. In this case the watchman's body was found on the premises, and the evidence was to the effect that he suffered an instantaneous death from a bullet from his own revolver, which was found, some months afterwards, hidden at a considerable distance from the body.

So, too, compensation was allowed the dependent of a night watchman in *Ohio Bldg. Safety Vault Co. v. Industrial Bd.* (1917) 277 Ill. 96, 115 N. E. 149, 14 N. C. C. A. 224, where all of the evidence was consistent with the theory that he suffered death from assault by intruders, and some of it was inconsistent with any other theory.

But if the assault was for reasons personal to the watchman himself, and not because he was a watchman, then no recovery may be had.

Thus a night watchman in a mill, who was waylaid and killed by another employee who had hidden himself in the mill for the sole purpose of attacking and robbing the watchman, did not suffer death by accident arising out of the employment. *Wal-*

ther v. American Paper Co. (1916) 89 N. J. L. 732, 99 Atl. 263.

So a night watchman who was shot by a deputy sheriff, whom he mistakenly supposed to be a burglar, is not injured by accident arising out of and in the course of his employment, where, at the time of the shooting, he was not protecting his employer's property from thieves, the property was in no wise threatened, and he did not suppose that it was, and he was not fired upon because he was the watchman in charge. *Harbroe's Case* (1916) 223 Mass. 139, L.R.A.1916D, 933, 111 N. E. 709. The court said: "Undoubtedly there are particular instances where the occupation of a night watchman exposes him to risks substantially beyond the ordinary normal ones, and where the employment involves and obliges the employee to face such perils. Where the employee's injury is the result of such special risk incidental to the employment, and where there is 'a causal connection between the conditions under which the work is required to be performed and the resulting injury,' the injury 'arises out of' the employment within the meaning of the Workmen's Compensation Act. . . . [Here] the injury might quite as well have been suffered by any person who happened to be in the locality, whether employed by the construction company or not."

The New York statute applies to hazardous employments only, but the New York court of appeals has held that an employee is within the statute, although he was injured in a non-hazardous employment, provided such employment was fairly incidental to a hazardous business conducted by the employer. Thus a night watchman in a bakery, which is a hazardous employment, is himself within the Compensation Law. *Fogarty v. National Biscuit Co.* (1917) 221 N. Y. 20, 116 N. E. 346, reversing the decision of the Appellate Division (1916) 175 App. Div. 729, 161 N. Y. Supp. 937. The decision of the court of appeals must be considered as also overruling the decision of the appellate division in *Kehoe v. Consolidated Teleg. & Electrical Subway Co.* (1916) 176 App.

Div. 84, 162 N. Y. Supp. 481, in which it was held that a watchman employed by a corporation engaged in the concededly hazardous employment of constructing electrical conduits, whose duties were to sweep and mop out the office and to keep the drivers in the employ of the company out of the tool house, was not engaged in a hazardous employment.

So in *Sorge v. Aldebaran Co.* (1915) 171 App. Div. 959, 155 N. Y. Supp. 1142, affirmed in (1916) 218 N. Y. 636, 112 N. E. 1077, the court, without opinion, affirmed a finding of the Commission that a night watchman employed by one engaged in constructing the building where the night watchman was employed, who fell from a board temporarily located, receiving injuries which caused his death, was himself engaged in a hazardous employment, and his dependents could recover compensation for his death.

A night watchman for an employer admittedly within the operation of the Compensation Act, who was injured while attempting to close a window, by something blown into his eye from outside the building, will be presumed to be entitled to compensation, in the absence of any evidence that the factory was not in operation at the time of the injury. *Kobyra v. Adams* (1916) 176 App. Div. 43, 162 N. Y. Supp. 269.

A night watchman in the employ of a railway company, injured while in

the performance of his duty to guard tools and materials, is within the protection of the New York act. *New York C. R. Co. v. White* (1917) 243 U. S. 188, 61 L. ed. 667, L.R.A.1917D, 1, 37 Sup. Ct. Rep. 247, Ann. Cas. 1917D, 629, 13 N. C. C. A. 943, affirming the decision of the New York court of appeals (1915) 216 N. Y. 653, 110 N. E. 1051.

A rule similar to the New York rule also prevails in Kansas.

Thus in *Smith v. Kaw Boiler Works Co.* (1919) — Kan. —, 180 Pac. 259, it was held that compensation might be recovered for the death of a watchman in a boiler factory, although it resulted from the act of burglars, and not directly from the operation of the machinery. The court said: "A fair statement of the rule under the rather limited statute of this state is that the injury must result from some danger peculiar to the hazardous character of the employment. This does not mean, however, that in a factory classified as extrahazardous because of the use of dangerous machinery none but machine operators or employees working in proximity to machinery may have compensation. Regarding for the moment the operating of machinery as the acme of the employment, all that combines to make it such, everything integrated with it essential to effective functioning, other conditions being fulfilled, is included in the hazard." W. M. G.

BENJAMIN SALVIN et al., Exrs., etc., of Henry Salvin, Deceased,
Appts.,
v.

MYLES REALTY COMPANY et al., Resp'ts.

New York Court of Appeals—July 15, 1919.

(227 N. Y. 51, 124 N. E. 94.)

Usury — right of guarantor of corporation.

1. One guaranteeing the debt of a corporation cannot defend on the ground of usury, if, by statute, the corporation could not do so.

[See note on this question beginning on page 586.]

Appeal — examination of evidence — divided opinion.

2. The New York court of appeals may examine the evidence upon appeal from a decision of the appellate division which is not unanimous.

Mortgage — payment — keeping alive.

3. A mortgage, when paid, may be kept alive for other purposes when the rights of creditors and third persons have not intervened.

[See 19 R. C. L. 443-445.]

Estoppel — to contest assigned mortgage.

4. The assignment and delivery of a mortgage upon payment by the mortgagor, at his instigation, to a stranger, gives it new vitality and estops the mortgagor from asserting that it was extinguished.

[See 19 R. C. L. 445.]

Corporation — ownership of stock by one person — effect.

5. That a mortgagor owns nearly all the stock of a corporation does not destroy its legal entity nor prevent it from paying and taking an assignment of the mortgage.

[See 7 R. C. L. 197.]

Usury — bonus of third person — effect.

6. Payment of a usurious bonus by the president of a corporation who owns nearly all of its stock for a loan to it, repayment of which he guarantees, does not constitute usury which will affect the loan.

— what necessary to establish.

7. To establish usury, evidence must be produced to show a corrupt intent in both the borrower and lender.

APPEAL by plaintiffs from a judgment of the Appellate Division of the Supreme Court, First Department, affirming a judgment of a Special Term, Part VI., for New York County (Erlanger, J.) in favor of defendants in an action brought to foreclose a mortgage. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Douglas, Armitage, & McCann, for appellants:

The defendant corporation, owner of the mortgage, had acquired title more than sixteen months before the transaction in suit. Plaintiff loaned to it on the faith of its record title and the assurance that it owned the mortgage. There is no evidence that the mortgage was held by the corporation as a dummy for defendant Rieser, or that the plaintiff, before the loan, was made cognizant of that fact.

Morton v. Thurber, 85 N. Y. 550; Guggenheimer v. Geiszler, 81 N. Y. 293; Condit v. Baldwin, 21 N. Y. 219, 78 Am. Dec. 137; Mutual Ben. Loan & Bldg. Co. v. Lynch, 54 App. Div. 559, 67 N. Y. Supp. 6; United States Mortg. Co. v. Sperry, 138 U. S. 313, 34 L. ed. 969, 11 Sup. Ct. Rep. 321; 39 Cyc. 920, note 66; Stillman v. Northrup, 109 N. Y. 473, 17 N. E. 379; Booth v. Swezey, 8 N. Y. 276; Valentine v. Conner, 40 N. Y. 248, 100 Am. Dec. 476; Re Consalus, 95 N. Y. 340; Matthews v. Coe, 70 N. Y. 239, 26 Am. Rep. 583; Morris v. Talcott, 96 N. Y. 100; Houghton v. Burden, 228 U. S. 161, 57 L. ed. 780, 33 Sup. Ct. Rep. 491; Weinreb v. Coleman Stable Co. 70 Misc. 535, 127 N. Y. Supp. 343; Stewart v. Bramhall, 74 N. Y. 85; Hubbard v. Tod, 171 U. S. 474, 43 L. ed. 246, 19 Sup. Ct. Rep. 14; Schanz v.

Sotscheck, 167 App. Div. 202, 152 N. Y. Supp. 851; Gilbert v. Real Estate Co. 155 App. Div. 411, 140 N. Y. Supp. 354; Miller v. Zeimer, 111 N. Y. 441, 18 N. E. 716; Barnett v. Zacharias, 24 Hun, 304, affirmed in 89 N. Y. 637.

A loan to a corporation in place of an individual, even though done with intent to avoid the objection of usury, is valid. The corporation is not used as "a cloak to conceal usury," but to legalize and validate the loan. If the borrower takes advantage of the special privileges and limited liability conferred by law upon a corporation, he cannot repudiate the limitation against pleading usury placed by law upon a corporation.

Stewart v. Bramhall, 74 N. Y. 85; Rosa v. Butterfield, 33 N. Y. 665; Union Estates Co. v. Adlon Constr. Co. 221 N. Y. 183, — A.L.R. —, 116 N. E. 984; De Moltke-Huitfeldt v. Garner & Co. 145 App. Div. 766, 130 N. Y. Supp. 558.

There was no usury in the transaction because the loan was part of a larger contract whereby Salvin advanced to Rieser \$15,000, surrendered a valid claim against him for \$2,100, with accumulated interest, and discontinued without costs the pending litigation.

89 Cyc. 888; Flagg v. Fisk, 93 App. Div. 169, 87 N. Y. Supp. 530, affirmed in

(227 N. Y. 51, 124 N. E. 94.)

179 N. Y. 590, 72 N. E. 1141; Spain v. Talcott, 165 App. Div. 815, 152 N. Y. Supp. 611; Stillman v. Northrup, 109 N. Y. 473, 17 N. E. 379; Booth v. Swezey, 8 N. Y. 276; Valentine v. Conner, 40 N. Y. 248, 100 Am. Dec. 476; Re Gonsalus, 95 N. Y. 340; Morris v. Talcott, 96 N. Y. 100; White v. Benjamin, 138 N. Y. 623, 83 N. E. 1037; Houghton v. Burden, 228 U. S. 161, 57 L. ed. 780, 33 Sup. Ct. Rep. 491; Bosworth v. Kinghorn, 94 App. Div. 187, 87 N. Y. Supp. 983; Re Mesibovsky, 119 C. C. A. 42, 200 Fed. 562; Jarvis's Appeal, 27 Conn. 432; Marsh v. Howe, 36 Barb. 649; Southern Trading Co. v. State Nat. Bank, 35 Tex. Civ. App. 5, 79 S. W. 644; Tyler, Usury, 141.

Mr. Joseph P. Segal with Mr. I. Gainsburg, for respondents:

The payment of usury was proven by clear and satisfactory evidence, and the transaction being concededly a loan, the lender cannot avoid the statute of usury by disguising the borrower, and using a corporation as the dummy borrower, instead of the real party.

Hall v. Eagle Ins. Co. 151 App. Div. 815, 136 N. Y. Supp. 774, affirmed in 211 N. Y. 507, 105 N. E. 1085; Grannis v. Stevens, 216 N. Y. 583, 111 N. E. 263; Schanz v. Sotscheck, 160 App. Div. 798, 145 N. Y. Supp. 778, 167 App. Div. 202, 152 N. Y. Supp. 851; Wyeth v. Braniff, 84 N. Y. 627; Fiedler v. Darin, 50 N. Y. 437; United States ex rel. Atty-Gen. v. Delaware & H. Co. 213 U. S. 366, 53 L. ed. 836, 29 Sup. Ct. Rep. 527; Booth v. Bunce, 83 N. Y. 139, 88 Am. Dec. 372; Anthony v. American Glucose Co. 146 N. Y. 407, 41 N. E. 23; Cawthra v. Stewart, 59 Misc. 33, 109 N. Y. Supp. 770; Gilbert v. Warren, 19 App. Div. 403, 46 N. Y. Supp. 489; Schwarz v. Sweitzer, 202 N. Y. 8, 94 N. E. 1090; Bliven v. Lydecker, 130 N. Y. 102, 28 N. E. 625; Spain v. Talcott, 165 App. Div. 815, 152 N. Y. Supp. 611; Braine v. Rosswog, 13 App. Div. 249, 42 N. Y. Supp. 1098; Dry Dock Bank v. American L. Ins. & T. Co. 3 N. Y. 344; Merwin v. Robertson, 154 App. Div. 823, 139 N. Y. Supp. 723.

Defendants are not estopped from setting up the defense of usury.

Jacobus v. Jamestown Mantel Co. 211 N. Y. 162, 105 N. E. 210; Baker v. Union L. Ins. Co. 43 N. Y. 283; Bridger v. Goldsmith, 143 N. Y. 424, 38 N. E. 458; Merwin v. Romanelli, 141 App. Div. 711, 126 N. Y. Supp. 549; Masten v. Olcott, 101 N. Y. 153, 4 N. E. 274; 39 Cyc. 1019; Empire Trust Co. v. Cole-

man, 85 Misc. 312, 147 N. Y. Supp. 740; Public Bank v. London, 147 N. Y. Supp. 738; Silverstein v. Brown, 153 App. Div. 677, 138 N. Y. Supp. 848; Schanz v. Sotscheck, 167 App. Div. 202, 152 N. Y. Supp. 851.

McLaughlin, J., delivered the opinion of the court:

This action was brought to foreclose a mortgage on an interest in real estate in the city of New York. The mortgage was for \$15,000, which had, by payments, been reduced so that at the time the action was commenced there was only claimed to be due \$2,000 and interest. Two defenses were set up: (a) Usury, and (b) novation. The court at special term reached the conclusion that defendants had failed to establish the second defense, but had succeeded upon the first, and directed that the complaint be dismissed upon the merits. From the judgment entered to this effect an appeal was taken to the appellate division, where the same was affirmed, two of the justices dissenting. An appeal was then taken to this court.

The sole question presented upon the appeal is whether there is any evidence to sustain the finding that the mortgage sought to be foreclosed was the result of a usurious agreement. If so, the appellants must fail. The decision of the appellate division, not being unanimous, enables us to examine the record for the purpose of ascertaining that

Appeal—
examination of
evidence—
divided opinion.

fact. Heskell v. Auburn, Light, Heat & P. Co. 209 N. Y. 86, L.R.A. 1915B, 1127, 102 N. E. 540; Hickok v. Auburn Light, Heat & P. Co. 200 N. Y. 464, 93 N. E. 1113. Such examination discloses the following uncontradicted facts: That the Myles Realty Company is a domestic corporation, with 106 shares of stock, of which defendant Ely J. Rieser owns 104, his wife one, and a third person one; that the business of the corporation, so far as appears, was to enable Rieser to take the title to real estate pur-

chased by him in the name of the corporation, then to negotiate loans thereon, and otherwise to manage the same; that in May, 1908, Rieser was the owner of a lease of real estate on Fifty-ninth street in the city of New York; that on that day he borrowed \$15,000 from one Bates, for which he gave his bond, payable April 30, 1910, and as collateral security for its payment gave a mortgage, in which his wife joined, on such leasehold interest; that when the loan fell due it was paid, but the bond and mortgage were not satisfied, but by agreement between the parties were kept alive and assigned to the Myles Realty Company; that the assignment was recorded and the record title to same was in the corporation from April 29, 1910, to September 1, 1911, when it was assigned and transferred by the realty company to Harry Salvin, plaintiffs' testator, as collateral security for a loan of \$15,000 made by him to it. The facts connected with the loan by Salvin were substantially as follows: Some time prior to September 1, 1911, Rieser sold to Salvin the stock in a corporation and guaranteed that its debts did not exceed a certain amount. Subsequently Salvin claimed that the debts exceeded, by \$2,091.94, the amount which had been represented, and he therefore demanded that Rieser pay him such sum. The demand being refused, an action was brought to enforce the claim. After issue was joined, the matter was sent to a referee to hear and determine. Several hearings were had, but before the case was finally closed a settlement was arrived at by the terms of which Rieser paid \$1,000 to Salvin, the fees of the referee and stenographer, and Salvin loaned to the Myles Realty Company \$15,000, as collateral security for the payment of which the realty company assigned the bond and mortgage above referred to, also gave its bond, and Rieser and his wife gave their bond, conditioned that if the realty company did not make the payments as provided, they would. Rieser also

paid to Salvin, or to a third party for his benefit, \$1,000, for making the loan to the realty company.

After a careful consideration of the record I am unable to find any evidence to sustain the following findings:

(1) That when Bates was paid the amount of his loan, the bond and mortgage, and the indebtedness covered thereby, were extinguished.

On the contrary, the mortgage was kept alive by agreement between the parties. This is clearly shown by the fact that a satisfaction was not given, but instead an assignment to the realty company. There is no doubt that a mortgage, when paid, may be kept

**Mortgage—
payment—
keeping alive.**

alive for other purposes, when the rights of creditors and third parties have not intervened. *Hoy v. Bramhall*, 19 N. J. Eq. 563, 97 Am. Dec. 687; *James v. Morey*, 2 Cow. 246, 14 Am. Dec. 475; *Bogert v. Bliss*, 148 N. Y. 194, 51 Am. St. Rep. 684, 42 N. E. 582. The assignment to the realty company put the title to the mortgage in it. The delivery of the mortgage, so assigned, at the instigation of the mortgagor, gave it a new vitality, and in equity estopped him from asserting to the contrary.

**Estoppel—
to contest
assigned
mortgage.**

(2) That the payment to Bates was made by Rieser and not by the realty company.

The fact that Rieser held nearly all the stock of the realty company did not destroy its legal entity nor prevent its performing legal corporate acts.

**Corporation—
ownership of
stock by one
person—effect.**

It could make the payment to Bates and then, instead of having the mortgage satisfied, take an assignment. The assignment itself recites: "That I, Charles F. Bates . . . in consideration of the sum of fifteen thousand (\$15,000) dollars, . . . to me in hand paid by Myles Realty Company, . . . the receipt whereof is hereby acknowledged," have sold, assigned, etc.

(3) That the realty company was

a mere dummy and held the title for Rieser.

The realty company had held the title for upwards of a year. The assignment to it had been recorded, and there is not a particle of evidence to indicate that it held such title other than for itself. Plaintiffs' witness Armitage testified, and his testimony was uncontradicted, that he told plaintiffs' testator, in the presence of Rieser: "It was an old mortgage on the premises; that it had existed there since 1908; that it had been assigned and was owned by the Myles Realty Company, and that there was no question as to its validity."

(4) That the loan was made to Rieser and not to the realty company, under a usurious agreement by which a bonus of \$1,000 was paid to the lender.

The only basis for this finding is the fact that Rieser was president of the realty company, owned nearly all of its stock, and that he paid to plaintiffs' testator a bonus of \$1,000 for making the loan. The fact that Rieser owned substantially all the stock of the company did not prevent its doing business as a corporation. It had the right to borrow money, and if Rieser personally paid

Usury—bonus of third person—effect.

a bonus it did not in any way affect the transaction. Before the loan was made, at a stockholders' meeting duly called, a resolution was passed—two thirds of the stockholders being present—authorizing the realty company to make the loan and to assign the mortgage as collateral security for its payment. The fact that Rieser guaranteed to pay the amount of the loan if the realty company did not, and to induce the making of the loan he paid \$1,000, did not, in my opinion, affect the transaction in the least. The realty company was in need of money. An action was pending against Rieser to recover upwards of \$2,000, which he ascertained could be settled for \$1,000, and in addition thereto a loan could

be obtained by the realty company of \$15,000. It may very well be he thought this was a good way to end the litigation and obtain the money, but whether he did or not, his acts and purposes did not affect the assignment of the mortgage by the realty company. It received \$15,000. The check which the plaintiffs' testator gave for the loan was payable to the realty company's order, and the same was collected by it. There is no evidence to show that the realty company was a party to any agreement by which a bonus was agreed to be paid, or that it paid any part of the bonus. It is well settled that to establish usury, evidence must be

produced to show a —what necessary to establish. corrupt intent by

both the borrower and the lender. *Hartley v. Eagle Ins. Co.* 222 N. Y. 178, 3 A.L.R. 1379, 118 N. E. 622; *White v. Benjamin*, 138 N. Y. 623, 33 N. E. 1037.

The loan was made to the realty company. It was the primary debtor. Rieser was a secondary debtor, having guaranteed to pay the loan if the realty company did not. By express provision of the statute the realty company could not interpose a defense of usury. General Business Law, § 374 (Consol. Laws, chap. 20). Rieser stood in no better position than it did.

Stewart v. Bram—right of guarantor of corporation. hall, 74 N. Y. 85;

Union Estates Co. v. Adlon Constr. Co. 221 N. Y. 183, — A.L.R. —, 116 N. E. 984.

There being no evidence to sustain these findings, there is no basis for the conclusions of law that the loan was made upon a usurious agreement, and therefore void, and that the mortgage could not be enforced.

The judgment appealed from therefore should be reversed, and a new trial ordered, with costs to abide event.

Hiscock, Ch. J., and Collin, Cuddeback, Cardozo, Pound, and Andrews, JJ., concur.

ANNOTATION.

Right of guarantor or surety for corporation to set up usury where corporation could not.

Notwithstanding some early decisions to the contrary (*Bock v. Lauman* (1855) 24 Pa. 435; *Market Bank v. Smith* (1858) Fed. Cas. No. 9,090; *Hungerford's Bank v. Dodge* (1860) 30 Barb. (N. Y.) 626, 10 Abb. Pr. 24, 19 How. Pr. 39, reversing (1858) 9 Abb. Pr. 124), it is settled that the effect of the New York statute which provides that "no corporation shall hereafter interpose the defense of usury in any action" is to prevent not only the corporation itself, but also its surety, guarantor, or indorser, from setting up usury. See *Rosa v. Butterfield* (1865) 33 N. Y. 665; *Union Nat. Bank v. Wheeler* (1875) 60 N. Y. 612; *Stewart v. Bramhall* (1878) 74 N. Y. 85, affirming (1877) 11 Hun, 139; *Union Estates Co. v. Adlon Constr. Co.* (1917) 221 N. Y. 183, — A.L.R. —, 116 N. E. 984; *SALVIN v. MYLES REALTY Co.* (reported herewith) ante, 581; *Smith v. Alford* (1866) 63 Barb. (N. Y.) 415; *First Nat. Bank v. Morris* (1874) 4 Thomp. & C. (N. Y.) 182; *DeRoe v. Smith* (1874) 4 Thomp. & C. (N. Y.) 690; *Graves v. Lovell* (1874) 6 Jones & S. (N. Y.) 154; *Smith v. Isle of Wight Co.* (1888) 50 Hun, 605, 21 N. Y. S. R. 317, 3 N. Y. Supp. 800; *Ludington v. Kirk* (1896) 17 Misc. 129, 39 N. Y. Supp. 419, affirming (1896) 16 Misc. 301, 37 N. Y. Supp. 1141; *Weinred v. Coleman Stable Co.* (1911) 70

Misc. 535, 127 N. Y. Supp. 343; *Freese v. Brownell* (1871) 35 N. J. L. 285, 10 Am. Rep. 239; *Bramhall v. Atlantic Nat. Bank* (1873) 36 N. J. L. 243; *Lane v. Watson* (1889) 51 N. J. L. 186, 17 Atl. 117, affirmed in (1890) 52 N. J. L. 550, 10 L.R.A. 784, 20 Atl. 894.

This is upon the ground that the statute, although in form providing that no corporation shall "interpose the defense of usury," operates not merely upon the corporation in personam, but upon its contract for the loan of money to itself, by making lawful what would otherwise be usurious. The contract itself being lawful, its guarantors are liable upon their guaranties. *Rosa v. Butterfield* (1865) 33 N. Y. 665.

The fact that the note of the corporation was discounted under an arrangement between the lender and the indorser that the former would discount if the latter would indorse does not affect the legal aspect of the question. *Stewart v. Bramhall* (1878) 74 N. Y. 85.

An indorser, however, is not precluded from setting up the defense of usury where the corporation was only an accommodation maker. *Strong v. New York Laundry Mfg. Co.* (1874) 5 Jones & S. (N. Y.) 279.

E. S. O.

MARY REID, Respt.,

v.

FRED EHR, Appt.

North Dakota Supreme Court — June 16, 1919.

(— N. D. —, 174 N. W. 71.)

Innkeeper — injury by electric light fixture — liability.

1. The owner or operator of a hotel lighted by electricity must use ordinary care to provide safe electric lights and appliances which are intended

Headnotes 1 and 2 by GRACE, J.

for use by the guests and patrons of the hotel. If he does not do so, and a guest of the hotel is injured by reason of the defects of such electric lights or appliances, he is liable in damages for the injuries sustained by such guest.

[See note on this question beginning on page 590.]

Appeal — sufficiency of evidence.

2. An action was brought by plaintiff to recover damages by reason of certain injuries suffered and sustained to her person by reason of a dangerous charge and current of electricity passing into and upon her body when she turned on an electric light in a room of a hotel operated by the defendant, which room was being occupied by her as a guest and patron of the hotel. She recovered a verdict for \$3,625. She had in a former trial recovered a verdict for \$2,800. It is held, that the judgment appealed from in this case is well sustained by the evidence.

[See 2 R. C. L. 199.]

Evidence — testimony given at former trial.

3. The testimony of a witness beyond the jurisdiction of the court, which was given at a former trial at which he was cross-examined by the counsel who appeared at the present

trial, and which was transcribed and settled as part of the statement of the case at the former trial, may be read in evidence.

[See 10 R. C. L. 969.]

— weight — expert testimony.

4. Expert testimony that a serious electric shock cannot be received by one attempting to turn on the lights at an ordinary electric light fixture is not conclusive as against the manifest fact that one making such attempt was injured by such shock.

[See 11 R. C. L. 586.]

Appeal — conclusiveness of finding of jury.

5. A finding by the jury of absence of contributory negligence on the part of one injured by attempting to turn on the light at an ordinary electric fixture, when supported by evidence, is conclusive on appeal.

[See 20 R. C. L. 172.]

APPEAL by defendant from a judgment of the District Court for Ward County (Leighton, J.) in favor of plaintiff, and from an order denying a motion for judgment notwithstanding the verdict, or for a new trial, in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Bradford & Nash, for appellant:

Unless defendant knew or ought to have known that there was danger from the electric fixture he cannot be held liable.

20 R. C. L. pp. 13 et seq.; Com. v. Pierce, 138 Mass. 165, 52 Am. Rep. 264; Wabash, St. L. & P. R. Co. v. Locke, 112 Ind. 404, 2 Am. St. Rep. 193, 14 N. E. 391.

Messrs. Sinkler & Eide and Greenleaf, Woolledge, & Lesk for respondent.

Grace, J., delivered the opinion of the court:

This action is brought by plaintiff to recover damages by reason of certain injuries suffered and sustained to her person by reason of a dangerous charge and current of electricity passing into and upon

her body when she turned on an electric light in a room of a hotel operated by defendant, which room was being occupied by her as a guest and patron of the hotel. It is claimed and charged by plaintiff that the defendant negligently and carelessly failed to keep the electric lights and wires, etc., in said room in a safe and proper condition, and negligently and carelessly permitted them to become out of repair; that he carelessly and negligently failed to inspect and put said electric lights in proper repair, and permitted the same to remain in a dangerous and unsafe condition; and that the injuries of the plaintiff were caused thereby. Defendant admits that he was operating a hotel, and that plaintiff was a guest therein,

and avers the injuries, if any, to plaintiff, were caused by her own negligence and contributory negligence. It is further averred in the answer that the plaintiff brought an action for the same injury against the Consumers' Power Company, and alleged that said injury was due to the wrongful act of that company; that she entered into a stipulation and agreement with it whereby she agreed to accept, and that company agreed to give, the sum of \$100 in settlement of said claim from the said injury, and that she agreed to release them from any claims of damage by reason of the injury; that said sum so agreed to be paid should not in fact be actually paid until after the time of this action and trial of the action between plaintiff and defendant herein. This point, we think, now is completely abandoned, and will need no further consideration.

This action has been twice tried to a jury. In the first action plaintiff recovered a verdict for \$2,800 damages. The trial court set that verdict aside on the ground that it was excessive, and that the same was the result of passion and prejudice on the part of the jury. From the order granting a new trial, defendant appealed to this court on the grounds stated; the order appealed from was affirmed, the writer hereof dissenting, and the case was remanded to the lower court for another trial, which has occurred, and a verdict again returned in the plaintiff's favor, at a trial had after the expiration of approximately two years since the first trial. The jury, at the second trial of the action, returned a verdict for plaintiff for \$3,625. The second trial having occurred at about two years since the first trial, and the jury having been necessarily composed of men who knew nothing concerning the fact that a former verdict had been returned for \$2,800, such fact clearly demonstrates there was no passion or prejudice exercised by the jury which returned the verdict

for \$2,800. The defendant in this action has appealed from the judgment and from the order refusing to grant the judgment notwithstanding the verdict, or a new trial.

In his appeal defendant specifies nine assignments of error, and in addition thereto the insufficiency of the evidence to support the verdict. In effect, the same errors and reasons are assigned in support of the motion for a judgment non obstante or for a new trial, and the appeal from the judgment. In the motion for a new trial it is again claimed that the damages are excessive and appear to have been given under the influence of passion or prejudice. There is no merit in such contention.

The defendant assigns as error the admitting as evidence in this trial the testimony of the witness Mrs. Cotta, taken at the former trial. She personally appeared and testified upon the first trial. She was cross-examined by the same counsel who appeared for defendant upon the second trial. Her testimony was taken down in the ordinary manner at the former trial, and was transcribed and settled as a part of the statement of the case upon the former appeal. At the time of the present trial she was out of the state and beyond the jurisdiction of the court. Under these circumstances it was proper to read into the record in this case the evidence which she gave upon the first trial. It was proper for the trial court to receive and admit the evidence of the witness Cotta, given upon a former trial, and there was no error in admitting such evidence. There was no error in the court's refusal to strike out the testimony of Mary Reid; with reference to the absence of the witness Cotta, or the efforts of Mrs. Reid to procure Mrs. Cotta, who was in Minneapolis, to come to Minot with her as a witness in this action.

*Evidence—
testimony given
at former trial.*

The defendant maintains in his assignments of error, and in his as-

signments of the insufficiency of the evidence to sustain the verdict, that it appears from the undisputed evidence that the fixtures involved were the usual and ordinary Edison lamp and socket attached to the usual and ordinary drop cord, and that by no means known to science could this fixture give forth a shock or possibly cause a burn to a person turning on the current key. The defendant further claims the undisputed evidence shows that the only way in which a shock could be obtained from such fixture would be for the person turning on the current to have grasped the brass socket of the lamp at its base, being at the same time connected with the current through the medium of metal or water, and then turning on the current by the means provided.

There is considerable expert testimony to this effect.

This is, however, not conclusive. The physical facts speak louder than the testimony of the experts. The plaintiff was injured. This cannot successfully be disputed. She was injured by an electric current from the lamp in question. In the face of these physical facts, the testimony of the experts becomes of little probative force. The jury must have disbelieved the testimony of the experts, and this they did have a right to do. Jurors, as a rule, are men of average and reasonable minds, and in the face of physical facts expert testimony did not have any great weight with them. The defendant maintains, further, that the plaintiff was guilty of negligence and contributory negligence. This

question was one exclusively for the jury, and it has found against the contentions of the defendant, and that completely disposes of those questions.

We have examined the evidence, and it is quite sufficient to sustain the verdict. There was no error in the court refusing to grant judgment to the defendant

notwithstanding the verdict, nor error in denying defendant's motion for a new trial. We have examined with considerable care all and each of the errors assigned, and find no prejudicial nor reversible error. The matters in controversy have been submitted to two separate and distinct juries; the last trial was approximately two years after the former. There is not the least reason to claim any passion or prejudice. There has been no passion nor prejudice shown by the jury. There is no evidence, nor any reason, upon which to base such a claim. The jury is the exclusive judge of the facts of the case, and it has decided against the defendant. He must abide the result.

The order and judgment appealed from are in all things affirmed. Respondent is entitled to statutory costs on appeal.

Bronson, Birdzell, and Robinson, JJ., concur.

Christianson, Ch. J., concurring specially:

This case is here for a second time. The trial court set aside the verdict returned on the first trial on the ground that it was given under the influence of passion and prejudice. In his memorandum filed with the order granting a new trial the court based this ruling largely upon the insufficiency of the evidence bearing upon the question of permanent injuries. 36 N. D. 556, 162 N. W. 903. On appeal this court held that it had not been shown that the trial court had abused its discretion in granting a new trial. In so holding this court merely recognized the well-settled rule that the trial court was vested with discretionary powers in determining the motion for a new trial on the ground stated, and that this court was limited to a consideration of whether the trial court had abused its discretion; for, as was stated by Mr. Justice Grace in *Huber v. Zeisler*, 37 N. D. 556-560, 164 N. W. 132: "A granting or re-

inkeeper—
injury by
electric light
fixture—liability.

—weight—expert
testimony.

Appeal—conclu-
siveness of
finding of jury.

—sufficiency
of evidence.

fusing to grant a new trial rests largely in the discretion of the trial court, and unless there is plain abuse of such discretion its order in such matter will not be disturbed."

The second trial took place twenty-seven months after the first trial. Upon the second trial the plaintiff testified that certain nervous symptoms and certain pains in her back to which she had referred on the first trial still continued, and had become worse rather than better. The physician who attended the plaintiff, and who testified upon the first trial, was also called and testified upon the second trial. The situation upon the second trial, therefore, was that the plaintiff had undergone twenty-seven months more of pain and suffering than she had undergone at the time of the first trial, and manifestly both the permanency of injury and the extent thereof were far better estab-

lished upon the second trial. So the second verdict clearly rests upon a far stronger basis than the first verdict. The trial court refused to disturb the verdict, and under the rule of law announced by this court in its former decision in this case the verdict and the trial court's ruling should be sustained.

So far as the question of defendant's negligence and plaintiff's contributory negligence are concerned, I am of the opinion that under the evidence these were questions for the jury. It may also be noted that they were held to be so by the trial court upon the motion for a new trial after the first trial.

I am also of the opinion that the testimony given by the witness Mrs. Cotta upon the first trial was properly admitted in this case, under the rule announced in *Felton v. Midland Continental R. Co.* 32 N. D. 223, 155 N. W. 23.

ANNOTATION.

Liability of innkeeper for injury to guest from defective lighting appliance.

The holding in the reported case (*REID v. EHR*, ante, 586) to the effect that an innkeeper is liable to a guest for injuries resulting from a defective electric lighting appliance intended for the use of guests, where he has failed to use ordinary care in the installation or maintenance of the same, is undoubtedly good law although no other case seems to have squarely passed upon the question. Of some interest in this connection, however, is the case of *Harter v. Colfax Electric Light & P. Co.* (1904) 124 Iowa, 500, 100 N. W. 508, wherein an action was brought against both a hotel owner and the company furnishing electricity thereto for injuries to a hotel guest caused by a charged electric wire falling upon him in the bathroom. In this case a judgment was obtained against both defendants in the trial court, but on motion a new trial was granted to the hotel proprietor, but upon what ground does not appear; and on appeal by the defendant electrical company a reversal was ob-

tained upon the ground that it was not shown that a dangerous current was sent into the building, and that such defendant was not liable for the fall of the wire, that having been erected and maintained under the supervision of the hotel proprietor.

In *Patrick v. Springs* (1911) 154 N. C. 270, 70 S. E. 395, Ann. Cas. 1912A, 1209, 2 N. C. C. A. 642, the court, applying the modern rule that innkeepers are not insurers of the personal safety of their guests, but that their liability does extend to injuries resulting from unsafe or unsanitary rooms, held that where a guest was injured by gas escaping from a defective fixture (burner had no stop or safety pin, so that it was possible to turn the shut-off key all the way around) the question of the defendant's negligence and the plaintiff's contributory negligence was for the jury. In reaching this conclusion and sustaining a finding for the plaintiff, *Brown, J.*, said: "It seems now to be well settled that,

in case of an injury occurring in consequence of the unsanitary and defective condition of the inn premises or room to which a guest is assigned, the innkeeper is liable upon the same principles applicable in other cases, where persons come on the premises at the invitation of the owner or occupant and are injured in consequence of their dangerous condition. The innkeeper is not an insurer of his guests' personal safety, but his liability does extend to injuries received by the guests from being placed in an unsafe room. This is a matter peculiarly within the innkeeper's knowledge and

entirely beyond the control of the guest. In that particular he is peculiarly within the innkeeper's power and protection. . . . One who keeps a public house extends an invitation to all to come on his premises, and is therefore liable for injuries sustained in consequence of the bad condition of his inn premises. . . . When the plaintiff proved the unsafe and defective condition of the gas fixture in consequence of which gas escaped during the night and injured him, he made out a prima facie case of negligence, which it was defendant's duty to answer." G. J. C.

NATIONAL COUNCIL OF KNIGHTS AND LADIES OF SECURITY,
Plff. in Err.,

v.

MALISSIE FOWLER.

Oklahoma Supreme Court — August 14, 1917.

(— Okla. —, 168 Pac. 914.)

Insurance — receipt of dues — effect — waiver of habits.

1. Where a local council of a mutual benefit society, with authority to waive conditions and warranties of the contract of insurance, receives dues from a member in payment of his assessment to the society, with full knowledge of the habits of the insured with reference to the use of intoxicating liquors, it thereby waives the conditions and warranties in the contract with reference to the use of such intoxicating liquors by the insured.

[See note on this question beginning on page 599.]

Appeal — refusal to direct verdict — error.

2. A prima facie case having been admitted for plaintiff, it is not error for the trial court to refuse to direct a verdict for the defendant where the evidence in support of the affirmative defense relied upon does not prove the allegation of such defense to such a degree of certainty as to preclude reasonable men to differ thereon.

Insurance — mutual benefit — power of waiver.

3. A local council of a mutual benefit society which, by the provisions of the by-laws of the society, has authority to issue and deliver the benefit certificate and collect assessments, has

authority to waive conditions and warranties of the insurance contract.

[See 19 R. C. L. 1276-1279.]

Appeal — submitting question to jury — error.

4. Where a local council of a mutual benefit society had authority to waive conditions and warranties in an insurance contract, held, it was not error for the trial court to submit the question as to whether or not the local council had waived said conditions and warranties to the jury, notwithstanding the court predicated the authority of the local council to waive said conditions and warranties upon the wrong section of the by-laws, especially where the result reached would have been the same.

ERROR to the District Court for Jackson County (Crump, J.) to review a judgment in favor of plaintiff in a suit brought to recover the amount alleged to be due on a mutual benefit certificate. *Affirmed.*

The facts are stated in the Commissioner's opinion.

Mr. W. C. Austin, for plaintiff in error:

The court erred in refusing to direct a verdict for defendant.

Supreme Tribe, B. H. v. Owens, 50 Okla. 629, L.R.A.1916A, 979, 151 Pac. 198; Choctaw, O. & G. R. Co. v. Garrison, 18 Okla. 461, 90 Pac. 730; St. Louis & S. F. R. Co. v. Bloom, 39 Okla. 78, 134 Pac. 432; Thomas v. Knights of Maccabees, 85 Wash. 665, L.R.A. 1916A, 750, 149 Pac. 10, Ann. Cas. 1917B, 804.

Warranties in applications for insurance are binding.

Connecticut F. Ins. Co. v. George, 52 Okla. 432, 153 Pac. 118; Brown v. Connecticut F. Ins. Co. 52 Okla. 392, 153 Pac. 173; Kirk v. Fraternal Aid Asso. 95 Kan. 707, 149 Pac. 400; Modern Brotherhood v. Beshara, 42 Okla. 684, 142 Pac. 1014.

The local officers of these societies, nor special agents of the same, have any authority whatever to bind the brotherhood beyond the terms of the contract and the by-laws made a part thereof.

Modern Woodmen v. Tevis, 54 C. C. A. 293, 117 Fed. 369; Harvey v. Grand Lodge, A. O. U. W. 50 Mo. App. 472; Supreme Lodge, F. B. v. Price, 27 Cal. App. 607, 150 Pac. 803; Hines v. Modern Woodmen, 41 Okla. 135, L.R.A. 1915A, 264, 187 Pac. 675; National Council, K. L. S. v. Owen, 47 Okla. 464, 149 Pac. 231; Modern Woodmen v. International Trust Co. 25 Colo. App. 26, 136 Pac. 806; Modern Woodmen v. Weekley, 42 Okla. 25, 139 Pac. 1138; Hartman v. National Council, K. L. S. 76 Or. 153, L.R.A.1915E, 152, 147 Pac. 931.

Messrs. S. B. Garrett and Everett Petry, for defendant in error:

Every inference will be indulged to support a verdict, and where there is any competent evidence from which the jury might have arrived at such verdict it will not be disturbed on appeal.

Reed v. Scott, 50 Okla. 757, 151 Pac. 484; Eichoff v. Russell, 46 Okla. 512, 149 Pac. 146; Smith v. Bell, 44 Okla. 370, 144 Pac. 1058; McKemie v. Albright, 44 Okla. 405, 144 Pac. 1027; Hodgins v. Noyes, 42 Okla. 542, 141 Pac. 968; St. Paul F. & M. Ins. Co. v. Peck, 40 Okla. 396, 139 Pac. 117;

Avants v. Bruner, 39 Okla. 730, 136 Pac. 598; Moore v. Johnson, 39 Okla. 587, 136 Pac. 422; St. Louis & S. F. R. Co. v. Kerns, 41 Okla. 167, 136 Pac. 169; Chicago, R. I. & P. R. Co. v. Newburn, 39 Okla. 704, 136 Pac. 174; Lowenstein v. Holmes, 40 Okla. 33, 135 Pac. 727; Tyer v. Wheeler, 41 Okla. 335, 135 Pac. 351.

An objection and exception to the charge as a whole is not a sufficient exception to present any question to this court, or at least is not well taken if any portion of the charge is correct.

Powell v. Nichols, 26 Okla. 734, 29 L.R.A.(N.S.) 886, 110 Pac. 762; Ft. Smith & W. R. Co. v. Hill, 50 Okla. 357, 150 Pac. 1066; Cummings v. Lobsitz, 42 Okla. 704, L.R.A.1915B, 415, 142 Pac. 993; Weleetka Light & Water Co. v. Northrop, 42 Okla. 561, 140 Pac. 1140.

If a forfeiture of the policy could have taken place during the life of insured, it has been waived by the agents of the insurer, who were vested with authority to so waive it.

Western Nat. Ins. Co. v. Marsh, 34 Okla. 414, 42 L.R.A.(N.S.) 991, 125 Pac. 1094; Home Ins. Co. v. Mobley, 57 Okla. 692, 157 Pac. 324; Moore v. Life & Annuity Asso. 93 Kan. 398, 148 Pac. 981; Modern Brotherhood, A. L. v. Bailey, 50 Okla. 54, L.R.A.1916A, 551, 150 Pac. 674, Ann. Cas. 1918E, 744; Pacific Mut. L. Ins. Co. v. McDowell, 42 Okla. 305, L.R.A.1918E, 391, 141 Pac. 276; McRory v. Independent Order of Puritans, 60 Colo. 456, 154 Pac. 92; Pringle v. Modern Woodmen, 76 Neb. 384, 107 N. W. 756, 113 N. W. 231; Supreme Lodge, K. H. v. Davis, 26 Colo. 252, 58 Pac. 595; High Court, I. O. F. v. Schweitzer, 171 Ill. 325, 49 N. E. 506; Coverdale v. Royal Arcanum, 193 Ill. 91, 61 N. E. 915; Alexander v. Grand Lodge, A. O. U. W. 119 Iowa, 519, 93 N. W. 508; Brotherhood of Painters, D. P. H. v. Moore, 36 Ind. App. 580, 76 N. E. 262; Sovereign Camp, W. W. v. Carrington, 41 Tex. Civ. App. 29, 90 S. W. 921; Johanson v. Grand Lodge, A. O. U. W. 31 Utah, 45, 86 Pac. 494; Hoffman v. Supreme Council, A. L. H. 35 Fed. 252; McMahon v. Supreme Tent, K. M. 151 Mo. 522, 52 S. W. 384; Rascot v. Royal Neighbors, 18 Idaho, 85, 29 L.R.A.

(— Okla. —, 168 Pac. 911.)

(N.S.) 433, 138 Am. St. Rep. 180, 108 Pac. 1048.

West, C., filed the following opinion:

This is a suit instituted by the defendant in error, who will hereinafter be styled plaintiff, against plaintiff in error, who will hereinafter be styled defendant, in the district court of Jackson county, Oklahoma, upon a beneficiary certificate of insurance issued by defendant to Dr. James E. Fowler, payable at his death to plaintiff, wife of the insured.

Briefly stated, plaintiff alleged that said certificate was issued in September, 1907, by the defendant, acting by its president, W. B. Kirkpatrick, and J. M. Wallace, its secretary, and Local Council No. 1518, Knights and Ladies of Security of Altus, Oklahoma, through its president and secretary, respectively. Copy of the certificate was attached to and made a part of the petition. Petition pleaded full and complete compliance by the insured with all conditions in said contract, and, further, that if there was a violation of any part of the contract that the same had been waived. Defendant's answer admitted the issuance of said certificate, the death of the insured, and receipt of proof of death, and denied that Local Council No. 1518 of the National Council of Knights and Ladies of Security of Altus was a local branch of defendant, and denied the authority of said local council to waive any conditions in the contract, and alleged that the insured had violated and forfeited his contract on account of certain false representations made in his application with reference to his use of intoxicating liquors and in the taking of a gold cure for same, and further, that after the issuance of such contract insured became addicted to the excessive use of intoxicating liquors, in violation of the contract, and that the excessive use of such intoxicating liquors was the proximate cause of his death.

Upon the trial defendant admitted a prima facie case, but attempted to

prove the affirmative defense set out above. There are a number of assignments contained in defendant's petition in error which were treated by the defendant in his brief and argument collectively, and we will treat these assignments in the same manner under two propositions: First. Did the court err in refusing to instruct a verdict for the defendant? Second. Did the court err in submitting to the jury the issue raised as to the authority of the Local Council No. 1518, Knights and Ladies of Security of Altus, Oklahoma, to waive certain conditions of the insurance contract? And this last question is raised both in the admission of evidence over the objection of defendant and in giving certain instructions excepted to by the defendant.

We will now consider the first proposition. Prima facie case having been admitted, and the defendant assuming the burden of proving an affirmative defense, was the evidence in the case

Appeal—refusal
to direct verdict
—error.

such that only one logical conclusion could be drawn therefrom, or was it such that reasonable men might differ thereon? Applying this rule, under the doctrine announced in case of National Council, K. L. S. v. Owens, — Okla. —, 161 Pac. 178, second paragraph of the syllabus is as follows: "The truth or falsity of warranties in an application for insurance, where there is a conflict in the evidence, is a question of fact for the jury."

There was a conflict in the testimony as to the truth of the statements made by the insured in his application for the policy, and whether the insured had violated his contract after the issuance of the same, and the evidence as to whether or not the warrant contained in the application of the insured for the certificate in question was false in the sense that it would vitiate the contract, and whether the insured had violated his contract after the issuance of the same, was not such, in our opinion, that all rea-

sonable men might draw the same conclusion therefrom.

The Supreme Court of the United States in case of *Knickerbocker L. Ins. Co. v. Foley*, 105 U. S. 350, 26 L. ed. 1055, in dealing with a situation similar to the one presented here, makes use of the following language: "When we speak of the habits of a person, we refer to his customary conduct, to pursue which he has acquired a tendency from frequent repetition of the same acts. It would be incorrect to say that a man has a habit of anything from a single act. A habit of early rising, for example, could not be affirmed of one because he was once seen on the streets in the morning before the sun had risen, nor could intemperate habits be imputed to him because his appearance and actions on that occasion might indicate a night of excessive indulgence. The court did not, therefore, err in instructing the jury that if the habits of the insured, 'in the usual ordinary and everyday routine of his life, were temperate,' the representations made are not untrue, within the meaning of the policy, although he may have had an attack of delirium tremens from an exceptional overindulgence. It could not have been contemplated from the language used in the policy that it should become void for an occasional excess by the insured, but only when such excess had, by frequent repetitions, become a habit, and the testimony of the witnesses who had been intimate with him for years, and knew his general habits, may well have satisfied the jury that, whatever excesses he may at times have committed, he was not habitually intemperate."

And so, in this case, the evidence tended to show that, whatever indulgence the insured had been guilty of, it was not of a very frequent occurrence, and that it was an exceptional thing for him to be seen intoxicated, and, further, no witness testified that they had ever seen the insured take a drink, and a num-

ber testified, who met him frequently, that they had never seen him drinking or under the influence of liquor. And, further, the evidence tended to show that the president and local secretary, its financier and a large number of the members, were acquainted with the habits of the insured in regard to his use of intoxicating liquors, and some of these had been for the whole time that the same had been used by the insured, and the evidence on all the issues raised by the affirmative defense conflicted; and in view of this state of the evidence, indulging every inference which might fairly support the verdict, we cannot say as a matter of law that the insured used intoxicating liquors to excess within the purview of the contract. This was not shown to such a degree of certainty as to preclude reasonable men to differ thereon, and we hold that the court did not err in refusing to instruct the jury to return a verdict for the defendant. *Reed v. Scott*, 50 Okla. 757, 151 Pac. 484, and cases cited thereunder.

The last proposition involved is as to whether or not the knowledge of the Local Council No. 1518, Knights and Ladies of Security of Altus, and its officers, as to the habits of the insured, and the extent of his use of intoxicating liquors, could be imputed to the National Council, and this involves the action of the court in the admission of testimony on the part of the plaintiff, and his instructions to the jury on this phase of the case. In other words, if the theory of the plaintiff is correct that the knowledge of the local council could be imputed to the National Council, then the action of the trial court complained of was not erroneous, and, if it could not be, it was. Our court, in case of *Modern Woodmen v. Weekley*, 42 Okla. 25, 139 Pac. 1138, fourth paragraph of the syllabus, lays down the following rule: "The local agent of an insurance company who has au-

(— Okla. —, 108 Pac. 214.)

thority to solicit, execute, and deliver policies for insurance— the company has mutual benefit— authority to waive power of waiver. conditions of the contract of insurance, but a local agent with power only to solicit applications and forward them to the company, which issues and delivers the policies, has no such power."

And in announcing this rule the court followed the well-considered cases of *Western Nat. Ins. Co. v. Marsh*, 34 Okla. 414, 42 L.R.A. (N.S.) 991, 125 Pac. 1094, and *Insurance Co. v. Little*, 34 Okla. 449, 125 Pac. 1098.

Section 98, by-laws, p. 51, of defendant is as follows: "When Certificate in Force.—The beneficiary certificate shall become effective and be in force from and after the initiation of the member and payment of one assessment and subordinate council dues to the financier, the certificate having been countersigned by the president and secretary of the subordinate council, dated, its seal affixed, and signed by the member and delivered to him."

It will be noted by the provisions of this section that it was necessary before the certificate became binding upon the company for the local council to countersign the same by its president and secretary, respectively, the same to be dated by the council, and the seal of the local council affixed thereto, and by such local council delivered to the insured. This provision is not found in many of the by-laws of other institutions of like character, and it is apparent to us that under the rule announced in the cases of *Home Ins. Co. v. Mobley*, 57 Okla. 692, 157 Pac. 324, and *Rochester German Ins. Co. v. Rodenhouse*, 36 Okla. 378, 128 Pac. 508, the Local Council No. 1518 is the issuing agent, as much so as the National Council, and performs all the duties and functions that any resident agent performs for insurance companies in this jurisdiction. This authority is delegated to the local council for some purpose. After the application of the pro-

posed beneficiary has been received by the National Council and passed upon favorably by it, the certificate is then returned to the local council, and, under the section of the by-laws above quoted, is required to be executed by the local council by its president and secretary, and the seal of the subordinate council attached, and by said subordinate council delivered to the insured. It evidently was the purpose of this section of the by-laws to allow the local council to have the last and final authority in passing upon the propriety and advisability of executing the contract, and if there was any reason not known to the National Council why said certificate should not be delivered, which might be known to the local council by reason of its location at or near the domicile of the proposed beneficiary, and the opportunity of its officers to know and be informed as to the character, habits, and fitness of the applicant to become a beneficiary, then it was within the power of the local council to refuse to countersign said certificate, and its failure so to do would, under the section above referred to, fail to give force and effect to such certificate. It was just as necessary for the local council to sign it as it was for the National Council to sign it.

In treating this subject, Bacon on *Benefit Societies*, vol. 1, 4th ed., in §§ 187 and 188, uses the following language:

"The law of benefit societies is not fully settled, and many important questions are still to be determined in regard to the authority of the local lodges when acting as agents of the responsible corporation. For example, the courts must further consider to what extent knowledge of the local lodge is that of the superior; whether notice to the former binds the latter; and how far the principal is liable for the misfeasance or neglect of the agent. Of course, the rule applies to these societies, as to mutual insurance companies, that the members are supposed to have knowledge

of all limitations upon the powers of the lodge officers, or the lodge itself, contained in the charter and by-laws; but, as we shall see, the tendency of the courts is to ignore, whenever possible, the differences between purely mutual and the ordinary stock companies. The probabilities are that future decisions will trace stronger resemblances between benefit societies and life insurance companies, and, as their methods of business become more alike, so it will be easier to apply the same rules to the contracts of both and emphasize the distinctions because of difference in the methods of doing business. The society and regular company alike issue certificates or policies which are sent to the local agent, or lodge, which countersigns and delivers them, and afterwards collects and remits the assessments or premiums. Though the society has a fraternal and charitable feature that the company has not, the principal business of both is the sale of life insurance for a consideration. The reasonable inference is that the same principles of agency determine in each case the liability of the principal for the acts of the agent.

"Sec. 188. Same Subject Continued.—It is difficult, if not impossible, to deduce from the opinions of the court in the numerous cases where the subject has been considered a general rule. It will be sufficient, however, to give a few extracts from cases bearing on the subject. In the case of *Rasicot v. Royal Neighbors*, 18 Idaho, 85, 29 L.R.A.(N.S.) 433, 138 Am. St. Rep. 180, 108 Pac. 1048, the court said: 'The local camp of which the insured was a member collected and received the dues and assessments from its members, and was charged with the duty of looking after the health and conduct of its members and of expelling or suspending its members for any violation of the laws of the order or breach of their duties as members of the society. The local lodge was; therefore, the agent of the society which issued the

benefit certificate, and the appellant, after the lapse of more than four years is chargeable with notice of the existence of the condition on the part of the insured which would have avoided the risk and prevented the contract from becoming effective and operative. Under these facts and circumstances the doctrine of waiver should be applied to the society.' In *Supreme Lodge, K. H. v. Davis*, 26 Colo. 252, 58 Pac. 595, the court said: 'In the mutual benevolent order composed of a supreme lodge and subordinate lodges, an officer of a subordinate lodge charged with the duty of notifying the members of assessments made by the supreme lodge for the purpose of paying insurance certificates of deceased members, and of collecting and forwarding to the supreme lodge such assessments, is an agent of the supreme lodge, notwithstanding a rule or by-law of the order recites that such officer in collecting and forwarding assessments shall be the agent of the members of the subordinate lodge, and the supreme lodge is charged with all knowledge possessed by the agent in making the collection.' In *Trotter v. Grand Lodge*, L. H. 132 Iowa, 513, 7 L.R.A.(N.S.) 569, 109 N. W. 1099, 11 Am. Cas. 533, the court said: 'The rule that courts will give effect to any act or circumstance from which it may fairly be argued that the insurer has waived the right to strict and literal performance by the insured, or upon which an estoppel against forfeiture may be founded, applies to fraternal or lodge insurance. And whether a waiver of forfeiture of a certificate of insurance will be found in any particular case depends not on the intention of the insurer, against whom it is asserted, but on the effect which its conduct or course of business has had upon the insured, and this rule is applicable where the insurer acts under a mistake.' In *Pringle v. Modern Woodmen*, 76 Neb. 384, 113 N. W. 231, *Pringle* held a benefit certificate which contained a clause to the effect that it

(— Okla. —, 168 Pac. 914.)

should become null and void if the insured should at any time be convicted of a felony. While holding the certificate, the insured was convicted of felony and sentenced to the state penitentiary, where he was confined for about six months, and died. The beneficiary sued on the contract to recover the amount of the policy. It appeared that the insured had continuously kept up the payment of his dues and assessments. The supreme court of Nebraska, in speaking through Mr. Justice Barnes, said: "The local camp and its clerk being the agents of the association, the conclusive presumption, in the absence of fraud, is that they seasonably communicated the fact of Pringle's conviction to the head camp. Indeed, the clerk testified that the governing body knew of the fact, and his statement stands unchallenged, except by the evidence of one C. W. Hawes, the head clerk of the association. A like state of facts has often been held to amount to waiver of a similar forfeiture clause. The state is vitally interested in the thrift and frugality of its citizens, and in encouraging the citizen in providing for his family and looking to their protection and comfort in the event of his demise. To allow him, when acting honestly and from the most laudable motive, to be led on under the belief that he is devoting his savings to the purchase of a legacy for his dependent ones, and then, when the beneficiary comes to make demand for that paltry recompense, to tell him that the court, the final arbiters of his rights, will not listen to the equity of the case, would be doing violence to the principles of fair dealing, and would be likewise contrary to the best interests of the public at large, which we term "public policy." Had the insured been in any manner advised that her policy was not in force, she would perhaps have procured one that would have been valid, and this would have been to the benefit of her family and in the interest of society as well, and the state itself must

feel an interest in having her take such precautions, and in that sense the construction of such contracts becomes a matter of public policy. The insurer cannot suffer half so much from such a policy and such construction as the individuals interested, and society at large must in the end, of necessity, suffer from the cold-blooded technical rule that seems to prevail in so many jurisdictions. This ought to be the rule in order to prevent organizations soliciting membership, receiving insurance applications, and accepting dues and assessments for years, and then, after the applicant is perhaps too old to procure insurance elsewhere, tell the insured that he made a false answer in some one of the numerous questions propounded by the society, and that consequently his policy has never been in force. Such a contract is clearly violative of the interests of society at large and of the welfare of its citizens, and ought to be discouraged."

"Many other cases substantially support this view. *Frank v. Switchmen's Union*, 87 Wash. 634, 152 Pac. 512; *Crumley v. Sovereign Camp*, W. O. W. 102 S. C. 886, 86 S. E. 954; *Knights of Maccabees v. Pelton*, 21 Colo. App. 185, 121 Pac. 949; *Colliver v. Modern Woodmen*, 154 Iowa, 615, 135 N. W. 67; *Johanson v. Grand Lodge*, A. O. U. W. 31 Utah, 45, 86 Pac. 494; *Shultice v. Modern Woodmen*, 67 Wash. 65, 120 Pac. 531; *Henton v. Sovereign Camp*, W. W. 87 Neb. 552, 138 Am. St. Rep. 500, 127 N. W. 869; *Jones v. Supreme Lodge*, K. H. 236 Ill. 113, 127 Am. St. Rep. 277, 86 N. E. 191; *Thomas v. Modern Brotherhood*, 25 S. D. 632, 127 N. W. 572; *Leland v. Modern Samaritans*, 111 Minn. 207, 126 N. W. 728; *Patton v. Women of Woodcraft*, 65 Or. 33, 131 Pac. 521; *Independent Order of Foresters v. Cunningham*, 127 Tenn. 521, 5 A.L.R. 1569, 156 S. W. 192; *Gilmore v. Modern Protective Asso.* 171 Ill. App. 525; *Kelly v. Ancient Order of Hibernians' L. Ins. Fund*, 113 Minn. 355, 129 N. W. 846; *Supreme Lodge, United Benev. Asso. v. Lawson*, —

Tex. Civ. App. —, 133 S. W. 907; Grand Temple & Tabernacle, K. D. T. v. Johnson, — Tex. Civ. App. —, 171 S. W. 491; Hendrickson v. Grand Lodge, A. O. U. W. 120 Minn. 36, 138 N. W. 946; Mosaic Templars v. Jones, 99 Ark. 204, 137 S. W. 812."

And so it is our opinion that the weight and reason of authorities are to the effect that, under the circumstances in this case, knowledge of such local council would be knowledge to the National Council, and the court, in admitting evidence of the knowledge of local council and its officers as to the habits of the insured with refer-

~~—receipt of dues~~
~~—effect—waiver~~
~~of habits.~~

ence to the use of intoxicating liquors, could not be complained of, and if the said local council, with the knowledge of the habits of insured, continued to receive his dues in payment of his insurance, said conditions and warranty in the contract with reference to the use of intoxicating liquors would be waived, and there would be no error predicated on § 9 of the court's charge, which fairly states the law in this respect, and which is as follows: "You are further instructed that, inasmuch as the defendant as an association, of which the deceased was a member, could receive from the insured premiums in payment for the benefits mentioned in said policy sued upon herein, and if said premiums were received by the defendant with full knowledge of its subordinate lodge that the deceased had violated certain conditions in said policy, said conditions were waived, and the defendant would be required to pay the amount of its promise mentioned in said policy."

Section 15 of the court's charge is as follows: "If a subordinate lodge of a mutual benefit association, which has the power to discipline or expel a member for violating the by-laws and constitution of the association, possess such knowledge that a member has forfeited his benefit certificate by violating the by-laws of an association,

waives the right of the association to insist upon the forfeiture by continuing to receive his dues, and otherwise treating him as member. And in this connection you are instructed that, if you find that local council of the defendant association, acting by its officers and agents, had knowledge of the habits of life of the insured James E. Fowler, with reference to the use of alcoholic liquors, and knew that he had thereby forfeited his right to the benefit certificate sued on, and said local lodge had power and authority to discipline or expel a member for such cause, and said local lodge then continued to treat the insured as a member of said association, and continued to accept his dues as such member, then it has waived the right of the association to claim a forfeiture of his benefit certificate, and your verdict should be for the plaintiff."

Section 174 of the by-laws of defendant is as follows: "National Executive Committee and Subordinate Council to Have Concurrent Jurisdiction.—In any case where charges are preferred against a member of the order as provided in the laws of the order, the subordinate council and the national executive committee shall have original concurrent jurisdiction to hear and determine all matters of complaint."

Section 171 of the by-laws of defendant in part is as follows:

"Sec. 171. Offenses Specified.—The following shall be recognized, among other things, as distinct offenses against this order: . . .

"4. Intemperate use of intoxicating liquors, drugs, or narcotics, or visiting a council while intoxicated."

Section 173 of the by-laws of defendant is as follows:

"Sec. 173. Penalties.—The following shall be the penalties which may be inflicted upon members found guilty of any of the foregoing charges, and the vote shall be taken upon said penalties (if the member has first been found guilty) in the order as set forth below:

"First. Expulsion.

(— Okla. —, 168 Pac. 911.)

"Second. Suspension for definite period.

"Third. Reprimand."

Section 190 of the by-laws of defendant is as follows: "Sec. 190. The Effect of Suspension or Expulsion.—The effect of expulsion or suspension for more than three months shall include, among other things, the cancelation of the beneficiary certificate held by such member."

It will be noted that it was within the power of the local council to discipline its members, and one of the grounds upon which a member might be expelled or suspended was the intemperate use of intoxicating liquors, and the infliction of such penalty carried with it, ipso facto, the cancelation of the beneficiary certificate.

The trial court predicated the authority of the local council to waive the right of the National Council to insist upon forfeiture of the contract in question on the ground that said council had authority to discipline or expel a member who vio-

lated the by-laws and constitution of the association, when in fact this authority should have been predicated, as we think, upon the authority of the local council as the issuing agent of the defendant. However, it is our opinion that, whichever way the question might have been submitted to the jury, the result would have been the same, and we think that the last part of the above paragraph of the court's charge correctly states the law of this case, and the action of the court in placing the right of the plaintiff to claim a waiver on the part of the National Council, by reason of the acts of the local council, on the wrong section of by-laws, when the result reached would have been the same, could not be complained of.

Appeal—submitting question to jury—error.

Finding no prejudicial error, the case is affirmed.

Petition for rehearing denied, November 27, 1917.

ANNOTATION.

Waiver of provisions of insurance contract as to habits of insured by subordinate lodge of benefit society.

A subordinate lodge of a mutual benefit society, which continues to treat an insured as a member in good standing after knowledge that he has made false warranties in, or violated provisions of, the contract of insurance with respect to his personal habits, thereby waives the right to claim a forfeiture of the insurance for such breach, and, in the absence of express limitations on the power of the subordinate lodge to waive conditions of the contract, the waiver is binding on the supreme body. *Collver v. Modern Woodmen* (1912) 154 Iowa, 615, 135 N. W. 65; *Modern Woodmen v. Breckenridge* (1907) 75 Kan. 373, 10 L.R.A. (N.S.) 136, 89 Pac. 661, 12 Ann. Cas. 636; *Callies v. Modern Woodmen* (1903) 98 Mo. App. 521, 72 S. W. 713; *Galvin v. Knights of Father Mathew* (1912) 169 Mo. App. 496, 155 S. W. 45; *Whigham v. Independent Forest-*

ers (1904) 44 Or. 543, 75 Pac. 1067; *Knights of Pythias v. Bridges* (1897) 15 Tex. Civ. App. 196, 39 S. W. 333; *Order of Columbus v. Fuqua* (1901) — Tex. Civ. App. —, 60 S. W. 1020. And see the reported case (*NATIONAL COUNCIL K. L. S. v. FOWLER*, ante, 591).

In *Collver v. Modern Woodmen* (Iowa) supra, it appeared that in an application for fraternal insurance, the insured warranted that he had been a total abstainer from the use of liquor for four years, and agreed that if any warranty was not literally true the certificate should be void. In an action on the policy by a beneficiary thereof, it appeared that the insured's statements as to his abstention from intoxicants were false, and, furthermore, that the head officer and clerk of the local camp were cognizant of the fact. The plaintiff contended that

the receipt of assessments and dues, with knowledge of his habits, was a waiver by the defendant of the right of forfeiture. The by-laws in force when the insured became a member, and which governed the contractual relation between the parties, provided as follows: "No local camp, nor any officer thereof, shall have the right or power to waive any of the provisions of the by-laws of this society. The clerk of a local camp is hereby made and declared to be the agent of such camp, and not the agent of the head camp, and no act or omission on his part shall have the effect of creating a liability on the part of this society, or of waiving any right or immunity belonging to it." The defendant maintained that this stipulation relieved it from the consequences which would ordinarily follow knowledge on the part of the agents of the local camp. The court said: "The local camp or lodge is in fact an agent of the general organization, and where such is the case the weight of authority is that a denial of the legal effect of the acts and omissions of such agent in performing the duties of the agency will not relieve the general organization from responsibility therefor. Where an agency actually exists, the party creating it cannot destroy its effect by a stipulation that it does not exist."

In *Modern Woodmen v. Breckenridge* (1907) 75 Kan. 373, 10 L.R.A. (N.S.) 136, 89 Pac. 661, 12 Ann. Cas. 636, the defendant, being sued on a fraternal benefit insurance contract, disclaimed liability on the ground that the insured had forfeited all rights under the contract by violating the following provision of the agreement: "If a member holding this certificate shall . . . become so far intemperate in the use of alcoholic drinks, or the use of drugs, to such an extent as to permanently impair his health, or to produce delirium tremens, . . . then this certificate shall be null and void and of no effect." The evidence showed that the insured had been an excessive user of intoxicating liquors, and that he had died of alcoholic dementia, but the plaintiff con-

tended that the defendant had waived its right to insist on a forfeiture, since the local lodge, with full knowledge of the habits of the insured, had continued to accept his dues and had treated him as a member in good standing until his death. The court held that these acts of the local lodge constituted a waiver, and further stated that a recital in the by-laws of the society that "no local camp, nor any of the officers thereof, shall have the right or power to waive any of the provisions of the by-laws of this society," had reference only to contractual waiver, and would not apply to a waiver by operation of law resulting from the acts of the local lodge.

And where an insured stated in the certificate of insurance that he did not use intoxicating liquors and had never been intoxicated, and the certificate provided that if he should become intemperate the policy should be void, the court held that the failure of the local lodge to expel him on proof of his subsequent intoxication was a waiver of the right of forfeiture for such breach. But the court added that the failure to expel the insured did not waive the falsity of the warranty that he had not been drunk before his application, since a waiver presupposes knowledge of the thing to be waived. *Callies v. Modern Woodmen* (1903) 98 Mo. App. 521, 72 S. W. 713.

In *Galvin v. Knights of Father Mathew* (1912) 169 Mo. App. 496, 155 S. W. 45, the plaintiff sought to recover the amount of an insurance certificate issued by the defendant association on the life of her husband. In his application the insured had agreed that he would not violate the required pledge to abstain from all intoxicating drink, and had further agreed that all rights and privileges in the society should be forfeited on a violation of the pledge. It appeared that thereafter the insured did break the pledge, but, although some of the officers and members of the local council were aware of the breach, he was never expelled as the by-laws of the society provided, continuing in good standing until his death. The defendant argued that the supreme council had no

knowledge of the insured's breach of contract, and that the subordinate council had no authority to waive a forfeiture. The court said: "Since complete authority was given the subordinate council to deal with cases of the violation of the total abstinence pledge . . . and since we find in the laws of the order no express prohibition against the waiver of forfeitures on this score by subordinate councils, we think the subordinate council in this instance did have authority to waive such forfeiture."

In *Whigham v. Independent Foresters* (1904) 44 Or. 543, 75 Pac. 1067, the plaintiff sought to recover on a policy of life insurance taken out by her husband through a local lodge of the defendant society. The defendant claimed a forfeiture of the policy by reason of the untruthful statements of the insured concerning his habits, such falsehoods being sufficient, by the express terms of the application, to render the policy void. The plaintiff maintained that the defendant had waived the right of forfeiture by its failure to act after knowledge by its local agents of the insured's breach of warranty. The court said: "If, with full knowledge of an applicant's false answers or statements, a local lodge receives and admits him as a member, or if, after his admission, the officer whose duty it is to collect his assessments learns of the false statements, and thereafter receives the assessments and remits them to the supreme order, the society will, as a general rule, be held estopped from pleading the false statements or representations as a defense to an action on the benefit certificate." But, owing to the inconclusiveness of the evidence of knowledge on the part of the local lodge, the cause was remanded.

In *Knights of Pythias v. Bridges* (1897) 15 Tex. Civ. App. 196, 39 S. W. 333, it appeared that the defendant association had issued a benefit certificate on the life of one Bridges, in favor of the plaintiff. The defendant sought to escape liability on the certificate on the ground that Bridges had made false warranties as to his habits in respect to the use of intoxicating

liquors, and had thereafter continued to violate the regulations of the order, which he had agreed to respect, by such an excessive use of alcoholic drinks as resulted in his death. The plaintiff replied that the defendant was estopped from setting out a forfeiture, since the subordinate lodge to which Bridges belonged had, after full knowledge of his habits, continued to accept his premiums and to regard him as a member. The court held that the act of the subordinate lodge in continuing to recognize Bridges as a member constituted a waiver of his breach of warranty. As to the authority of the subordinate lodge to bind the supreme lodge by a waiver, the court in view of the authority vested in the local lodge to admit persons to membership "according to the laws of the order as promulgated from time to time by the supreme lodge and the board of control and of the endowment rank," said: "We do not hesitate to say that the inferior lodges and their officers, acting in the scope of their authority, were the agents of the order, and that their knowledge of facts affecting their duties would be notice to the supreme lodge of such facts, as in case of agents of ordinary insurance companies."

And where a certificate of insurance in a fraternal association was issued on an application which contained a false warranty as to the habits of the insured, which, by the terms of the application, worked a forfeiture of the policy, and the insured continued to violate the contract until he died, the court held that, since the examiner and secretary of the local council knew of the breach of contract and habits of the insured, its failure to take any action constituted a waiver of the right of forfeiture. And, by virtue of the agency vested in the local council, this waiver was held to estop the supreme lodge from setting up the forfeiture. *Order of Columbus v. Fuqua* (1901) — Tex. Civ. App. —, 60 S. W. 1020.

But where the authority of the subordinate lodge to waive conditions in contracts of insurance, as to the habits of the insured, is strictly limited,

it has been held that acts of the subordinate lodge are ineffectual to estop the supreme body from setting up a forfeiture. *Modern Woodmen v. International Trust Co.* (1913) 25 Colo. App. 26, 136 Pac. 806; *Hubbard v. Modern Brotherhood* (1917) — Mo. App. —, 193 S. W. 911.

In *Modern Woodmen v. International Trust Co.* (Colo.) *supra*, an action on a fraternal benefit insurance policy, the defendant resisted payment, alleging that the assured had "made false statements in his application in regard to his health and habits, and that at the time he made such statements he had a disease of the heart, and was intemperate in the use of intoxicating liquors, which was the indirect cause of his death, and that such false statements and intemperance on the part of the assured, under the terms of his application and the by-laws of the society, render his certificate null and void." The plaintiff denied the charges, and replied that, even if they were true, the agent who assisted in organizing the local society knew the actual condition of affairs at and before the time of issuing the certificate, and, by thereafter accepting the dues and premiums of the insured, had waived the conditions in the contract and estopped the defendant from setting up the forfeiture. The court held that no acts of the local society in excess of its authority could create a waiver of the defendant's right to claim a forfeiture, since "an insurance company, when not restricted by statute, is at liberty to limit the authority of its own agents, and an applicant dealing with an agent whose authority is so limited by the express terms of the application, which the applicant is presumed to read and required to sign, cannot benefit by any act done by such agent in excess of his authority so limited and declared."

In *Hubbard v. Modern Brotherhood* (1917) — Mo. App. —, 193 S. W. 911, the plaintiff sought to recover on a fraternal benefit certificate insuring the life of her son. The by-laws of the association, which were part of the policy, provided that all insurance should become null and void, "if the

holder of a certificate at the time of its issuance had or thereafter shall become intemperate in the use of alcoholic drinks, or if such holder's death shall result directly or indirectly from his intemperate use of such alcoholic drinks." It appeared that the insured had been a drinking man for several years before his death, and that his death probably resulted from excessive alcoholism. The evidence showed further that the officers of the subordinate lodge knew of the insured's personal habits. The plaintiff maintained that this knowledge of the subordinate lodge, coupled with a regular acceptance of dues from the insured, and his continued good standing in the lodge, constituted a waiver of the conditions of the contract in respect to intemperance. By statutory provision (Laws 1911, p. 292) fraternal benefit associations were empowered to make regulations providing that no subordinate lodge should have the authority to waive any of the provisions of the laws and constitution of the society. The court held that, inasmuch as the laws of the defendant society contained such a provision, the subordinate lodge could not by waiver create an estoppel. But whether there had been a waiver in fact by the association was held to be a question for the jury.

And see *Kempe v. Woodmen of World* (1898) — Tex. Civ. App. —, 44 S. W. 688, wherein it was held that the action of the officers of a subordinate lodge in permitting the insured to remain in the lodge for a long time after they had knowledge that he was using intoxicating liquors to excess would not estop the defendant from setting up a later expulsion since by the terms of the certificate it was provided that the policy should ipso facto become void if the insured used liquor to such extent as to injure his health.

See also *Hogins v. Supreme Council, C. R. C.* (1888) 76 Cal. 109, 9 Am. St. Rep. 173, 18 Pac. 125, wherein it was held that the failure of the local lodge of a fraternal association to expel or suspend a member who had violated a provision of the contract of insurance in regard to habits did not estop

the society from claiming a forfeiture of the policy because of a provision that a breach of the requirement should be punishable by suspension or expulsion, when the application

showed clearly that it was the insured's agreement that his good conduct after the issuance of the policy was to be a condition precedent to recovery.
R. E. B.

STATE OF OKLAHOMA EX REL. JAMES D. LANKFORD, State Bank
Commissioner, Plff. in Err.,

v.

T. J. COLLINS et al.

MODERN WOODMEN OF AMERICA, Garnishee.

Oklahoma Supreme Court—July 30, 1918.

(— Okla. —, 174 Pac. 568.)

Exemptions — statutory construction.

1. The expression "to be paid, provided or rendered," in § 3498, Revised Laws 1910, exempting from legal process "the money or other benefit, charity, relief or aid to be paid, provided or rendered" by fraternal insurance associations, is merely descriptive of the benefits which the statute authorizes such associations and the members thereof to provide; it being contemplated that, the benefits not existing at the time of enacting the law, they would afterwards be provided for and would inure or accrue in futuro, and the expression, being descriptive of the benefits, and not of exemption, does not limit the exemption to any particular time or to any condition other than as expressed in the section.

[See note on this question beginning on page 610.]

— who entitled — duration.

2. The exemption from legal process of the money, other benefit, charity, relief, or aid provided for in § 3498, Revised Laws 1910, may be invoked in favor of any beneficiary in a certificate of insurance on the life of a member of a fraternal insurance association, whether such beneficiary is a nonresident or resident of the state.

— insurance money.

3. Facts in the instant case examined, and held, that the fraternal order known as Modern Woodmen of America is a fraternal insurance association as contemplated by article 3, chap. 38, Revised Laws 1910, and that the money or other benefit coming to the beneficiary from a certificate of insurance on the life of one of its members is exempt from legal process for the debts of such beneficiary under § 3498, Revised Laws 1910.

[See 11 R. C. L. 528.]

Insurance — dependence — who may question.

4. A creditor who seeks by garnishment to reduce the money due to the beneficiary in a certificate of life insurance duly issued by a fraternal insurance association as defined by statute cannot raise the question of the dependence of the beneficiary on the insured in order to relieve the fund from the operation of the law rendering it not liable for the debts of the beneficiary.

[See 19 R. C. L. 1288.]

Exemptions — strict construction.

5. The rule that exemption statutes are not favored and are to be strictly construed does not apply in this state, but such statutes will be given a reasonable construction in favor of the purposes and objects of the exemption authorized.

[See 11 R. C. L. 492.]

Headnotes by STEWART, C.

ERROR to the Superior Court for Muskogee County (Thurman, J.) to review an order sustaining a motion to dissolve a garnishment and discharge the garnishee in an action on a promissory note. *Affirmed.*

The facts are stated in the Commissioner's opinion.

Messrs. Harlow A. Leekley and Franklin P. Schaffer for the State.

Mr. Vilas V. Vernor for defendants in error.

Stewart, C., filed the following opinion:

The plaintiff, in his official capacity as bank commissioner having taken over the assets of the insolvent Union State Bank of Muskogee, Oklahoma, brought suit against defendants on a promissory note executed by the defendants to such bank in the sum of \$3,500, and also instituted garnishment proceedings, naming the Modern Woodmen of America, a fraternal insurance association with local camp and organization at Muskogee, as garnishee. Muskogee Camp No. 7114, Modern Woodmen of America, filed verified answer in the garnishment proceedings denying that it owed any money or held any property belonging to the said Emma R. Collins. Thereafter the Modern Woodmen of America filed answering affidavit admitting that it was indebted to the defendant Emma R. Collins in the sum of \$2,000 upon a benefit certificate issued on the life of her son, Oakey F. Collins, who died April 30, 1916, and setting forth that the garnishee is a fraternal insurance association, organized for the benefit of its members and their beneficiaries, with death benefits payable to the families, heirs, blood relatives, or persons dependent upon its members, and further facts showing that the indebtedness owing to the defendant Emma R. Collins, under § 3498, Revised Laws 1910, was not subject to attachment, garnishment, or to be taken or appropriated by any legal or equitable proceeding or by operation of law to pay the debts or liabilities of a certificate holder or any beneficiary named in the certificate, or any person having a right thereunder. Later the defendant Emma R. Collins filed motion to dissolve the garnishment, pleading the same state of facts set forth in the answering affidavit of the Modern Woodmen of America, and asking that the garnishment be dissolved

and the money released. Motion to strike the motion to dissolve garnishment was filed by the plaintiff and overruled by the court, and afterwards the plaintiff filed reply and answer to the affidavit of the garnishee and also response to defendant's motion to dissolve, in which reply and response the plaintiff denied that the \$2,000 named was exempt from garnishment for the debts of the said Emma R. Collins, asserting that the said Emma R. Collins was a nonresident of the state of Oklahoma, not entitled to the benefits of the exemption laws of the state of Oklahoma, and had not and cannot meet the conditions and requirements of article 3, chap. 38, Revised Laws 1910, relating to fraternal insurance associations. After hearing the testimony, the court sustained the motion of defendant to dissolve garnishment and discharged the garnishee, from which action of the court the plaintiff prosecutes error to this court.

It is undisputed that the Modern Woodmen of America is a fraternal insurance association as contemplated and defined by statute, and that the defendant Emma R. Collins was the mother of Oakey F. Collins, deceased, and the beneficiary named in the certificate issued on the life of the said Oakey F. Collins. The evidence shows that, at the time the action was brought, the defendant Emma R. Collins was living in California with her husband, T. J. Collins, the other defendant. The question of nonresidence is in dispute. But on the assumption that she was a nonresident, we will undertake to construe that part of article 3, chap. 38, Revised Laws 1910, relating to fraternal insurance associations, being running § 3498, Revised Laws 1910, which reads as follows: "The money or other benefit, charity, relief or aid to be paid, provided or rendered by any association authorized to do business under this article shall not be liable to attachment by trustee, garnishee or other process, and shall not be

Exemptions—
insurance
money.

seized, taken, appropriated or applied by any legal or equitable process, or by operation of law, to pay any debt or liability of the certificate holder, or of any beneficiary named in any certificate, or any person who may have any right thereunder."

It is claimed by plaintiff in his brief that it is the settled policy of this state that exemption laws are not available to nonresidents, and therefore Emma R. Collins cannot claim the benefits of the section quoted. Our general exemption statute is found in chapter 84, Revised Laws 1910, and provides for certain exemptions to heads of families, as well as to persons not heads of families who are residents of the state. If the statute under consideration in the case at bar is construed to be an exemption statute, it is not a part of the general exemption statute, and we have no general law which, either in effect or in words, deprives nonresidents of the benefit of exemptions other than as defined in chapter 84, *supra*. If we hold that the provisions of § 3498, *supra*, do not inure to the benefit of nonresident beneficiaries, we must do so by construction, and not because of express statute; for there is nothing in the section under consideration, or in the entire chapter on fraternal insurance associations, which can be construed as authority for holding that the protection afforded does not apply to nonresidents. In fact, the language of the section is strongly in favor of applying the protection to nonresidents as well as to residents, in that it is provided that the money or benefit shall not be taken to pay the debts or liabilities of "any beneficiary named in the certificate or any person who may have any right thereunder," language broad enough to comprehend all persons, resident or nonresident. It is true that, as a rule, exemption laws have no extra-territorial effect; but it does not necessarily follow that, where property situated in this state is the subject of litigation in our courts, the

according of rights or privileges fixed by statute as to such property to any and all litigants, resident or nonresident, would be giving extra-territorial effect to such laws. We may say that in the case at bar, if the presumption were necessary, it would do no violence to legal principles to presume that the law of the defendant's residence is the same as the law of this state; there being no showing or claim to the contrary in the record. In this action it is the *res* which is the gist of the contention, and, in the absence of an express statute making a distinction between residents and nonresidents, it would be the duty of the courts to give to nonresidents the same rights in the subject of the litigation which would be accorded to residents.

In 11 R. C. L. p. 505, it is observed: "While some courts have taken the position that, where an exemption statute is not expressly made applicable to nonresidents, it will not be given effect to their favor, the better view is that, unless an exemption statute is expressly confined to residents, it applies to nonresidents as well, even though such nonresidents be aliens."

In view of our statutes, abolishing the rule of strict construction as to statutes in derogation of the common law, and the uniform holdings of this court that exemption laws are to be ^{—strict construction.} construed liberally, the latter view would be more in harmony with the genius of our laws and the settled policy of this court. On an investigation of the authorities, we find that the courts of some states, especially where statutes in derogation of the common law are strictly construed, still hold to the strict construction of exemption laws, and, on a theory that exemptions are not favored, hold that exemption laws do not protect nonresidents unless they are specifically included in the statute. The great ^{—who entitled—} ^{duration.} weight of authority is to the contrary. One of the best

considered cases expressing the latter view is *Bond v. Turner* (*Bond v. Martin*) 33 Or. 551, 44 L.R.A. 430, 54 Pac. 158. Other authorities are as follows: *Schwartz v. Birnbaum*, 21 Colo. 21, 39 Pac. 416; *Mineral Point R. Co. v. Barron*, 83 Ill. 365; *Wabash R. Co. v. Dougan*, 142 Ill. 248, 34 Am. St. Rep. 74, 31 N. E. 594; *Zimmerman v. Franke*, 34 Kan. 650, 9 Pac. 747; *Everett v. Herrin*, 46 Me. 357, 74 Am. Dec. 455; *Himmel v. Eichengreen*, 107 Md. 610, 69 Atl. 511; *Thompson v. Peterson*, 122 Minn. 228, 142 N. W. 307; *Borodofski v. Feld*, 88 Miss. 31, 40 So. 816; *State use of Johnson v. Knott*, 19 Mo. App. 151; *Sproul v. McCoy*, 26 Ohio St. 577; *Wright v. Chicago, B. & Q. R. Co.* 19 Neb. 175, 56 Am. Rep. 747, 27 N. W. 90; *Hill v. Loomis*, 6 N. H. 263; *Bunn v. Fonda*, 2 N. Y. Code Rep. 70; *Goodwin v. Claytor*, 137 N. C. 224, 67 L.R.A. 209, 107 Am. St. Rep. 479, 49 S. E. 173; *Linsenmayer v. Smythe*, 3 Pa. Co. Ct. 400; *Bell v. Indian Live-Stock Co.* — Tex. —, 3 A.L.R. 642, 11 S. W. 344; *Carroll v. First State Bank*, — Tex. Civ. App. —, 148 S. W. 818; *Haskill v. Andros*, 4 Vt. 609, 24 Am. Dec. 645; *Lowe v. Stringham*, 14 Wis. 222.

But the plaintiff contends that, even barring the question of residence or nonresidence, under the holdings of the courts, the fund can be subjected to the payment of the claim, and cite as a principal authority relied upon *Klinckhamer Brewing Co. v. Cassman*, 12 Ohio C. D. 141, 21 Ohio C. C. 465. Learned counsel for plaintiff in the brief (no doubt inadvertently) misconstrue and misapply the holding in that case, quoting as the law of the case from the language of the sole justice dissenting from the views of the majority. It appears that the case was assigned to and written by Justice Smith, and, in the opinion, he gives his view, but expressly says that the other justices have reached a different conclusion, and the case is disposed of in accordance with the opinion of the majority. Catherine Cassman was the beneficiary in a

certificate on the life of her husband in the sum of \$3,000, issued by the Supreme Lodge, Knights and Ladies of Honor. On the death of the husband, the plaintiff brought action in the nature of a creditor's bill to subject the money due on the policy to the payment of a judgment against Mrs. Cassman in favor of the plaintiff. Mrs. Cassman answered, setting up the exempt nature of the property, but afterwards died, and an administrator of her estate was appointed. The controversy continued between the plaintiff and the administrator, it being the claim of the administrator that the money was exempt from application to the payment of the debts of Mrs. Cassman. It appears that, after the service of garnishment on the fraternal order named, and during the lifetime of Mrs. Cassman, the money was deposited in court. Justice Smith expressed the view that the payment of the money into court was in effect the payment to Mrs. Cassman, and further, that the provisions of the statute under consideration (the same being identical with our statute) were intended only to prevent the reaching of the money by legal process during the lifetime of the party insured, and that on his death the insurance claim might be subject to attachment or garnishment before its payment to the beneficiary. He states, however, that the other members of the court hold a different view, and orders the money paid to the administrator, instead of being applied to the creditor's claim, concluding the decision with this language: "But, in accordance with the holding of the majority, a decree may be entered that the amount of the fund remaining after the payment of the Ottman & Company and Clements claim be paid to the administrator of the estate of Mrs. Cassman, to be by him administered according to law."

Ottman & Company and A. C. Clements were parties to the action, Mrs. Cassman having voluntarily assigned to them a portion of the money in consideration of loans ad-

vanced by them to her, and their claims were adjudicated and allowed. The opinion of the court as expressed by the majority was directly opposite to the views expressed by Justice Smith, and the syllabus in the case defines the law as found by the majority, so that it will be found that the decision, instead of supporting the contention of plaintiff in this case, sustains the action of the trial court.

In *McIntosh v. Aubrey*, 185 U. S. 122, 46 L. ed. 834, 22 Sup. Ct. Rep. 561, cited by plaintiff, the Supreme Court of the United States construes the provision in the pension law which reads as follows: "No sum of money due, or to become due, to any pensioner, shall be liable to attachment, levy or seizure, by or under any legal or equitable process whatever, whether the same remains with the pension office, or any officer or agent thereof, or is in course of transmission to the pensioner entitled thereto, but shall inure wholly to the benefit of such pensioner." U. S. Rev. Stat. § 4747, Comp. Stat. § 9080.

In that case, the high court merely follows the statutory language and holds that the exemption attaches to the fund while the same remains with the pension office or any officer or agent thereof, or is in course of transmission to the pensioner. But the concluding words of the opinion are: "The pensioner, however, may use the money in any manner for his own benefit and to secure the comfort of his family free from the attacks of creditors, and his action in so doing will not be fraud upon them."

We have also examined the following cases cited by plaintiff in error, to wit: *Bull v. Case*, 165 N. Y. 578, 59 N. E. 301; *Recor v. Commercial & Sav. Bank* (*Recor v. Recor*) 142 Mich. 479, 5 L.R.A. (N.S.) 472, 106 N. W. 82, 7 Ann. Cas. 764; *Hamilton v. Darley*, 266 Ill. 542, 107 N. E. 798. The opinion in each of these cases construes a statute either identical or similar to the one under consideration in the case at bar. In each

case the conclusion is reached that the money cannot be taken until after it is paid over to the beneficiary, thus supporting the trial court in this case, as the money has never reached the hands of Emma R. Collins.

The cases discussed were written with a view to a strict construction of exemption statutes. It is said in the opinion in the New York case that "the law does not favor exemptions." It thus appears that, even in states where the rule of strict construction prevails, the money cannot be taken by legal process until received by the beneficiary. The reasoning in those cases that the money may be reached afterwards is based upon a construction of the expression, "to be paid," used in the statute, and it is held that such phrase is meant to exempt the money only while the same is yet "to be paid." On account of the decision in the New York case, the legislature of that state amended the law so that there would be no doubt as to the money being exempt even after being paid over to the beneficiary, which fact is persuasive in showing that the original intention of the legislature and of the people was to attach an exempt character to the money itself, whether "to be paid" or actually paid. From a perusal of article 3, chap. 38, Revised Laws 1910, containing the law of this state on fraternal insurance associations, it will be discovered that the statute, after authorizing such associations to do business, prescribes at length the method and manner of doing business, the kind of certificates to be issued, the means of assessments and class of beneficiaries, after which the statute exempts "the money or other benefit, charity, relief, or aid to be paid, provided or rendered by such association."

It is our duty to place a reasonable and liberal construction on the section in favor of those intended to be benefited, and favorable to the objects and purposes of the statute, and yet it would not be necessarily

liberal to say that the expression "to be paid, provided or rendered" is merely descriptive of the benefits which the statute authorized fraternal insurance associations and their members to provide, such benefits not then existing, it being contemplated that they would afterwards be provided for and would inure or accrue in futuro; and that the expression, being descriptive of the benefits, and not of the exemption,

does not limit the exemption to any particular time or to any condition not specifically expressed in the section. If the legislature had intended otherwise, it would have been easy to have expressed such intention. Such a construction is, we think, more in consonance with the humanitarian purposes of the exemption law and the liberal policy of this court in construing laws meant to protect the necessitous. The fraternal insurance statute is based upon the theory of mutual moral obligation existing between members of the same family and relatives, and was meant to give an opportunity to provide a fund unhampered by liability to legal process to protect loved ones from want in case of the death of the insured. The creditors of the

Insurance—dependence—who may question.

beneficiary are not in a position to complain. If a son, at his own expense, desires to protect an aged and impecunious parent from want by establishing or providing a fund for such purpose not subject to the importunate demands of creditors, he works no hardship upon such creditors; in fact, he does them a favor, in that, because of the relief given to the debtor, such debtor becomes in a better position to accumulate property and possibly afterwards discharge the debt.

The plaintiff in this case contends that the money ought not to be taken because the mother was not dependent upon the son. There is no evidence to support the contention, and, if there were evidence, the contention would still be untenable. The

statute names the class of beneficiaries, the mother of the insured coming under one of the classes named, and the wise purposes of the act would be thwarted if in each individual case the question of dependence of the beneficiary upon the insured could be raised.

The Kansas statute on the subject of fraternal insurance, which, in its objects, is akin to our statute, has been construed in *Emmert v. Schmidt*, 65 Kan. 31, 68 Pac. 1072, and it is said by the court: "Chapter 163, Laws 1895, construed, and held to exempt to the beneficiary named in beneficiary certificates issued by fraternal orders the proceeds of such certificates, while deposited in bank, from the process of garnishment employed by a judgment creditor of the beneficiary to enforce payment of his judgment out of such proceeds."

The California statute exempting the proceeds of insurance policies was construed in *Holmes v. Marshall*, 145 Cal. 777, 69 L.R.A. 67, 104 Am. St. Rep. 86, 79 Pac. 534, 2 Ann. Cas. 88. It was held that the money was exempt from legal process for debts of the beneficiary even though placed by the beneficiary in a bank. The court used the following language: "Appellant contends that, by the deposit of the money in the bank, the money lost its identity, and that thereafter the bank owed Annie J. Jenkins the money; that the debtor thus voluntarily parted with the money, which was exempt, and acquired in lieu thereof a credit due by the bank. Such construction would seem to be unreasonable, and no authority is cited which supports it. It is true that, in one sense, by the deposit the relation of debtor and creditor was created as between the bank and Mrs. Jenkins; but she put the exempt money in the bank. . . . She expected to and did draw it as she needed it. The bank did not give her the identical pieces of money that she deposited, but it gave her, as she drew upon it, money equal in value and kind. She was not required to keep the money

buried, or in her stocking, in order to have it remain exempt. If the appellant's theory is correct, she could not have paid a \$5 grocery bill with a \$20 piece, receiving \$15 in change, without the risk of having the \$15 attached. The law does not require such absurdity."

We have disposed of the main contentions made by the plaintiff in error. There are some technical objections to procedure, however, which we have not yet considered. The plaintiff moved to strike the motion of defendant Emma R. Collins to dissolve the garnishment, and urges that his motion should have been sustained for the reason that § 4831, Revised Laws 1910, provides that "the defendant may in all cases, by answer duly verified, to be served within twenty days from the service of the garnishee summons on him, defend the proceedings against any garnishee," etc.

Such section also provides that the defendant may participate in the trial of an issue between the plaintiff and the garnishee for the protection of his interest. In the first place, if it were necessary for the defendant to pursue the method first authorized in the section cited, there is nothing in the record to show when or where service of garnishee summons was had upon the defendant. The sheriff's return shows that he received the summons on the 5th day of June, 1916. He further certifies: "I served the defendant by delivering to each of the defendants a correct and complete copy of the same." The return does not show when and where the garnishment summons was served upon the defendants, if served at all. As to the necessity for verification, we must say that the garnishee had filed a duly verified answer setting up the same state of facts shown in the motion of the defendant. None of the facts stated therein are disputed by the plaintiff, nor were they disputed during the trial. The only question presented to the trial court and to

this court is the question of the legal conclusion to draw from such state of facts. We may add that the section quoted authorizes the defendant to participate in the trial between the defendant and the garnishee for the protection of his interest. It is contended that the defendant is not authorized under our practice to file a motion to dissolve garnishment. Our statute on attachment and garnishment is based upon an entirely different theory than that urged by the plaintiff. Garnishment is a species of attachment, and it is so treated by our statute. Section 4862, Revised Laws 1910, reads: "The defendant may, at any time before judgment, upon reasonable notice to the plaintiff, move to discharge an attachment, as to the whole or part of the property attached."

And § 4855, Revised Laws 1910, reads: "If judgment be rendered in the action for the defendant the attachment shall be discharged and the property attached, or its proceeds, shall be returned to him. If the attachment or garnishment shall be discharged on motion prior to final judgment, the defendant may, upon proper supplemental answer, recover his damages, as in other cases for such wrongful attachment or garnishment."

It is the duty of the court to prevent an abuse of its processes; and, when the court's attention is called to the fact that the same are abused, the court has inherent authority to prevent a miscarriage of the law. The plaintiff suffered no prejudice because of any ruling of the court in matters of procedure.

Having carefully considered all of the argument and authorities offered by plaintiff in error, we find no reversible error, and that the garnishment should have been dissolved. The judgment and order of the trial court are therefore affirmed.

Per Curiam:

Adopted in whole.

ANNOTATION.

Period or duration of exemption under statute exempting money or benefit "to be paid" under insurance policy or certificate.

As to constitutionality of statute exempting proceeds of life or benefit insurance, see annotation to *Brown v. Steckler*, 1 A.L.R. 757.

The statute involved in the reported case (*STATE EX REL. LANKFORD v. COLLINS*, ante, 603), which purports to exempt money or other benefit "to be paid" from the debts of a certificate holder or beneficiary, has been adopted in several states in substantially identical terms; and there is a sharp conflict of authority upon the question whether, under this form of statute, the exemption survives the payment of the benefit by the insurer; in other words, as the reported case formulates the question, whether the words "to be paid" are descriptive of the benefit which is the subject of the exemption, or of the period or duration of the exemption; some cases, taking the former view of the phrase in question, hold that the exemption under such statutes continues after the payment of the benefit by the insurer. *Re How* (1895) 61 Minn. 217, 63 N. W. 627; *First Nat. Bank v. How* (1896) 65 Minn. 187, 67 N. W. 994; *Coleman v. McGrew* (1904) 71 Neb. 801, 99 N. W. 663; *STATE EX REL. LANKFORD v. COLLINS*.

Although it appears in the reported case (*STATE EX REL. LANKFORD v. COLLINS*) that the benefit had been paid into court, and had not reached the hands of the beneficiary, it is clear that the court was of the opinion that the benefit would be exempt after reaching the hands of the beneficiary.

In *First Nat. Bank v. How* (1896) 65 Minn. 187, 67 N. W. 994, supra, holding that money collected by a beneficiary under a benefit certificate was exempt in her hands, and did not pass to her assignee for the benefit of her creditors as soon as it was received by her, the court said: "We are of the opinion that the statute in question was intended to and does exempt from execution the money or fund paid by co-operative and assessment

life insurance associations on their policies after it is received by the beneficiary. The statute was intended to secure to the widow and children of a deceased member a fund for their support after the death of the husband and father; and, in order to render it certain that its beneficent purpose should not be defeated, it exempts the fund from execution. To interpret the statute so as to exempt the fund only while it is in the hands of the association would defeat the purpose of the law, and justly expose the legislature to the charge of paltering with the beneficiary in a double sense. What benefit is it to an unfortunate widow to be mockingly told that the money provided by her husband for her support is exempt from execution so long as it remains in the hands of the insurance company, where it can do her no possible good, but, when she reaches out her hand to take the money, her creditors may wrest it from her grasp? Such is not the meaning of the statute. It exempts the money from execution in the hands of the beneficiary."

In some cases, however, upon the reasoning that the exemption statutes under consideration were enacted solely for the protection of the insurers, the benefit has been held to be no longer exempt from process after it has been paid over by the company. *Martin v. Martin* (1900) 187 Ill. 200, 58 N. E. 230; *Hathorn v. Robinson* (1901) 96 Me. 33, 51 Atl. 236; *Recor v. Commercial & Sav. Bank (Recor v. Recor)* (1905) 142 Mich. 479, 5 L.R.A. (N.S.) 472, 106 N. W. 82, 7 Ann. Cas. 754; *Bull v. Case* (1901) 165 N. Y. 578, 59 N. E. 301.

In *Bull v. Case* (N. Y.) supra, under a statute of the kind being considered, it was held that proceeds of a benefit certificate, after they reached the beneficiary's hands, ceased to be exempt. The court said: "It will be seen at once that the meaning of this part of the section turns upon the interpreta-

tion to be given to the words 'to be paid.' Do they create an exemption of the fund while in the hands of the insurance company or society, or do they exempt the moneys paid from said fund after they reach the hands of the beneficiary, from the payment of 'any debt or liability of a member, beneficiary, or beneficiaries of a member?' The words 'to be paid' seem to have been carefully chosen to exclude the possibility of a construction which would exempt such moneys from the payment of debts or liabilities of members or other beneficiaries after they have been paid over. The exemption refers not to moneys paid or when paid, but 'to be paid.' This view accords not only with the ordinary and appropriate use of the language employed, but with the obvious purpose of the legislature. This was not to create a new class of exemptions, but to protect membership insurance societies, as well as their members and beneficiaries, from the annoyances and harassing inconveniences which would result if a beneficiary fund, in which each member and beneficiary has at least an equitable interest prior to the member's death, could be the subject of attack by importunate creditors of said members and beneficiaries. Such an organization would be kept so busy answering the demands of legal proceedings against its members and beneficiaries as to be unable to carry out the design of its being, unless the moneys comprising its beneficiary fund were protected until they passed from its hands." As pointed out in the opinion in the reported case *STATE EX REL. LANKFORD v. COLLINS*, ante, 603), the New York statute was afterward amended so as to avoid the effect of this decision.

In *Martin v. Martin* (Ill.) supra, under a like statute, money which had been paid to the agent of the beneficiary of a benefit certificate was held subject to garnishment by the creditors of the beneficiary, the court construing a provision of the statute that "the money, charity, relief, or aid to be paid, provided, or rendered" by fraternal benefit associations should not be subject to attachment, garnish-

ment, or other process, as not expressing an intention to exempt the benefit altogether, but as merely exempting it for the society's benefit before it was paid over.

And in *Hathorn v. Robinson* (1901) 96 Me. 33, 51 Atl. 236, under a similar statute it was held that money paid to a beneficiary by such a society did not continue to be exempt, but that it was subject to garnishment by a creditor of the beneficiary. The court said: "The question is whether, under this statute, money received by a beneficiary from such an organization continues to be exempt from attachment, or seizure upon execution, after it has come into his possession. It is evident that, literally, the statute does not go to this extent. It refers to the money or other benefit 'to be paid.' But it is argued that, if the effect of this statute is only to exempt such money before it is received by the beneficiary, the exemption would be of such slight value to him that something more must have been intended. Upon the other hand, it is difficult to understand why, if the framers of this statute meant to extend the exemption to money received from such a source after it has come into the possession of the beneficiary, they did not employ language that would make this meaning clear and explicit. We cannot believe that, if the legislature had intended to make so important and far-reaching an exemption as is claimed by the defendant, it would have used the language above quoted. If the effect of this statute is to continue the exemption after the money has come into the possession of the beneficiary, such exemption might perhaps be claimed to follow the money, so long as its identity was preserved, in investments and in the purchase of property not otherwise exempt from attachment. As to this, we, of course, do not intend to express an opinion; we refer to it merely to show that the consequences of such a continuing exemption are too important, and the questions involved in such a construction are too serious, to permit us to give an effect to this statute far beyond that which would

naturally follow from the ordinary meaning of the words used."

And the decisions in *Bull v. Case* (N. Y.) and *Hathorn v. Robinson* (Me.) supra, were relied upon in *Recor v. Commercial & Sav. Bank* (Recor v. Recor) (1905) 142 Mich. 479, 5 L.R.A. (N.S.) 472, 106 N. W. 82, 7 Ann. Cas. 754, where, under a like exemption act, it was held that money which had been paid to a beneficiary under a benefit certificate, and deposited by her in the bank, was not exempted from garnishment by her creditor."

The question has arisen in some cases as to the exemption, under the statutes here considered, of the insurance benefit in the hands of the beneficiary's personal representative.

Thus, in *Grand Lodge, A. O. U. W. v. Dister* (1898) 77 Mo. App. 608, where the statute exempted money or other benefit "already paid, or to be paid," it was held that the administrator of a beneficiary was, where the beneficiary died subsequently to the insured, but before the benefit was paid, entitled to the fund, and that the proceeds when received should be held in trust for the beneficiary's heirs, exempt from the payment of liabilities of the estate.

And in *Coleman v. McGrew* (1904) 71 Neb. 801, 99 N. W. 663, the proceeds of benefit certificates on the life of a husband, which were never paid to the beneficiary, were held exempt in the hands of the beneficiary's executor from the claims of her creditors, and held a trust fund for the benefit of the legatees and heirs of the testatrix, under a statute exempting money or other benefit "to be paid."

In *Pietri v. Seguenot* (1902) 96 Mo. App. 258, 69 S. W. 1055, it was held that the proceeds of a policy payable to the insured's executors or administrators were not, while in the administrator's hands, exempt from the claims of the insured's creditors, under a statute providing that the money or benefit "to be paid" should not be liable to attachment or other process, and not be applied to any legal or equitable process, nor by operation of law to the payment of any debt or

liability of a policy or certificate holder, it being held that it was not the purpose of such provision to hamper the freedom of action of an insured who might wish to discharge his obligations to his creditors before transmitting the fund to others.

Under the phraseology of the statutes here considered, it seems clear that the benefit is exempt before it has been paid over by the insurer, and it has been so decided.

Thus, in *Brown v. Balfour* (1891) 46 Minn. 68, 12 L.R.A. 373, 48 N. W. 604, where a statute provided that the fund "to be paid" over to the families of the insured, or to any member of said families, should be exempt from seizure by any process to pay any debt of a deceased member, it was held that the benefit payable after the decease of a member was, so long at least as it remained unpaid, not subject to be reached by garnishment by the creditors of the beneficiary.

And in *Rumbold v. Supreme Council, R. L.* (1904) 206 Ill. 513, 69 N. E. 590, it was held the duty of a fraternal benefit society having money due on a certificate in its possession to interpose on behalf of the beneficiary a statute providing that the money or other benefit, relief, or aid "to be paid, provided, or rendered" shall not be liable to attachment or garnishment. It was urged in this case that the statute was only designed to protect the society against harassing suits, and that it was at the option of the society to interpose the defense or suffer judgment; that the statute was not one of general exemption for the benefit of the policyholder or a beneficiary named in the policy; but the court stated that they thought that this was too narrow a view, and that *Martin v. Martin* (1900) 187 Ill. 200, 58 N. E. 230, set out supra, did not support it; that in that case the fund had been paid by the society to the agent of the beneficiary, and while in his hands was garnished.

In *Hunt v. Branch Circuit Judge* (1905) 141 Mich. 423, 113 Am. St. Rep. 542, 104 N. W. 724, under a statute providing that the money or other benefit to be paid by benefit associations

should not be seized on legal process to pay any debt of a certificate holder or beneficiary, it was held that money due to a husband as beneficiary under certificates of his father in mutual benefit societies was exempt from interference by a court of equity in a proceeding by the beneficiary's wife for divorce and alimony, and that the court, in such a proceeding, had no jurisdiction over the fund.

In *Ettenson v. Schwartz* (1902) 38 Misc. 669, 78 N. Y. Supp. 231, it was held that the creditor of a beneficiary could not reach the benefits due from a fraternal benefit society where a statute provided that all money or other benefit "to be paid, provided, or rendered, or which has heretofore been paid, or which shall hereafter be paid, provided, or rendered" by a benefit society, should be exempt from execution, and not be liable to be seized or taken by any process to pay any debt of a member, beneficiary or beneficiaries of a member. The court here called attention to the fact that the statute involved was more exten-

sive in its operation than the one involved in *Bull v. Case* (1901) 165 N. Y. 578, 59 N. E. 301, supra, and that it exempted not only all money to be paid, but also all money that had been paid, or should hereafter be paid under the benefit contract.

The cases involving the question whether pension money was exempt after reaching the hands of the pensioner are of no value on the question under consideration in this note, since, as pointed out in the opinion in the reported case (*STATE EX REL. LANKFORD v. COLLINS*, ante, 608), the statute declared in express terms that the money was exempt while it was in the hands of the pension officers, or "while in course of transmission to the pensioner." The conflict of authority, before the question was settled by the decision in *McIntosh v. Aubrey* (1902) 185 U. S. 122, 46 L. ed. 834, 22 Sup. Ct. Rep. 561, that the exemption did not survive payment to the pensioner, was due to a further provision of the statute to the effect that the money shall inure wholly to the pensioner.

J. T. W.

WAGGONER BANK & TRUST COMPANY, Plff. in Err.,
v.
GAMER COMPANY et al.

Texas Supreme Court — June 18, 1910.

(— Tex. —, 213 S. W. 927.)

Bank — nonpayment of check — failure to return to payee — liability.

1. Failure of a bank taking a check for collection to return it upon nonpayment does not render it liable to the payee if the bank to which it was sent for collection surrendered it to the drawer without remitting the funds, and notice was promptly given to the payee so that he might have protected himself had he seen fit to do so.

[See note on this question beginning on page 618.]

Payment — effect of check.

2. The giving and acceptance of a check does not operate as the payment of the debt upon which it is to be applied in the absence of an understanding by the parties that it shall have that effect.

[See 21 R. C. L. 60.]

— when check payment.

3. To render a check payment of the debt upon which it is to be applied the drawer must have the funds to his credit in the bank upon which it is drawn and the bank must be in a position to pay the check on demand.

[See 21 R. C. L. 60, 61.]

— inability of bank to pay — effect.

4. A check upon a bank which is not in a position to pay it is not a satisfaction of the debt for which it was given.

[See 21 R. C. L. 61.]

Bank — duty in collection of check.

5. A bank in which a check on another bank is deposited for credit is charged merely with the use of due diligence for its collection and due care in its selection of an agency for that purpose.

[See 3 R. C. L. 610, 625.]

— negligence — sending to drawee.

6. A bank undertaking the collection of a check is not negligent in sending it to the drawee if it is the only bank at the place of payment.

[See 3 R. C. L. 627.]

— obligation upon failure of collection.

7. A bank, after undertaking the collection of a check in the usual way and notifying the owner that it could

not be collected is not bound to resort to extraordinary methods.

[See 3 R. C. L. 613.]

Check — right of action upon — necessity of possession.

8. Physical possession of a check by the payee is not essential to enable it to maintain an action against the drawer if the check was surrendered to the drawer by the bank on which it was drawn without remitting the proceeds to the payee.

[See 5 R. C. L. 530.]

Payment — by check — surrender to drawer.

9. The drawee's marking a check as paid and surrendering it to the drawer does not constitute payment if the drawee failed to remit the proceeds.

[See 21 R. C. L. 60, 61.]

Appeal — findings of fact — conclusiveness.

10. The appellate court will not overrule findings of fact which it cannot say there was no warrant for.

[See 2 R. C. L. 203.]

ERROR to the Court of Civil Appeals for the Second Supreme Judicial District to review a judgment reversing a judgment of the District Court for Tarrant County (Buck, J.) in favor of defendant bank, cross complainant, and affirming a judgment in favor of the City National Bank, cross defendant, in an action brought to recover a balance alleged to be due on a certain check. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Wray & Mayer for plaintiff in error.

Messrs. Capps, Cantey, Hanger, & Short, Theodore Mack, and Cockrell & Gray for defendants in error.

Phillips, Ch. J., delivered the opinion of the court:

The Sagerton Hardware & Furniture Company, of Sagerton, Texas, owing the Garner Company, of Fort Worth, for a bill of merchandise, on October 23, 1907, gave the latter its check for \$1,435.88, drawn upon the First Bank of Sagerton. The check was currently deposited to its credit by the Garner Company with the Waggoner Bank & Trust Company, of Fort Worth, the bank with which it did business. The latter, as was its custom, forwarded the check for collection to its correspondent bank at Dallas, the City National Bank. The First Bank being the only bank at Sagerton, the City National Bank

forwarded the check to it for collection and remittance. Instead of remitting as instructed, the First Bank on receipt of the check on October 29 marked it as paid, and credited the City National Bank with the amount. The First Bank was badly involved at the time and insolvent. It went into bankruptcy about the 4th of December following. The trial court found, however, that if, prior to November 10th, the check had been presented at the counter of the bank and payment in that way demanded, the bank would have had the money with which to pay it.

Not receiving remittance for the check, the City National Bank, about November 1st, telephoned the First Bank of Sagerton in inquiry concerning its disposition of the matter, and was told that while it had canceled the check as paid and

surrendered it to the Hardware Company, the drawer, it could not remit for it. The First Bank had in fact, on October 30th, surrendered the check as canceled to the Hardware Company. Thereupon the City National Bank advised the Waggoner Bank & Trust Company of the Sagerton bank's failure to remit for the check. On receiving the advice, the Waggoner Bank & Trust Company, on November 4th, charged back the check to the account of the Gamer Company, and advised the latter that the payment of the check had been refused, but the check had not been returned to it. The Waggoner Bank & Trust Company apparently made no effort to obtain the return of the check. A few days later it advised the Gamer Company that it was expecting to receive it. It did not obtain the check, nor did the Gamer Company secure its return. On behalf of the City National Bank it was testified that it made no effort to obtain the check because of the advice of the First Bank of Sagerton that the check had been by it canceled and surrendered to the drawer.

The City National Bank had been sending checks to the First Bank of Sagerton for collection ever since the latter opened for business—some months prior to this transaction. It had been its custom to make collections of checks on that bank only by that means. On account of the latter's high rate of exchange, it at one time had tried to have an express company handle checks for collection there, but the express company had refused. It does not appear that either the Waggoner Bank & Trust Company or the City National Bank, in undertaking the collection of the check, had any reason to apprehend that the First Bank of Sagerton would not remit for it in accordance with the City National Bank's instruction. The drawer of the check, the Hardware Company, did not have the amount of the check to its credit in the First Bank when it gave the check, but it

had arranged with the bank for its payment. No question was made in the case as to the reliability of the City National Bank.

The suit was by the Gamer Company against the Sagerton Hardware & Furniture Company, the Waggoner Bank & Trust Company, and the City National Bank. In the pleading, the liability of the City National Bank was rested upon its having surrendered the check to the First Bank of Sagerton. The liability of the Waggoner Bank & Trust Company was predicated upon its surrender of the check and having in effect collected it by receiving credit for it from its correspondent bank. If mistaken as to the liability of the defendant banks, plaintiff sought judgment against the Sagerton Hardware & Furniture Company upon its original liability for the merchandise.

The trial was before the court. Judgment was rendered in favor of both banks, but for the Gamer Company against the Sagerton Hardware & Furniture Company in the amount of the check, less certain credits realized from the bankrupt estate of the First Bank.

The court found that neither of the banks was negligent in its handling of the check, nor in failing to collect it or obtain its return.

On the appeal of the Gamer Company and the Sagerton Hardware & Furniture Company, the honorable court of civil appeals reversed the trial court's judgment and rendered judgment in favor of the Sagerton Hardware & Furniture Company, and for the Gamer Company against the Waggoner Bank & Trust Company in the amount of the check less the credits referred to, holding also that the Waggoner Bank & Trust Company should recover nothing over against the City National Bank on its cross action. — Tex. Civ. App. —, 166 S. W. 428. The Waggoner Bank & Trust Company alone applied to this court for a reversal of this judgment.

We referred the case to the com-

mission of appeals for its examination and report. Section B of the commission was of the opinion, and so reported, that the Gamer Company was clearly not entitled to any recovery against the Sagerton Hardware & Furniture Company; and that the Waggoner Bank & Trust Company was liable because, after learning that the First Bank had not paid the check, it did not report the facts to the Gamer Company, and failed to make any further effort to collect the check. It relied upon *First Nat. Bank v. City Nat. Bank*, 106 Tex. 297, L.R.A.1918E, 336, 166 S. W. 689, for its holding.

We did not agree with the conclusions of the commission of appeals, and accordingly set the case down for argument.

There is nothing in the record to indicate that the Gamer Company agreed with the Sagerton Hardware & Furniture Company to accept the check in payment of its debt against

the latter company.
Payment—effect of check.

In the absence of such an understanding, the giving of the check did not operate as a payment of the debt. For a check to have the effect

of payment, the drawer must have the funds to his credit in the bank upon which it is drawn, and the bank must be in position to pay the check on demand.

The receipt of a check is not payment for the debt for which it is delivered, if there is no laches on the part of the holder. *Daniel, Neg. Inst. § 1623*. Here, there was no laches. The bank upon which the check was drawn did not pay it, and evidently had no intention of paying it. It reported to the City National Bank that it could not remit for it. This was equivalent to saying that it could not pay it. A bank which confesses its inability to pay in a customary method cannot be said to be in position to pay. A check given for a debt upon such a bank, and whose payment by the bank is so refused,

—inability of bank to pay—effect.

is not a satisfaction of the debt. The bank appropriated the check, instead of paying it. With this true, the Hardware Company could not claim that by means of the check it had paid its debt to the Gamer Company.

The Gamer Company is not complaining here of the favorable judgment for the Hardware Company rendered by the court of civil appeals; and the determination of its liability for the original debt is material only in its bearing upon the liability of the Waggoner Bank & Trust Company.

The Waggoner Bank was under no absolute obligation to collect the check. The duty it was charged with was to use due diligence for its collection and due care

Bank—duty in collection of check.

in its selection of an agency for the purpose. It forwarded the check in accord with business custom to its correspondent at Dallas, a reputable and reliable bank. Its correspondent, in keeping with its custom and having no reason to apprehend that by the means adopted the check would not be duly remitted for, sent it for collection to the drawee bank. It was the only bank at the place of payment. Under this condition, the Gamer Company had no right to expect that a different means of collection would be used, or to require a different method. The correspondent bank was not guilty of negligence, under the circumstances, in sending the check for collection to the drawee bank. *First Nat. Bank v. City Nat. Bank*, supra.

—negligence—sending to drawee.

We fail to perceive upon what theory the conduct of the Waggoner Bank, after learning that the check had not been remitted for to its correspondent bank, can be held to have been negligent

as a matter of law. **—obligation upon failure of collection.**

The decision in *First Nat. Bank v. City Nat. Bank* furnishes no authority for such a holding. There, the Stockyards Na-

tional Bank forwarded a check to the drawee bank for collection and returns, with instructions to protest if not paid. It received no returns or notice of protest. More than a month elapsed, during which time it made no effort whatever to ascertain whether the check had been paid or to obtain remittance for it if paid. It did nothing; but ignored the transaction entirely after sending the check for collection, leaving the bank from which it had received the check, and in consequence, the original holder, under the belief that the check had been duly paid by the drawee bank, and giving neither an opportunity for self-protection. We held that its conduct was negligent as it clearly was.

There is presented here no such state of facts. The forwarding agency used by the Waggoner Bank promptly made inquiry of the drawee bank when it failed to duly receive a remittance for the check. Upon then learning that the drawee bank could not remit for the check, it promptly so notified the Waggoner Bank, and the latter, in turn, promptly notified the Gamer Company of its nonpayment. The Waggoner Bank had endeavored to collect the check in a customary business way. It was not obliged, under the facts, to use an extraordinary method. It was not able to make the collection, but through no negligence of its own or its correspondent, and only because the drawee bank had failed to make payment. It promptly notified the owner of the check of its nonpayment. This, we think, fully apprised the Gamer Company of the situation and afforded it opportunity to take for its protection such steps as it desired, either against the drawee bank or the Hardware Company, the drawer of the check. If this action did not terminate the duty in the premises of the Waggoner Bank, save possibly as to obtaining the return of the check, it was

sufficient to warrant the trial court's finding substantially to that effect. A bank is not an ordinary collection agency. After it once presents a check for payment to the drawee bank and payment is refused, it is under no absolute duty, in the absence of a special undertaking, to thereafter make repeated presentations of the check. Its ordinary duty, in the absence of instruction to protest, is only to promptly notify the owner of the check of its dishonor, return him the check, and leave him to his own methods for his protection. This the Waggoner Bank did, except as to returning the check.

The check was not returned by it because it did not regain its possession. While making no payment of the check, the drawee bank marked it paid on the day of its receipt, and on the next day surrendered it as a canceled check to the drawer. For that reason the City National Bank did not obtain its return and failed to return it to the Waggoner Bank. The physical possession of the check, under the facts, was not absolutely essential to the Gamer Company in order for it to obtain payment from the Hardware Company, or the First Bank if it could do so, or for it to proceed against them because of its nonpayment had it seen fit to pursue such a course. It received prompt notice that the check had not been paid. That was the important fact in the situation; and its being promptly brought to the knowledge of the Gamer Company was sufficient to enable it to itself take action in its own behalf. For this reason it is our opinion that a mere failure by the Waggoner Bank to obtain the return of the check did not charge it with negligence as a matter of law.

Check—right of action upon—necessity of possession.

Bank—nonpayment of check—failure to return to payee—liability.

It is urged that the Waggoner Bank in omitting to advise the Gamer Company that the drawee

bank had marked the check as paid, but had not remitted for it, and in stating that the check had not been paid, failed to state the real facts.

**Payment—by
check—sur-
render to
drawer.**

Marking the check as paid was not payment of the check.

It was, in truth, not paid. In so notifying the Gamer Company, we think the Waggoner Bank stated the substantial fact.

In our view the case is one of fact. The trial court found that the Waggoner Bank was not guilty of

negligence. It cannot be said that there was no warrant for the finding, and we therefore decline to overturn it.

**Appeal—
findings of fact—
conclusiveness.**

The judgment of the Court of Civil Appeals as to the Waggoner Bank & Trust Company is reversed, and the judgment of the District Court denying the Gamer Company recovery against it is affirmed. In other respects the judgment of the Court of Civil Appeals is affirmed.

Petition for rehearing denied.

ANNOTATION.

Duty of bank taking bill or note for collection to see that it is returned if not paid.

The liability of a bank which has undertaken the collection of commercial paper, for failure to return the paper, has usually arisen in cases in which the paper has been lost. In most such cases the liability is predicated upon negligence. It is ordinarily held that if a bank which has undertaken the collection of commercial paper has lost the same by reason of its negligence, or has been negligent in failing to discover the loss, and notify its principal, it is liable therefor to its principal. *First Nat. Bank v. First Nat. Bank* (1878) 4 Dill. 290, Fed. Cas. No. 4,810; *German Nat. Bank v. Burns* (1889) 12 Colo. 539, 13 Am. St. Rep. 247, 21 Pac. 714 (certificate of deposit); *Spooner v. Bank of Donaldsonville* (1915) 144 Ga. 745, 87 S. E. 1062 (check); *Wakem v. Colonial Trust & Sav. Bank* (1915) 195 Ill. App. 30; *National Revere Bank v. National Bank* (1902) 172 N. Y. 102, 65 N. E. 799; *Shipsey v. Bowery Nat. Bank* (1875) 59 N. Y. 485; *American Nat. Bank v. Savannah Trust Co.* (1916) 172 N. C. 344, 90 S. E. 302, s. c. on second appeal (1919) — N. C. —, 98 S. E. 595; *Moldawer v. Trust Co. of N. A.* (1914) 57 Pa. Super. Ct. 66, s. c. on second appeal (1915) 59 Pa. Super. Ct. 155. It is, of course, true that there must be damage or loss to the principal which is the proximate result of the bank's negligence.

It is not negligence for the bank

undertaking the collection to employ the United States mail to forward the paper. *Shipsey v. Bowery Nat. Bank* (1875) 59 N. Y. 485.

A bank which has received for collection a note which, on its face, purports to be payable at the "Bank of Kent, Kent, New York," without any other instructions as to the postoffice address of the bank at Kent, is not negligent in forwarding it in a letter addressed to the Bank of Kent, at Kent, New York, and is not, therefore, liable if the note fails to reach its destination. *Chapman v. Union Bank* (1864) 32 How. Pr. (N. Y.) 95.

A banker undertaking the collection of a note, who forwarded the same to a foreign country by mail with the sanction of the owner of the note, was held not liable for its loss in *Jacobsohn v. Belmont* (1860) 7 Bosw. (N. Y.) 14.

The question of negligence in sending a check directly to the drawee bank is not within the scope of this note. There are a number of cases passing upon this question. In *Pinkney v. Kanawha Valley Bank* (1910) 68 W. Va. 254, 32 L.R.A.(N.S.) 987, 69 S. E. 1012, Ann. Cas. 1912B, 115, a case passing upon this question, a point is made of the fact that control of the check was lost to the collecting bank, and the bank's principal was allowed to recover the full amount of the check in an action of assumpsit up-

on the common counts as for recovery had and received.

It is negligence for a collecting bank which has forwarded paper in the course of collection, to fail for an unreasonable time to make inquiry in regard thereto, where no word is received therefrom. Thus, the bank in *Shipsey v. Bowery Nat. Bank* (1875) 59 N. Y. 485, was held negligent where, in the ordinary course, it should have received an acknowledgment of the check from the bank to which it was sent on the 4th of the month, but did not receive such acknowledgment, and did not discover the loss until the 16th of the month, and did not notify its principal until two days later. Failure to make inquiry for a month where, in the ordinary course of mail, the draft would reach the bank to which it was sent the day after it had been sent, is negligence. *American Nat. Bank v. Savannah Trust Co.* (1916) 172 N. C. 344, 90 S. E. 302. It seems that some time expired before the principal of the collecting bank was notified of the loss, as, in a second appeal of the case reported in (1919). — N. C. —, 98 S. E. 595, it is stated that the principal was not notified for forty days, and that the drawer of the check had in the meantime become insolvent. A failure to inquire for about a month as to the status of a check sent to the drawee bank was held to be negligence in *Hobart Nat. Bank v. McMurrough* (1909) 24 Okla. 210, 103 Pac. 601, and the collecting bank liable therefor, where it had credited its principal with the amount of the check, and become a holder for value thereof. It seems that the check remained in the possession of the drawee bank, and was not lost. In *First Nat. Bank v. First Nat. Bank* (1878) 4 Dill. 290, Fed. Cas. No. 4,810, the draft involved was sent so that it would have been received at the latest on the 14th of one month; the collecting bank made no inquiry prior to the 9th of the following month, but assumed that it had been received and credited until the latter date, when, on receiving the monthly statement or account current from the bank to which it was sent, it learned that the draft was not cred-

ited, whereupon inquiry was made. This was held to be an unreasonable time to wait before making inquiry. The collecting bank attempted to show a custom to rely on the monthly statement, but it is held that such custom was not made out.

It is negligence for a bank which has undertaken the collection of a note which has been lost by a notary public in whose custody the note was placed for protest, to fail to notify the owner for about ten days. *Moldawer v. Trust Co. of N. A.* (1914) 57 Pa. Super. Ct. 56, s. c. on subsequent appeal in (1915) 59 Pa. Super. Ct. 155.

In *Wakem v. Colonial Trust & Sav. Bank* (1915) 195 Ill. App. 30, where a note had been delivered by the bank undertaking its collection to an indorser, and had thus been lost, it is stated that where no authority is given to a bank to deliver a note to an indorser for collection, such unauthorized act on the part of the bank constitutes negligence.

A collecting bank was held liable in *National Revere Bank v. National Bank* (1902) 172 N. Y. 102, 64 N. E. 799, where it never returned the draft sent it for collection or fixed the liability of an indorser thereon by protest. In this case the drafts were sent to the bank on which they were drawn by the collecting bank, and drafts on the collecting bank were returned by the bank upon which the original drafts were drawn. The drafts thus received were protested by the collecting bank and forwarded to its principal, but no attempt was made to secure the original drafts nor protest them so as to charge an indorser thereon. The court states that in whatever way the transaction is viewed it is impossible to avoid the conclusion that the delivery of the paper by the plaintiff to the defendant for collection imposed upon the latter obligations and duties that it has failed to discharge.

In *Aebi v. Bank of Evansville* (1905) 124 Wis. 73, 68 L.R.A. 964, 109 Am. St. Rep. 925, 102 N. W. 329, a bank which had accepted a check on deposit with the depositor's indorsement was held to have discharged the indorser from liability thereon by

failing to notify him of its nonpayment for nearly a month, notwithstanding it was lost in the mail when forwarded for collection, and the bank waited in the hope that it would reach its destination.

It has been held that the loss in the mail of a check forwarded by a bank for collection after crediting it as money to the account of the depositor upon his unrestricted indorsement falls upon the bank unless it takes steps to charge him as indorser. *Heinrich v. First Nat. Bank* (1916) 219 N. Y. 1, L.R.A.1917A, 655, 113 N. E. 531.

A question as to the duty of the bank to return the check has arisen. It seems that there is no absolute duty on the bank to return commercial paper taken for collection. A bank taking a check for collection does not make the check its own because, after dishonor, it fails to return it to its owner when the check is in the hands of the receiver in bankruptcy of the bank on which it was drawn. *Hendricks v. Jefferson County Sav. Bank* (1907) 133 Ala. 636, 14 L.R.A.(N.S.) 686, 45 So. 136.

It has been stated that failure to return the paper or its proceeds makes out a prima facie case of negligence. Thus in *Davis v. First Nat. Bank* (1897) 118 Cal. 600, 50 Pac. 666, where the court had instructed the jury that, "if through the negligence and fault of the defendant the defendant has never returned to the plaintiff the draft handed to it nor the proceeds thereof, the plaintiff has made out a prima facie case of negligence against the defendant," it is stated by the supreme court that the instruction was, "however, only a truism and did not aid the jury in reaching a verdict. The court should have instructed them with reference to the evidence in the case, and whether, if any of the facts claimed thereby were established, they would constitute such negligence on the part of the defendant as would render it liable."

There is a statement in one case indicating that there is an absolute duty to return paper taken for collection or account for its proceeds. In

McClure v. D. M. Osborne & Co. (1899) 86 Ill. App. 465, where it appeared that a note sent to a bank for collection had been paid by the maker to one who had possession of the note, but whose identity is not disclosed, the court, in allowing the owner of the note to recover against the bank, states that "when a banker receives a note for collection he is bound to return it or to account for the amount of its proceeds."

It is stated in *Harris v. National Reserve Bank* (1912) 182 N. Y. Supp. 794, that a bank which undertakes the collection of a note which it has credited to a customer's account has no right, if it negligently fails to return the note to the customer at his known address, and deprives him of his right to the note, to charge back the amount thereof to the customer's account together with protest fees, but it is held in this case that a partnership of which the customer was a member actually received the note and collected it, and, therefore, the bank was justified in taking the action above indicated.

The question as to the duty to return commercial paper taken for collection did not arise in *Western Brass Mfg. Co. v. Maverick* (1893) 4 Tex. Civ. App. 535, 23 S. W. 728, but the facts of that case are similar to those in the reported case (*WAGGONER BANK & T. Co. v. GAMER Co.* ante, 613). In the former case, a draft drawn on an individual in favor of a bank was sent to the bank for collection, the bank presented the paper to the drawee, and received from him a check, whereupon the bank collector stamped the draft "Paid" and surrendered it to the drawee. Upon return to the bank, and the discovery that the drawer of the check had no funds, the check was returned to him and the draft demanded, but he refused to surrender it. In an action by the drawer of the draft against the bank, recovery was denied on the theory that the check of the drawee had not been taken in payment, therefore the drawer of the draft was not in any worse position than he was before, but might recover against the drawee of the draft. W. A. E.

GLADIE M. LARSON, Admr., etc., of B. F. Richardson, Deceased, Appt.,
v.

J. L. ANDERSON, Respt.

Washington Supreme Court (Dept. No. 1) — August 7, 1919.

(— Wash. —, 182 Pac. 957.)

Costs — several actions against joint tort-feasors.

1. But one allowance of costs can be made in several actions against joint tort-feasors under a statute providing that, when several actions are brought for one cause of action against several parties who might have been joined as defendants in the same action, no costs shall be allowed to plaintiff in more than one action.

[See note on this question beginning on page 623.]

Joint debtors — satisfaction of judgment against one — effect against others.

2. The acceptance of the amount of a judgment against one joint tort-feasor satisfies a larger judgment against another, even though the acceptance was under a stipulation that

it should not be considered as a release against the other.

[See 15 R. C. L. 830.]

— release of interest.

3. The satisfaction of a judgment against one joint tort-feasor releases the interest which has accrued on a judgment against the other joint tort-feasor.

APPEAL by plaintiff from an order of the Superior Court for King County (Jurey, J.) granting defendant's motion to require plaintiff to cancel and satisfy a judgment against him in toto in an action brought for the conversion of a boat. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. P. W. Willett and O. L. Willett, for appellant:

Where a settlement is made with one of the joint tort-feasors for the full amount of damages, it does not release the other joint tort-feasor from costs that have accrued in the other suit at the time of such settlement.

Sherman v. Brett, 7 Wis. 139; *Butler v. Ashworth*, 110 Cal. 614, 43 Pac. 4, 386; *Clements v. Crawford*, 1 Ala. 531; *Savage v. Stevens*, 128 Mass. 254; *Livingston v. Bishop*, 1 Johns. 290, 3 Am. Dec. 330; *Albright v. McTighe*, 49 Fed. 817; *Lovejoy v. Murray*, 3 Wall. 1, 10, 11, 18 L. ed. 129, 131, 132; *Chaffee v. United States*, 18 Wall. 516, 538, 21 L. ed. 908, 911; *Hawkins v. Hatton*, 10 S. C. L. (1 Nott & M'C.) 318, 9 Am. Dec. 700; *Lord v. Tiffany*, 98 N. Y. 412, 50 Am. Rep. 689; *Smith v. Singleton*, 27 S. C. L. (2 McMull.) 184, 39 Am. Dec. 122.

Defendant should have been required to pay the interest, less the amount of interest paid on the Hodge judgment, before plaintiff was required to satisfy the judgment.

Thompson v. Lassiter, 86 Ala. 536, 6 So. 33; *Guerry v. Perryman*, 2 Ga. 63; *Lumpkin v. Ferguson*, 44 S. C. L. (10 Rich.) 424.

Where the damages have been liquidated, payment of the smaller amounts acts only as payment pro tanto of the larger amount.

Guerry v. Perryman, 2 Ga. 63; *Lumpkin v. Ferguson* and *Thompson v. Lassiter*, supra; *Bloss v. Plymale*, 3 W. Va. 393, 100 Am. Dec. 752; *Ellis v. Esson*, 50 Wis. 138, 36 Am. Rep. 830, 6 N. W. 518; *Louisville & E. Mail Co. v. Barnes*, 117 Ky. 860, 64 L.R.A. 574, 111 Am. St. Rep. 273, 79 S. W. 261; *McVey v. Manatt*, 80 Iowa, 132, 45 N. W. 548; *Power v. Baker*, 27 Fed. 396; *Shainwald v. Lewis*, 46 Fed. 839; *Missouri, K. & T. R. Co. v. Haber*, 56 Kan. 717, 44 Pac. 619; *Whittemore v. Judd Linseed & Sperm Oil Co.* 124 N. Y. 565, 21 Am. St. Rep. 708, 27 N. E. 244.

Messrs. Byers & Byers, for respondent:

The acceptance of money in satisfaction of a claim against one joint tort-feasor, even with the reservation that

it is not to be considered as a release of another joint tort-feasor, operates to release the latter.

Randall v. Gerrick, 93 Wash. 526, L.R.A.1918D, 179, 161 Pac. 357; Abb v. Northern P. R. Co. 28 Wash. 428, 58 L.R.A. 293, 92 Am. St. Rep. 864, 68 Pac. 954; McLeod v. Morrison, 66 Wash. 686, 38 L.R.A.(N.S.) 783, 120 Pac. 528; Johnson v. Irvine Lumber Co. 75 Wash. 544, 135 Pac. 217.

Main, J., delivered the opinion of the court:

Gladie M. Larson, as administratrix of the estate of B. F. Richardson, brought an action against the Anderson Steamboat Company, a corporation, and J. L. Anderson for the conversion of a boat known as The City of Bothell. The action was tried to a jury and resulted in a verdict in favor of the plaintiff for the sum of \$2,350. After the verdict was entered the trial court sustained a motion for judgment notwithstanding the verdict, and entered a judgment dismissing the action. From this action an appeal was prosecuted, which resulted in a reversal and a direction that judgment be entered upon the verdict. Larson v. Anderson, 97 Wash. 484, 166 Pac. 774.

While that action was pending and before it went to final judgment, Gladie M. Larson as administratrix brought another action against Robert T. Hodge as sheriff of King county, and his official bondsmen, for the loss of the same boat. This action resulted in a verdict and judgment in favor of the plaintiff for the sum of \$1,800. An appeal was prosecuted and the judgment was affirmed. Larson v. Hodge, 100 Wash. 419, 171 Pac. 251. After that judgment was affirmed the plaintiff was paid in satisfaction thereof the sum of \$1,800, with interest and costs.

Thereafter J. L. Anderson, one of the defendants in the action first referred to, moved the court for an order to require the plaintiff to cancel and satisfy the judgment against him in toto. An order was entered as requested by the motion, from

which order this appeal is prosecuted.

The appellant, the plaintiff in both actions, makes the contention that the court was in error in requiring her to satisfy the cost incurred in the action against Anderson, without the same having been paid.

In Larson v. Hodge, *supra*, referring to the loss of the boat by the plaintiff and the part that the sheriff and Anderson respectively had therein, it was said: "It was their joint acts that deprived plaintiff of the boat, and they thus became joint tort-feasors. . . . It is too well settled to need citation of authority that joint tort-feasors may be sued either jointly or severally, and that a judgment against one is not a bar to suit against another. While plaintiff can have but one satisfaction for her wrong, yet, as between Anderson and the sheriff, neither can set up anything less than a satisfaction of a judgment against the other as a bar to an action."

As to whether Anderson and the sheriff are joint tort-feasors further inquiry will not here be made, but the holding in the case against the sheriff when it was here on appeal that they were such will be accepted. Since they were joint tort-feasors and they could have been sued jointly or separately, it follows under the statute (§ 478, Rem. & Bal. Code) that the plaintiff was entitled to costs in one action only. That statute provides that when several actions are brought for the same cause of action, against several parties "who might have been joined as defendants in the same action, no costs or disbursements shall be allowed to the plaintiff in more than one of such actions, which may be at his election, if the parties proceeded against in the other actions were, at the commencement of the previous action, openly within this state." In this case the plaintiff, by accepting the

Costs—several actions against joint tort-feasors.

costs in the action against the sheriff, made her election to take costs in that action.

Another contention is that it was error for the trial court to require the satisfaction of the judgment against Anderson except to the extent of \$1,800, or, in other words, that the plaintiff was entitled to the additional sum of \$550 before she should be required to satisfy the judgment against Anderson, which was the excess of the judgment in that case over the amount of the judgment in the case against the sheriff.

It is claimed that the receipt of the money upon the judgment in the case against the sheriff was under an agreement or understanding between the parties that it should operate only as a pro tanto satisfaction of the judgment in the case against Anderson. It is the rule in this state that the acceptance of

Joint debtors—
satisfaction of
judgment
against one—
effect against
others.

money in satisfaction of a claim against one joint tort-feasor, even with the reservation that is not to be

considered as a release against another joint-feasor, operates as a release of the latter. *Abb v. Northern*

P. R. Co. 28 Wash. 428, 58 L.R.A. 293, 92 Am. St. Rep. 864, 68 Pac. 954; *Randall v. Gerrick*, 93 Wash. 522, L.R.A. 1918D, 179, 161 Pac. 357.

Assuming that there was such an understanding as the appellant claims, it would not prevent the payment of the judgment in the case against the sheriff from operating as a release of the judgment against Anderson. If the payment of the judgment in the case against the sheriff operated as a release of the judgment against Anderson, it would seem to follow that it would operate, not only as a release of the amount for which

the judgment was entered, but also for —release of interest.

the interest which may have accrued thereon. In this respect no distinction could be made between the principal of the judgment and the interest.

It is unnecessary here to review authorities from other jurisdictions, as under the holdings of this court, the law touching the controversy between the parties is settled.

The judgment will be affirmed.

Holcomb, Ch. J., and Tolman, Mackintosh, and Mitchell, JJ., concur.

ANNOTATION.

Right to costs in both actions where parties who might have been sued jointly are sued separately.

I. Introductory, 623.

II. Satisfaction before all judgments obtained, 623.

III. Satisfaction after all judgments obtained, 625.

IV. Rule in Kentucky, 627.

V. Rule in New York, 627.

I. Introductory.

It is the purpose of this note to include only those cases dealing with the right to costs when a plaintiff, who might have sued all of the defendants in one action, elects to bring separate actions against each. It therefore does not include the cases arising on

negotiable instruments prior to statutes providing for a joint action against the maker and indorsers.

II. Satisfaction before all judgments obtained.

Where a creditor elects to sue separately persons who are liable jointly and severally, and receives satisfaction of the judgment first obtained during the pendency of a subsequent action and prior to the trial thereof, he is not entitled to the costs of the subsequent action. *Ayer v. Ashmead* (1863) 31 Conn. 447, 83 Am. Dec. 154; *Foster v. Buffum* (1841) 20 Me. 124; *Savage v. Stevens* (1880) 128 Mass.

254. And see the reported case (*LARSON v. ANDERSON*, ante, 621).

In *Savage v. Stevens* (Mass.) supra, the plaintiff elected to sue the defendants severally. Both actions were brought on the same day and were returnable at the same term of court. The plaintiff recovered a judgment for damages and costs against one of the defendants. This judgment was satisfied before the subsequent actions were tried, and the defendants filed a supplemental answer, pleading the judgment and satisfaction in bar. The plaintiff contended that he was entitled to nominal damages and costs. The defendants insisted that they were entitled to a general judgment, and for costs. The court held that, since satisfaction of the first judgment was obtained before judgment was rendered in the subsequent suits, the case was within the general rule that each defendant, as the prevailing party, is entitled to a judgment for his costs.

In *Foster v. Buffum* (1841) 20 Me. 124, the plaintiff instituted simultaneous suits against the maker and indorser of a note. Before the second trial the maker of the note satisfied the judgment rendered against him in the first action. It was held that since the plaintiff had received satisfaction of his claim, he could not prevail against the defendant, and therefore, since the defendant was the prevailing party, he was entitled to costs.

In *Perry v. Kennabunkport* (1867) 55 Me. 453, it was held that a statute (Rev. Stat. chap. 82, § 107) providing that "when a plaintiff . . . at the same term of court . . . brings more than one suit on a joint and several contract, he shall recover costs in only one of them unless the court certifies that there was good cause for commencing them," applied only to a plaintiff on the record, and that the court could not go beyond the record and regard an assignee or indorsee, or actual owner, as the "plaintiff" named.

In *Ayer v. Ashmead* (Conn.) supra, it appeared that the plaintiff elected to bring separate suits against joint tort-feasors. During the pendency of both suits, but before the trial of either, the plaintiff settled with one of

the defendants, including the damages and the costs of that action. On the second trial the second defendants offered the release in bar. It was admitted that the parties understood that the release was not to have the effect of releasing the other defendant. The court held that the release of one of the defendants released all, both as to the damages suffered and the costs incurred. The court said: "Now it is true, undoubtedly, that the law allows the costs in all the separate suits against joint trespassers to be collected, after they have once become established by the recovery of judgments, because then the costs have become judgment debts. They are then liquidated and established liabilities, and the same rule that permits the recovery of several independent judgments against each joint trespasser necessarily carries costs in each suit as incident to the judgment. But as a party plaintiff can never recover costs except as an incident to the recovery of some debt or damage, it follows that when the debt or damage is satisfied and discharged there remains nothing to which the costs can be an incident. Suppose, instead of receiving his damages of Grumley, the plaintiff had received them in full of the defendant Ashmead and had discharged Ashmead from all damages in consequence of the trespass, would it still be contended that the discharge would not bar the further prosecution of the suit? Could the action still be sustained for nominal damages, for the purpose of enforcing what may be considered an imperfect equity to the costs which had accrued? We believe that the history of jurisprudence furnishes no precedent for such a claim."

But if the satisfaction was had after the commencement of the subsequent trial, the plaintiff is entitled to the costs which have accrued in the subsequent action up to the time the first judgment was satisfied, but costs subsequently accruing are to be assessed against the plaintiff. *Westbrook v. Mize* (1886) 35 Kan. 299, 10 Pac. 881. In that case, the plaintiff elected to sue the defendants separately, instead

of jointly as he might have done. The judgment in the first action was not satisfied until after the second suit was begun. It was held, therefore, that the plaintiff was entitled to the costs which had accrued in the second action until the first judgment had been satisfied, while all costs subsequently accruing should be assessed against the plaintiff. The court said: "The plaintiff, as we have seen, had a right to bring and maintain separate suits against each of the wrongdoers at the same time, and therefore had a right to recover all costs in both suits up to the time when satisfaction was made in either one."

III. Satisfaction after all judgments obtained.

When a creditor elects to sue separately, persons who are jointly and severally liable and recover judgments against each before receiving satisfaction from any of them, he is entitled to the costs in all of the actions. *Kissire v. Plunkett-Jarrell Grocer Co.* (1912) 103 Ark. 473, 145 S. W. 567; *Bank of Columbia v. Ross* (1799) 4 Harr. & M. (Md.) 456; *Ryan v. Annelin* (1918) 228 Mass. 591, 118 N. E. 257; *Porter v. Ingraham* (1813) 10 Mass. 87; *Simonds v. Center* (1809) 6 Mass. 18; *Knott v. Cunningham* (1859) 2 Sneed (Tenn.) 204; *Shuter v. Dee* (1845) 1 U. C. Q. B. 292.

Thus in *Ryan v. Annelin* (1918) 228 Mass. 591, 118 N. E. 257, the plaintiff elected to sue the defendants severally, and recovered a judgment against each. The judgment rendered in the first action was satisfied and an execution issued to satisfy the second judgment, including costs. In a suit to restrain the enforcement of the execution levied on the second judgment, the court held that since the plaintiff prosecuted his several actions to judgment before receiving satisfaction, he could levy an execution in any one of the actions for the damages and in each action for the costs due him.

In *Simonds v. Center* (1809) 6 Mass. 18, it appeared that the plaintiff elected to sue the joint promisors of a note severally. Judgments were recovered against each of the defendants and the plaintiff moved for costs 6 A.L.R.—40.

against each. The lower court allowed costs to be had in one of the actions. On appeal, this holding was reversed, and the plaintiff allowed costs in each of the several actions.

The case of *Bank of Columbia v. Ross* (1799) 4 Harr. & M. (Md.) 456, arose under an act of the assembly 1793, chap. 30, which gave a right of action against all parties liable to the bank on a negotiable instrument. The act created a joint and several liability. In that case it was held that, when a note is indorsed and not paid, the holder, after demand made of the drawer, and notice to the indorsers of nonpayment, may institute suits against each; and that, the debt being several and joint, although separate executions must issue, and though but one satisfaction can be had, the holder of the note is entitled to the costs in all the actions.

In *Shuter v. Dee* (U. C.) *supra*, it appeared that the plaintiff was the holder of two negotiable notes, indorsed by one Lane and the defendant. It further appeared that the plaintiff first sued Lane separately, who, after issue joined, gave a cognovit; and, having also sued the defendant in a separate action, likewise obtained a cognovit from him. Later the plaintiff received payment of the debt from Lane, with costs in full in the action against him, and at the same time was offered the disbursements in the suit against the defendant, which he refused to receive. The plaintiff insisted on the full costs of both actions. It was held that the plaintiff was entitled to the costs of one action, and allowed no more than disbursements in the other.

In *Knott v. Cunningham* (1854) 2 Sneed (Tenn.) 204, the plaintiff elected to sue joint tort-feasors separately. In the second action, the defendant pleaded the judgment recovered in the first action in bar, and asked for judgment and costs. It appeared that there had been no satisfaction of the first judgment. The court held that since there was no satisfaction of the first judgment the plaintiff could prosecute his second action to judgment and levy execution for costs of both actions.

See also *Sherman v. Brett* (1859) 7 Wis. 139, wherein the court held that where there were separate judgments against several persons liable in the same cause of action, there could be but one satisfaction, but that all the judgment debtors were liable for reasonable costs in the prosecution of appropriate remedies.

And though the satisfaction of the first judgment is tendered during the pendency of the second action, the plaintiff cannot be compelled to accept it unless it includes the costs of both actions. Thus in *Porter v. Ingraham* (1813) 10 Mass. 87, the plaintiff elected to sue joint promisors severally instead of jointly. During the pendency of the second suit the plaintiff was tendered the amount of the claim with costs of the first suit. This was refused because, as suggested by the plaintiff, "it might prevent the recovery of costs in another action then pending." The defendant in the pending action claimed a verdict on the ground that he was exonerated. The court held that no valuable consideration had passed, and that the plaintiff was entitled to costs in the second action.

And in the later Massachusetts case of *Cook v. Hinsdale* (1849) 4 Cush. (Mass.) 134, Chief Justice Shaw said, "When [the assignee] paid into court the amount of the mortgage, the demandant was not bound to take it and discharge his action, without a tender of the costs in both actions, both suits being rightfully brought and pending for one and the same debt."

But the court will not, against the plaintiff's objection, exercise its equitable power to stay proceedings in one action on the payment by the defendant therein of a sum of money into court which does not include the costs of both actions.

Thus in *Whipple v. Newton* (1835) 17 Pick. (Mass.) 168, the defendant offered, in the usual form, to pay the costs of the action to that time. The plaintiff objected in writing to the offer, on the ground that it did not extend to the payment of the costs of both actions. The lower court ruled that the plaintiff was not bound to ac-

cept the money brought into court, unless the costs of both actions should be paid. To this the defendants objected. On appeal, the ruling of the trial court was sustained, the court saying: "Allowing a defendant to pay money into court, and thereupon staying all further proceedings, is a summary proceeding, in its nature equitable, and provided for the ease of the defendant; it cannot therefore be allowed to the injury of the plaintiff. Had the defendant been allowed thus to pay money into court, and thus to cancel and discharge the security, it would not only deprive the plaintiff of his costs in a suit rightly brought on a good cause of action, but leave him exposed to pay costs to the defendant." See also *Cook v. Hinsdale* (Mass.) *supra*.

In such an event it would seem that the proper method of procedure would be to prosecute the second action to judgment for damages and costs, and levy execution in either of the actions for damages, and in each action for the costs. *Savage v. Stevens* (1880) 128 Mass. 255.

And where an execution is issued on the final judgment, and the payment of the costs out of the funds derived from the levy results in preventing the entire satisfaction of the judgment, the plaintiff is entitled to the costs in a subsequent action against another defendant. Thus, in *Kissire v. Plunkett-Jarrell Grocer Co.* (1912) 103 Ark. 473, 145 S. W. 567, separate actions were brought against two parties liable on a joint contract. It appeared that on the final suit, the costs were paid, but it had the effect of preventing the plaintiff from obtaining satisfaction on his judgment. It was urged that the costs of the second suit be adjudged against the plaintiff because the present defendant could have been joined in the former action. Section 4422 of Kirby's Digest provided as follows: "No creditor on any joint or joint and several obligation shall have more than one satisfaction and costs in one suit." The court held that the plaintiff was entitled to costs on the ground that there had been no satisfaction of first judg-

ment. The court said: "Where separate suits are brought against several parties liable on a joint contract, and judgment and costs are recovered against one of them, which are satisfied, then the costs of the other suits should be charged against the plaintiff. But where the holder of a joint and several obligation has brought a separate action against each of the promisors, and there has been no satisfaction of the first suit brought, then the plaintiff should also have judgment for his costs against the other promisor. In other words, the plaintiff should only have one satisfaction of his debt and one satisfaction of costs; but he should obtain both the satisfaction of his debt and also the satisfaction of the costs of one suit." In the same case it was said further: "In the case at bar, the proceeds of the mortgaged property under said foreclosure suit were not effective to pay the judgment or decree recovered. It is true that out of the proceeds of said sale the costs of that suit were first paid; but this was in effect a payment of such costs by the plaintiff, because it reduced the amount which plaintiffs received upon its judgment to the extent of said costs, and a large portion of his judgment remained unpaid. The plaintiff not having received satisfaction of his costs in the first suit brought against the principal on the note, he was entitled to have judgment for costs in this suit brought against the other obligor."

IV. Rule in Kentucky.

In Kentucky, when a plaintiff elects to sue several defendants separately where one action would have sufficed, the award of the costs is left to the discretion of the trial judge. *Kreiger v. Gosnell* (1902) 24 Ky. L. Rep. 1095, 70 S. W. 683. In that case the plaintiff elected to sue separately instead of jointly, as he might have done. It was sought to make the plaintiff liable for the additional costs occasioned by an unnecessary multiplication of actions, in bringing a separate suit on each apportionment warrant. The court held that it was a matter in which the trial court should be accorded a large discretion, and that on

appeal it would be left for such action as the trial judge deemed proper.

V. Rule in New York.

In New York, prior to the adoption of the Code, it was the rule that where a plaintiff sued joint defendants separately, and perfected judgments against each before receiving satisfaction from any of them, he was entitled to the costs of each action.

Thus, in *Knickerbacker v. Cover* (1828) 8 Cow. 111, a nonbailable *capias ad respondendum* was issued against tort-feasors jointly, but on receiving separate notices of retainer by different counsel, the plaintiff declared separately. The plaintiff taxed his costs as in two separate actions, perfected judgment in each for costs and damages, and sued out execution for the whole against each. Satisfaction was had as to one defendant and the other defendant moved that satisfaction be entered as against him. The court held that there could be but one satisfaction, but that the plaintiff could recover his costs in both actions.

And where the parties entered into an express agreement that one of the defendants should be answerable for the entire damages, and in the event of a verdict against him that the other defendants were to pay the costs of their respective suits, it was held that a judgment rendered against the principal defendant, and the subsequent satisfaction of that judgment, did not operate as a release of the claim for costs under the agreement. *Livingston v. Bishop* (1806) 1 Johns. 290, 3 Am. Dec. 330, wherein the plaintiff brought separate actions of trespass against the defendant and five other persons, for a joint trespass. Pending the suits and before trial of any of them, a written agreement was made that the principal defendant should be considered as answerable for the whole trespass; and should a verdict be found against him, and should the court be of opinion that the plaintiff would be entitled to the costs in the other suits, then the other defendants were to pay the costs of their respective suits; otherwise not. A judgment was obtained against the

principal defendant and satisfied, whereupon the other defendants sought to escape liability for the costs incurred in their respective suits. The court held that, under the agreement, the plaintiff was entitled to the costs of the other suits.

But see *Ontario Bank v. Baxter* (1826) 6 Cow. 395, wherein it was held that the Statute of April 21, 1818 (Sess. Laws 41, chap. 259, § 6), regulating the costs of several suits on the same instrument or note, etc., against maker and indorsers, applied only to the general, and not to the interlocutory, costs of the cause.

Under the New York Code of Civil Procedure (§ 3231), if a plaintiff brings several actions against several defendants when one action would have sufficed, he can recover costs, other than disbursements, in but one action. *Quin v. Bowe* (1882) 10 Daly, 505; *Roberts v. Warren* (1886) 3 How. Pr. N. S. 524; *Moosbrugger v. Kaufman* (1896) 7 App. Div. 380, 40 N. Y. Supp. 213.

In *Moosbrugger v. Kaufman*, supra, the object of § 3231 of the Code of Civil Procedure was stated by Follett, J., as follows: "The object of this section is to prevent plaintiffs from bringing a multitude of actions for the purpose of recovering costs, in cases in which all of their legal rights might be adjudicated in a single legal or equitable action."

In *Quin v. Bowe* (1882) 10 Daly, 505, the plaintiff sued a sheriff for an alleged trespass. During the pendency

of this action the plaintiff brought suit against the indemnitor of the sheriff and recovered judgment, which was satisfied. The sheriff then moved for leave to set up the satisfaction by way of supplemental answer. The court held that the answer might be set up on payment of the disbursements only, as costs, other than disbursements, could not be recovered.

Similarly, in *Roberts v. Warren* (1886) 3 How. Pr. N. S. 524, the plaintiff sued joint tort-feasors separately. During the pendency of the second action the judgment obtained in the first action was satisfied, and the defendant in the second action moved for leave to serve a supplemental answer, setting up the recovery and the satisfaction of the former judgment in bar. The court held that the plaintiff was entitled to any taxable disbursements that he had incurred and that were not included in the former action, and should have leave to discontinue.

And see *Pratt v. Allen* (1858) 19 How. Pr. 450, wherein it was held that where a severance was occasioned by the acts of the defendant, although one action was brought and therefore the case was not within the terms of the statute, nevertheless the case was within the spirit of the act, and therefore costs were to be allowed in but one action. See to the same effect *Levin v. Haas* (1881) 25 Hun, 266, and *Abbott v. Johnstown, G. & K. Horse R. Co.* (1881) 24 Hun, 135. A. S. M. .

GEORGE C. CAMPBELL, Appt.,

v.

MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Resp't.

Wisconsin Supreme Court — March 4, 1919.

(— Wis. —, 170 N. W. 937.)

Carrier — adoption of rules — limiting passengers.

1. An interurban electric railway company may adopt a rule reserving its cars for the use of interurban passengers only.

[See note on this question beginning on page 632.]

— power to question right to operate cars.

2. One seeking damages because an interurban railway company refused to permit him to enter its car as an urban passenger cannot raise the question of the right of the company, under its franchise, to run interurban cars on the city streets.

— reasonableness of rule.

3. A rule of a street railway company which runs urban and interurban cars over the same tracks, excluding urban traffic from interurban cars in congested parts of the city, is reasonable.

[See 25 R. C. L. 1126.]

— power to adopt rules.

4. A common carrier of passengers may adopt reasonable rules and regulations for the management of its business, and use the necessary amount of force to secure their observance.

[See 4 R. C. L. 1055.]

Courts — jurisdiction — matter committed to Railroad Commission.

5. Where the state has provided a remedy before the Railroad Commission for an attempt by a street railway company to enforce unreasonable and improper regulations, the court must yield the prior right of determination to such tribunal.

APPEAL by plaintiff from a judgment of the Circuit Court for Milwaukee County (Schinz, J.) dismissing an action brought to recover damages for alleged forcible ejection of plaintiff from one of defendant's cars. *Affirmed.*

Statement by Eschweiler, J.:

The plaintiff seeks to recover damages as a result of having been forcibly prevented from entering one of defendant's cars by the conductor in charge. On May 18, 1916, the plaintiff attempted to become a passenger, being ready to pay his fare, on one of the cars used by defendant in interurban traffic between Kenosha and Racine to and into the city of Milwaukee. It had been running such cars for more than twenty years between such points, Milwaukee being the northern terminus. Some time prior to the occurrence complained of the defendant had filed with the Railroad Commission of this state its printed schedule of its rules as to the conduct and management of such interurban cars on this line. Among such provisions was one to the effect that north-bound trains must not stop to pick up passengers after passing Kinnickinnic and Pryor avenues in said city of Milwaukee. This designated point was south of the place where plaintiff sought to enter this north-bound car, thus making the place of such proposed entry within the territory covered by such excluding regulation. The place of attempted entry was at a street crossing in the city of Milwaukee which was a regular stop-

ping place for such interurban cars, and where they discharged passengers who came from outside the city, and it was also a regular stopping place for both the receiving and discharging of passengers on its urban cars, which also used the same tracks. Plaintiff was informed by defendant's conductor that he could not be permitted to enter because of the rules of the defendant prohibiting such purely urban traffic. Plaintiff had known of such regulation before, although on some prior occasions he had been permitted to ride on such cars in spite of such rule.

The complaint alleged that the defendant had no right, license, permission, or authority whatever to run cars upon the street in question, other than obtained by two certain franchises of the city of Milwaukee of December 28, 1874, and January 16, 1888, respectively. The plaintiff alleged, upon information and belief, that the defendant had issued orders to its conductors not to permit city passengers to ride upon said car from which plaintiff was ejected, and that defendant had unlawfully and illegally issued an order that such cars should be reserved exclusively for persons taking passage thereon outside of the city limits of the city of Milwaukee

and in other cities and elsewhere, and that in such forcible ejecting of the plaintiff the conductor was obeying the instructions of the defendant.

Plaintiff learned, subsequent to his attempting to board this car, that there was or might be no franchise from the city giving to the defendant the right to run such interurban cars over the street in question. The trial court, in submitting the case to the jury, instructed them as follows: "You will assume that the conductor had a right to resist plaintiff's attempt to board the car, and in so doing had the right to use such force as was reasonably necessary under the circumstances as disclosed by the evidence in the case to accomplish such purpose."

The jury found that the conductor did not use more force than was reasonably necessary to eject the plaintiff from the steps of the car upon which he stood while the car stopped at the crossing in question. Upon such finding the court directed judgment to be entered dismissing the action on the merits. From such judgment the plaintiff appealed.

Messrs. Schoetz, Williams, & Anderson, for appellant:

The car from which the plaintiff was ejected was a street car.

Daly v. Milwaukee Electric R. & Light Co. 119 Wis. 398, 100 Am. St. Rep. 893, 96 N. W. 832, 15 Am. Neg. Rep. 227; Schuster v. Milwaukee Electric R. & Light Co. 142 Wis. 578, 126 N. W. 26.

Plaintiff was a passenger.

Zimmerman v. Mednikoff, 165 Wis. 333, 162 N. W. 349; Tolleman v. Sheboygan Light, Power & R. Co. 148 Wis. 197, 134 N. W. 406; Lugner v. Milwaukee Electric R. & Light Co. 146 Wis. 175, 181 N. W. 342; Karr v. Milwaukee Light, Heat & Traction Co. 132 Wis. 662, 13 L.R.A. (N.S.) 283, 122 Am. St. Rep. 1017, 113 N. W. 62.

Injury to feelings alone will support a judgment in a passenger ejectment case.

Wightman v. Chicago & N. W. R. Co. 73 Wis. 169, 2 L.R.A. 185, 9 Am. St. Rep. 778, 40 N. W. 689; Phettiplace v.

Northern P. R. Co. 84 Wis. 412, 20 L.R.A. 483, 54 N. W. 1092.

Plaintiff has a right of recovery.

New York, L. E. & W. R. Co. v. Winter, 143 U. S. 60, 36 L. ed. 71, 12 Sup. Ct. Rep. 356, 8 Am. Neg. Cas. 690; Nellis, Street Railways, 1st ed. p. 504; Kiley v. Chicago City R. Co. 189 Ill. 384, 52 L.R.A. 626, 82 Am. St. Rep. 460, 59 N. E. 794, 9 Am. Neg. Rep. 476.

Messrs. Van Dyke, Shaw, Muskat, & Van Dyke, for respondent:

A special remedy for securing a change in a known and established practice of the defendant road is provided by law, and it was not the plaintiff's right to compel a change by resort to physical force.

State ex rel. Superior v. Duluth Street R. Co. 153 Wis. 650, 142 N. W. 184.

An intending passenger has no right to forcibly enter a conveyance which to his knowledge is being operated for a special purpose, or for a special class of traffic, which excludes the intending passenger and all persons similarly situated.

Ohage v. Northern P. R. Co. 118 C. C. A. 302, 200 Fed. 128; Waszkiewicz v. Milwaukee Electric R. & Light Co. 147 Wis. 422, 133 N. W. 596.

The defendant's common carrier duty to the plaintiff as an intending passenger was fully discharged. Its duty to the plaintiff as a traveler upon the street is not involved.

Spellman v. Caledonia, 117 Wis. 254, 94 N. W. 27; Scanlon v. Wedger, 156 Mass. 462, 16 L.R.A. 395, 31 N. E. 642; Waszkiewicz v. Milwaukee Electric R. & Light Co. 147 Wis. 422, 133 N. W. 596; Derr v. Chicago, M. & St. P. R. Co. 163 Wis. 234, 157 N. W. 753.

Interurban cars having been operated upon Kinnickinnic avenue past the point of the accident, for the period of about twenty years, the right to object thereto lies with public authorities, not with an individual.

Zehren v. Milwaukee Electric R. & Light Co. 99 Wis. 83, 41 L.R.A. 575, 67 Am. St. Rep. 844, 74 N. W. 538; Chicago General R. Co. v. Chicago City R. Co. 186 Ill. 219, 50 L.R.A. 734, 57 N. E. 822; Hine v. Bay Cities Consol. R. Co. 115 Mich. 204, 73 N. W. 116.

In any event, the plaintiff, after being in a considerate manner denied admission to the car, was not justified in forcing entry by violence.

Hogner v. Boston Elev. R. Co. 198 Mass. 260, 15 L.R.A. (N.S.) 960, 84 N. E. 464; North Chicago Street R. Co. v.

Olds, 40 Ill. App. 421; Monnier v. New York C. & H. R. Co. 175 N. Y. 281, 62 L.R.A. 357, 96 Am. St. Rep. 619, 67 N. E. 569, 14 Am. Neg. Rep. 423.

Eschweiler, J., delivered the opinion of the court:

The substance of plaintiff's contention in this case is based upon the proposition asserted by him that, there being no franchise granted by the city of Milwaukee to defendant to run its interurban cars upon the street in question, such cars, when so running on the street, must be considered, so far as prospective passengers are concerned, as urban cars, and required, therefore, to carry persons who desire to be transported from one point in the city of Milwaukee to another reached by such car in the same manner as such urban cars, and subject to all the regulations as to the taking on or discharging of city passengers that apply to the regular urban service of the defendant.

The plaintiff, however, cannot test by force, nor have determined in this action, whether or not the defendant is running

Carrier—power to question right to operate cars.

its interurban cars on the streets of the city of Milwaukee under a proper franchise or not. He has not been injured by reason of the defendant's use of the streets, but only, if at all, because the defendant, while using the streets, denied him his claim of right to take advantage as a passenger, of the very use that was being made of the streets by the defendant as a common carrier. He does not come into court as the owner of property adjacent to this car line, whose real estate has been depreciated in value, or right in connection with such ownership invaded, as was the situation in Schuster v. Milwaukee Electric R. & Light Co. 142 Wis. 578, 126 N. W. 26; nor has he sustained personal injury by reason of defendant's use of the street, as in Daly v. Milwaukee Electric R. & Light Co. 119 Wis. 398, 100 Am. St. Rep. 893, 96 N. W. 832, 15 Am. Neg. Rep. 227.

The rule of defendant, which its employee was seeking under its di-

rection to enforce, by which such interurban cars were reserved for interurban traffic only, and city traffic excluded therefrom, —adoption of rules—limiting passengers.

was a regulation that the defendant as a common carrier

had the right to —reasonableness of rule.

make, and was, under the situation disclosed in this case, at least a reasonable one. Such regulation has been submitted to the tribunal in this state which is clothed with full power to determine whether such a regulation was a proper one or not. That tribunal, the Railroad Commission, has passed upon such a system of proposed restricting urban from interurban service, and adopted the view that it may be properly done. *Racine v. Milwaukee Electric R. & Light Co.* 12 Wis. R. C. 388; *Kenosha v. Kenosha Electric R. Co.* 12 Wis. R. C. 508.

That a common carrier of passengers may adopt reasonable rules and regulations for the management of its business, and use the necessary amount of

force to secure —power to adopt rules.

their observance, is beyond question. *Coombs v. Southern Wisconsin R. Co.* 162 Wis. 111, L.R.A.1916D, 539, 155 N. W. 922, Ann. Cas. 1918C, 532; *Ellis v. Milwaukee City R. Co.* 67 Wis. 135, 58 Am. Rep. 858, 30 N. W. 218; *Plott v. Chicago & N. W. R. Co.* 63 Wis. 511, 23 N. W. 412; *Yorton v. Milwaukee, L. S. & W. R. Co.* 54 Wis. 234, 41 Am. Rep. 23, 11 N. W. 482, 8 Am. Neg. Cas. 678; *Garricott v. New York State R. Co.* 223 N. Y. 9, L.R.A.1918D, 929, 119 N. E. 94; *Sullivan v. Boston Elev. R. Co.* 199 Mass. 73, 21 L.R.A. (N.S.) 36, 84 N. E. 844; *Ohage v. Northern P. R. Co.* 118 C. C. A. 302, 200 Fed. 128.

If the defendant is operating its interurban cars on the streets of the city of Milwaukee without proper right or authority, the law has provided orderly proceedings to determine that question.

If the defendant as a common carrier is attempting to enforce and carry out unreasonable and im-

proper regulations, to the detriment of the general public, the state has provided for summary proceedings and a speedy determination of such questions before the Railroad Commission of this state, and even the courts are required, at least in ordinary situations, which would certainly cover the one in question here, to yield the prior right of determination to

Courts—jurisdiction—matter committed to Railroad Commission.

such tribunal. *State ex rel. Superior v. Duluth Street R. Co.* 153 Wis. 650, 142 N. W. 184.

No good reason appears why at least the same amount of self-restraint as to course of procedure should not be expected from an individual situated as was the plaintiff in this case.

Judgment affirmed.

Petition for rehearing denied.

ANNOTATION.

Right to exclude urban traffic from interurban cars.

There can be no doubt as to the power of a carrier of passengers to make, and by its proper agents enforce, reasonable rules and regulations for the carriage of its passengers, and the transaction of its business generally. 4 R. C. L. title, Carriers, 1055.

Under that general principle, the reported case (*CAMPBELL v. MILWAUKEE ELECTRIC R. & LIGHT CO.* ante, 628), which appears to be the only decision passing on the point, holds that a rule adopted by an interurban railway company whereby its interurban cars are reserved for interurban traffic, and city or urban traffic is excluded therefrom, was one which the company had, as a common carrier, the right to make, and was a reasonable one under the circumstances. In that case it appeared that the rule or regulation adopted by the company was to the effect that north-bound interurban trains should not stop to pick up passengers after passing certain streets in the northern terminal city. This designated point was south of the place where the plaintiff sought to enter a north-bound car, thus making the place of his proposed entry within the territory covered by this excluding regulation. The place of attempted entry was at a street crossing in the city which was a regular stopping place for interurban cars for the purpose of discharging passengers who came from outside the city, and it was also a regular stopping place

for both the receiving and discharging of passengers on its urban cars, which also used the same tracks. The plaintiff was informed by the defendant's conductor that he could not be permitted to enter because of the rules of the defendant prohibiting such purely urban traffic. The court held that the rule was a reasonable one, and one which the defendant company had a right to make, and that therefore the conductor had a right to eject the plaintiff.

In connection with the subject of this note, though not strictly within its scope, it has been held that a city or village has no power to require an interurban railroad which passes through its streets to stop its cars at places designated by the city, and receive passengers, for the reason that it would inconvenience the public, and the value of the interurban line, as such, would be greatly depreciated, the court saying that so much time would be consumed in passing through cities and villages that it would no longer be practicable for many to travel that way. *Townsend v. Circleville* (1908) 78 Ohio St. 122, 16 L.R.A. (N.S.) 914, 84 N. E. 792.

To the contrary, however, see *Camden v. Public Service R. Co.* (1913) 84 N. J. L. 307, 86 Atl. 447, Ann. Cas. 1914D, 1090, affirming (1912) 82 N. J. L. 242, 82 Atl. 609, wherein it was held that a municipal ordinance compelling a railway company to stop its interurban cars in the city to take on

or let off passengers was a reasonable one, under the power derived from its charter to pass ordinances regulating the streets of the city and prescribe the manner in which corporations should exercise the privilege granted to them in the use of any street. The court said: "The question remains whether it was a reasonable exercise of this power to require through cars running to the Philadelphia ferry from Merchantville and Moorestown, for the especial accommodation of citizens of those towns, to stop in Camden. It is urged that there is nothing to show that the railway company did not run cars enough, aside from the through cars, to accommodate the local traffic within the limits of Camden. This, however, is not the precise question to be determined. Passengers from Merchantville or Moorestown might wish to alight at points in Camden long before the car reached its terminus at the ferry and passengers from Camden to Merchantville or Moorestown might wish to board the car at points in the city without going to the ferry or the other points

within the city at which the through cars stop. We know no reason why the city council might not regulate the stops of street cars with a regard to the interest and need of such passengers. Indeed, in view of the fact that one of the peculiar characteristics of street railroads is frequent stops for the reception and discharge of passengers along its route, usually at every street corner (36 Cyc. 1345, 1347), in return for which service they are allowed special privileges in the public highways, it may be doubted whether, in the absence of legislation conferring the authority, a street railroad is entitled to these privileges for cars that do not purport to serve the municipality whose highways they use. This question was not argued and we need not express an opinion thereon. We need now go no further than to hold that the street railway, in return for its privileges in the highways of Camden, may properly be required to stop all cars, whether local or through cars, at the usual stopping places within the city limits."

J. C. L.

N. P. SLOAN CORPORATION

v.

ROSS B. LINTON et al., Trading as Josiah Linton & Company, Appts.

Pennsylvania Supreme Court — March 18, 1918.

(260 Pa. 569, 103 Atl. 1011.)

Broker — Individual liability.

1. Brokers who fail to disclose their principal are individually liable on their sales contract.

[See note on this question beginning on page 641.]

Sale — failure to exercise option of inspection — effect.

2. Failure of a buyer to exercise his option of inspection at point of shipment does not render the contract ineffective.

Damages — breach of sales contract — where ascertained.

3. The damages for breach of contract to sell and deliver cotton linters are the difference between the con-

tract price and market price at the largest and most active market for that class of goods at time of breach, less cost of transportation there, where prices at place of delivery are based on those at such market, and the statute provides that where there is an active market for the goods, the damages are the difference between the contract and market price.

[See 24 R. C. L. 72-74.]

APPEAL by defendants from a judgment of the Court of Common Pleas No. 2 for Philadelphia County (Wessel, J.) in favor of plaintiff in an action brought to recover damages for breach of a sales contract. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Morris & Kirby, for appellants:

The contract was not fully executed, but was merely an executory contract of sale, which would become fully executed after an examination of the stock of linters at the respective mills.

Pennsylvania Lubricating Co. v. Wilhelm, 255 Pa. 392, 100 Atl. 93; Nicholson v. Taylor, 31 Pa. 123, 72 Am. Dec. 728; Hyde v. Kiehl, 183 Pa. 414, 38 Atl. 998; Miller v. Seaman, 176 Pa. 291, 35 Atl. 134; Erisman v. Walters, 26 Pa. 467; Conrad v. Pennsylvania R. Co. 214 Pa. 98, 63 Atl. 424.

The market price, which is relevant in actions for alleged breach of sales of personal property, is that at the time and place of delivery.

Canavan v. Neeld, 189 Pa. 208, 42 Atl. 115; Willock v. Crescent Oil Co. 184 Pa. 245, 39 Atl. 77; Arnold v. Blabon, 147 Pa. 372, 28 Atl. 575; Boyd v. Merchants & F. Peanut Co. 25 Pa. Super. Ct. 199; Reiss v. Myers, 57 Pa. Super. Ct. 243; Tuttle-Chapman Coal Co. v. Coaldale Fuel Co. 136 Iowa, 382, 113 N. W. 827; Miller v. Seaman, 176 Pa. 291, 35 Atl. 134; Dannemiller v. Kirkpatrick, 201 Pa. 218, 50 Atl. 928; Jacksonville, T. & K. W. R. Co. v. Peninsular Land, Transp. & Mfg. Co. 27 Fla. 157, 17 L.R.A. 65, 9 So. 689; Pennsylvania & N. Y. R. & Canal Co. v. Bunnell, 81 Pa. 414.

Conceding, for the sake of argument, that there was no market value or no open market at Columbia or Cheraw on November 1st, it was not competent to go to a distant market without further showing that such market was the nearest available one.

Sedgw. Damages, p. 2638; Deifendorff v. Gage, 7 Barb. 18; Savercool v. Farwell, 17 Mich. 308; Abbott v. Wyse, 15 Conn. 254; Union Pacific, D. & G. R. Co. v. Williams, 3 Colo. App. 526, 34 Pac. 731; Berry v. Nall, 54 Ala. 446; Gregory v. Rosenkrans, 78 Wis. 451, 47 N. W. 832; Jones v. St. Louis, I. M. & S. R. Co. 53 Ark. 27, 22 Am. St. Rep. 175, 13 S. W. 416; Siegbert v. Stiles, 39 Wis. 533; Stiff v. Fisher, 2 Tex. Civ. App. 346, 21 S. W. 291; Gulf, C. & S. F. R. Co. v. Dunman, 4 Tex. App. Civ. Cas. (Willson) 147, 16 S. W. 421; Bump v. Cooper, 20 Or. 527, 26 Pac. 348; Berry v. Dwinel, 44 Me. 255;

Log Mountain Coal Co. v. White Oak Coal Co. 163 Ky. 842, 174 S. W. 721; Hogan v. Donohue, 49 Ill. App. 432; Gensburg v. Marshall Field & Co. 104 Iowa, 599, 74 N. W. 3; Tuttle-Chapman Coal Co. v. Coaldale Fuel Co. 136 Iowa, 382, 113 N. W. 827; Grand Tower Min. Mfg. & Transp. Co. v. Phillips, 23 Wall. 471, 23 L. ed. 71; Fessler v. Love, 48 Pa. 407; Gordon v. Bowers, 16 Pa. 228.

Messrs. Paul C. Hamlin and Albert L. Moise, for appellee:

The contract was executed, and not executory.

Conard v. Pennsylvania R. Co. 214 Pa. 98, 63 Atl. 424.

Plaintiff's evidence was competent and sufficient to prove damages.

Gordon v. Bowers, 16 Pa. 226; 2 Sutherland, Damages, 4th ed. § 653, p. 2295; Hazleton Coal Co. v. Buck Mountain Coal Co. 57 Pa. 301, 2 Mor. Min. Rep. 389; Oak Ridge Coal Co. v. Rogers, 108 Pa. 147; Kingston v. Lehigh Valley Coal Co. 241 Pa. 469, 49 L.R.A.(N.S.) 557, 88 Atl. 763; Stevens v. Lyford, 7 N. H. 360; Wemple v. Stewart, 22 Barb. 154; Lafrance v. Desautels, 225 Mass. 324, 114 N. E. 312; Hauptman v. Pennsylvania Working Home, 258 Pa. 427, 102 Atl. 142.

Defendants, having failed to name their principal, became personally liable for breach of their contract.

Meyer v. Barker, 6 Binn. 228; Youghiopheny Iron & Coal Co. v. Smith, 66 Pa. 340, 10 Mor. Min. Rep. 139; Quigley v. DeHaas, 82 Pa. 267; Hopkins v. Mehaffy, 11 Serg. & R. 126; 81 Cyc. 1559.

Potter, J., delivered the opinion of the court:

The N. P. Sloan Corporation brought this action of assumpsit to recover damages from the firm of Josiah Linton & Company for the breach of a contract for the sale of cotton linters. Plaintiff's claim was based upon a letter dated October 25, 1916, from defendants to plaintiff, in which they stated that "we have sold to you as brokers per contracts turned over to us, cotton linters as follows: Quantity, 475 bales. Quality, clean mill run. Price, 6.18 f. o. b. cars mills."

It was further stated that the linters sold consisted of 250 bales at Columbia, South Carolina and 225 bales at Cheraw, South Carolina. The letter contained the following clause: "You have the privilege of examining stock at point of shipment, but shipping instructions to be given to us immediately."

The record shows that shipping instructions were promptly given to defendants, and plaintiff sent its agent to Columbia and Cheraw, South Carolina, to examine the goods sold, but none could be found at either place, and therefore he could make no inspection. On November 1, 1916, defendants notified plaintiff that they could not deliver the goods sold and stated that they had sold them as brokers on account of the Corey-Bickmore Corporation of New York, and that their interest in the matter had ceased. In plaintiff's statement damages were claimed on the basis of the difference between the contract price and the market value of cotton linters on November 1st, the date of the breach, at New York, less the cost of transportation from Columbia and Cheraw, South Carolina, to that city. At the trial, defendants contended: (1) That, having made the sale as brokers, they were not personally liable upon the contract; (2) that, as no examination of the goods had been made by plaintiff, the contract was not complete, and no recovery could be had for its breach; and (3) that the measure of damages set up in the statement was not the true measure under the law. There was a verdict for plaintiff, and from the judgment entered thereon defendants have appealed.

As to the first point, it appears that plaintiff showed, by uncontradicted evidence that defendants made no disclosure of their principal until some

Broker—
individual
liability.

days after the contract was made, and not until they notified plaintiff that the contract would not be performed. Beyond question, there-

fore, defendants could not escape liability upon that ground.

Their counsel contend further that the clause giving plaintiff the privilege of examining the goods at point of shipment was a condition precedent to the contract taking effect, and that, as no such examination was made, it was not consummated and never became effective. The evidence shows that plaintiff attempted an examination, but its agent was unable to find the goods, and they were not produced for his inspection. But, aside from that, the language of the letter of October 25, 1916, does not make such an examination a condition of the contract. It gives the purchaser the privilege only of inspection at point of shipment. Of course, such privilege might be exercised or waived, at the option of the person to whom it

Sale—failure to
exercise option
of inspection—
effect.

was extended, without affecting the validity of the contract. An inspection might have disclosed grounds for rescinding the contract, but it would have been optional with the purchaser whether he would rescind or not. Until rescinded, the contract would remain in force. To sustain their position on this question, counsel for appellants rely upon *Pennsylvania Lubricating Co. v. Wilhelm*, 255 Pa. 390, 100 Atl. 93. In that case the acceptance of the vendor's offer contained the following clause: "The above subject to approval of sample drawn from bulk, when submitted."

It was held that the contract was not complete until the sample had been submitted and approved. Our Brother Walling said (255 Pa., page 392): "The contract was lacking in one essential particular: the minds of the parties had not met on the quality of the commodity, as that was to be determined by sample thereafter to be submitted for plaintiff's approval. Until such approval, there was no completed agreement. Should plaintiff disapprove the sample drawn from bulk, there would be no sale."

It was there further said (255 Pa. 393): "This is not the case of a sale of property subject to the buyer's inspection when delivered; if so, the contract would be valid. *Conard v. Pennsylvania R. Co.* 214 Pa. 98, 63 Atl. 424. Nor is it an agreement that the article sold should be satisfactory to the buyer; but it is an agreement that, as part of the sale, and in advance of the delivery of the commodity, its quality shall be determined by the purchaser's approval of the sample. Certainly, defendant could not compel plaintiff to accept the grease, without its previous approval of the sample thereof."

The present case is, however, distinctly that of a sale of property subject to the buyer's inspection when delivered, and therefore the contract was valid and complete. It did not require the purchaser's approval of the goods delivered, in order to make it binding upon the parties.

The case of *Conard v. Pennsylvania R. Co.*, supra, cited in Mr. Justice Walling's opinion and by appellee here, arose out of a contract for the purchase of steel rails, conditioned upon an inspection by the vendee. Mr. Justice Mestrezat said (214 Pa. 102): "An executed contract for the sale of a chattel vests the title at once; but an executory contract always leaves something to be done before the title to the property will vest in the purchaser. When, however, the act is performed, the sale is complete and the title to the property passes. And in cases like the present, where personal property of a certain description is purchased but not identified or selected from a mass of like property of the vendor, the contract is executory and incomplete, and the title to it remains in the vendor. As soon, however, as the purchaser makes a selection of a particular part of the property, in pursuance of his contract, and his act is approved by the vendor, the sale is complete and the title of the vendor is divested.

In the case now before us, a specified number of bales of cotton linters, of a designated quality and manufacture, were sold, and neither inspection nor selection was a condition of the contract. The purchaser was merely given the "privilege" of examination at the place of delivery. The contract was fully executed, except as to the delivery of, and payment for, the goods.

Upon the trial, both parties agreed that the damages in such a case are to be measured by the difference between the contract price and the market value at the date of the breach. But they differed as to the method of ascertaining that that value. Plaintiff proved the market value at the place of delivery by showing the market value in New York city, and deducting therefrom the cost of transportation from the places of shipment. Counsel for appellants contend that this method was erroneous. The general rule is stated in 35 Cyc. 633, as follows:

Damages—
breach of sales
contract—where
ascertained.

"Where the breach consists in the failure of the seller to deliver the goods, the measure of damages is ordinarily the difference between the contract price and the market price of the goods at the time and place of delivery, provided there is a market price for goods of the character and quality contracted for by the buyer at such time and place, and interest thereon from the time of the breach." And on page 638, it is said: "The market price must be determined as of the place of delivery, provided the goods have a market price at such place. If there is no market price at the place of delivery, the true value is to be shown by the best evidence possible; and in such cases the market price at other places, plus the expense of transportation to the place of delivery, may be used as a basis for computation; and if the market price in the vicinity of the place of delivery is shown to depend on the market price at a large, well-known, and active market, the market price

at such place, plus transportation charges, may be considered. If the place of delivery and place of destination are different, the market price at the destination, less the cost of transportation, may be resorted to."

Here there was testimony tending to show that the market price of cotton linters throughout the country is based on New York prices, that being the largest and most active market for that class of goods. There was also testimony from which the jury were justified in finding that the market value at Columbia and Cheraw, South Carolina, was based upon the market price in New York, being determined by the cost of transportation to that point.

Under Sales Act May 19, 1915 (P. L. 543) § 67, referring to the measure of damages where the seller has wrongfully refused to deliver the goods, it is provided: "Third. Where there is an available market for the goods in question, the measure of damages, in the absence of special circumstances showing proximate damages of a greater amount, is the difference between the contract price and the market or current price of the goods at the time or times when they ought to

have been delivered, or, if no time was fixed, then at the time of the refusal to deliver."

It will be noted that it is an "available market" to which resort is to be had for a price, and no mention of the place of delivery is made in that connection in the act.

We find no merit in any of the assignments of error in which complaint is made of the rulings of the learned trial judge upon the admission of testimony as to the market value of the goods. Nor is there any substance in the specifications alleging error in the charge to the jury. It was clear, explicit, and adequate, and the answers to the points submitted were entirely correct.

The judgment is affirmed.

NOTE.

The decision in the reported case (N. P. SLOAN CORP. v. LINTON, ante, 633), that brokers who fail to disclose their principals are individually liable on their sales contract, is in accord with the weight of authority, as is shown in the annotation following HURRICANE MILL CO. v. STEEL & P. CO. post, 641, on the general subject of "Personal liability of broker for breach of contract by his principal."

HURRICANE MILLING COMPANY

v.

STEEL & PAYNE COMPANY, Plff. in Err.

West Virginia Supreme Court of Appeals — May 27, 1919.

(— W. Va. —, 99 S. E. 490.)

Broker — personal liability.

1. A broker authoritatively representing a known or disclosed principal, as vendor in the sale of a commodity, not notified at the time of the sale of the purpose of the vendee to hold him responsible for the performance of the contract, nor bound by its terms in any form, is not personally liable for any breach thereof.

[See note on this question beginning on page 641.]

Headnotes 1-5 by POFFENBARGER, J.

— knowledge of character.

2. To absolve a broker from personal liability in such case, it suffices that the vendee knew before consummation of the contract of sale that the person negotiating it was a broker engaged in the sale, as such, of the kind of commodity in question, and that he was then selling the vendee property belonging to a third person. The contract need not show, by express stipulation, or express warning given at the time of the sale, that the negotiator was making it as a broker and for a third party.

[See 4 R. C. L. 292.]

Evidence — character of broker.

3. In such case, the relation of the parties to the transaction and knowledge thereof on the part of the vendee may be established in an action by the vendee against the broker on account of a breach of the contract, by proof of facts and circumstances warranting inference thereof by the jury; and, for such purpose, evidence of the situation of the parties and the attendant facts and circumstances is admissible.

[See 21 R. C. L. 897.]

— what sufficient.

4. Unqualified and unexplained payment by the vendee of a sight draft with bill of lading attached, for the contract price of the commodity, reception by the vendee of a written confirmation of the sale, from the broker, disclosing the name of his principal and advising that the sale was made for his account, and identity of the manner of the sale, delivery, and pay-

ment with those of others of the same kind of commodity, previously effected between the same parties and by the same broker, are each conclusive proof of the vendee's knowledge of the relation of the parties to one another in the transaction.

[See 21 R. C. L. 897.]

— burden of proof — injury in transportation.

5. If, in the case of such a sale, there is liability on the part of the broker by reason of nondisclosure of his principal, for breach of a warranty of quality, due to injury in transportation, the burden is upon the vendee to prove that the injury occurred before delivery of the commodity at the place of delivery specified in the contract.

— character of parties to contract.

6. Upon the question whether principal or broker is liable for breach of a contract of sale, all the facts and circumstances tending to cast any light upon the relations of the parties are relevant and material.

Custom — presumption of knowledge.

7. There is no presumption of knowledge of a custom or usage unless it is so general and notorious that the parties to a transaction of which it is claimed to have constituted a part may be deemed to have had knowledge of it.

[See 4 R. C. L. 263.]

Sale — right of inspection.

8. The consignee of goods delivered by the carrier always has the right of inspection.

[See 23 R. C. L. 1432.]

ERROR to the Circuit Court for Kanawha County to review a judgment in favor of plaintiff in an action brought to recover damages for alleged breach of a contract of sale. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Blue & McCabe and Morton & Mohler for plaintiff in error.

Poffenbarger, J., delivered the opinion of the court:

The judgment brought up by this writ of error was obtained against the defendant as vendor of a carload of damaged corn. It resisted the action on two grounds: (1) That it was a mere agent or broker acting for a known or disclosed principal in the transaction, and therefore, not being a vendor at all, was

not liable for the alleged breach of the contract; and (2) that the injury to the corn was occasioned by negligence of the vendee, after delivery thereof. The plaintiff having declined to accept it, the carrier disposed of it and took its charges out of the proceeds, and the residue, \$619.76, was applied on the purchase price, leaving a difference of \$395.38, which the plaintiff recovered. The assignments of error go to rulings of the court, respecting

admission and exclusion of evidence, instructions, and the motion for a new trial.

According to the narration of the transaction by the plaintiff's principal witness, it was as follows: Early in May, 1912, the defendant, doing business in Charleston, made the plaintiff an offer of sale of corn by telephone, and the latter accepted the offer to the extent of two carloads, both to be No. 2 kiln-dried, one white and the other yellow. Afterwards, the plaintiff received from the defendant a letter of confirmation of the sale, saying, "For account of Paul Kuhn & Company." Some days later, the corn arrived, just when the record does not clearly disclose. In one part of his testimony, the witness suggests May 11th, but in another he disclaims knowledge of the date, and says it arrived possibly a week or more prior to May 27th, the date on which it was examined, and the yellow corn found to be badly damaged. Before it was examined, the plaintiff paid a sight draft for the contract price drawn on it by Paul Kuhn & Company, of Terre Haute, Indiana, with a bill of lading attached, showing the corn had been consigned to it by Paul Kuhn & Company. Having paid that company in full, and yet treating the Steel & Payne Company as the vendor and its debtor in the amount paid for the corn, the plaintiff credited it with the amount received from the carrier, on account of the proceeds of the sale of the corn. Plaintiff had bought corn of Paul Kuhn & Company on several previous occasions, through the Steel & Payne Company, the method of consummation varying from that of the one in question, the witness protests in only one particular, namely, right of examination before payment. As to right of inspection of the carload in question, his testimony is not clear. In one place he says he did not sooner pay the draft and examine the car because the consignee was not ready for it, and in another that he "never had the right to look

at that corn" until after payment of the draft. He denied that plaintiff had ever bought any corn of Paul Kuhn & Company, notwithstanding the former transactions referred to in which the corn had come from that company, did not know any of the drafts paid were drawn in favor of the defendant, but thought some of them had been, because plaintiff had sometimes gotten "some truck" in Charleston for which drafts were made by the defendant.

The trial court excluded evidence offered to prove the defendant had placed orders of the plaintiff for corn in May, 1912; that it had previously sold the defendant other cars of corn in the same way; that it was a broker handling vast quantities of corn, as such, and acting as agent for Paul Kuhn & Company; that by custom a period of twenty-four hours was allowed for examination of corn by the consignee; that the car of corn in question was sold by receipt of a quotation from Paul Kuhn & Company, an offer to the plaintiff, its acceptance, a telegraphic order to the sellers, confirmation by them, and confirmation by the broker to the purchaser; that the vendee knew from prior transactions who the sellers were; and that the defendant had no authority to sell otherwise than as agent of Paul Kuhn & Company, and in the manner above indicated.

An agent or broker contracting for and on behalf of a principal known or disclosed to the person with whom the contract is made is not personally bound by it, nor ^{Broker—personal liability.} liable for a breach thereof, unless the credit has been extended to him or he has expressly bound himself by the contract in some form. *Johnson v. Welch*, 42 W. Va. 18, 24 S. E. 585; *Ogden v. Raymond*, 22 Conn. 379, 58 Am. Dec. 429; *McCurdy v. Rogers*, 21 Wis. 199, 91 Am. Dec. 468; *Story, Agency*, § 261; *Clark & S. Agency*, § 564; *Mechem, Agency*, § 1357.

The tendency of the rejected evi-

dence to prove plaintiff's knowledge of the capacity in which the defendant acted is obvious. It had made several sales of the same commodity from the same principal to the plaintiff, and in the same way. For previous consignments, plaintiff had paid Paul Kuhn & Company. The requirements of specific proof of the plaintiff's knowledge of the relation of principal and agent, as a condition precedent to the admission of facts and circumstances tending to prove it, is too rigid and restrictive. On an issue of the kind developed

**Evidence—
character of
parties to con-
tract.**

here, all of the facts and circumstances tending to cast any light upon the relations of the parties are generally relevant and material. It was not at all improper for the jury to know that part of the defendant's business was brokerage in corn, and that it usually represented a certain firm of corn dealers, as sellers. These circumstances do not of themselves constitute a defense to the action, but they are essential elements of

**Broker—
knowledge of
character.**

the defense. Coupled with notice thereof to the plaintiff, they make out a complete defense. The order of the introduction of proof is not ordinarily deemed to be important, and it was not necessary to prove that notice of the capacity in which the defendant acted was given in terms, in so many words. An agent or broker seldom stipulates that he acts only as such or gives formal notice of his relation to the transaction. Parties to a business transaction may always be deemed to have taken cognizance of obvious facts. Previous dealing with the defendant as broker for Paul Kuhn & Company, reception of a confirmation of the sale in question as having been made for them, and payment of the draft for the price of the corn drawn in their favor were facts from which a jury could well infer notice of the relation claimed by the defendant. *Drake v. Pope*, 78 Ark. 327, 95 S. W. 774. All of the evidence reject-

ed, except witness Davis's expression of opinion that plaintiff knew the corn was coming from Paul Kuhn & Company, and that pertaining to custom governing

**Evidence—
character of
broker.**

the time allowed for examination, was clearly admissible. In point of fact, nearly all of the circumstances to which it related were admitted by the plaintiff's witnesses in some form. The jury were as competent as the witness to form an opinion as to whether the circumstances justified an inference of notice, wherefore so much of Davis's testimony as expressed that opinion was properly rejected. The proffer of evidence as to custom was too narrow. There is

**Custom—pre-
sumption of
knowledge.**

no presumption of knowledge of a custom or usage, unless it is so general or notorious that the parties to a transaction of which it is claimed to have constituted a part may be deemed to have had knowledge of it. *Anderson v. Lewis*, 64 W. Va. 297, 61 S. E. 160; *Sims v. Carpenter*, 68 W. Va. 223, 69 S. E. 794. The proffer of evidence did not indicate generality or notoriety of the custom relied upon. Gerlach's evidence was properly admitted. He knew something about the transaction.

Three of the instructions requested by the defendant and refused by the court, if given, would have virtually directed a verdict for it. One of them made payment of the purchase price to Paul Kuhn & Company conclusive, another, the confirmation of the sale, and another, the making of the sale in question in the manner in which sales of corn were customarily made between Paul Kuhn & Company and the plaintiff. Unqualified and unexplained, as they were, these facts, or any one of them, constituted a defense to the action. It is inconceivable that the plaintiff could have deemed payment to Paul Kuhn & Company to be a discharge of indebt-

**Evidence—what
sufficient.**

edness to the Steel & Payne Company. It paid the former because it knew they were the sellers, and because such payment was a condition precedent to its procurement of a title then vested in them. Admission of receipt of the confirmation was an unequivocal admission of notice of the agency of the defendant. Purchase of the corn in question in the same manner in which other corn had been purchased by the plaintiff from the same seller, and paid for, was equally conclusive of notice. It did not differ in any material respect. There is no proof that anybody forbade or prevented inspection of the corn before payment, or that the privilege or right of inspection was requested or demanded. The consignee always has right of inspection of the goods. Hutchinson, Carr. 3d ed. § 733. If there were any right of action against the

Sale—right of inspection.

defendant, the burden would be upon the plaintiff to show that the injury occurred before the arrival of the car, for after that event there was a duty upon it to accept the corn and take care of it, unless it had a valid ground of rejection. *Allen & W. Co. v. Farr*, 81 W. Va. 150, 93 S. E. 1030. In the absence of such ground, it had no cause of action. Proof thereof was obviously a part of its case. Hence defendant's instruction No. 2, placing this burden upon the plaintiff, should have been given.

Evidence—burden of proof—injury in transportation.

It is hardly necessary, in view of the conclusions stated, to say the verdict is contrary to the law and the evidence, and should have been set aside for that reason, as well as for the errors noted.

The judgment will be reversed, the verdict set aside, and the case remanded for a new trial.

ANNOTATION.

Personal liability of broker for breach of contract by his principal.

- I. Disclosed principal:
 - a. General rule, 641.
 - b. Liability for earnest money or advance payment, 645.
- II. Undisclosed principal:
 - a. General rule, 649.
 - b. Sufficiency of disclosure:
 - 1. Generally, 656.
 - 2. Custom of trade, 660.
 - c. Effect of settlement with or action against principal, 668.
 - d. Right of broker to reimbursement, 669.

I. Disclosed principal.

a. General rule.

A broker is not liable for the breach of a contract by his principal if at the time he negotiated the contract he disclosed his principal, or the party with whom he was dealing knew that he was dealing on behalf of that principal. *Walker v. Cross* (1908) 87 C. C. A. 324, 160 Fed. 372; *Drake v. Pope* (1906) 78 Ark. 327, 95 S. W. 774; *Morehouse v. Winter* (1910) 159 Ill. App. 296; *Johnson v. Shea* (1918) — 6 A.L.R.—41.

Iowa, —, 166 N. W. 531; *Waddell v. Mordecai* (1835) 21 S. C. L. (3 Hill) 22; *Harral v. Bridges* (1914) — Tex. Civ. App. —, 162 S. W. 1001. And see *HURRICANE MILL. CO. v. STEEL & P. CO.* (reported herewith) ante, 637.

In *Drake v. Pope* (1906) 78 Ark. 327, 95 S. W. 774, it appeared that the plaintiff ordered of a broker a carload of feed stuff containing, among other things, corn of a certain grade. After paying a draft for the price and receiving the car, the plaintiff discovered that the corn was not in compliance with the order. It was therefore returned and an action was instituted against the broker for the price of the corn. The court held that if the broker was acting for a disclosed principal, or if the plaintiff knew or had sufficient information to create an inference that the broker was acting for another, the broker was not liable, saying: "It was well established that a broker cannot be held personally liable to the third party

upon a contract for a disclosed principal; and if the third party knew, or had sufficient knowledge to create an inference, that the broker was acting for another, then the broker is not liable."

In *Morehouse v. Winter* (1910) 159 Ill. App. 296, it appeared that a broker was engaged in negotiating a loan in favor of a third person with the plaintiff, so that the third person could purchase a certain farm. After the notes and mortgage were executed and placed on record, the broker indorsed the notes to the plaintiff as per previous arrangements. Before the notes and mortgage were delivered to the plaintiff it was learned that the other person had not purchased the farm, but that the broker and plaintiff were victims of a confidence game, whereupon an action was instituted against the broker by the indorsee of the note for the return and recovery of the money. The mortgagor had been pointed out to the plaintiff as the one who wanted the loan. It was held that since the broker disclosed his principal and gave to the other party full knowledge of the circumstances and conditions surrounding the transaction, no liability rested on the broker. It was said: "The rule of law is too well established to admit of serious controversy that where an agent or broker, acting for other parties, discloses the principal and gives to the parties for whom he is acting full knowledge of the circumstances and conditions surrounding the transaction, no liability exists against the broker, and the rule applicable thereto is fully set forth in *Walker v. Cross* (1908) 87 C. C. A. 324, 160 Fed. 372; *Drennan v. Bunn* (1888) 124 Ill. 175, 7 Am. St. Rcp. 354, 16 N. E. 100, and *Bailey v. Galbreath Bros.* (1898) 100 Tenn. 599, 47 S. W. 84. . . . *Winter*, having fully disclosed to *Morehouse* that *Miller* was the principal who was making this loan, and informed *Morehouse*, with whom he was dealing, of all of the information possessed by *Winter* regarding this transaction, and having taken the mortgage to himself as trustee and made himself the payee in the note

under the established custom and usage as previously requested by *Morehouse*, *Winter* acted in good faith throughout this entire transaction with *Morehouse*, and was guilty of no act that could render him liable to repay this money to *Morehouse*. From the conclusion reached herein, it is unnecessary to pass upon any other questions raised upon this record."

In *Walker v. Cross* (1908) 87 C. C. A. 324, 160 Fed. 372, it appeared that a firm of real estate brokers was instrumental in negotiating a real estate deal, which was finally consummated by a delivery of deeds from the alleged owner to the vendee. It was found, subsequent to that transaction, that the vendor had never had title to the property. In an action against the brokers on a contract for the sale of the land, which the brokers had never signed owing to changes made by the vendee, the court held that real estate agents with disclosed principals were not liable for the breach of contract, saying: "Taking this letter as a whole it not only did not ratify or confirm the paper taken by *Cross*, but suggested the making of a new contract in accordance with the wishes of *Cross*. It also told *Cross* that *Walker Brothers* did not own the land, which fact he (*Cross*) already knew. At the date of this letter, then, neither party had signed any contract. On January 12, 1903, in reply to a letter written by *McVay*, the attorney of *Cross*, *Walker Brothers* agreed to send abstract of title as soon as they received it from the owner, who, they said, resided in Washington. They also said they had no power of attorney to sell the land, but had authority to do so by letter received from the owner. Without reviewing every letter that constituted the correspondence between the parties, it may be stated that there is not a line of it that assumes or states that *Walker Brothers* are selling the land as their own. On the contrary *Walker Brothers* are particular to state that they do not own the land, but are simply acting for another who is the owner. It appears from the evidence that *Walker Brothers* did not sign the contract sued

upon, and that every declaration in writing made by them was in direct opposition to the idea that they were selling the land as the owners thereof. Not only this, but both Cross & Walker acted on this theory. When Cross first received the abstract on January 23, 1903, he knew the title appeared therefrom to be in Nelson O. Nailen. Notwithstanding this he makes no complaint, and finally on March 12, 1903, he goes to Missouri, and without objection receives deeds from Nailen for the land. No conveyance was demanded from Walker Brothers, and, as Cross testifies, the alleged contract now sued on was not produced or even mentioned, and, in accordance with the statement of counsel for Cross in their brief, both Cross and Walker Brothers honestly believed 'that Nailen was the bona fide owner.' Walker Brothers received none of the purchase price except the sum of \$320 as their commission for making the sale, and Cross was entirely satisfied with the deed from Nailen until about April 20, 1903, when he learned from Edward Gould that he had never conveyed the land to Nailen. The case presents the ordinary sale of land by a real estate agent with a disclosed principal, the vendee dealing directly with the vendor. In such case the remedy of the vendee for defects in the title is upon such covenants as are contained in the deed which he accepts. There is no claim in the petition or evidence in the record that Walker Brothers ever warranted in any way the title of Nailen. It therefore clearly appears that the paper sued upon never became the contract of Walker Brothers."

In *Harral v. Bridges* (1914) — Tex. Civ. App. —, 162 S. W. 1001, it appeared that a real estate broker promised a tenant in possession to obtain from the owner a certain amount of money for the tenant's release of possession, and later the owner affirmed the promise of the broker to the tenant. The tenant surrendered possession and was not paid the agreed amount of money. The court held that the broker was not personally liable. It was said: "The trial court sub-

mitted the following charge: 'If you find and believe from the evidence that the defendant R. A. McWhorter did, on or about the 27th day of February, 1912, promise to pay F. M. Bridges the sum of \$150 to relinquish possession of said place, and that, relying upon said promise, the plaintiff did relinquish possession of said place, then I charge you to find for the plaintiff against the said R. A. McWhorter in said sum.' We believe Bridges's testimony as to the agreement he had with McWhorter will control the liability of that defendant. We think, upon a study of the record, that a reasonable construction of Bridges's testimony does not indicate that McWhorter personally agreed to pay the sum of \$150, but the arrangement was upon the basis that McWhorter was to get the money from Harral. Bridges says: 'I did not take Mr. McWhorter's word. I wanted to be sure I was to get the money. . . . The reason I went to Mr. Harral was that I was on his place, and I thought he was the man to see for the money.' Bridges never moved from the premises until he obtained the promise from Harral, as indicated above. Neither is there any theory of misrepresentation of agency in this record to support a basis of recovery against McWhorter. It is true Mrs. Bridges's testimony is susceptible of the construction that McWhorter told her that he had told her husband that he would pay the \$150, but Bridges's testimony of the real arrangement upon which he must predicate recovery does not sustain a personal liability against McWhorter. He only purported to act for, and obtain the money from, Harral. Bridges regarded it that way. Bridges's testimony is a judicial admission of the real arrangement, which must control. In this respect, we think the court erred in submitting the liability of McWhorter, and the judgment is reversed and rendered ^{ad} to McWhorter and, as stated, ^{advised} as to Harral."

In *Scaling v. Knollin* (1900) — Tex. App. 448, it appeared that ^{live stock} brokers sold to the plaintiff ^{company} a large quantity of sheep for ^{at the price}

son. Those holding through the purchasers were subjected to replevin suits, for the recovery of the sheep, which had been stolen. In an action against the broker for a breach of an implied warranty of title, the court held that if his principals were disclosed, they were liable for a breach of an implied warranty of title and the broker was not. The court said: "If, however, the agency of Scaling & Tamblin was known to defendants in error when the transaction was had, and it was known that by the sale they were obligating McLain and not themselves, then the known principal alone was bound upon the implied warranty of title, and the agents were not liable. *Chase v. Debolt* (1845) 7 Ill. 371; *Seery v. Socks* (1862) 29 Ill. 313. And this would be so whether the fact that the agents were acting only for the known principal was disclosed by the agents themselves, or was otherwise brought to knowledge of the vendees. *Warren v. Dickson* (1861) 27 Ill. 115."

In an early Canadian case, it was held that a broker for a principal residing in a foreign country is liable, whether he discloses his principal's name or not. See *Nolan v. Crane* (1872) 4 Rev. Leg. (Can.) 657.

In England, the contrary has been held, in *Green v. Kopke* (1856) 18 C. B. 549, 139 Eng. Reprint, 1484. In that case it appeared that an agent of a foreign merchant was sued for the breach of a contract for the sale of a quantity of tar. The contract, which was in writing, was entered into by the agent and stated that it was on behalf of a named foreign principal. The court held that an agent for a disclosed foreign principal was not liable for the breach thereof by the principal, if the contract was in writing, saying: "No doubt, as has been said by learned judges more than once, the fact of the principal being a foreigner is entitled to some weight; but there is no rule of law, as is suggested by Mr. Brown, that the agent is in all cases liable personally where the principal is a foreigner residing abroad. It is in all cases a question of intention, capable of being explained by the custom or usage of

trade where any such can be shown to exist. There was, however, no usage proved here, nor could there be. It is ridiculous to suppose that an agent, for a mere commission of $\frac{1}{2}$ per cent, would guarantee the performance of a contract for the sale of 1,000 barrels of tar. Chancellor Kent, in his very valuable Commentaries, puts it on the ground on which we now put it, and, in the passage to which I referred in the course of the argument, qualifies and repudiates to that extent the doctrine laid down by Dr. Story. It is admitted, that, if this had been the case of an English principal, the principal and not the agent would have been liable. That admission seems to me to put the plaintiff out of court; for Mr. Brown must say that Roos, the principal, if he came to this country, could not be sued; he cannot contend for a coexisting personal liability in both. I am clearly of opinion that the correct rule is as I have stated; that it is a question of intention; and that, upon the fair construction of this contract, the defendant intended to contract only as agent, and is not personally liable. . . . In the case of a contract of sale without writing, the party making the contract may be personally liable, notwithstanding he mentions at the time that he is buying for a foreign principal. This is the case of a contract in writing, which is to be construed according to the intention of the parties as evidenced by the words they have used. In order to arrive at a correct construction of it, we may also have recourse to the surrounding circumstances; one of which is, that the defendant is an agent, acting for a principal who is known. I think it is impossible to hold him personally liable. . . . If a broker buys goods for a merchant, naming him and stating that he lives in Australia, unless he at the same time stated that he was buying only as agent, the jury would be warranted in holding him to be personally liable. There is another class of cases where custom may intervene and qualify the contract so as to make the party resident in this country liable personally, though acting for a known foreign principal. But,

where the contract is reduced into writing, we must gather from its contents what was the intention of the parties; and here the question is whether the defendant so expressly contracts as agent as to exclude his personal liability. I strongly incline to think that no such custom exists as that suggested, and to establish which there was a fruitless attempt recently in the court of Queen's bench. Without saying whether, if such custom existed, it would be excluded by the terms of this contract, it is enough to say that I am clearly of opinion that the terms here used show that the defendant contracted as agent, and as agent only."

b. Liability for earnest money or advance payment.

If earnest money is paid to a broker, and the contract is broken by the principal, the broker is liable to the other party for the return of the earnest money if it remains in his hands at the time of the breach, though he has disclosed the name of his principal. *Messer Real Estate & Ins. Co. v. Ruff* (1913) 185 Ala. 236, 64 So. 51; *Kroeger v. Good* (1907) 13 Idaho, 184, 89 Pac. 632; *Gosslin v. Martin* (1910) 56 Or. 281, 107 Pac. 957.

In *Crosby v. Livingston* (1919) — Kan. —, 185 Pac. 284, the court applied the general rule that an agent who exceeds his authority in making a contract and whose principal declines to be bound thereby renders himself liable to the third party with whom he made the unauthorized bargain, by holding that a broker who exceeded his authority in making a contract which the principal refused to ratify was liable for the return of earnest money paid to him on account of the contract. The money in this case seems to have been turned over to the principal by the broker, but it is perhaps assumed that that was done after notice from the plaintiff to the broker that the principal had refused to carry out the contract, though the report is not clear on that point.

In *Gosslin v. Martin* (Or.) *supra*, it appeared that a real estate broker entered into negotiations with the plaintiffs whereby they agreed to purchase

a certain tract of land for a stipulated price, part of which was to be paid on the signing of the agreement, and the balance upon delivery of a good conveyance and an abstract showing a good title. A deed was delivered, but the abstract did not show a clear title. Plaintiffs, after failing in specific performance proceedings, were compelled to purchase the land through other parties at an advanced price. The broker refused to return the deposit left with him on the ground that it was due him for commission. In an action against him for the return of the deposit, the court held that when a deposit is still in the hands of the broker, not having been turned over to the principal, the broker is liable for the return of it if the consideration has failed. It was said: "The money which defendant received belonged to plaintiffs. It was paid to him on the theory that he was the agent of John Denny, and plaintiffs were entitled to the return of it when the consideration on which it was paid absolutely failed. Where an agent has collected money for his principal under such circumstances, and paid it over to the principal, an action will not lie against him to recover it; but where, as in this case, he still has the money in his possession, such action will lie. It is probable that defendant has a good cause of action against Denny to recover his commissions, but to allow him to retain the money paid him by plaintiffs would be unconscionable."

In *Kroeger v. Good* (1907) 13 Idaho, 184, 89 Pac. 632, it appeared that a letter offering a certain lot of land to be sold at a fixed price was shown by real estate brokers to a prospective purchaser. The purchaser paid \$100 as deposit on the lot, the balance to be paid when the deed could be procured. The owner of the land, on being informed of the transaction, refused to sell at that price, but offered to sell at a greater one. The purchaser refused to pay the greater price and refused to accept the return of the deposit from the brokers. The court held, in an action against the brokers for damages sustained, that the plaintiff was entitled only to the return of the deposit, as the broker acted in good

faith and did all in their power to procure a deed. It was said: "It is clear to us that the appellant was cognizant of the fact that the respondents were real estate brokers, and that they did not have the title to said property at the time said receipt was given, and that the appellant knew that respondents could not procure the title unless the owner saw fit to convey, and from the facts and circumstances we cannot conclude that the respondents intended to guarantee to the appellant that they would procure title for said sum of money. They had a letter from the owner in which she stated that she would accept the offer of \$1,700 for said lot, which they exhibited to the appellant at the time said transaction occurred. There was not an intimation in the record but what the respondents acted in perfect good faith, and did endeavor to procure a conveyance from the owner of said lot to the appellant, and the owner absolutely refused to accept less than \$2,000 therefor. That receipt must be interpreted in the light of the circumstances and facts surrounding its making. It is said in 2 Page on Contracts, § 1123: 'It is a recognized rule of construction that the court will place itself in the position of the parties who made the contract as nearly as can be done, by admitting evidence of the surrounding facts and circumstances, the nature of the subject-matter, the relation of the parties to the contract, and the objects sought to be accomplished by the contract.' The receipt on its face, perhaps, does indicate that the respondents were the owners of said lot, or that they had it within their power to secure a conveyance of it to the appellant. If that were true, then a court of equity would compel them to pay whatever damages the appellant had sustained by reason of their failure to do so. But as the appellant knew that the conveying of the title could not be controlled by the respondents, that it was solely at the option of the owner to convey or not, we do not think said receipt should be interpreted in a manner to do any injustice to either of the parties. We think it would be most unjust, under

the circumstances and facts of this case, to require the respondents to pay to the appellant the sum of \$790 as damages, when he knew at the time of the transaction that the defendants did not intend to guarantee to him that they would procure the title, and well knew that the procuring of the title depended upon the will of the owner. The defendants have offered to, and are ready and willing to, return the \$100 deposited with them on said contract, and we think that is all they are required to do under the facts of this case."

In *Messer Real Estate & Ins. Co. v. Ruff* (1913) 185 Ala. 236, 64 So. 51, wherein it appeared that a purchaser in a contract for the sale of a tract of land paid a deposit to the broker, and subsequently the contract was mutually rescinded, the court held that the broker was in no better position than his principal, and was bound to return the earnest money paid to him. It was said: "The check which was turned over to the Real Estate & Insurance Company 'to bind the trade' was, in our opinion, under the terms of the contract itself, a check which was to become the property *ex equo et bono* of Cooke only when Cooke did those things which, under the law, his contract required him to do. That check *ex equo et bono* belonged to Ruff until Cooke carried out his contract. The parties never did get together and complete the trade. By mutual agreement they rescinded it. This mutual agreement, which the parties were certainly competent in good faith to make, forecloses any consideration as to whether Cooke or Ruff was in the wrong pending the negotiations which finally resulted in a complete rescission of the contract. The Messer Real Estate & Insurance Company acquired no greater rights to the check than did their principal Cooke. In this transaction the rights of the real estate company to the \$1,000 must be worked out through Cooke; and Cooke, having rescinded the contract, is certainly in no position to claim *ex equo et bono* the check or its proceeds. For this reason the plaintiff, under all the evidence, was entitled to the gen-

eral affirmative charge as to count 4. This being the situation, it seems to us that it is not necessary for us to consider any other question presented by this record. Cooke may owe the Messer Real Estate & Insurance Company more than the \$1,000 involved in this suit, because of Cooke's failure to complete a trade which said Real Estate & Insurance Company made for him. If this be true, such fact in no way authorizes the said Real Estate & Insurance Company to retain from Ruff and apply on the Cooke debt money which *ex equo et bono* belongs to Ruff and to which Cooke is not *ex equo et bono* entitled. The agent is not superior to his principal, and under the facts of this case the rights of the agent must be measured by the rights of the man in whose shoes, at all times during this matter, it has stood."

In *Mead v. Altgeld* (1891) 136 Ill. 298, 26 N. E. 388, affirming (1889) 33 Ill. App. 873, it appeared that real estate brokers agreed to refund the money to the purchaser of real estate if the title proved defective. The owner of the property had a similar contract with the purchaser. The title proving defective the purchaser demanded the return of the purchase money, which was refused. The court held that where a broker makes himself personally responsible for the return of a deposit he will be held to his agreement, saying: "But the defendants contend that if there is any liability to refund to the plaintiff the \$1,000 paid, such liability is upon Mrs. Ray and not upon them, and that she and not they should have been sued. The contract between Mrs. Ray and the plaintiff, by which she agreed to sell and convey said lots to him, is in writing and contains substantially the same provision in relation to refunding to the plaintiff the \$1,000 paid in case the title should prove not good that is also contained in the defendants' receipt above set forth. The contention is that the two instruments should be construed together as one instrument, and that by such construction both should be held to be contracts of Mrs. Ray, the principal, and

not of Mead & Coe, the agents. We are of the opinion that this contention cannot be sustained. The construction of written contracts is a matter of law for the court, and, by applying to said receipt the recognized rules of construction, we are of the opinion that it amounts to a personal undertaking on the part of Mead & Coe to refund the \$1,000 in case the title should prove not good. This conclusion need be in no way affected by the fact that Mrs. Ray, in her contract with the plaintiff, inserted a similar stipulation. The two instruments, though executed at the same time and in relation to the same subject-matter, are not necessarily one contract. It was entirely competent for Mead & Coe, if they saw fit to do so, to become personally obligated to the plaintiff to refund him his money if the title should prove defective, and whether they did so or not must depend upon the construction to be given to the instrument to which they have affixed their signatures. 'It is undoubtedly competent,' says Mr. Mechem, 'for an agent, although fully authorized to bind his principal, to pledge instead his own personal responsibility, if he so prefers. The presumption is that the agent intends to bind his principal, but where he expressly charges himself personally, he will be held. Such a personal undertaking is not necessarily inconsistent with his character as agent, and where he has so promised personally, the mere addition of the word "agent," "trustee," etc., to a written promise, will ordinarily be regarded as mere *descriptio personæ*.' Mechem, *Agency*, § 558."

In *Read v. Riddle* (1886) 48 N. J. L. 359, 7 Atl. 487, it appeared that a real estate broker was paid \$500 on account of the purchase price of certain land. He promised to return the money if it turned out that his principal did not have a good title. It subsequently turned out that his principal did not have a good title. A good title, however, was later obtained. The court held that when an agent promises to return money paid on deposit in case it should turn out that his principal

did not have a good title, though a deed is subsequently obtained, he is liable to return the deposit. It was said: "At the trial his counsel asked the court to charge that the action could not be maintained because Read received the money merely as the agent of Mrs. Maison, and the payment to him was in fact payment to her. The judge refused to so charge, and, on the contrary, charged that under the evidence the action could be maintained. The charge was correct. Under the circumstances, Read was liable to Mrs. Riddle for the return of the money. Where an agent, being a stakeholder, receives a deposit which he pays over before the conditions upon which it is to be paid are fulfilled, he is liable for the deposit. . . . In the case in hand, Read expressly promised Mrs. Riddle that he would return the money to her in case it should turn out that his principal's title was not good."

If the prospective purchaser and the broker's principal, the vendor, mutually agree to vary the terms of the contract, the broker is not liable for the return of the earnest money or part payment. *Fowler v. Quall* (1887) 36 Kan. 507, 13 Pac. 784. In that case it appeared that a firm of real estate agents received a part payment of the purchase money on a sale conditioned that the offer be accepted by the owner on the terms and conditions specified in the agreement, or the money returned. The vendor and vendee subsequently modified the terms and conditions upon which the agents sold. The agents had already paid the money to the principal. In an action for the return of the money so paid to the agents, it was held that an agent was not liable when the agreement was varied by mutual consent of the parties, the court saying: "Whatever remedy the defendants in error may have against Burns, it must be conceded that on the state of facts shown by the record they cannot maintain this action against the plaintiffs in error for the recovery of \$140 received by them as a part payment on the sale of the lots. One very good reason for this is because the condition upon

which it was paid to them as agents was that their principal should accept the offer. This, as we have already stated, was done by the subsequent agreement. A contract of purchase and sale was entered into and signed by all the parties."

The broker is not liable when he has already paid the deposit over to his principal. *Fowler v. Quall* (Kan.) supra; *Waddell v. Mordecai* (1835) 21 S. C. L. (3 Hill) 22.

In the case last cited it appeared that an agent for the owners of a brig received a certain amount as passage money for the transportation of twenty or twenty-five slaves. In the receipt for the money received the agent signed himself, after naming the brig, "For the owners," and then signed his name. The brig was wrecked after being out two days and the captain of the brig left the negroes stranded. The agent had turned the money received by him over to the owners. In an action against the agent for the return of the money paid the court, held, that the agent was not responsible for the return of the money when he had already paid the money over to his principal. It was said: "The voyage utterly failed. The negroes were not advanced a single league towards their destined port; on the contrary, much injury was done to Waddell. The captain, in his own language, 'did not care a —,' and by his conduct verified his utter disregard of the duties he had undertaken to perform. He wilfully carried the negroes out of the voyage into Nassau, where they were lost or detained, all but the seven who returned home. We have here certainly a strong case on the part of Waddell for recovering not only the passage money advanced, but for a much greater amount in damages. But is Mordecai answerable for either the one or the other? If in due time he disclosed to Waddell that he acted as agent merely, and for whom his agency was, then he might be holden liable for all the damages; for, if we are to hold him as principal by reason of his passing himself in that character, he must take to himself all the consequences that would otherwise have accrued to

the true principal. Waddell has great claims. But from whom are they due? Does Mordecai come in for the payment of any part? Or may he not be yet found under the established rules that protect agents from liability? Mordecai may have been in danger, from the seeming concealment of his principal, and still escape unhurt. He may still be in no worse situation than that of his humble namesake, who in old time sat obtrusively in the King's gate. The act was offensive; but it did not follow in the law, when duly considered, that he was to be hung up on high. Let us then see, under the same measure of strict law, whether our Mordecai may not also pass through unhurt. What are the facts on this side of the case? Since the verdict, it cannot be questioned that Mordecai paid over the \$100 advanced by Waddell to the owners of the brig, that he received no timely notice to retain the money; that he acted throughout in good faith; and in the whole transaction appeared as the certain agent of the owners of the brig, though they were not specifically named. . . . The action is for money had and received to the use of the plaintiff. The \$100 was voluntarily paid by the plaintiff in advance; and he gave no timely notice to have the money detained. Mordecai committed no trespass, and made no encroachment upon the rights of the plaintiff. He simply received the money advanced for his principal. Had he obtained it by some device, or by any deliberate and affirmative act of his own, as by selling one of the negroes, there would have been much more reason and law in charging him personally. But to render him liable in the equitable action of money 'had and received,' when he was the mere quiescent receiver without bad faith, and had given the money its only proper destination by paying it over, would be to adjudge him principal 'in extenso,' and of course liable for all the damage done by the captain at Nassau. It would be to divert the primary principle of this species of action which has been called a 'little bill in equity,' in which money shall not be

recovered against equity and good conscience. This is strictly a legal view. And assuredly, whatever view may be taken of his conduct in other respects, in the matter of this particular action, both in receiving and paying over the \$100, Mordecai stands blameless; in this regard, at least, he is 'an Israelite indeed without guile.'"

II. Undisclosed principal.

a. General rule.

A broker who does not disclose the name of his principal at the time of entering into the contract is personally liable for any breach thereof by the principal.

United States.—*Darlington Iron Co. v. Foote* (1883) 16 Fed. 646; *Lincoln v. Levi Cotton Mills Co.* (1904) 63 C. C. A. 333, 128 Fed. 865.

Arkansas.—*Drake v. Pope* (1906) 78 Ark. 327, 95 S. W. 774.

California.—*Krohn v. Lambeth* (1896) 114 Cal. 302, 46 Pac. 164.

Illinois.—*Scaling v. Knollin* (1900) 94 Ill. App. 443.

New York.—*Cobb v. Knapp* (1877) 71 N. Y. 348, 27 Am. Rep. 51; *Knapp v. Simon* (1884) 96 N. Y. 284, 6 N. Y. Civ. Proc. Rep. 1; *Newman v. Greeff* (1886) 101 N. Y. 663, 5 N. E. 335; *Argersinger v. Macnaughton* (1889) 114 N. Y. 535, 11 Am. St. Rep. 687, 21 N. E. 1022; *Zimmermann v. Weber* (1909) 135 App. Div. 428, 120 N. Y. Supp. 483; *Whitman v. Johnson* (1895) 10 Misc. 725, 31 N. Y. Supp. 805; *Waring v. Mason* (1837) 18 Wend. 425.

Pennsylvania.—*N. P. SLOAN CORP. v. LINTON* (reported herewith) ante, 633; *Lichten v. Verner* (1899) 8 Pa. Dist. R. 218.

Texas.—*Dorman v. Boehringer* (1917) — Tex. Civ. App. —, 195 S. W. 669.

Washington.—*Yamaoka v. Kloeber* (1913) 71 Wash. 598, 129 Pac. 387, affirmed on rehearing in (1913) 74 Wash. 697, 133 Pac. 1037.

Canada.—*Boulton v. Gzowski* (1898) 29 Can. S. C. 54.

In *Darlington Iron Co. v. Foote* (1883) 16 Fed. 646, it appeared that a broker was treated in the correspondence preliminary to the contract for the sale of a commodity, as the pro-

posed purchaser. In the bought and sold notes which were exchanged by the parties, the broker was designated as purchaser. The court held that under such circumstances the broker should be regarded as principal. It was said: "It has been urged for the defendant that the correspondence was but a negotiation for a contract, and that the parties contemplated the exchange of formal written instruments as a definite conclusion of their negotiation; and in this view of the case emphasis has been placed upon the facts that the defendant was acting as a broker; that plaintiff's agents knew this; and that both parties regarded the credit which was to be supplied in London as a condition precedent to a final contract. Although defendant was buying the rails to sell to another party, and although his profit was to be derived from a commission of 1 per cent, to be allowed him on the purchase money by the plaintiff, there is no room to doubt that both parties contemplated a contract in which he was to be a principal and by which he was to pay cash for the rails upon delivery. The bought and sold notes sent by plaintiff's agents to defendant in their letter of February 5th, name the defendant as the purchaser, and conclude with the clause: 'An approved bank credit to be arranged when this contract is confirmed.' What was to be done to 'confirm' the contract? Certainly nothing after the bought and sold notes were exchanged. But could either party recant at any time before the notes were exchanged? Did they intend the period of uncertainty to intervene which would take place while the notes were crossing the Atlantic? Certainly not; because in the same letter plaintiff's agents ask defendant to 'cable confirmation of the contract.' Confirmation of the contract was to be signified by a cablegram. If confirmation was to be signified by a cablegram, the parties must have regarded the exchange of bought and sold notes, not as the preliminary to a contract, but as evidence of a contract already concluded. This view of the understanding of the par-

ties is enforced by the statement in the plaintiff's letter that the notes are enclosed 'to avoid any possible mistake.' Subsequent communications indicate that undoubtedly the plaintiff's agents were anxious to know whether the defendant's buyers had closed with the defendant, and provided him with the bank credit he was to forward to London; but the reasonable interpretation of the whole correspondence is that the parties intended to be reciprocally obligated when the conditions of the contract were fully understood and accepted by both."

In *Drake v. Pope* (1906) 78 Ark. 327, 95 S. W. 774, it was held that if an agent does not disclose his principal, but deals personally, then he is liable personally. After disclosure, however, the third party may hold either the broker or principal. The court said: "But if he does not disclose his principal nor the fact that he is acting as a broker, but deals personally, then he is liable, although in fact he acted as broker, and his principal may be held after disclosure, but this does not prevent his personal liability if the third party elects to hold him instead of his after-disclosed principal."

In *Scaling v. Knollin* (1900) 94 Ill. App. 443, it was held that if the party buying did not know who the principal was, but did know that the party selling was a broker, and the broker did not see fit to bind his principal, he is liable personally. It was said: "It is not claimed that Scaling & Tamblyn disclosed their agency and their principal; but it is claimed that the fact was otherwise brought to the knowledge of defendants in error, by the bill of lading and scale tickets. We are of opinion that the trial court was fully warranted in finding from the evidence that defendants in error had no such notice or knowledge. Assuming that Knollin, who represented defendants in error, did see the freight bill, or bill of lading, and that he must have observed that McLain was named therein as consignor and consignee, yet we regard that circumstance as entirely consistent with a bona fide belief that Scaling & Tamblyn owned the sheep and were selling them in their

own behalf. If Scaling & Tamblyn had bought the sheep from any shipper, who had brought them to the Kansas City stockyards for a market, precisely the same conditions might be expected to obtain in the matter of bill of lading and scale tickets. The bill of lading would, in that event, have named the shipper as consignee, and upon a sale of the sheep to Scaling & Tamblyn, who wished to resell in the same market, no change would naturally be made in the bill of lading until they in turn sold to someone who wished to ship again. We are unable to agree with the contention of the learned counsel for plaintiff in error that the facts of this case establish knowledge upon the part of defendants in error of the agency of Scaling & Tamblyn. But aside from this ground for sustaining the finding of the trial court as to a liability, there is another reason why that finding must be sustained. It is the rule established in this state, that even if the party buying knows that the party selling is a broker, and although there be reason to believe that he is selling for some principal, yet if the party selling does not see fit to bind his principal by the form of the contract made, and does bind himself by the form of the contract, the agent thus contracting in his own name may be held to the liability of a vendor."

In *Cobb v. Knapp* (1877) 71 N. Y. 348, 27 Am. Rep. 51, it appeared that a broker purchased some wheat for an undisclosed principal from the plaintiff. The broker's principals failing to pay for the wheat, this suit was instituted against the broker therefor. It was held that a broker, although acting for another, was personally liable if he contracted in his own name without disclosing his principal, and this would be so even though the seller knew that the broker was acting as broker or agent.

In *Knapp v. Simon* (1884) 96 N. Y. 284, 6 N. Y. Civ. Proc. Rep. 1, arising out of the same transaction, it appeared that a broker had purchased wheat for his undisclosed principal, who did not pay for same. The broker was thereupon sued and judgment re-

covered against him. The broker then brought suit to recover from his principal. The court held, among other things, that a purchase by an agent for an undisclosed principal rendered the agent personally liable. It was said: "The effect of a purchase of property by an agent who does not disclose the name of his principal to the vendor at the time of such purchase is to render the agent personally liable to the vendor for the purchase price. . . . When a broker purchases or sells property without disclosing to the respective principals in the transaction the name of the party for whom he acts, he becomes, on the one side, liable personally for the purchase price of the property bought, and, on the other, is entitled to collect such price from the principal at whose instance a purchase was made."

In *Zimmermann v. Weber* (1909) 135 App. Div. 428, 120 N. Y. Supp. 483, it appeared that stock brokers agreed in their own name to sell certain stock to purchasers. The defendants had authorized the brokers to sell their stock, but between the time of the authorization and the contract for the sale the principals had disposed of them otherwise, and so were unable to deliver them when called upon by their brokers. The brokers thereupon reimbursed the purchasers for the damage caused by the inability of their principal to perform. In an action for reimbursement the court held that the purchasers could hold the brokers for the breach by their principal. It was said: "The failure of the plaintiffs to carry out their contract resulted from the default of the defendant in carrying out his and in failing to furnish the stock which he had authorized them to sell for him. The market price rose, and on failure of the plaintiffs to deliver, the plaintiffs' purchaser had the right to go into the market and buy the stock at the market price, and to hold the plaintiffs, who were the only persons he knew in the contract, for his damage. . . . In pursuance of the authority given by the defendant the plaintiffs were justified in making the contract for the sale of the shares of stock at the price stipulated

by the defendant, and in becoming personally responsible for the delivery of the same at the price agreed upon."

In *Whitman v. Johnson* (1895) 10 Misc. 725, 31 N. Y. Supp. 805, it appeared that a broker entered into a contract with the plaintiff for the sale of a certain quantity of oil. The oil was never delivered, and the broker was thereupon sued for the damages caused by the breach of contract. The court held that in order to relieve an agent or broker from liability on a contract for his principal, it must appear that when the agent made the contract he had authority from the person from whom he made it, to make it in the form he did, and that he not only disclosed the fact of his agency at the time of entering into the contract, but that he also disclosed the name of the principal in such a way that the contract would bind the principal and not himself.

In *Newman v. Greeff* (1886) 101 N. Y. 663, 5 N. E. 335, it appeared that the defendants, commission merchants, entered into a contract with the plaintiff in their own name. The defense was based upon the ground that the contract was made by them as agents for third parties. It was held that evidence having been received to interpret the true meaning of the contract, and the jury having found that the defendants acted as principals, there was no error. It was said: "Upon this appeal the counsel for the appellants assumes that the defendants were commission merchants and agents for manufacturers, and, in the light of that knowledge and the language of the letters, contends that the character of the transaction was one of agency merely. What the plaintiff knew was, under the testimony, for the jury to say, and we are unable to find in the letters any conclusive evidence showing that the defendants intended to act otherwise than as principals. In the first place they sign as principals. Then they say, 'We report your order,' and this, in view of the fact testified to, that the plaintiff had given the order verbally and Chapman had made a memorandum of the articles and prices, may mean 'report the order'

for the information of the plaintiff, as in *Brigg v. Hilton* (1885) 99 N. Y. 517, 52 Am. Rep. 63, 3 N. E. 51. They add, 'Goods to be put up in bulk; delivery as soon as possible.' Thus the contract imports a personal obligation. . . . In the case before us the signature is the firm name of the defendants, and whether the words used in the bodies of the letters are susceptible of an interpretation which would indicate a different relation to the contract on the part of the signers is, at most, ambiguous. Evidence was therefore admissible and was received, to fix its true character. And the jury have found as a fact that the defendants did act, and were understood by the plaintiff to act, in the transaction as principals, and not as agents."

In *Lichten v. Verner* (1899) 8 Pa. Dist. R. 218, it appeared that a broker purchased 100 shares of capital stock of a certain corporation on the floor of the exchange, from plaintiff's testator, for an undisclosed principal. On delivery of the stock a letter of attorney was attached to the certificate, authorizing the transfer of the shares but leaving a blank space for the name of the transferee. Later two calls were made on the stock, and the plaintiff, as executor of the nominal owner of the stock, was forced to pay a judgment obtained to enforce collection. The present suit was then instituted to recover from the broker. It was held that a broker who does not disclose the name of his principal is liable to the other party to the contract as if he himself were the contracting party. The court said: "It is clear, therefore, that the defendant would be liable in this action if he were the purchaser of the stock on his own account. But does the fact that in buying it he acted on behalf of another party relieve him? It is well settled that where one contracting on behalf of another fails to disclose his agency, he becomes subject to all the liabilities, express or implied, created by the contract, in the same manner as if he were the principal in the transaction. And the subsequent revelation of his true position and the name of his principal will not relieve him. In that

event, the other party to the contract may pursue either the agent or the principal, although, of course, he is entitled to but one satisfaction of his claim. *Meyer v. Barker* (1813) 6 Binn. (Pa.) 228; *Beymer v. Bonsall* (1875) 79 Pa. 298. In this case Verner neither named his principal when he bought the stock nor gave Lichten to understand that he was not dealing on his own behalf. He is therefore liable, as if a principal, in all matters arising out of the purchase. It has been argued that since Mr. Verner is a broker those dealing with him are charged with notice that he buys or sells, not for himself, but for other parties; that therefore they cannot be said to deal on his credit; and that to take any different view of the case would subject the members of the stock exchange to a condition practically prohibitive of business. But the general law of agency applies to brokers as well as to other classes of agents, and it has been expressly held that a broker who does not disclose the name of his principal is liable to the other party to the contract as if he were himself the contracting party. *Royal Exch. Ins. Co. v. Moore* (1863) 11 Week. Rep. (Eng.) 592, 8 L. T. N. S. 242; *Nickalls v. Merry* (1875) L. R. 7 H. L. (Eng.) 530, 45 L. J. Ch. N. S. 575, 32 L. T. N. S. 623, 23 Week. Rep. 663; *Baltzen v. Nicolay* (1873) 53 N. Y. 467; *Watson v. Miller* (1876) 11 W. N. (Eng.) 18. See *Dos Passos, Stock-Brokers & Stock Exch.* 680, et seq.; *Mechem, Agency*, § 959. If he discloses his principal at the time of the making of the contract, he will not himself incur a liability on it. *Coles v. Bristowe* (1868) L. R. 4 Ch. (Eng.) 3, 38 L. J. Ch. N. S. 81, 19 L. T. N. S. 403, 17 Week. Rep. 105."

In *Yamaoka v. Kloeber* (1913) 71 Wash. 598, 129 Pac. 387, affirmed on rehearing in (1913) 74 Wash. 697, 133 Pac. 1037, it appeared that defendant sold the plaintiff several head of cattle and agreed to furnish certificates of registration for them. In an action for his failure so to do he contended that he only acted as broker in the sale of one of the cattle, and therefore was not liable. The court held, how-

ever, that inasmuch as he agreed to furnish a certificate of registration for the stock, he was liable. It was said: "The contention that the appellant acted only as a broker in the sale of one of the calves, and hence is not liable in damages, is not tenable. The evidence supports the finding of the court that he agreed to furnish a certificate of registration for him and failed so to do."

In *Krohn v. Lambeth* (1896) 114 Cal. 302, 46 Pac. 164, it appeared that a broker interested the defendant in the purchase of a mine and the formation of a company to work such mine. The broker entered into a contract with the plaintiff for the purchase of the mine, paying part of the purchase price in cash, and gave a note for the balance in his own name. The defendant then advanced the money. In an action on the note against the defendant as an undisclosed principal, the court held that the broker was personally liable as principal and as promoter of the corporation. It was said: "Lambeth was not the purchaser of the property. Lambeth was not to receive from Bailey a deed to the property, or to any part thereof. Bailey was a 'promoter,' desirous of securing the ownership and control of the mine. He was without financial means to do so himself. He interested Lambeth in the proposition, and agreed with Lambeth that if he, Lambeth, would advance to him, Bailey, money wherewith Bailey might purchase the mine, Bailey in turn would organize a corporation, convey certain shares of stock to others for their interest in the property, would retain a certain amount for himself, and would make over to Lambeth 110,000 shares. The money which Lambeth advanced, or in effect lent, to Bailey, was not even to be repaid in the form of stock. He was, under his agreement, still entitled to a return of every dollar of it out of a designated fund, the profits of the mine. If Lambeth had said to Bailey that he would advance him \$12,000 for the indicated purposes, without taking any interest in the corporation, and that Bailey was to repay this money out of the profits of the mine, it

would not be contended for an instant that Lambeth was any more an undisclosed principal than would have been any other person from whom Bailey might have secured the desired loan. But the circumstance that Lambeth is to receive shares of stock in the corporation to be formed does not alter his position under the agreement. Bailey is still the principal in the transaction with plaintiff. It devolved upon Bailey to purchase the property, not for Lambeth, but as a part of his agreement to secure the mine, organize the corporation, and convey to it the property. Lambeth's promises of money enabled him to do what otherwise he would have been unable to accomplish. For Lambeth's failure to make good those promises Bailey might have had his cause of action against Lambeth, but as between plaintiff and Lambeth there was no privity. Bailey was not alone acting as principal, but in fact was the principal."

A broker who does not disclose his principal, and who enters into a contract not in accordance with his instructions, is personally liable for any damage caused thereby. In *Flannery v. New England Transp. Co.* (1908) 168 Fed. 397, it appeared that a ship broker, without disclosing that he was chartering for a third person, chartered a vessel from the plaintiff. The broker's principal had told him that the boat was to be towed by their tugs, but the broker failed to disclose this fact to the owner of the boat. It was held that the ship broker acted as principal in this case, and was responsible for the charges. He may, however, recover part of it from his principal. The court said: "In one part of the libellant's testimony it is shown that Mr. Kellam was in the habit of occasionally chartering on his own account. In another part thereof that is denied, but I think it may be safely concluded that this was one of the occasions where he was acting as principal instead of being merely a broker. That the respondent's proctors made a mistake in originally taking the position that Kellam was an agent of the respondent is frankly ad-

mitted by them, and should not be prejudicial. The correct attitude was assumed when the facts were made clear to them. There will be a decree for the libellant against Kellam for \$364.36 with interest, Kellam to recover over against the New England Company \$212.44. The decree will provide that in the event of failure to recover from Kellam the whole amount due the libellant shall be payable by the New England Company."

A broker who does not disclose his principal is personally liable for a breach of warranty. *Argersinger v. Macnaughton* (1889) 114 N. Y. 535, 11 Am. St. Rep. 687, 21 N. E. 1022; *Waring v. Mason* (1837) 18 Wend. (N. Y.) 425; *Wheeler v. Reed* (1864) 36 Ill. 81.

In *Argersinger v. Macnaughton* (N. Y.) *supra*, it appeared that a commission merchant sold the plaintiffs some skins, warranting them to be of a certain kind. There was no disclosure as to who the principal was. In an action against the broker on the warranty, the court held that an agent who contracted in his own name, and did not disclose the name of his principal at the time of making the contract, was personally liable for whatever obligation arose out of the contract. The court said: "The defendant did not inform the plaintiffs, nor were they in any manner advised, of the name or names of the party or parties who sent the skins to the defendant to be sold by him. The question is presented whether the fact that the defendant failed to give the plaintiffs such information was sufficient to deny to him the right to make his agency effectual as a defense. It does not appear that the plaintiffs had any knowledge of the names of the consignors of the property, or that the defendant supposed they had such knowledge. In such case there is some reason to conclude that the defendant intended to make the warranty his own as between him and the purchasers. And the proposition that an agent contracting in his own name, and failing to disclose the name of his principal at the time of making a contract for the sale or purchase of goods, is per-

sonly liable for whatever obligation may arise out of the contract, has the support of authority. . . . That doctrine is applicable to the present case. The defendant made the contract of sale in his own name, as commission merchant, without disclosing the name of any principal; and his warranty given to produce it may, within that rule, as between the parties, be deemed his undertaking. In such case it may be supposed that a purchaser relies upon the responsibility of the person with whom he deals for the performance of the contract, and that he is not required to look elsewhere to obtain it. When there is, in fact, a principal, the agent may ordinarily relieve himself from personal liability upon a contract made in his behalf, by disclosing his name at the time of making it. Upon such disclosure, however, the party proceeding to deal with the agent may or may not, as he pleases, enter into contract upon the responsibility of the named principal, but to permit an agent to turn over to his customer an undisclosed and, to the latter, unknown principal, might have the effect to deny to the customer the benefit of any available or responsible means of remedy or relief founded upon the contract. The rule is no less salutary than reasonable that an agent may be treated as the party to the contract made by him in his own name, unless he advises the other party to it of the name of the principal whom he assumes to represent in making it, where that is unknown to such party. This proposition is not inconsistent with the general rule that an agent, acting within the scope of his authority with a party advised of his agency, will not be personally charged unless it appears that such was his intention."

In *Waring v. Mason* (1837) 18 Wend. (N. Y.) 425, wherein it appeared that commission merchants sold the plaintiff a quantity of cotton by sample, it subsequently turned out that the center of each bale contained damaged cotton. In an action for a breach of the implied warranty of the quality of the cotton, the court held that a broker, agent, or commission merchant, who sells goods in his own

name without disclosing his principal, is personally liable. It was said: "There was nothing in the case to exempt the defendants from liability on the ground that they were merely acting as commission merchants, or as agents for some other person. As the cotton was sold in their own names, merely proving that they were generally known to the plaintiffs and others to be commission merchants amounts to nothing, without also proving that commission merchants never buy or sell on their own account; and I presume no such custom could have been established. Besides, if they wish to protect themselves from responsibility as agents, they should not have sold in their own names; or at least they should have disclosed the name of their principal, if the cotton was not in fact theirs, so as to give the purchasers an action against him."

In *Wheeler v. Reed* (1864) 36 Ill. 81, it appeared that the defendant's brokers, without disclosing the capacity in which they were acting, represented certain flour sold to be of a quality equal to another grade. In an action for a breach of warranty the court held that while an agent or broker who contracts and discloses his principal at the time, or the principal is known at the time, is not personally liable for breach of the contract, still where the facts show that a broker is acting as principal he is personally liable. It was said: "We admit the rule to be as stated, where an agent makes a contract and discloses at the same time his principal, or the principal was known at the time by the other party, the agent is not personally liable unless he makes himself so, expressly; or it may be fairly inferred from the nature of the contract itself and concurring circumstances. These are facts for the consideration of the jury, and they have found there was no agency in this sale. The account rendered shows the sale was made by the defendant as principal. Nor does the proof show that the broker, when he purchased, knew the principal. He traded with the defendant as the principal, and so the account of sales was made out and the receipt of payment

made. It would seem to us this proof would enable the defendant to recover in his own name against the plaintiffs, had they failed to pay for the flour on delivery. This is some test of the right of the plaintiffs to recover against him for a breach of his contract of warranty. The witness stated that the defendant did not disclose his agency; he supposed he was selling on commission; did not know, when he bought, that one Burrows was the proprietor of the flour, but supposed so; that defendant had advanced upon it, and that Burrows was running the mill. The rule is that a vendor not disclosing his agency may be treated as a principal. . . . Any other rule, it seems to us, would be fraught with some hardship and great inconvenience, so much of the business of our cities being transacted through factors and agents. Suppose a wheat factor should state to a party applying to purchase that he was selling as agent for a principal, naming him, whose residence is at Odessa on the Black Sea. It is not very probable that a purchase would be made with a recourse for damages on a principal there situated; hence a necessity of disclosing the agency and the principal. It is but right and just, if no disclosure is made, that the agent should be personally liable."

There is no obligation on the part of a broker to disclose his principal, the result of a failure to do so being a personal assumption of liability on the contract. *Knapp v. Simon* (1884) 96 N. Y. 284, 6 N. Y. Civ. Proc. Rep. 1; *Zimmermann v. Weber* (1909) 135 App. Div. 428, 120 N. Y. Supp. 483.

b. Sufficiency of disclosure.

1. Generally.

It seems that a disclosure which merely indicates that the broker is acting for a principal without naming him is insufficient. Thus in *Argersinger v. Macnaughten* (1889) 114 N. Y. 535, 11 Am. St. Rep. 687, 21 N. E. 1022, it was said: "The disclosure of his agency is not completely made unless it embraces the name of the principal; and, without that, the party dealing with him may understand that he in-

tended to give his personal liability and responsibility in support of the contract, and for its performance."

So in *Cobb v. Knapp* (1877) 71 N. Y. 348, 27 Am. Rep. 51, wherein it appeared that the broker said the wheat was for the "Blissville distillery," and was to be delivered there, the court held that that was not a sufficient disclosure of the broker's principal, saying: "It is argued that because the defendant stated that the property was for the 'Blissville distillery,' and was to be delivered there, that that was a sufficient disclosure of the principal, but this is not conclusive. The plaintiff states that he did not know the proprietors of the distillery, and that the defendant directed the property to be charged to him. . . . Here the distillery named was not a corporation, and its name, therefore, conveyed no idea of its owners. It is not sufficient that the seller may have the means of ascertaining the name of the principal. If so, the neglect to require might be deemed sufficient. He must have actual knowledge. There is no hardship in the rule of liability against agents. They always have it in their own power to relieve themselves, and when they do not, it must be presumed that they intend to be liable."

In *Dorman v. Boehringer* (1917) — Tex. Civ. App. —, 195 S. W. 669, reversed on rehearing on other grounds in 195 S. W. 1183, it appeared that a broker sold a customer a quantity of corn without disclosing any principal. In small letters near the top of the paper on which the contract was written, the broker disclaimed any liability except as broker. The broker failed to deliver the corn after many assurances of its being on the road. In an action for such breach, the court held that a broker will be liable as a principal when he does not disclose his principal at the time of entering into the contract. A disclosure is not sufficient unless the name of the principal is disclosed. It was said: "If an agent discloses the fact of his agency, but conceals the name and identity of his principal, and deals in his own name as the contracting party, he will

be personally liable. . . . In the case now before the court appellant utterly failed to show that he had any principal, and contracted in his own name for delivery of the corn. The word 'principal' is nowhere mentioned in the transaction between the parties. An agent contracting in his own name and failing to disclose the name of his principal at the time of making a contract for the sale or purchase of goods is personally liable for whatever obligation may arise out of the contract. . . . Appellant could not escape liability by merely stating that he was liable only as a broker, unless he disclosed for whom he was acting as agent. The disclosure of agency is not completely made unless it embraces the name of the principal. Appellant not only failed to show that he was acting for any principal, but failed to show that he ever had any authority for making the contract of sale. On the other hand, the facts tend to show that there was no principal, and that he was contracting for himself, and was therefore liable. *Simmons v. More* (1885) 100 N. Y. 140, 2 N. E. 640. If appellant is not liable for a breach of the contract, no one is liable, for he had no principal. He cannot escape by stating on his stationery that he acted as broker only and assumed responsibility as such. As such broker, he is liable when he discloses no principal."

In *Gadd v. Houghton* (1878) L. R. 1 Exch. Div. (Eng.) 357, it appeared that a firm of brokers sold to the plaintiff a quantity of oranges on account of a foreign principal. In an action on the contract for the nondelivery of the oranges, the court held that the words, "on account of," were a sufficient disclosure to the purchaser that the foreign principals were liable, and not the broker. It was said: "When a man says that he is making a contract 'on account of' someone else, it seems to me that he uses the very strongest terms the English language affords to show that he is not binding himself, but is binding his principal. . . . I do not dissent from the principle that a man does not relieve himself from liability upon a

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contract by using words which are intended to be merely words of description. . . . The question is whether, on the true construction of this contract, Houghton & Company sold the goods themselves or entered into a contract on behalf of Morand & Company. The language used must be interpreted according to its plain and natural meaning. As is said in the note to *Thomson v. Davenport* (1829) 2 Smith, Lead. Cas. (Eng.) 6th ed. 344, when a man signs a contract in his own name he is *prima facie* a contracting party and liable, and there must be something very strong on the face of the instrument to show that the liability does not attach to him. But if there are plain words to show that he is contracting on behalf of somebody else, why are we not to give effect to them? I can see no difference between a man writing; 'I, A. B., as agent for C. D., have sold to you,' and signing 'A. B.:' and his writing, 'I have sold to you,' and signing 'A. B., for C. D., the seller.' When the signature comes at the end you apply it to everything which occurs throughout the contract. If all that appears is that the agent has been making a contract on behalf of some other person, it seems to me to follow of necessity that that other person is the person liable. This is one of the simplest possible cases. How can the words, 'on account of Morand & Company,' be inserted merely as a description? The words mean that Morand & Company are the people who have sold. It follows that the persons who have signed are merely the brokers, and are not liable. . . . The usual way in which an agent contracts so as not to render himself personally liable is by signing as agent. That, however, is not the only way, because if it is clear from the body of the contract that he contracted only as agent he would save his liability. No words could be plainer than the words, 'On account of Morand & Company,' to show that the defendants contracted only as agents."

In *Deslandes v. Gregory* (1860) 2 El. & Bl. 602, 121 Eng. Reprint, 226, it appeared that defendants signed a charter party as agents of their prin-

principal, naming him. In an action on the charter party, the court held that the defendants were not liable personally, as there was a sufficient disclosure of the principal. It was said: "We are all of opinion that the judgment of the court of Queen's bench was right. The form of the charter party and the mode of signature, taken together, are decisive to show that the defendants did not bind themselves by the contract as principals. They sign, 'For Samuel Ferguson, Esq., of Anamaboe, Gregory Brothers, as agents.' It would require extremely plain words in the body of the contract to control the effect of that mode of signature, and no such words are to be found there, the contract purporting to be made by 'Messrs. Gregory Brothers, as agents to Samuel Ferguson, of Anamaboe, merchants and charterers.'"

Nor is it sufficient for a broker to disclose his principal after the breach of the contract.

N. P. SLOAN CORP. v. LINTON (reported herewith) ante, 633. In that case it appeared that a firm of brokers sold to plaintiff a quantity of cotton linters, without disclosing their principal. Later the brokers notified plaintiff that they could not deliver the goods sold, and also stated that they had sold them as brokers on the account of their principal, naming the principal. In an action against the brokers for the breach of contract, the court held that the brokers could not escape liability for breach of contract by their principal, when the principal was not disclosed until after the breach. It was said: "As to the first point, it appears that plaintiff showed by uncontradicted evidence that defendants made no disclosure of their principal until some days after the contract was made, and not until they notified plaintiff that the contract would not be performed. Beyond question, therefore, defendants could not escape liability upon that ground."

The agency must appear in the signature as well as in the body of the contract. *Paice v. Walker* (1870) L. R. 5 Exch. (Eng.) 173. In that case it appeared that defendants, for a foreign

principal, signed a contract for the sale of wheat in the following terms: "Sold A. J. Paice, Esq., London, about 200 quarters wheat (as agents for John Schmidt & Co., of Danzig). (Signed) Walker & Strange." In an action for a breach of contract, the court held that where a contract was signed without any words importing agency, unless the body of the contract showed a contrary intention, the person so signing was personally liable. It was said: "The question is whether the defendants are personally liable upon this contract, and I am of opinion that they are. Although it may be difficult to reconcile, I do not say all the cases, but all the dicta in the cases upon this subject, there is no difficulty in extracting from the authorities a very sound rule, and one on which we can always safely act. That rule is well laid down in the note to *Thomson v. Davenport* (1829) 2 Smith, Lead. Cas. (Eng.) 6th ed. 344, in these terms: 'It may be laid down as a general rule that where a person signs a contract in his own name without qualification, he is *prima facie* to be deemed to be a person contracting personally; and, in order to prevent this liability from attaching, it must be apparent from the other portions of the document that he did not intend to bind himself as principal.' Now, to apply that rule to the present case; the contract is here signed 'Walker & Strange' without more, therefore without any such qualification as is referred to in the rule I have cited, and that circumstance disposes of the many cases adverted to by Mr. Dowdeswell, in which the contract was signed by a person describing himself in the signature, and as part of it, as agent. That the incorporation of such words with, or their annexation to, the signature is the qualification referred to in the first part of the passage I have cited, is shown by the conclusion of the sentence, where 'the other portions of the document' are contrasted with the signature itself. The defendants, therefore, not signing as agents, is there anything in the contract to bring them within the latter part of the rule I have referred to,

and to which I entirely accede,—that is, is there anything in the document to show that the defendants did not intend to bind themselves otherwise than as agents? The words relied upon to show this are the words, 'as agents for J. Schmidt & Co. of Danzig.' But numerous cases, and amongst them that of *Lennard v. Robinson* (1855) 5 El. & Bl. 125, 119 Eng. Reprint, 428, 24 L. J. Q. B. N. S. 275, 3 C. L. R. 1363, 1 Jur. N. S. 863, have decided that the use of these words in the body of the contract does not prevent the liability of a party who signs as principal. The rule, therefore, stands thus, that where a contract is signed by a person without any words importing agency, the person so signing is, by virtue of the contract, both entitled and liable, unless in the body of the contract a contrary intention is clearly shown. The contract before us is so signed, and there is nothing tending to show a contrary intention, except words which, on the authority of decided cases, have not that operation."

In *Hough v. Manzanos* (1879) L. R. 4 Exch. Div. (Eng.) 104, it appeared that the defendants entered into a charter party with the plaintiffs as agents for the charterers without disclosing their principals. In an action against the agents for breach of contract, it was held on demurrer that where a person signed a contract in his own name without qualification, unless the other portions of the agreement showed a contrary intention, he was personally liable. The words "as agents" for charterers were not sufficient to make the intention apparent. It was said: "That rule is that, where a person signs a contract in his own name without qualification, he is *prima facie* to be deemed to be a person contracting personally, and in order to prevent this liability from attaching it must be apparent from the other portions of the document that he did not intend to bind himself as principal. Now the words, 'as agents for charterers,' do not in themselves, as the cases decided on the subject show, make that intention apparent."

In *Hutcheson v. Eaton* (1884) L. R.

13 Q. B. Div. (Eng.) 861, it appeared that a firm of brokers signed a contract of sale to the plaintiff with their name, and immediately after their name the word "brokers." In an action against the brokers for a breach of contract, the court held that if the brokers only signed their name, and then added "brokers," and not "as brokers," they were personally liable on the contract. It was said: "The action was brought against the defendants in respect of an alleged breach of contract in the purchase and sale of certain produce. They had in fact made the compact; but they were in reality brokers, and they signed the contract in this form, 'W. Eaton and Son, Brokers.' The contract is in this form: 'Messrs. Hutcheson & Company. We have this day sold to you the following goods:—The cargo of 500 tons more or less (in bags) of American decorticated cotton seed cake.' The first point taken on behalf of the defendants was that upon this contract, the defendants having signed as brokers, they were not personally liable. But according to the authorities, as I understand them, where the contract is drawn up in this way and the signature is of the name of the persons, with 'brokers' added, and the contract is not signed 'as brokers,' they are personally bound; for it is said to be a signature on their own behalf, and the word 'brokers' is only a description."

In *Lennard v. Robinson* (Eng.) *supra*, it appeared that defendants entered into a charter party with the plaintiff, for a foreign principal. In the body of the charter party they were described, after naming them as merchants, as contracting parties, but on signing, they signed their firm name after the following clause, "By authority of, and as agents for (their principal)." In an action against them for the breach of the contract, the court held on demurrer to the plea that, although not attaching much importance to the fact that the defendant's principal was a foreigner, by the whole of the contract the defendants were made personally liable. It was said: "I do not attach much weight

to the fact that the alleged principal is a foreigner; for a part of the contract was to be performed in Memel where he resides, and none in England where the defendants reside. But, looking at the whole of the contract itself, I think the defendants are made personally liable. There is nothing in the signature to prevent them from being so. In the body of the contract, they are contracting parties; and they may well become so 'by authority of, and as agents for,' their employer; that is, he may be made liable to them. That, however, does not alter the effect of the instrument by which they become contracting parties as between themselves and the plaintiff. They are therefore liable for the breach of the contract; and we must give judgment against them. . . . There are many cases which show that the mere fact of a man being agent is not enough to save him from liability."

Previous dealing with the same broker in his capacity as broker for the present principal is held in *HURRICANE MILL. CO. v. STEEL & P. CO.* (reported herewith) ante, 637, to be a sufficient disclosure.

And in the same case it is held that a receipt of the confirmation of the contract by the principals of the broker amounts to an unequivocal notice of the identity of the principal.

2. Custom of trade.

In England, it seems that the rule that a broker is personally liable for a breach of the contract by the principal where he discloses the fact of agency, but not the name of the principal, is vested largely on customs of trade. *Hutchinson v. Tatham* (1873) L. R. 8 C. P. (Eng.) 482, 42 L. J. C. P. N. S. 260, 29 L. T. N. S. 103, 22 Week. Rep. 18; *Fleet v. Murton* (1871) L. R. 7 Q. B. (Eng.) 126, 41 L. J. Q. B. N. S. 49, 26 L. T. N. S. 181, 20 Week. Rep. 97; *Dale v. Humfrey* (1858) El. Bl. & El. 1004, 120 Eng. Reprint, 783, 27 L. J. Q. B. N. S. 390, 5 Jur. N. S. 191, 6 Week. Rep. 854.

In *Hutchinson v. Tatham* (1873) L. R. 8 C. P. (Eng.) 482, it appeared that a charter party was entered into between plaintiffs and defendants "as agents to merchants." It was proven

that defendants acted merely as agents. Evidence at the trial was admitted of a trade usage that if the principal's name was not disclosed within a reasonable time after the signing of the charter party the broker was personally liable for the breach. The court, after holding that by the terms of the contract the brokers were not liable, held that it was proper to admit evidence of a trade usage, as it was not inconsistent with the terms of the contract. The court said: "The question therefore arises whether evidence is admissible to add a term not expressed in the contract, to the effect that, if the principal be not disclosed within a reasonable time from the signing of the contract, then the agent is to be personally liable. It is the general rule that evidence is admissible for the purpose of explaining the terms of a contract with reference to the usage of a particular trade, and of showing that a term, which *prima facie* would have one meaning, may have in such trade another well-understood meaning. The question sometimes arises as to the meaning of a particular expression, but it also often arises as to whether, on a contract which purports to be made by a party only as agent, he can be charged as principal. Within my experience the question has arisen whether such a custom exists in many of the trades in London. In *Humfrey v. Dale* (1857) 7 El. & Bl. 266, 119 Eng. Reprint, 1246, 26 L. J. Q. B. N. S. 137, 3 Jur. N. S. 213, affirmed in (1858) El. Bl. & El. 1004, 120 Eng. Reprint, 783, 27 L. J. Q. B. N. S. 390, 5 Jur. N. S. 191, 6 Week. Rep. 854, the contract was, as it seems to me, substantially the same as this. There the contract was made by the defendants *prima facie* as agents, but it was decided that evidence of custom was admissible to show that it was intended that the agent should himself be bound if the principal's name were not declared. There is nothing unreasonable in such a custom, and I have known it applied by the findings of juries to many branches of trade. There is a good reason for such a custom. With respect to many branches of trade of a

speculative character, where contracts are made through a broker to take advantage of the rise and fall of the markets, it may be all important that the names of the real principals should not be disclosed. In such cases, if the opposite party cannot obtain the name of the principal, no one can be responsible to him but the broker. If the custom does exist, its only effect is to add a term to the contract, and to make the contract, which *prima facie* is that of the principal, likewise bind the agent personally in a particular event. After the cases of *Humfrey v. Dale* (Eng.) *supra*, and *Fleet v. Murton* (1871) L. R. 7 Q. B. 126, 41 L. J. Q. B. N. S. 49, 26 L. T. N. S. 181, 20 Week. Rep. 97, it seems to me impossible to contend that this evidence is inadmissible."

In *Fleet v. Murton* (Eng.) *supra*, it appeared that a firm of brokers entered into a contract of sale of a quantity of raisins with the plaintiffs, in the following terms: "Messrs. Fleet & Dobbing. London, 30th of October, 1869. We have this day sold for your account to our principal, to arrive per steamer from Trieste, 50 to 70 tons of good sound Chesne raisins in cases, at 41s. per cwt., usual market terms. Cash on delivery. F. & D. to draw on M. & W. for £500 (if required) on landing, handing equal value. Customary allowances. Murton & Webb, Brokers, 25 Mincing Lane." After the breach of contract, defendants disclosed their principal. In an action against the brokers for the breach of the contract, evidence was received that in the fruit trade brokers who did not disclose their principal's name in the contract note were personally liable. The court held that, while the brokers would not have been personally liable by the terms of the contract, still evidence of the customs of the trade was admissible to show a qualification of the contract. Cockburn, Ch. J., said: "But I think nevertheless that the evidence of the custom was admissible, and that after that evidence had been given the brokers were properly held liable on the contract. For, although where a party contracts as agent there would not, inde-

pendently of some further bargain, be any liability on him as principal, yet if a man, though professing on the face of the contract to contract as agent for another, and to bind his principal only, and not himself, chooses to qualify that contract by saying that he will make himself liable, though he is contracting for another and giving to another rights under the contract, he himself will incur the same liability as his principal. Now although, where a party professes to contract as broker, it might *prima facie* be taken that he contracts without the intention of incurring liability on his own part, yet if by the custom of the particular trade there is that qualification of the contract, which, if written into the contract in *extenso*, would undoubtedly bind him, that qualification may, I think, be imported into the contract by evidence of the custom. In the case of *Fairlie v. Fenton* (1870) L. R. 5 Exch. (Eng.) 169, 39 L. J. Exch. N. S. 107, 22 L. T. N. S. 373, 18 Week. Rep. 700, there was no qualifying circumstance like the custom in the present case. The defendants here undoubtedly call themselves 'brokers' acting for their principal. But if the custom attaches, the nonliability which would, under ordinary circumstances, *prima facie* exist in a contract made by a person purporting to contract as broker, ceases, and the contract assumes a different form and character, and carries with it different legal consequences, by reason of the custom of the trade, evidence of which, according to all principles, is admissible to qualify the terms of a contract where not inconsistent with it. Blackburn, J., said: I agree that in the present case, if it were not for the evidence of custom, the defendants who contract for a principal, 'sold to a principal,' and sign as brokers, would not have been liable at all upon this contract. But then there came the custom, and the evidence of the custom was to this effect: that in this trade the brokers deal on these terms. The custom is this: if the broker does not disclose his principal's name on the contract, he is personally liable. The custom did not go

to the extent, and there is not the slightest ground for saying that the custom went to show, that the principal was not liable also, or that the principal was discharged. It was simply this, that if the broker did not name the principal in his contract he incurred personal liability."

In *Dale v. Humfrey* (1858) El. Bl. & El. 1004, 120 Eng. Reprint, 783, it appeared that brokers purchased a quantity of linseed oil for an undisclosed principal, through another broker who did not disclose his principal. The brokers of the purchaser did not disclose their principal until after the principal became insolvent. The brokers gave the broker of the seller a note, containing the following clause: "Sold this day for Messrs. Thomas & Moore to our principal, 10 tons of linseed oil of merchantable quality." The broker for the seller gave his principal a note which contained the same terms, excepting the following: "Sold to Dale, Morgan, & Co., for account of Mr. Charles Humfrey, 10 tons linseed oil, of merchantable quality." In an action by the seller against the brokers for the purchasers for not accepting the linseed oil, the court held that it having been proven at the trial that according to the custom in trade a broker who contracted for an undisclosed principal was considered liable for the breach of the contract by the principal, the defendants herein would be held liable. It was said: "And according to the custom proved at the trial, the transaction in face amounted to a sale by Messrs. Thomas & Moore to Messrs. Dale & Company, the defendants below. But it is said the note signed by the defendants below is not a sufficient memorandum of the bargain to satisfy the Statute of Frauds. It is true the words are, 'Sold for Thomas & Moore to our principals;' but that is equivalent to 'Bought of Thomas & Moore for our principals.' For as between Thomas & Moore and the defendants, according to the custom, it was a sale to the defendants, their principals being undisclosed. And a sale 'for Thomas & Moore,' by the defendants to themselves, is in reality a purchase by them from

Thomas & Moore. When the plaintiff is made acquainted with the contract which his brokers have entered into for him, he may step in and sue upon it. First, then, it appears to me that the bargain was in effect one which made the defendants below personally liable to be sued upon it. And, secondly, that the note signed by them was a true memorandum of such bargain. The real bargain was between the brokers, upon which the plaintiff below, the principal of Thomas & Moore, now sues the defendants below, and, as I think, may well maintain this action. . . . In this case the plaintiff seeks to enforce a bargain by which the defendants promised to accept certain oil. The facts are that the plaintiff authorized brokers named Thomas & Moore to sell some oil, and one Schenk authorized defendants, who were also brokers, to buy some oil. The brokers met and made the bargain on behalf of undisclosed principals. The defendants wrote a note in which they stated the contract truly, as being for their principal, without disclosing his name, and signed it as brokers, and sent it to Thomas & Moore; they sent a note to plaintiff in which they stated that they had sold the oil to defendants, without more, and signed it as brokers. It was further proved to be the usage in the city of London (where the matter occurred) that, where a broker makes a contract without disclosing his principal, he is himself liable to be looked to as the purchaser or seller. . . . In the present case the usage (if it be necessary to resort to it) shows that the plaintiff had a right to treat the case as if the defendants were the principals who had described themselves as agents. . . . The plaintiff adduced evidence to show that, by the custom of the trade, whenever a broker purchased without disclosing the name of his principal, he was liable to be looked to as the purchaser. Two objections were taken before us, as in the court below, to the verdict entered for the plaintiff: First, that the evidence of usage was not admissible to vary the terms of the written contract. . . . As regards the first of these objections, I am

clearly of opinion that as the evidence was offered not to vary, but simply to explain, the terms of the contract, it was admissible on the principle on which evidence of the usage of particular trades has, in so many other instances, been admitted. The elaborate reasoning on this subject contained in the judgment of the court of Queen's bench appears to me so conclusive that, if any doubt could have before been entertained, it is thereby entirely removed; and I think it unnecessary to do more than express by entire concurrence in the language and conclusion of the judgment referred to. . . . Now, according to the authorities cited on the argument, the legal effect of a contract entered into by a person as agent for an undisclosed principal is to bind the agent as principal, if the party with whom the contract is made thinks proper to sue him. Besides which, in this case, independently of any rule of law, the like effect is given to the contract by the usage of the particular trade. The memorandum must, therefore, be read as though the defendants, while signing as agents for an unknown principal, had in terms declared that in the event of the vendor not discovering the principals, or preferring to hold them liable, they would be liable as principals; for this liability is tacitly included in the terms used; and I think, as I have before explained, that if this holds (as it undoubtedly does) for the purpose of ascertaining the liability of the defendants, independently of the statute, it equally holds for the purpose of satisfying the statute. It may further be observed that unless the foregoing conclusion were sound in no case could an unnamed principal be sued on such a contract, or party purporting to sign as agent, but being in fact the principal; nor, on the other hand, could an unnamed principal take advantage of such a contract; yet the contrary is well established by authority and precedent."

A custom of the trade fixing liability on a broker for a breach of the principal must yield to a provision of the contract, which is inconsistent therewith. *Pike v. Ongley* (1887) L.

R. 18 Q. B. Div. (Eng.) 708, 56 L. J. Q. B. N. S. 373, 35 Week. Rep. 534; *Barrow v. Dyster* (1884) L. R. 13 Q. B. Div. (Eng.) 635, 51 L. T. N. S. 573, 33 Week. Rep. 199; *Magee v. Atkinson* (1837) 2 Mees. & W. 440, 150 Eng. Reprint, 830, 6 L. J. Exch. N. S. 115.

In *Pike v. Ongley* (Eng.) supra, it appeared that a firm of brokers sold to plaintiff a quantity of hops. The terms of the contract were as follows: "Sold by Ongley & Thornton to Messrs. Pike, Sons, & Co., for and on account of owner, 100 Bales Hallertau Bavarian hops at 52s. per cwt. Delivery in October. (Signed) for Ongley & Thornton, S. T." In an action for the nondelivery of the hops evidence was admitted which tended to prove that it was customary in that trade that if the principal was not disclosed at the time of making the contract the broker was regarded as the principal, and was liable. It was held that the terms, "for and on account of" an undisclosed principal, or foreign principal, showed an intention that the broker should not be personally liable, and, as the evidence of the customs of trade showed a contradiction of the terms of the contract, it was erroneous to admit such evidence. The court said: "The document upon which this action was brought is a sale note of the defendants, who purported to sell thereby certain hops to the plaintiffs, 'for and on account of the owner.' The question is whether that contract on the face of it makes the brokers liable as principals, or whether, if that is not so, evidence can be given to vary the contract by showing a trade custom to treat as principals brokers who have not disclosed the names of their principals at the time of the making of the contract. It is clear from a series of decisions that where the contract sued upon has been made by a broker 'for,' or 'for and on account of,' an undisclosed or foreign principal, the broker is not primarily liable. That is the result of the decision in *Gadd v. Houghton* (1876) L. R. 1 Exch. Div. (Eng.) 357, 46 L. J. Exch. N. S. 71, 35 L. T. N. S. 222, 24 Week. Rep. 975, where the court of appeal held that where the words 'on account

of" were inserted in the body of a contract, the broker was not personally liable. That case is binding and conclusive, and we must hold that in the present case, where goods have been sold "for and on account of" an owner (the owner not having been named), the brokers are not primarily liable. That is a convenient expression to use. But evidence was in this case tendered to prove a trade custom, and such evidence is often admissible where it is not inconsistent with the contract. The custom here set up was that if the broker did not disclose the name of his principal he was himself personally liable. I asked whether the custom was that the principal should be disclosed at the time of the making of the contract, and I gather from the judge's notes, and from the answers of counsel, that a primary liability would attach to the broker as part of the contract, if that was not done. If that is so, the new term contradicts the written document, which says that the defendants do not contract for themselves, but for the owner of the hops, thus excluding all idea of primary liability; until it was shown that they were the owners they could not be taken to be so. Therefore I am of opinion that the evidence of custom which was tendered was inadmissible."

In *Barrow v. Dyster* (1884) L. R. 13 Q. B. Div. (Eng.) 635, it appeared that a firm of brokers entered into a written contract with plaintiffs, for undisclosed principals, for the sale of a quantity of hides, containing the following terms: "If any difference or dispute should arise under this contract it is hereby mutually agreed between sellers and buyers that the same shall be settled by the selling brokers, whose decision in writing shall be final and binding on both sellers and buyers." In an action against the brokers for the delivery of hides of a quality inconsistent with the terms of the contract, evidence of a custom of the trade that a broker who did not disclose his principal was personally liable was rejected. The court held that such evidence was properly rejected, as it was inconsistent with the terms

of the contract. It was said: "It has been argued for the plaintiffs that there were two different contracts; that one was a contract of employment between the plaintiffs and the defendants, binding the defendants to exercise proper skill and care as brokers, and by the custom of the city of London there was annexed to that contract a clause that on any contract they made they should be personally liable, if, within a certain and reasonable time, they did not disclose the names of their principals. Mr. Reid says that there is no inconsistency between the custom and that contract. Then it is said that another contract which the defendants made was that expressed in the bought and sold notes of the 18th of November, 1881. As to that, I thought there was some inconsistency, as the learned counsel wanted to make the clause which he put into the other contract part of this contract also, but he says that the addition to the contract of employment of a clause inconsistent with one of the terms of the notes would not vitiate the contract made by the brokers by the notes. But the case appears to me in a different light. It seems to me that the bought and sold notes must be taken to be the contract between the buyers and sellers and brokers, and the effect of the custom would be to incorporate into the bought and sold notes a clause inconsistent with the clause making the brokers arbitrators. I think, therefore, that the arbitration clause will not allow the introduction of the custom, so on that short ground my brother Lopes was right. But another argument was advanced which was intelligible enough. Mr. Reid said that even if the custom were written into the bought and sold notes there would be no inconsistency, for then the contract would read that, if there was a dispute between the original buyers and original sellers, that dispute was to be settled by the brokers as arbitrators, but if there was a dispute between the brokers and the sellers, or the brokers and the buyers, it could not be intended that the brokers should settle it themselves. But this is not the interpretation which anybody would put on

the agreement except for the purpose of avoiding repugnancy, and when the question is as to admitting this custom I do not see why we should be very anxious to avoid repugnancy. The arbitration clause seems to mean what it says: 'If any difference or dispute shall arise under this contract' it is mutually agreed between the buyers and sellers that the same shall be settled by the brokers, and the brokers obviously agree to that too, because they put their names to the document. It seems to me they all three contract that the brokers are to be the arbitrators. If that is so, it is inconsistent with the idea that the brokers are themselves to be substituted for the principals. I do not think the decisions to which we have been referred come very near this case. They tend to show that in certain instances, where there is no such clause as this arbitration clause, there is a possibility that such a custom might be introduced. The arbitration clause which creates the present difficulty was not referred to in any of those cases."

In *Magee v. Atkinson* (1837) 2 Mees. & W. 440, 150 Eng. Reprint, 830, 6 L. J. Exch. N. S. 115, it appeared that a firm of brokers sold a number of shares to plaintiff. The first sold note was sent in the brokers' names. Later another note was sent in the seller's name. In an action on the contract against the broker, the court held that the evidence as to the custom in trade to the effect that, if the buyer knew that a person was selling as broker, the broker was not liable, was properly excluded, as it tended to alter a written contract.

On the other hand, if the broker makes a contract in his own name without disclosing his principal, a custom to make contracts in that form will not relieve him from liability.

Jones v. Littledale (1837) 6 Ad. & El. 486, 112 Eng. Reprint, 186. In that case it appeared that a firm of brokers sold hemp by auction, and gave an invoice describing the goods as "bought of" themselves. They received a part of the price, but failed to deliver the goods, although an or-

der was given by them on their principals, who refused delivery. In an action brought against them for money had and received, and for such non-delivery, the court held that they had made themselves personally liable by the invoice. It was no defense that they had sold as agents, and had so intimated at the time of the sale. Nor was it a defense for them to prove that it was customary for brokers in that locality to make out the invoice in such a manner, in order to secure the passage of the purchase money through their hands, because of an indebtedness on the part of their principal to them. It was said: "On moving to set aside this verdict, the counsel for the defendants argued that the sale by auction was the contract, from which, and the previous advertisement, it was apparent that the plaintiff knew that the defendants were only agents, and who the principals were, and that the learned judge should have left to the jury to say whether the contract was made with the defendants, or the principals; urging also that if the purchase money had been paid at the proper time the plaintiff would have obtained the goods; and contending that the £100 must be taken as paid to the principals, and might be proved under the fiat against them, and that the £52, paid after the fiat, had been tendered. And he cited *Moore v. Clementson* (1809) 2 Campb. (Eng.) 22, to show that the form of the invoice made no difference, but evidence was admissible to show who was the real contracting party; contending that from the evidence of the facts and the custom the invoice had the same effect as if it had stated that the plaintiff bought of the defendants for Coupland and Duncan, payment to be made to the defendants. There is no doubt that evidence is admissible on behalf of one of the contracting parties, to show that the other was agent only, though contracting in his own name, and so to fix the real principal; but it is clear that if the agent contracts in such a form as to make himself personally responsible, he cannot afterwards, whether his principal were or were not

known at the time of the contract, relieve himself from that responsibility. In this case there is no contract signed by the sellers, so as to satisfy the Statute of Frauds, until the invoice, by which the defendants represent themselves to be the sellers; and we think that they are conclusively bound by that representation. Their object in so representing was, as appeared by the evidence of custom, to secure the passing of the money through their hands, and to prevent its being paid to their principals; but in so doing they have made themselves responsible; and we think it impossible to read the invoice in the sense proposed."

The broker must prove the existence of a custom on which he relies for exoneration.

Southwell v. Bowditch (1876) L. R. 1 C. P. Div. (Eng.) 374. In that case it appeared that a broker sold certain goods to the seller's account for his principal. The seller was notified by the broker as follows: "I have this day sold by your order and for your account to my principals 5 tons of . . . anthracene. . . ." In an action for goods sold and delivered against the broker, there having been no custom in trade proven that a broker for an undisclosed principal was liable, the court held that there was a sufficient disclosure in the contract so as not to make the broker personally liable. The court said: "The first observation which I wish to make is that, so far as I know, there is in law no difference of construction between mercantile contracts and other instruments. The grammatical meaning is, as in other cases, the meaning to be adopted unless there be reason to the contrary. In the present case there can be no doubt that the person signing this contract intended to sign as broker. The contract says, 'Sold by your order and for your account,' and 'to my principals.' There is nothing whatever on the contract to show that the defendant intended to act otherwise than as broker. No doubt it does not absolutely follow from the defendant's appearing on the contract to be broker that he is not liable as principal. There are two ways in which he

might so be made liable: First, intention on the face of the contract making the agent liable as well as the principal; secondly, usage. But, as to usage, none was proved; and I can see nothing on the face of this contract to make the agent liable as well as the principal. . . . I think we are bound to construe mercantile contracts, not less than other contracts, by the words used, and according to the natural and usual meaning of those words. Otherwise we import into them stipulations never made. Is there anything in the terms of this contract to make the defendant liable? I forbear to advert to cases on usage of trade, except to remark that all such cases tend to show the necessity of usage to make the broker liable in the absence of agreement that he should be; for the attempt to prove usage failed in the present case. In the terms of the contract itself there is, I think, nothing to make the defendant liable. . . . I entirely agree that this, being a mercantile contract, is, like any other contract, to be construed according to the natural meaning of the words. Now there is, I think, a material difference between the words, 'sold for you to my principals,' and, 'bought of you for my principals.' The rule of law, no doubt, is that if the principal is undisclosed the broker saying, 'bought of you for my principals,' is himself liable; but this contract says 'sold for you to my principals,' i. e., I, your broker, have made a contract for my principals, the buyers. The court below have held, on the authority of *Humfrey v. Dale* (1857) 7 El. & Bl. 266, 119 Eng. Reprint, 1246, 26 L. J. Q. B. N. S. 137, 3 Jur. N. S. 213, affirmed in (1858) El. Bl. & El. 1004, 120 Eng. Reprint, 783, 27 L. J. Q. B. N. S. 390, 5 Jur. N. S. 191, 6 Week. Rep. 854, and *Fleet v. Murton* (1871) L. R. 7 Q. B. (Eng.) 126, 41 L. J. Q. B. N. S. 49, 26 L. T. N. S. 181, 20 Week. Rep. 97, that these words mean the same thing. But in those cases usage was proved; rightly looked at, the usage added a term to the contract, and the real difficulty, as pointed out in *Fleet v. Murton* (Eng.) supra, by Blackburn, J., was occa-

tioned by the form of the declaration; the majority of the judges, however, in *Humfrey v. Dale* (Eng.) *supra*, in the exchequer chamber, got over that difficulty, and upon their decision *Fleet v. Murton*, is founded; therefore neither of those cases is an authority that these words not only may, but must, mean the same thing. No usage was proved in the present case, and the usage which has been proved in previous cases was in other trades and at other places."

Customs of similar trades may be admitted as corroboratory of the evidence of the custom whose existence is in issue.

Fleet v. Murton (Eng.) *supra*, wherein evidence was admitted of a custom of trade in the colonial market, viz., that the brokers were personally responsible unless they gave the name of their principals within three days after the making of the contract. It was held that such evidence was admissible as tending to corroborate the evidence as to the existence of such custom in the fruit trade. Cockburn, Ch. J., said: "I own I entertain somewhat more doubt as to the admissibility of evidence of a similar custom in other trades than the particular trade which was the subject-matter of this contract. This case seems to me to go further than the case of *Noble v. Kennoway* (1780) 2 Dougl. K. B. 510, 99 Eng. Reprint, 326, which related to the admissibility of evidence of custom in the trade of Newfoundland as applicable to the custom of the trade in Labrador. Labrador had been recently annexed to Newfoundland, and the trade in each was of the same description, it being a trade that related to fishing. By the terms of the contract (a policy of insurance) the ship was to be at liberty to call at Newfoundland, and it might be fairly inferred by persons entering into a contract with reference to the trade of Labrador that what was the custom of the trade of Newfoundland would extend to the trade of Labrador. But this case goes further. At the same time it is impossible to shut one's eyes to the fact that the moral effect of the evidence would operate on a rea-

sonable mind with very considerable force. If there exists a custom to the effect that the agent makes himself liable under given circumstances, in a large and extensive trade like the colonial trade, it makes it more probable that in the fruit trade in the Mediterranean or elsewhere a similar custom would obtain. I am not quite so clear on the point, but still I do not think that the argument addressed to us goes so far as to show that this evidence was not admissible. There is no doubt that it would be useful in elucidating the truth; and therefore, on general principles, I think the evidence was admissible." Blackburn, J., said: "Now, passing from that point, we have to consider whether the evidence of custom in the colonial trade was admissible; and I am bound to say that I clearly think it was. The objection taken was that there was no evidence to make the defendants, the brokers, responsible at all. Then the plaintiff's counsel said: 'I will prove by evidence of persons connected with the fruit trade that the broker, where he does not disclose the principal's name, makes himself personally liable.' The plaintiffs accordingly offered evidence to prove such a custom, and, to strengthen the evidence, showed that in the colonial trade brokers did incur a personal liability if they did not disclose their principal's name. What was proved was this: that the trades were very closely allied to each other. All brokers are very closely connected with each other; they all deal with merchants, and with much the same merchants, in the general way of business; and they buy and sell sometimes fruit, sometimes wool, and sometimes other things. And it struck me, where the question was, Does a broker in the fruit trade, if he does not disclose his principal's name, incur a personal liability in consequence, that it would be proper evidence for a jury to consider and weigh that such a custom existed in other trades, and that in those other trades the broker did incur a personal liability. I think it cannot be denied that any sensible person would say that the existence of such a liability in the

colonial trade as was established in *Dale v. Humfrey* (1858) El. Bl. & El. 1004, 120 Eng. Reprint, 783, 27 L. J. Q. B. N. S. 390, 5 Jur. N. S. 191, 6 Week. Rep. 854, would be very cogent evidence as to whether there would be such a liability in the fruit trade. That is the reason, because I thought it would have this strong bearing on the case, that I left it to the jury. I quite agree that the case of *Noble v. Kennoway* (Eng.) supra, bears but slightly upon the point. It is, to some slight degree, analogous; but very slightly indeed, and there is no other authority cited at all; therefore we must go on the principle of common sense." Mellor, J., said: "With reference to the admissibility of the evidence of the custom in the colonial trade, which is a new point so far as I am aware, I think this case goes further than any case has actually gone; yet I cannot help thinking that the evidence was relevant to this case and admissible on the ground that, showing, as it did, what was the custom in other trades, though not so analogous, no doubt, to the trade in question as was the trade in *Noble v. Kennoway* (Eng.) supra, it tended to show the probability that in the fruit trade as well as in the colonial trade the broker did, under given circumstances, undertake a similar responsibility."

c. Effect of settlement with or action against principal.

In *Hopkins v. Everly* (1892) 150 Pa. 117, 24 Atl. 624, it appeared that a real estate agent for a disclosed principal sold to plaintiffs a house, agreeing to give possession within a certain time. The latter agreement was in excess of his authority. The principal, however, first offered to rescind the contract and then ratified and carried out the agreement on the terms agreed to by plaintiff. In an action for failure to give possession within the period limited by the contract the court held that the settlement by the plaintiffs with the owner, accepting an allowance on account of possession, merged the agreement to sell and all its terms and put an end to all further

claims against the broker as well as his principal. It was said: "When, on the contrary, they made a settlement with the owner, accepted an allowance on account of possession, and took the deed for the property, they merged the agreement to sell and all its terms, and put an end once for all to any further claim against the appellant as well as against his principal."

But the commencement of an action against a subsequently disclosed principal is not conclusive of an election to hold the principal.

Cobb v. Knapp (1877) 71 N. Y. 348, 27 Am. Rep. 51, wherein the court held that a subsequent disclosure of a broker's principal and the commencement of an action against him were not conclusive of an election to hold the principal responsible. It was said: "The subsequent disclosure of the principals by the agent, and the commencement of an action against them, are not conclusive of an election to hold them responsible only. *Raymond v. Crown & E. Mills* (1841) 2 Met. (Mass.) 319; *Curtis v. Williamson* (1874) L. R. 10 Q. B. (Eng.) 57, 44 L. J. Q. B. N. S. 27, 31 L. T. N. S. 678, 23 Week. Rep. 236. In the recent case of *Beymer v. Bonsall* (1875) 79 Pa. 298, it was held that neither the agent nor principal in such a case would be discharged short of satisfaction. The fact of commencing the action and the statements in the complaint were proper for the jury upon the contested fact, but they did not operate as a legal discharge."

In *Knapp v. Simon* (1884) 96 N. Y. 284, 6 N. Y. Civ. Proc. Rep. 1, it was held that a party dealing with a broker may, upon discovering the name of the principal in the transaction, hold the principal, the court saying: "The vendor may, however, upon discovering the name of the principal in the transaction, also hold him responsible for the price of the property bought, provided he has not in the meanwhile in good faith paid such price to the agent. He may therefore pursue either the agent or the principal, or both, until he recovers the contract price."

d. Right of broker to reimbursement.

A broker who has been held personally liable for a breach of contract by an undisclosed principal is entitled to reimbursement from the principal. *Zimmermann v. Weber* (1909) 135 App. Div. 428, 120 N. Y. Supp. 483, wherein the court said: "The plaintiffs were justified in settling with the purchaser

with whom they had bargained for the loss which he had sustained, and, being authorized by the defendant to do what they did, it was incumbent upon the defendant to save them from the damage which they sustained. An agent may demand reimbursement from his principal for expenses or damages incurred by him in the proper conduct of his agency." R. C. L.

BURNS B. BRAGDON

v.

WESLEY S. KELLOGG.

Maine Supreme Judicial Court — February 1, 1919.

(— Me. —, 105 Atl. 433.)

Highway — turning to wrong side of road — emergency.

1. One approaching a blind corner in an automobile is not negligent if, when another car suddenly turns the corner on the wrong side of the street, he, in the emergency, turns his car to the left to avoid the collision, although the other car also turns to that side of the street so that he is on the wrong side of the road when the accident occurs.

[See note on this question beginning on page 680.]

— law of road — applicability to automobiles.

2. A statute requiring teams meeting on a highway to turn to the right of the traveled part of the way applies to automobiles.

[See 2 R. C. L. 1194.]

Statute — construction — meeting on highway.

3. A statute requiring vehicles meeting on a highway seasonably to turn to the right means in season to prevent collision.

[See 13 R. C. L. 274.]

Highway — failing to turn to right — negligence.

4. One who, driving upon a highway, fails to turn to the right as required by statute when meeting another vehicle is *prima facie* negligent, and has the burden of justifying his presence on the wrong side of the road.

[See 13 R. C. L. 286-288.]

— negligence — reliance on speed of other car.

5. One driving an automobile on the wrong side of the highway is not entitled to rely on a machine coming from the opposite direction not exceeding the legal rate of speed.

Evidence — speed of automobile.

6. It is a matter of common knowledge that automobiles are more often driven without any reference to legal speed than in observance of it.

Highway — duty in turning corners.

7. One driving an automobile around a street corner or a curve or bend in the road must keep to the right of the middle of the traveled part of the road.

[See 13 R. C. L. 278.]

Appeal — finding of jury — against weight of evidence.

8. When the finding of a jury is against the concurrence of such a weight of evidence, and inconsistent with so many contradictory circumstances, as to meet the findings with proof of inherent improbability, such finding should not be permitted to stand.

[See 2 R. C. L. 196.]

Highway — act causing collision — liability.

9. One who, by cutting a blind corner with his automobile, renders collision with a car approaching on the other street imminent, cannot recover damages for injury to his car from the collision, although he promptly turned to

his side of the road so that, had the driver of the other car done the same, the collision would not have occurred, if the latter, in the emergency, turned

to his left, which act in his judgment was necessary to avoid collision.

[See 2 R. C. L. 1196; 18 R. C. L. 278.]

MOTION by defendant for new trial of an action before the Supreme Judicial Court for Aroostook County, at Law, to recover damages for injuries sustained in an automobile accident alleged to have been caused by defendant's negligence, which resulted in a verdict for plaintiff. *Motion sustained.*

The facts are stated in the opinion of the court.

Messrs. Verdi Ludgate and Hersey & Barnes, for defendant:

Lack of number plates and license does not affect rights of either.

Lockridge v. Minneapolis & St. L. R. Co. 161 Iowa, 74, 140 N. W. 834, Ann. Cas. 1916A, 158; Hyde v. McCreery, 145 App. Div. 729, 130 N. Y. Supp. 269; Black v. Morse, 135 Tenn. 73, L.R.A. 1916E, 1216, 185 S. W. 682; Southern R. Co. v. Vaughan, 118 Va. 692, L.R.A. 1916E, 1222, 88 S. E. 305, Ann. Cas. 1918D, 842; Derr v. Chicago, M. & St. P. R. Co. 163 Wis. 234, 157 N. W. 753; Luckey v. Kansas City, 169 Mo. App. 666, 155 S. W. 873; Armstrong v. Sellers, 182 Ala. 582, 62 So. 28; Atlantic Coast Line R. Co. v. Weir, 63 Fla. 69, 41 L.R.A.(N.S.) 307, 58 So. 641, Ann. Cas. 1914A, 126; Armstead v. Lounsberry, 9 N. C. C. A. 835, note; Lindsay v. Cecchi, 3 Boyce (Del.) 133, 35 L.R.A.(N.S.) 699, 90 Atl. 523, 1 N. C. C. A. 88; Bourne v. Whitman, 209 Mass. 155, 35 L.R.A.(N.S.) 701, 95 N. E. 404, 2 N. C. C. A. 318.

Taking either of two alternatives to avoid a collision is not negligence.

Larrabee v. Sewall, 66 Me. 376; Skene v. Graham, 114 Me. 229, 95 Atl. 950; Borders v. Boston & M. R. Co. 115 Me. 210, 98 Atl. 662.

Turning to the left side of the highway is not, in this case, negligence.

Tousley v. Pacific Electric R. Co. 166 Cal. 457, 137 Pac. 31; Hoff v. Los Angeles Pacific Co. 158 Cal. 596, 112 Pac. 53; Lininger v. San Francisco, V. & N. Valley R. Co. 18 Cal. App. 411, 123 Pac. 235; Simeone v. Lindsay, 6 Penn. (Del.) 224, 65 Atl. 778; Skene v. Graham, 114 Me. 229, 95 Atl. 950; Clarke v. Woop, 159 App. Div. 437, 144 N. Y. Supp. 595; McFern v. Gardner, 121 Mo. App. 1, 97 S. W. 972; Lloyd v. Calhoun, 78 Wash. 436, 189 Pac. 231.

Plaintiff was guilty of contributory negligence.

Wheeler v. Wall, 157 Mo. App. 38, 187 S. W. 63; Calahan v. Moll, 160 Wis.

528, L.R.A.1916A, 744, 152 N. W. 179; Weber v. Swallow, 136 Wis. 46, 116 N. W. 844; Rupp v. Keebler, 175 Ill. App. 619; Brown v. Mitts, 187 Mich. 569, 153 N. W. 714.

He who last has an opportunity of avoiding an accident, notwithstanding the negligence of the other, is solely responsible.

McKinnon v. Bangor R. & Electric Co. 116 Me. 292, 101 Atl. 452.

Messrs. Shaw & Thornton for plaintiff.

Spear, J., delivered the opinion of the court:

This case involves a mixed question of law and fact. It grows out of an automobile accident, happening in broad daylight, on a road of ample width to allow two cars to pass each other, without the least danger of interference.

The facts in this case show but a repetition of the negligent conduct in the operation of cars that constitutes a prolific source of the accidents that occur in this class of cases.

This accident happened in the village of Sherman, town of Sherman, Aroostook county. The plaintiff's son was driving a new Buick car easterly upon Main street, a well-wrought piece of road, with the intention of turning to his left at practically a right angle into North street. The defendant was on North street, traveling south, intending to turn at a right angle to his right into Main street. That is, these parties were approaching, each to turn the same corner into the same street from which the other was coming.

As North street formed a junction with Main street without crossing

it, it was evident to anyone approaching either side of North street from Main street that a car coming from the north must turn either to the right or the left into Main street when it reached the junction.

These two streets meeting each other in this way present a somewhat different situation than would arise if they crossed each other, forming four corners, in this, that a car on Main street, approaching North street, is charged with the knowledge that a car coming from North street must necessarily turn to the right or the left into Main street. Therefore it is inevitable that each party, where one intends to turn to the north and the other to the west, knows that he may meet the other at any moment, at the corner made by the junction of these two streets. If they can see each other as they approach the corner there is no earthly excuse why they should meet in collision. If they cannot see each other, then greater is the duty with which they are each charged that they be absolutely on their proper side of the road.

The law of the road was established many years ago, before electric roads or automobiles were heard of, yet it provided that even slow-moving vehicles, like teams, upon approaching to meet on a way, should "seasonably turn to the right of the middle of the traveled part of it, so

Highway—law of
road—applica-
bility to
automobiles.

far that they can pass each other without interference." Rev. Stat.

chap. 26, § 2. As the word "team" now includes an automobile, this statute is applicable now to this class of vehicles.

Statute—con-
struction—
meeting on
highway.

This statute is mandatory when it says travelers must "sea-

sonably turn to the right." It means that they must turn in season to prevent a collision, and the one

Highway—
failing to turn
to right—
negligence.

who fails to obey this mandate is prima facie guilty of negligence, and

must sustain the burden of excusing

his presence upon the wrong side of the road.

In *Neal v. Rendall*, 98 Me. 69, 63 L.R.A. 668, 56 Atl. 209, 15 Am. Neg. Rep. 68, a leading case, this rule of conduct, even of teams, is fully confirmed. This is a case in which the street upon which the parties were passing in opposite directions was located in the city of Auburn, and was from 40 to 50 feet wide. Either side of the middle of the traveled part of the way was wider than the wrought part of the ordinary country road. There was ample room on either side of the middle for three teams to pass abreast. The defendant was on the wrong side of the road, with ample room to pass the plaintiff without interference; but "just as the teams were about to meet and pass each other, the horse attached to the wagon in which the plaintiff was riding, became suddenly frightened and . . . shied . . . towards the defendant's team," and the accident happened. The court found that "there was no [other] evidence of any negligence on the part of the defendant" except the mere fact of the "position of his team on the left of the middle of the traveled part of the road." Upon this state of facts the court, on report, found that the case should stand for trial.

But the grounds upon which the case was decided are the important consideration. On page 73 of 98 Me., "seasonably turn" is defined as follows: "'Seasonably turn' means 'that travelers shall turn to the right in such season that neither shall be retarded in his progress by reason of the other occupying his half of the way, which the law has assigned to his use when he may have occasion to use it in passing. In short, each has an undoubted right to one half of the way whenever he wishes to pass on it, and it is the duty of each, without delay, to yield such half to the other.'"

Upon the question of prima facie negligence the court says: "This is a regulation to avoid collisions, and if one neglects it, and an accident follow, an explanation of the occur-

rence must begin with some presumption against him. *Cooley, Torts*, p. 666. This court has held the fact that a party was at the left of the road at the time of the collision 'strong evidence of carelessness,' and has said that, unexplained and uncontrolled, it would not only be strong but conclusive evidence of carelessness. *Larrabee v. Sewall*, 66 Me. 381."

The court further says, same page: "Notwithstanding the statutory duty to turn to the right of the middle of the traveled way, the defendant had the right to be upon any part of the road, and his negligence must arise out of his failure to exercise ordinary care under all the circumstances. There was ample room for the plaintiff and her husband to pass on the defendant's left, and they would have passed in safety had they kept upon the same course. On the other hand, the defendant was on the wrong side of the road; he saw the plaintiff approaching in ample time to turn to the right of the middle of the traveled road. There was nothing to prevent his doing so, and the evidence tended to show that had he done so there would have been no collision."

These citations state the responsibility that rests upon the slow-moving horse team in its duty to observe the law of the road, and declares a collision on the wrong side of the road, unexplained, "conclusive evidence of carelessness." This clearly throws the burden on the offending party in such a case. This same case, then, treats the question of duty or care which the law imposes upon travelers, moving with animal power. On page 76 of 98 Me., it is held: "To hold the defendant, however, it is not necessary that he should be able in the exercise of ordinary prudence to foresee the precise form in which the injury in fact resulted. *Hill v. Winsor*, 118 Mass. 251. "The injury must be the direct result of the misconduct charged, but it is not to be considered too remote if, according to the usual experience of mankind, the re-

sult ought to have been reasonably apprehended.' "

These rules of conduct and responsibility on the road apply to vehicles moved by animal power. They must accordingly be applied with emphasized severity to vehicles weighing tons, capable of great speed, and propelled by mechanical power, because most duties in life are measured by the consequences of a breach; and ordinary care is always predicated upon the degree of danger of which it is spoken.

Yet the persistent claim of automobile operators is that they have a right to use any part of the road, which they do, and are entitled to always rely in their use of the road upon the presumption that the other party is driving at a legal rate of speed, so that they can regulate their conduct upon this legal presumption. But this rule cannot be invoked even in ordinary cases of negligence, much

less in an automobile case. Such operators cannot con-

—negligence—
reliance on
speed of other
car.

fine their anticipation to a legal rate of speed as a protection. They are held to anticipate that, according "to the usual experience of mankind, the result ought to be reasonably apprehended." These operators must anticipate not according to the "legal," but the "usual," experience of mankind in running automobiles on the public highways.

It is, then, a matter of common knowledge, the "usual experience," that automobiles

are more often driven without any reference to legal speed than in observance of it. True, in the trial of automobile cases there are almost always two rates of speed that might be marked, plaintiff's 1, and plaintiff's 2, in which the plaintiff is seldom ever going over a speed of from 8 to 12 miles, while the defendant is going at from 25 to 45 miles an hour, and sometimes so fast that his speed produces a result in the nature of a blur as he passes. Nevertheless, the truth is that au-

Evidence—
speed of auto-
mobile.

tomobile operators pay little attention to the legal rate of speed. Hence it is "the usual experience" of operators that they are not authorized to rely on the legal presumption that an approaching car is coming at a legal rate of speed, but must exercise due care in the operation of their own car, especially in approaching corners, curves, and turns in the road, where their vision may be wholly or partially obscured. Accordingly, the claim that an operator has a right to rely on the presumption of a legal rate of speed cannot be admitted. Nor is the presumption of legal reliance allowed in many other cases of negligence. The gates at a railroad crossing are to warn the public when down, and invite it across when up, yet the court holds that lifted gates do not relieve the traveler from contributory negligence, if he relies wholly upon them. A railroad train is confined to a speed of 6 miles an hour through the thickly settled parts of villages, yet it is held that the public cannot rely upon the legal presumption of this rate of speed and thereby claim relief against the charge of contributory negligence. And so the instances might be multiplied. Accordingly, if as a matter of law the operator of an automobile is not authorized to rely upon the presumption of a legal rate of speed by the other car to relieve him from the charge of contributory negligence for being on the wrong side of the road himself, in a collision, then arises the vital question, What are the duties imposed upon him that will enable him to sustain the burden of proof against the legal presumption of his own negligence by being in an accident on the wrong side of the road?

It should be noted, as above seen, that, unexplained, a collision is "conclusive evidence of carelessness," against the party on the wrong side of the middle of the traveled part of the road. In view of the great speed of which automobiles are capable and at which they are actually driven, we think it not a difficult

task to deduce a workable rule. In *Savoy v. McLeod*, 111 Me. 234, 48 L.R.A.(N.S.) 971, 88 Atl. 721, we laid down the general rule touching the operation of automobiles. There we said that in the operation of street cars "the court should establish as a law the rule which prevents injury or loss of life rather than that which invites or even permits it," and that the same rule applies to the operation of automobiles, "except that the degree of diligence . . . is varied to correspond with the diminished danger."

But since the announcement of that opinion, we believe it to be a matter of common knowledge that the operation of automobiles is not now one of "diminished danger."

It seems to us that it is now advisable to reduce these somewhat disconnected principles of law to a more specific rule of due care, with reference to accidents that are so frequently occurring between cars approaching to meet at street corners, and upon curves in the road. It is difficult to say which place has become the more dangerous. It is a matter of common knowledge, however, that in our country roads, located in the woods and bordered by trees, their course is so constantly turning to avoid hills, ledges, marshes, and other obstacles that it is not seldom, but often, that cars approaching to meet at a street corner upon a curve can see each other but a short distance ahead. This condition is recognized by the Automobile Association of Maine, so that it also becomes a matter of common knowledge that this association has wisely, at no small expense, caused the erection of signs at blind curves in the road, and at blind street corners, bearing the warning signal, "Go slow," "Danger ahead," or some similar notice.

Yet it is claimed upon nearly every trial involving this class of accident that a vehicle of any kind, including an automobile, has a right to travel in any part of the way, and has a right to rely on the presumption that every approaching car will

observe the Speed Laws, and that, if it had, the other would have had plenty of time to have reached its own side of the road. Now, there is no question that any kind of a vehicle has a perfect right to travel in any part of the road, so long as it does not violate the rule of due care. But what is due care? What is the object of establishing legal rules of duty? Nothing more or less than to discover from actual experience what conditions produce danger, and then declare what shall be done to prevent such conditions. It matters not whether it is overspeed or underspeed, if it is a cause of accident. It is to prevent the causes of accidents, whatever their origin, that rules of due care are made. Experience has demonstrated that accidents are constantly occurring at street corners and around blind curves on the road, for want of observance of proper care by automobile operators. Why, then, should not a rule be suggested that will obviate these dangerous conditions?

In this class of cases the following deduction is unanswerable: If each party driving a car, fast or slow, approaching a street corner, or a curve or bend in the road, whether the corner or the curve is blind or visible, would keep to the right of the middle of the traveled part of the road, no collision could ever occur. Hence the rule that opera-

**Highway—duty
in turning
corners.**

tors should so drive their cars at these places. We think this precaution is reasonable, and necessary to prevent accident, and should be imposed as a legal duty. This rule imposes no hardship, but, if observed, will save life and limb. It is not new. It is as old as the law of the road. It applies the words of the statute, "seasonably turn to the right," to the speed of an automobile over the speed of a horse, precisely as, before the automobile, it applied them to the speed of a horse over the speed of an ox. If at a corner or bend or on a straight road one car can see the other, it is a statutory duty to "seasonably turn" to

the right. A fortiori, should it be a statutory duty to so turn at a blind corner or turn in the road, when legally bound to anticipate that an approaching car may at any moment appear.

Applying this rule of due care to the present situation, we are of the opinion that the plaintiff car was guilty of contributory negligence. Without deciding that the inexperience per se of the driver made him incompetent, we yet strongly feel that he lacked that experience necessary to give proper satisfaction that his lack of experience did not contribute to the accident. His father had owned this Buick car but eleven days. His experience with other cars before this spring was, in his own words, "somewhere around 100 miles." This must be regarded as meager experience for a boy nineteen years old, to prepare him to operate upon the public streets that tremendous engine of power known as a Buick 6.

But aside from this question of inexperience, it is apparent from the evidence that the driver of the plaintiff's car was guilty of contributory negligence in his failure to observe the law of the road in turning his car into North street. The evidence is so voluminous that space will not permit of an extended discussion. In analyzing the evidence, however, we do not overlook the fundamental law that makes the jury the judge of all questions of fact. They could have found many of the facts, single or in groups, in favor of the plaintiff without the right of interference; but when their finding is against the concurrence of such a weight of evidence, and inconsistent with so many contradictory circumstances, as to meet the plaintiff's contention with proof of inherent improbability, such finding should not be permitted to stand.

**Appeal—finding
of jury—against
weight of
evidence.**

From the facts and circumstances revealed by the evidence, we cannot avoid the conclusion that the plaintiff's car turned into North

street within a few feet of the corner of the Dennett platform; that the defendant was so near, when he first saw the other car, that he thought a collision imminent; that he immediately turned to his left, the wrong side, to avoid the impending accident; that the driver of the plaintiff's car, inexperienced and obeying the instinct of his instructions, immediately turned to his right.

As seen in the statement of the case, the plaintiff and defendant were approaching a right-angle corner of two streets, each to turn into the street from which the other was coming. Accordingly, applying the rule to this particular case, we have no hesitancy in saying that it was the legal duty of the defendant to keep his right-hand side of the road in approaching that corner, whether he could see the approach of the coming car or not; that it was equally the plain duty of the plaintiff to keep his right-hand side of the road, whether he could see the approaching car or not. If they could see each other, it was their duty to look, and only an emergency could excuse the one on the wrong side. If they could not see each other, by reason of obstructions, then it was the legal duty of each to anticipate that the one car might be approaching to turn that corner at the moment the other might reach it; and, regardless of the presumption of legal speed, each should be on his side of the road, if he would avoid the charge of contributory negligence.

This accident happened on the plaintiff's side of the road. We have said that when an accident happens by a collision of vehicles in the highway the one on the wrong side is *prima facie* guilty of negligence, unless something appears from the nature of the accident or from extrinsic evidence, to overcome such guilt. It may be rebutted by showing a case of emergency, in which a party may be justified in taking the wrong side of the road. And the exception proves the rule that one cannot

take the wrong side deliberately, when it is his duty to turn seasonably to the right, whether from actual observation, or legal anticipation of an approaching car. Do the law and the evidence rebut the presumption against the defendant in this case? We think they do.

In case of imminent danger, when two alternatives are presented, an exercise of intelligent and prudent judgment will excuse one from the charge of negligence, although the course taken may not prove to have been the safest or best. *Larrabee v. Sewall*, 66 Me. 376; *Skene v. Graham*, 114 Me. 229, 95 Atl. 950. In case of emergency, a swerving of a traveler to the wrong side of the road is not negligence. *Skene v. Graham*, *supra*. A driver is justified in turning to the left side of the road in order to avoid a collision. Highway—turning to wrong side of road—emergency.

Clarke v. Woop, 159 App. Div. 437, 144 N. Y. Supp. 595; *McFern v. Gardiner*, 121 Mo. App. 1, 97 S. W. 972. So in an action of injury sustained when two automobiles collided in the highway, the plaintiff, turning to the left, while acting as a reasonable man upon the honest belief that he would thereby avoid a collision with defendant, was "absolved from obeying the law of the road, and turning to the right." *Lloyd v. Calhoun*, 78 Wash. 438, 139 Pac. 281. We think this was just what happened. The emergency existed, and the defendant had instantly to choose what course he would pursue to avoid it.

Whether guilty of contributory negligence in any other respect is here immaterial, but we cannot say that the conduct of the defendant in turning to his left did not comport with "that degree of care that an ordinarily prudent person might have exercised under the same circumstances." *Borders v. Boston & M. R. Co.* 115 Me. 210, 98 Atl. 664. —not causing collision—liability. Whatever may have been the culpability of the defendant, we think the evidence is over-

whelming that the plaintiff's car was guilty of contributory negligence.

Motion sustained.

NOTE.

The emergency rule as applied to automobile drivers is discussed in an annotation to *ALLEN v. SCHULTZ*, post, 680. As there pointed out, it is well settled that an automobile driver, who, by the negligence of another, is suddenly placed in an emergency and compelled to act instantly to avoid injury, is not guilty of negligence, or contributory negligence, if he makes

such a choice as a person of ordinary prudence placed in a like position would make, although his choice is not the wisest. As there stated, however, if the peril arises because of his own negligence, the driver cannot invoke the emergency rule in his favor. The decision in the reported case (*BRAGDON v. KELLOGG*, ante, 669) passes upon negligence of an automobile driver in acting in an emergency created by another car which suddenly turned a corner on the wrong side of the street. This phase of the question will be found in subdivision IV., on page 685, of the annotation above referred to.

CORA ALLEN, by Guardian ad Litem, Respt.,
v.

CHRIST SCHULTZ et al., Appts.

Washington Supreme Court (In Banc) — June 12, 1910.

(— Wash. — 181 Pac. 916.)

Negligence — act in emergency — liability for injury to stranger.

1. Before one can absolve himself from liability for injury caused by acting upon emergency to save himself from harm, he must show that an emergency existed which was brought about by no negligent act of his own and that the resultant injury could not be prevented after the peril had passed.

[See note on this question beginning on page 680.]

Automobile — street car crossing — negligence in assuming that car is not to stop.

2. It is negligence on the part of the driver of an automobile upon a street crossing a street car track to proceed on the assumption that an approaching car is not going to stop at a regular stopping place until it is too late to stop his automobile to avoid collision with the car or injury to bystanders.

— operation with defective brake — negligence.

3. It is negligence to operate upon the public streets an automobile with brake so defective that the car cannot make an emergency stop if necessary.

Appeal — assumption of nonconflict of evidence — error.

4. It is not error for the court to assume that there was no conflict in the

evidence as to negligence in the operation of an automobile if the testimony of both parties shows it, and to charge the jury accordingly, even though it may have been influenced so to act by an inapplicable principle of law.

Negligence — extricating oneself from peril — injury — liability.

5. One is liable for injuries inflicted upon another by extricating himself from a perilous situation in which he had placed himself by his own negligence.

[See 20 R. C. L. 29.]

Trial — jury — extent of injury.

6. The question whether injuries inflicted by negligence are substantial or nominal is for the jury, upon conflicting evidence.

[See 8 R. C. L. 656.]

Pleading — waiver of failure to traverse.

7. Trial of a case on the merits, without contention that any travers-

able allegations in the pleadings had been admitted waives any failure to deny affirmative allegations in the answer.

APPEAL by defendants from a judgment of the Superior Court for Spokane County (Hurn, J.) in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendants' negligence. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. S. L. Americus and F. C. Highsmith, for appellants:

Being in imminent danger, an emergency was presented, and whether, under this emergency, the defendants acted with due prudence, is a question of fact for the jury.

Sheffield v. Union Oil Co. 82 Wash. 388, 144 Pac. 529; Johnson v. Heitman, 88 Wash. 598, 153 Pac. 331; Segerstrom v. Lawrence, 64 Wash. 247, 116 Pac. 876.

The verdict was excessive under any phase of the evidence.

See Mickelson v. Fischer, 81 Wash. 429, 142 Pac. 1160.

Messrs. Lacey & Newton for respondent.

Fullerton, J., delivered the opinion of the court:

The respondent, Cora Allen, while alighting from a street car on one of the streets of the city of Spokane, was struck and injured by an automobile owned by the appellant Christ Schultz, and driven by the appellant Jake Schultz. She brought this action to recover for the injuries received, averring in her complaint that the accident was the result of negligence on the part of the driver of the automobile. Negligence was denied in the answer of the appellants, and a trial had on the issues thus framed, which resulted in a verdict and judgment in favor of the respondent. On their appeal the appellants assign that the court erred in its instructions to the jury, erred in refusing to grant their motion for a new trial, and erred in entering judgment against the appellant Christ Schultz.

There are certain facts surrounding the transaction which are undisputed. The accident causing the injury occurred at the intersection of Howard street and Augusta

avenue in the city named. Howard street at this place extends north and south, is 60 feet in width, and has upon it a double street car track upon which is operated the street cars of the Washington Water Power Company. Augusta avenue is 30 feet wide and crosses Howard street at a right angle. On the square adjoining Howard street on the east and Augusta avenue on the north is a high school building in which the respondent was a student. The street intersection is a usual stopping place for the cars of the street car company named, and is the usual alighting place for students of the high school who use the cars as a means of transportation to the school. On the morning of the accident, the respondent, with other students of the high school, came in on a car from the north. The car stopped at the intersection of the streets, and one of the high school students got off. The respondent followed, getting off the car backwards, and was struck by the fender of the appellant's automobile just as she had reached the ground and while she was still holding to a stanchion on the side of the car steps. She was knocked down by the car which passed on to her left, colliding before stopping with an automobile truck which stood some distance back of the end of the street car.

The automobile approached the street car from the west coming along Augusta avenue, which has a downgrade at that place. It was traveling near the center or to the right of the center of the avenue, and, instead of turning to the right toward the front of the street car,

turned to the left in an effort to pass the car at its rear end. The principal dispute in the evidence is over the speed of the automobile when it approached and attempted to go behind the street car, and the necessity for its turning in that direction.

The respondent's witnesses testified that the automobile approached the street car at a rather high rate of speed, and was traveling at from 15 to 20 miles per hour when it struck the girl. They also testified that the street car on stopping at the street intersection protruded into Augusta avenue about one fourth of the distance across it, and that there was nothing to prevent the automobile from passing the street car at the front or from turning to the right and passing down the street on the right-hand side of the street.

The driver of the automobile testified, and in this he is corroborated by the two persons riding in the car with him, that the automobile approached the car at a slow rate of speed and was going no faster than 4 miles an hour when it turned to the left to pass the car. He further testified that the street car extended, when it stopped, almost, if not quite, across Augusta avenue, and that he was prevented from turning to the right because of an automobile which stood in Howard street near the front end of the street car at the south side of Augusta avenue. He further testified that the street car approached the street intersection rapidly, so rapidly in fact that he thought it was going through without stopping, and that he thought because of that fact that he could slack up and go behind it, and that he was within about 8 feet of it when it actually stopped. In explanation of the fact that he did not stop the automobile before striking the respondent, he testified that the brakes were not in good condition, being too loose to furnish sufficient pressure on the brake drums to stop the automobile.

He also testified that, after the street car stopped, a passenger, a high school girl, got off the car ahead of the respondent, and that the respondent got off the car backwards. It was shown without dispute that the respondent had been a cripple for many years, compelled to wear a metal ankle brace—a fact which possibly explains her manner of alighting from the car.

The court instructed the jury that by the undisputed evidence the driver of the automobile was, at the time of the accident, driving the automobile on the left-hand side of the street, contrary to the ordinances of the city of Spokane, and that such an act constitutes negligence on the part of the driver, and that such negligence is imputed as a matter of law to the owner of the automobile; further instructing the jury that the only question for them to determine was the amount of damage, if any, the respondent sustained by being struck by the automobile.

It is upon these instructions that the appellants assign error. It is not contended that the driver of the automobile was not driving upon the left-hand side of the street when the accident occurred, nor is it contended that to so drive is not contrary to the city ordinance; but it is contended that negligence does not necessarily follow from these conditions, that a driver of an automobile may, under some circumstances, drive upon the left-hand side of the street without being guilty of negligence, and whether it is negligence so to do in any particular case must depend upon the facts of such case. It is contended further that in the present case the facts show an excuse for the driver's action; it is said that when the street car did not pass on as he anticipated, but stopped in such a position that he could neither go forward nor turn to the right, he was confronted with an emergency, and whether he acted with due prudence in his effort to escape therefrom was a ques-

tion of fact for the jury, not one of law for the court.

It is probably the general rule that one confronted with a sudden peril not arising from any fault of his own may, to avoid bodily harm to himself, act in the way the emergency seems to require without being guilty of negligence, even though in so acting he injures another who in no way contributed to the condition creating the peril. This seems to be the holding in the case of *Donahue v. Kelly*, 181 Pa. 93, 59 Am. St. Rep. 632, 37 Atl. 186, 2 Am. Neg. Rep. 229, and is perhaps the corollary of the rule illustrated by the two shipwrecked mariners on the plank. The act, however, is not one which the law commends, and, before it will be given application, it must be clear that an emergency existed, that it was brought about

Negligence—act in emergency—liability for injury to stranger.

by no negligent act of the person in the perilous situation, and that the resultant injury to the

second person could not be prevented after the peril had passed. Here it is clear by the testimony of the driver of the automobile that he does not come within the rule. He had abundant time, according to his own testimony, to have stopped the automobile before he reached the place of peril, had he not been mistaken in assuming the street car was not going to stop. But this was a usual stopping place for street cars, and it was negligence for him to assume that it was not going to stop in this instance. Again, after he had

Automobile—street car crossing—negligence in assuming car is not to stop.

turned and avoided the peril, he had abundant time, at the speed he was traveling, to have stopped the automobile before striking the respondent, had the brakes on the automobile been in proper condition. One who operates on the streets of a city such a dangerous instrumentality as an automobile is bound to take notice that he may be called upon to make emergency

stops, and it is negligence on his part not to keep the automobile in such condition that such stops are possible.

—operation with defective brake—negligence.

We have then a condition of the record in which the testimony of both the respondent and the appellants show negligence. It was not, therefore, error on the part of the court to assume that there was no conflict in the evidence on the question of negligence, and to charge the jury accordingly, even though the court may have been influenced to so act from an inapplicable principle of law.

Appeal—assumption of nonconflict of evidence—error.

The case of *Sheffield v. Union Oil Co.* 82 Wash. 386, 144 Pac. 529, relied upon by the appellants, is not contrary to the principle we here announce. It does not present the question now involved. The question there was one of contributory negligence. The injured party was placed in a position of peril by the negligence of another, and the evidence was conflicting on the question whether he acted negligently or with due prudence in his endeavor to escape from the peril, and hence presented a question for the determination of the jury. The case before us presents a different state of facts, and the evidence is also without conflict. Here the appellant, to avoid injury to himself, ran down and injured another. The cause of his being placed in the perilous situation and his acts in extricating himself therefrom are disclosed by his own testimony. Since the testimony shows conclusively that he was guilty of negligence, there was no question for the jury.

Negligence—extricating oneself from peril—liability.

The claim of error under the second assignment is that the verdict is excessive. The jury allowed a recovery of \$1,500, and it is contended that the injuries shown were only nominal, while the verdict is

substantial. But to reach this conclusion we must disregard the evidence of the respondent and adopt that of the appellants. This was the province of the jury, not ours.

A final contention is that the plea of contributory negligence in the answer of the appellant Christ Schultz stands undenied, and must be taken as true, and, so taking it, no recovery can be had as against him. But the answer appearing in the record transmitted to this court was filed subsequent to the trial of the case before the jury, and, were the question open to the appellant, it may be doubtful if the record is

sufficient to invoke the rule. The case, however, was tried on its merits as if an issue had been formally joined, without contention on the part of either side that any traversable allegation of the pleadings had been admitted. The failure to deny was therefore waived by want of timely objection.

*Pleading—
waiver of failure to traverse.*

Kelly v. Lum, 75 Wash. 135, 49 L.R.A. (N.S.) 1151, 134 Pac. 819; Yeisley v. Smith, 82 Wash. 693, 144 Pac. 918.

The judgment is affirmed.

Holcomb, Ch. J., and Mount, Mitchell, Parker, Tolman, Mackintosh, and Main, JJ., concur.

Petition for rehearing denied.

ANNOTATION.

"Emergency rule" as applied to automobile drivers. .

I. General rules, 680.

II. Accidents near street cars, 681.

III. Accidents at railroad crossings:

- a. Where driver attempts to cross ahead of train, 681.
- b. Where driver partly over track reverses, 683.
- c. Where driver stalls engine on track, 683.

I. General rules.

It is well settled that an automobile driver, who by the negligence of another and not by his own negligence is suddenly placed in an emergency and compelled to act instantly to avoid a collision or injury, is not guilty of negligence if he makes such a choice as a person of ordinary prudence placed in such a position might make, even though he did not make the wisest choice. *Carpenter v. Campbell Automobile Co.* (1913) 159 Iowa, 52, 140 N. W. 225, 4 N. C. C. A. 1; *BRAGDON v. KELLOGG* (reported herewith) ante, 669; *Wilson v. Johnson* (1917) 195 Mich. 94, 161 N. W. 924; *ALLEN v. SCHULTZ* (reported herewith) ante, 676; *Parkes v. Lindenmann* (1915) 161 Wis. 101, 151 N. W. 787.

Nor, if he so acts under these circumstances, is he guilty of contributory negligence.

III.—continued.

- d. Alternative of jumping from or remaining in car, 683.
- e. Where car shut on crossing by closing of gates, 684.

IV. Accidents at street intersections, 685.

- V. Where automobile driven on sidewalk to avoid other vehicle, 686.

United States. — *Lehigh Valley R. Co. v. Kilmer* (1916) 145 C. C. A. 514, 231 Fed. 628, writ of certiorari denied in (1916) 242 U. S. 627, 61 L. ed. 535, 37 Sup. Ct. Rep. 13.

Alabama. — *Central of Georgia R. Co. v. Faust* (1919) — Ala. App. —, 82 So. 36, writ of certiorari denied in (1919) — Ala. —, 82 So. 345.

California. — *Lininger v. San Francisco V. & N. Valley R. Co.* (1912) 18 Cal. App. 411, 123 Pac. 235.

Georgia. — *Atlantic Coast Line R. Co. v. Daniels* (1910) 8 Ga. App. 775, 70 S. E. 203.

Indiana. — *Mayer v. Mellette* (1916) — Ind. App. —, 114 N. E. 241.

Iowa. — *Pilgrim v. Brown* (1914) 163 Iowa, 177, 150 N. W. 1.

Missouri. — *Swigart v. Lusk* (1917) 196 Mo. App. 471, 192 S. W. 138.

New Jersey. — *Dickinson v. Erie R.*

Co. (1911) 81 N. J. L. 464, 37 L.R.A. (N.S.) 150, 81 Atl. 104.

North Carolina.—*Brown v. Atlantic Coast Line R. Co.* (1916) 171 N. C. 266, 88 S. E. 329.

Pennsylvania.—*Wingert v. Philadelphia & R. R. Co.* (1918) 262 Pa. 21, 104 Atl. 859.

But where the situation of peril arises because of the driver's own negligence, it is held that the emergency rule cannot be invoked in his behalf. *Carpenter v. Campbell Automobile Co.* (1913) 159 Iowa, 52, 140 N. W. 225, 4 N. C. C. A. 1; *Fogg v. New York, N. H. & H. R. Co.* (1916) 223 Mass. 444, 111 N. E. 960; *Wilson v. Johnson* (1917) 195 Mich. 94, 161 N. W. 94; *ALLEN v. SCHULTZ* (reported herewith) ante, 676; *Ballard v. Collins* (1911) 63 Wash. 493, 115 Pac. 1050.

II. *Accidents near street cars.*

It will be observed that in *ALLEN v. SCHULTZ* (reported herewith) ante, 676, it was held negligence on the part of the driver of an automobile upon a street crossing a car track to proceed on the assumption that an approaching car was not going to stop at a regular stopping place until it was too late to stop his automobile and avoid a collision with one alighting from the car, and that the driver could not, therefore, invoke the emergency rule to relieve him from liability.

And in *Ballard v. Collins* (1911) 63 Wash. 493, 115 Pac. 1050, where the driver of an automobile, instead of waiting for a street car which he had been following, and which had stopped to take on passengers, to proceed, turned to the left onto the track for traffic in the opposite direction, and when he had driven on that track, believing that he had not time to pass between the standing car and another which he heard approaching, or to get behind the standing car, passed onto the left hand or wrong side of the street and collided with the plaintiff automobile coming in the opposite direction—it was held that he could not invoke the emergency rule, and argue that to avoid the approaching car he was justified in putting his automobile on the left side of the

street, the vice of such argument being that the proximate cause of the accident was his negligence in turning to the left of the standing car.

In *Lininger v. San Francisco, V. & N. Valley R. Co.* (1912) 18 Cal. App. 411, 123 Pac. 285, where a guest who was riding in an automobile was injured in a collision between the machine and an electric car, and the driver of the automobile testified that he approached the crossing where the accident occurred at a speed of 8 or 10 miles an hour, did not hear any bell or see the car until he was 25 or 30 feet from the track, and that he did not think he could stop and therefore put on speed to get across in front of the car, the court stated that, being put in sudden peril without having sufficient time to consider all of the circumstances, the driver was excusable for omitting some precautions, or making an immediate choice under the disturbing influence, although if his mind had been clear he ought to have done otherwise than he did. The negligence of the driver of the automobile was held in any event not imputable to the guest, who was taking no part in the operation of the car.

In *Hoff v. Los Angeles Pacific Co.* (1910) 153 Cal. 596, 112 Pac. 53, the question of contributory negligence on the part of the driver of an automobile was held for the jury, where there was evidence that he approached a street railway track at a speed of from 5 to 6 miles an hour, and when about 30 feet from the track looked to the west 150 feet and saw no car, that he looked to the east, and again looked to the west and saw a car approaching some 100 or 125 feet away, and that, being 6 or 8 feet from the track, he immediately increased his speed in an endeavor to get over the track, but that his machine was struck by the car, which was exceeding the speed limit.

III. *Accidents at railroad crossings.*

a. *Where driver attempts to cross ahead of train.*

Numerous cases involving the emergency rule as applied to automobile drivers have arisen out of accidents at

railroad crossings in which the driver sought to avoid a charge of contributory negligence on the ground that through the defendant's negligence he was placed in a position of peril and danger, by reason of which he was not required to take the wisest course, but was excusable if the course taken by him was one which a person of ordinary prudence would have taken under the circumstances.

In some of these, the driver, after seeing the approaching train, attempted to cross ahead of it.

In *Swigart v. Lusk* (1917) 196 Mo. App. 471, 192 S. W. 188, the evidence was held to justify a finding that the plaintiff, who was run into by a train at a railroad crossing, exercised proper care in looking and listening for trains and that he used proper care to avoid the train after discovering it, there being evidence that he looked down the track as soon as possible, and that, when he first saw the fast-coming train which struck him, he was 20 or 25 feet from the track, that he then shut off the power, applied the foot brake, and lowered his speed in going the next 10 or 15 feet to about 5 miles an hour; that he was much excited, and that, fearing that he would stop on or too near the track or run into the train, he then put his car into low speed and undertook to cross in front of the oncoming train, which he nearly succeeded in doing. The court in this case said: "It is probable that had plaintiff not changed his mind about stopping he could have done so before he reached the track, but we do not understand defendant to controvert the fact that he was then acting under excitement and peril, and that the law does not require one under such circumstances to do, at his peril, the thing which afterwards appears to have been the safest. . . . This principle is especially applicable where defendant has, by its neglect of duty and failure to give timely warning, lulled plaintiff into a sense of security and brought him unawares into the peril from which he seeks to extricate himself. . . . It must also be kept in mind that from the time plaintiff first saw the train, being

them only 20 to 25 feet from the crossing and the train only 150 to 180 feet therefrom, only three or four seconds elapsed till the collision. This is a very short time within which to act, especially in excitement, and what has been said in favor of railroad engineers and other trainmen, in not requiring them to act instantly and with absolute precision and accuracy in averting a suddenly discovered peril, is equally applicable to the driver of an automobile, and we refer, without repeating same, to what we said in *Underwood v. St. Louis, I. M. & S. R. Co.* (1914) 182 Mo. App. 252, 168 S. W. 803, and the cases there quoted from. We think it clear that a court should not say as a matter of law that plaintiff was guilty of negligence in failing to use due care in discovering the coming train, or in trying to avert a collision after its discovery."

And in *Lehigh Valley R. Co. v. Kilmer* (1916) 145 C. C. A. 514, 231 Fed. 628, writ of certiorari denied in (1916) 242 U. S. 627, 61 L. ed. 535, 37 Sup. Ct. Rep. 13, where there was evidence that, although the plaintiff stopped, looked and listened, he did not see or hear the engine until his automobile was on the track, and he then opened up the throttle and attempted to cross, the court stated that what he did after he got upon the track was not a matter of controlling importance; that in such a case, where one suddenly finds himself put in peril, he is excusable if he makes an unwise decision as to what he should do, and further said: "The rule on this phase of the matter is correctly laid down in *Shearman & Redfield on Negligence*, 6th ed. vol. 1, § 85a, where it is said: 'If one is placed by the negligence of another in such a position that he is compelled, to choose instantly, in the face of grave and apparent peril, between two hazards, and he makes such a choice as a person of ordinary prudence placed in such a position might make, the fact that if he had chosen the other hazard he would have escaped injury is of no importance. Even if in bewilderment he runs directly into the very danger which he fears he is not at fault. The confusion of mind

caused by such negligence is part of the injury inflicted by the negligent person, and he must bear its consequences.'"

b. Where driver partly over track reverses.

It has been held that the question of contributory negligence on the part of the driver of an automobile is for the jury where, after stopping and looking, he backed onto a railroad track when he saw a train approaching, and instead of continuing to back he reversed and tried to get off of the track by going ahead. *Wingert v. Philadelphia & R. R. Co.* (1918) 162 Pa. 21, 104 Atl. 859. The court stated that while it might be that had the plaintiff continued backing his car after he saw the train approaching, instead of stopping to reverse and proceed in the opposite direction, the accident might have been avoided, yet he was confronted with a sudden emergency and could not be held responsible for failure to exercise the best judgment.

c. Where driver stalls engine on track.

It has been held that where the driver of an automobile approaching a crossing, when he reaches a point where the view of the tracks is unobstructed, loses his presence of mind because of the proximity of a train approaching at a high rate of speed, without the statutory signal, and consequently loses control of his machine, by reason of which it becomes stalled on the track, he cannot be charged with contributory negligence because of a failure to exercise proper judgment. *Central of Georgia R. Co. v. Faust* (1919) — Ala. App. —, 82 So. 36, writ of certiorari denied in (1919) — Ala. —, 82 So. 345.

And in *Brown v. Atlantic Coast Line R. Co.* (1916) 171 N. C. 206, 88 S. E. 829, the question whether the plaintiff whose automobile was struck at a railroad crossing acted with ordinary prudence under the circumstances was for the jury, upon his testimony that he could not see the train until he got upon the track, as his view was obstructed by the defendant's cars on another track, and that no signal of the

approaching train was given, so that he could neither hear nor see, that he could have crossed safely had it not been for another vehicle which was coming over the track in the opposite direction, and that in backing his automobile to avoid a collision with that vehicle he was caught on the track and could not move his car, as his engine was stopped; there being further evidence that he did the best that he could in the presence of the impending danger, with his way blocked and his engine stopped, and the train approaching on the same track. The court said: "If without fault he went upon the track and was then confronted suddenly by a grave peril, and exercised such care as a man of ordinary prudence and presence of mind would have used under the same circumstances, negligence will not be imputed to him, and the court so charged the jury. Not having brought the danger upon himself, or, if he did, the defendant having a fair opportunity to prevent the injury, he was not required to act wisely or discreetly, but only with such care and judgment as would be expected of a man of ordinary prudence in a like situation. He testified that he could not go forward safely, as another vehicle was in his way, and he backed, hoping to clear the track in another direction, but failed to do so, owing to the stoppage of his car. There was no dirt between the rails, and the front wheels struck the rail and stopped the engine. He then called to the engineer and attempted to jump over the back seat of the car, when he was stricken by the engine. Whether he acted with ordinary prudence under the circumstances was a question for the jury, it not being so clear that he did not as to make it a question of law."

d. Alternative of jumping from or remaining in car.

It has been held that where the driver of an automobile is placed in a sudden peril at a railroad crossing by reason of the railroad employees' failure to give proper signals, and without his fault, his failure to stop his automobile instead of jumping cannot

be said to be negligence as a matter of law. *Dickinson v. Erie R. Co.* (1911) 81 N. J. L. 464, 37 L.R.A. (N.S.) 150, 81 Atl. 104. The court in this case said: "Where a traveler, without any fault on his part, is placed in a position of imminent peril at a crossing, the law will not hold him guilty of such negligence as to defeat his recovery if he does not select the very wisest course, and an honest mistake of judgment in such a sudden emergency will not of itself constitute contributory negligence, although another course might have been better and safer; and this rule is especially applicable where the person is placed in such perilous position by reason of the railroad company's negligence, as in failing to give the proper signals. All that is required of a person in such an emergency is that he act with ordinary care under the circumstances, it being for the jury to determine whether such an emergency existed, and whether the traveler acted with due care. *Weston v. Pennsylvania R. Co.* (1907) 74 N. J. L. 484, 65 Atl. 1015, and cases there cited. In the case at bar the plaintiff was confronted by a sudden peril, without any fault upon his part, and by reason of the failure of the defendant's servants to give proper signals. It may well have been, as the plaintiff testifies, that he could not determine, in the time at his disposal, on which track the train was coming. He was required to act quickly. He might have applied the brakes, taking the chance of the train being on the first track and the risk that the brakes would fail to work. He might possibly have attempted to escape by resort to some other means. If he had chosen any such other courses, and had been struck by the train, it might have been argued with equal weight that he should have jumped when he had the opportunity."

In *Smith v. Erie R. Co.* (1918) 182 App. Div. 528, 169 N. Y. Supp. 831, the plaintiff was held guilty of contributory negligence where, with knowledge that a train was rapidly approaching, he sat in his automobile, the wheels of which were slipping on an oily crossing, for sixteen seconds,

and attempted to move the car. The court here said: "Make allowance for the emergency and the natural desire to save his property and his momentary expectation that he would succeed in moving his car. There is a limit to such considerations. The agency that was coming swiftly to destroy him and his passenger should have ruled him to save life rather than property. It is an irrational excuse that his slipping wheels would not carry his person from danger, when he had the chance to go free from harm and let the young woman live. I cannot but think that he took a dangerous chance in going on the track, and that, even if he was detained there for a time by the condition of the crossing, he negligently and unnecessarily continued the exposure to danger."

e. Where car shut on crossing by closing of gates.

In *Atlantic Coast Line R. Co. v. Daniels* (1910) 8 Ga. App. 775, 70 S. E. 208, the defendant railroad was held negligent in allowing the plaintiff to drive his automobile onto a crossing and shutting him there by closing the gates, and the situation was held such as to frighten a normal person to a degree that he might forget the position of the spark and gasoline levers and attempt to crank the machine, while in that dangerous position; and it was held that the plaintiff might recover for an injury sustained while so doing. The court said: "If they find the plaintiff experienced such a fright from the negligence of the defendant, and that the fright was natural and normal under the circumstances, and that the impulse and effect of this fright caused him to forget that his machine had been left in a dangerous condition, and caused him to omit such acts of prudence as an ordinarily prudent man would have performed before attempting to crank it, in order to move it off the track, and that while in this state of mind, thus temporarily rendered abnormal, he forgot the condition of the levers and attempted to crank the machine, unconscious of the danger, and was injured, such causal connection between the negligence and the dam-

ages is established as to authorize the jury to find the defendant liable. On the other hand, if the jury should find that the defendant's acts were not negligent, or that, if negligent, they were not such as to produce such sense-robbing degree of fright in a normal person as to cause him to forget the condition of his machine or to neglect to take usual and ordinary precaution before attempting to crank it, or that the defendant's forgetfulness of the dangerous condition of his machine, or his neglect to examine into its condition before attempting to crank it, was the result of his own carelessness more largely than of any fright which he had normally experienced, the jury should find for the defendant. Thus the question is one for the jury; and the court properly declined to solve it on demurrer."

IV. Accidents at street intersections.

It has been held that the question of the plaintiff's contributory negligence was for the jury upon evidence that he approached a street crossing at a lawful speed, that when near the middle of the crossing he became aware of the rapid approach of the defendant's automobile on the intersecting street, and, realizing the necessity of doing something to avoid a collision immediately, increased his speed to clear the crossing, but collided with the defendant's machine, which was suddenly swung to the wrong side of the street. *Pilgrim v. Brown* (1914) 168 Iowa, 177, 150 N. W. 1. The court said: "According to plaintiff's statement he did not increase his speed until he reached the middle of the crossing, when he was first aware of the rapid approach of the appellant and realized the necessity of doing something to avoid a collision. There were but two courses open to him—to stop and permit appellant to pass ahead of him or to spurt forward and clear Main street roadway for appellant's use. He was compelled to decide and to act instantly, and his decision in such sudden emergency to pursue the latter course is not so palpably wrong that we can say he did not do what any other person of ordinary prudence

and experience would have done under the same circumstances. There was nothing to suggest to him that if he sprang ahead to clear the crossing appellant's car would be swung to the right into Sixth avenue, and into the line of his movement, instead of keeping to the left along its proper course up Main street. He was not bound at his peril to anticipate such an act on appellant's part. Whether he acted with the prudence and caution of the ordinary person is a matter upon which fair-minded men may differ, and it is therefore not within the province of the court to pronounce upon it as a matter of law."

In *Mayer v. Mellette* (1916) — Ind. App. —, 114 N. E. 241, where the negligence of the defendant in driving his car at an unlawful speed when approaching a street intersection gave rise to an emergency wherein the plaintiff, who was driving another automobile approaching on the intersecting street, was hastily compelled to elect between the other car colliding with her car and driving her own car toward the curb and a pole, the court declared that if her conduct in electing to take the latter course was that of a person of ordinary prudence she was not guilty of contributory negligence, and that that question was for the jury. And it was held in this case that the fact that the plaintiff exceeded the rate of speed fixed by an ordinance, in accelerating the speed of her car to avoid the collision threatened by the emergency, did not necessarily constitute negligence, but that, if the act of accelerating the speed was that of a person of ordinary prudence under the circumstances, she was not guilty of negligence, although the speed ordinance was violated.

In *Parkes v. Lindenmann* (1915) 161 Wis. 101, 151 N. W. 787, the finding by the jury that the driver of an automobile was negligent was held erroneous where it appeared from the evidence that he was driving north, and when at about the intersection of a street he saw the plaintiff waiting for a street car, and continued in a northeasterly direction at a speed of about 6 miles an hour, and would have

passed to the left and in front of the plaintiff, at a safe distance, had she remained where she was, but that when he was within 10 feet of her she, for the first time apparently, saw the automobile, and then stepped to the north, whereupon the driver turned his machine to the southeast to pass behind her, and she took a few quick steps to the south in front of the machine, and was struck by the fender of the car, which was stopped within 2 feet of where she was struck. The jury in this case applied the emergency rule in favor of the plaintiff, but failed to give the defendant the benefit of it. The court said that it was clear that what might be termed an emergency situation existed or was thought to exist by both parties when the plaintiff first moved north in front of the automobile, that under such circumstances a person is not held to the strict exercise of ordinary care, as there is no time for the exercise of judgment and deliberate action, and that in such situations an action is instinctive rather than deliberate, and for that reason a failure to take the best means of escape is not necessarily negligence.

In *BRAGDON v. KELLOGG* (reported herewith) ante, 669, sustaining a motion for a new trial after a verdict for plaintiff, in an action growing out of an automobile collision, it was held that the defendant was not guilty of negligence in suddenly turning to the left or wrong side in an attempt to avoid a collision with the plaintiff's car, which turned a corner on the wrong side of the street.

V. Where automobile driven on sidewalk to avoid other vehicle.

In *Carpenter v. Campbell Automo-*

bile Co. (1913) 159 Iowa, 52, 140 N. W. 225, 4 N. C. C. A. 1, where the plaintiff, while on the sidewalk, was struck by the defendant's automobile, which, according to some evidence, was suddenly turned to the wrong side of the street to avoid a motorcycle, mounted the curb, and traveled along the sidewalk, without the brakes being applied, it was held proper to refuse to instruct the jury to return a verdict for the defendant upon the theory that the evidence showed that the driving of the machine onto the sidewalk was the result of fright and excitement, since it was for the jury to say from the evidence whether the injury could have been avoided notwithstanding such emergency, by the exercise of reasonable care, and whether the emergency was due to the negligence of the defendant.

And in this case an instruction was held not prejudicial which in effect stated that if the person operating the car has shown that such an emergency existed as to justify him to turn to the left, nevertheless he was required to have the car under such control, after so turning, as to be able to avoid injury to others.

A further instruction was held properly refused to the effect that if the act complained of by the plaintiff was the result of excitement and confusion produced by sudden and impending peril from an approaching motorcycle, and but for such excitement the automobile would not have been driven onto the sidewalk, a verdict for the defendant should be returned, since it ignored the thought that if the emergency was produced by his own negligence it would not relieve him from liability.

J. T. W.

STATE OF WEST VIRGINIA

v.

JOHN, ALIAS "GIGGER," HILL, Plf. in Err.

West Virginia Supreme Court of Appeals—February 5, 1918.

(81 W. Va. 676, 95 S. E. 21.)

Criminal law — plea of guilty — acceptance.

1. A plea of guilty of a capital crime should be accepted cautiously, and not until the court has warned the prisoner and been satisfied that he has acted freely and deliberately after being so admonished, and with full knowledge, appreciation, and understanding of the nature and consequences of his confession.

[See note on this question beginning on page 694.]

Appeal — performance of duty by judge — assumption.

2. If the facts and circumstances attending the reception and recordation of such plea do not affirmatively appear from the record, it will be presumed that the trial court discharged its full duty in the premises.

[See 2 R. C. L. 219.]

Criminal law — plea of guilty — admonition of accused — withdrawal of plea.

3. If the trial court has not, on receiving and recording a plea of guilty of a capital offense, so admonished the accused, and after doing so been satisfied that the same has been made freely and deliberately and with full appreciation and understanding of the consequences of his confession, or if it is subsequently shown on motion of the accused before judgment that

he was misled or deceived and did not act freely and understandingly in making his confession, unless some good reason is shown for not doing so, the court should permit such plea to be withdrawn and the plea of not guilty to be interposed, and put the prisoner upon his trial thereon.

[8 R. C. L. 114-116; 13 R. C. L. 884.]

Appeal — denial of motion to withdraw plea — presumption.

4. But unless the record shows the fact to be otherwise this court will presume that the trial court discharged its full duty and did not abuse its judicial discretion in denying the prisoner's motion to withdraw his plea of guilty and substitute a plea of not guilty, and pronouncing judgment against him.

[See 2 R. C. L. 219.]

Headnotes by MILLER, J.

ERROR to the Circuit Court for Cabell County to review a judgment overruling defendant's motion for leave to withdraw or set aside his plea of guilty as principal to murder in the first degree, and plead not guilty. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. W. W. Higgins for plaintiff in error.

Messrs. E. T. England, Attorney General, and Henry A. Nolte, Assistant Attorney General, for the State:

A motion, to prevail, permitting defendant to withdraw a plea of guilty and substitute therefor a plea of not guilty, is directed to the sound discretion of the court.

12 Cyc. 350; *State v. Shanley*, 38 W. Va. 516, 18 S. E. 734.

The courts will not set aside the verdict of a lower court upon a discretionary matter, unless some circumstances are shown which would indicate that there was some abuse in the exercise of the sound discretionary power of the court.

Phillips v. People, 55 Ill. 429; *Pattie v. State*, 109 Ind. 545, 10 N. E. 421; *People v. Lee*, 17 Cal. 76.

In order to deprive the court of its discretionary power, the prisoner

must show that he was uninformed or misadvised as to the nature of the charge against him and the effect of his plea, or induced by threats or promises to confess the crime.

State v. Stevenson, 67 W. Va. 558, 68 S. E. 286; *Mounts v. Com.* 89 Ky. 274, 12 S. W. 311; *Davis v. State*, 20 Ga. 674; *People v. Scott*, 59 Cal. 341; *DeLoach v. State*, 77 Miss. 691, 27 So. 618; 12 Cyc. 351.

Miller, J., delivered the opinion of the court:

The several assignments of error substantially present but two questions: First, whether the trial court rightfully received the prisoner's plea of guilty of murder in the first degree; second, whether the court erred in denying defendant's motion for leave to withdraw his plea of guilty and to plead not guilty, and pronouncing the judgment of death against him.

Defendant was indicted as principal in the first degree along with George Martin, alias Red Martin, and Emory Harmon, as accessories before the fact, for the murder of George Church on September 23, 1916. The indictment was returned at the June term, 1917, and the record shows that on June 25, following, the defendant Hill was arraigned and appearing in person and by counsel entered his plea of guilty of murder in the first degree as charged in the indictment, and that thereupon, at the request of counsel, sentence was deferred to a future date, and the prisoner remanded to jail.

The record is silent as to the facts and circumstances attending the reception of said plea by the court, and as to whether the same was made by the prisoner freely and with full and perfect knowledge of the nature and consequences thereof, and under the deep solemnities which are usual and which should always attend the reception of such plea, fraught as it is with such grave consequences to the accused. It was suggested by counsel for defendant in the argument here that the prisoner had been induced or misled into the confession by prom-

ises of clemency on the part of the judge, but nothing of that kind appears from the record. It does appear, however, that on June 28, 1917, three days after his plea was received and recorded, when again brought into court, he immediately and before the judgment and sentence of death was pronounced against him moved the court for leave to withdraw or set aside his plea of guilty, and to plead not guilty, and for a trial by the jury thereon, which was overruled, and the bill of exception to this ruling of the court, signed, sealed, and made a part of the record, shows that on this motion no evidence was heard either in support of or against the same. Nor does it appear from the record that before pronouncing judgment of death against the defendant the court took any evidence in the presence of the prisoner to advise it of the facts and circumstances attending the crime, so as to be advised as to what judgment should be pronounced on the plea,—whether death or confinement in the penitentiary, as provided by statute.

On the first question, it was ancient law and is also settled by modern decisions, and in some states by statute, that a court should never in Criminal law—plea of guilty—acceptance. cases of capital crimes accept a plea of guilty without exercising caution and being satisfied by evidence that the confession is made by the accused freely and deliberately, and with full and perfect knowledge of the nature and consequences of the confession; otherwise the plea should not be received. It is the constitutional right of everyone accused of crime to be tried by a jury of the country, and though this is a right which he may waive, he is not bound by his confession, except when it has been done deliberately and under the deepest solemnities. 1 Greenl. Ev. § 216; 2 Hale, P. C. 225; 2 Hawk. P. C. 466; 1 Chitty, Crim. Law (1847) 428; 2 Bishop, New Crim. Proc. 2d ed. § 795, p. 619; *Com. v. Battis*, 1 Mass. 95; *Green v. Com.* 12 Allen,

155; State v. Johnson, 21 Okla. 40, 22 L.R.A. (N.S.) 463, 96 Pac. 26.

In the Oklahoma case cited, and in the note thereto, practically all the cases on this subject are reviewed, and it will be observed from the Michigan and Texas cases referred to that the statutes of those states require the defendant to be admonished by the court of the gravity and consequences of his admission, and to be satisfied that he was sane and uninfluenced by any consideration of fear, or by any persuasion or delusive hope of pardon; and when such facts do not appear a plea of guilty is invalid.

We have no such statute; and the Oklahoma court says in the Johnson Case: "We have no such statute to control the discretion of the courts in this state, but the authorities above cited are sufficient to indicate the policy of the law in the absence of such direct requirements."

And so we say that no court of this state in a capital case ought to accept a plea of guilty from the defendant until he has been warned, and cautioned of the grave consequences of his act, and been fully satisfied that he understands and appreciates the same, and that his plea is freely and understandingly proffered. But must the record of the court be made to show affirmatively that these rules of procedure have been complied with, before receiving and recording a plea of guilty? We have no statute requiring it. Our judgment is that the trial court should not be burdened with the duty of making such preliminary proceedings a part of the record. We must

**Appeal—
performance of
duty by judge—
assumption.**

assume that what ought to have been done has in fact been done, and with respect to receiving such plea, that the court has done its duty in the premises.

On the second question, whether the court erred in denying the prisoner's motion to withdraw his plea and pronouncing the death penalty thereon, we have decided in conformity with the general rule that

6 A.L.R.—44.

such motion is addressed to the sound discretion of the court, subject to review for any abuse thereof. State v. Stevenson, 64 W. Va. 392, 19 L.R.A. (N.S.) 713, 62 S. E. 688. And in early times it was said by Blackstone that courts were usually backward in receiving and recording such confessions out of tenderness to the life of the subject, and would generally advise the prisoner to retract it and plead to the indictment. 4 Cooley's Bl. Com. p. 329. If the plea of guilty was received by the court without observance of the precautions and solemnities required by law, the

**Criminal law—
plea of guilty—
admission
of accused—
withdrawal
of plea.**

court should have permitted the plea to be withdrawn. And the prisoner was also entitled to offer other evidence on his motion. He was entitled to show what the facts surrounding him were when his plea was tendered and received. Whether he offered such evidence the record does not show, but the bill of exceptions does recite that no evidence was heard in support of or against the motion. In the absence of a showing to the contrary we must assume that the trial court did its duty in receiving and recording the plea, and in overruling the motion to withdraw the same. 12 Cyc. 350; State v. Shanley, 38 W. Va. 516, 18 S. E. 734; Phillips v. People, 55 Ill. 429; Pattee v. State, 109 Ind. 545, 10 N. E. 421.

**Appeal—denial
of motion to
withdraw plea—
presumption.**

On the other phase of the question, the record is silent as to whether the court proceeded without evidence other than the bare plea of guilty to pronounce sentence of death upon the prisoner. Section 19, chapter 159, Barnes's Code, devolves the duty upon the court of determining which of the two possible judgments, death or imprisonment for life, ought to be pronounced. The statute says the judgment shall be the one or the other "as may seem right." How is the court to determine this ques-

tion of right? When the jury tries the case and fixes the punishment as provided by said statute, they are possessed of all the facts and circumstances of the crime; when the plea of guilty is accepted by the court, the court has nothing except the bare plea to determine the right, unless evidence is taken to further advise it in relation to the facts and circumstances of the offense. *State v. Stevenson, supra.* In Ohio there is a statute requiring the court to examine the witnesses to determine the degree of the crime, and pronounce sentence accordingly. *Craig v. State*, 49 Ohio St. 415, 16 L.R.A. 358, 30 N. E. 1120. It was suggested in argument that the court had or may have had before it the evidence produced in the trial of George or Red Martin, an accomplice; but it is conceded that though printed in the record, that evidence is no part of the record in this case, and besides it was taken in the absence of

Hill, the defendant, and we have held that a judgment based on or influenced by such evidence is erroneous. *State v. Stevenson, supra.*

We have a feeling of regret that all the facts and circumstances attending the reception of defendant's plea of guilty were not brought up by the record. And if any evidence other than those facts and circumstances was offered on the motion to withdraw the plea of guilty, the accused should also have protected himself by a bill of exceptions certifying all such evidence. As the record is presented with nothing to show error therein, we can do nothing but affirm the judgment.

NOTE.

The propriety and effect of pleas of guilty or of non vult contendere in capital cases are discussed in the annotation following *COM. v. SHROPE*, post, 694.

COMMONWEALTH OF PENNSYLVANIA

v.

CHARLES M. SHROPE, Appt.

Pennsylvania Supreme Court — March 24, 1919.

(264 Pa. 246, 107 Atl. 729.)

Criminal law — plea of non vult contendere.

1. The plea of non vult contendere may be entered by leave of court by one charged with an offense punishable merely by imprisonment, but not in capital cases.

[See note on this question beginning on page 694.]

Appeal — acceptance of plea of non vult contendere as confession of guilt.

2. Proceeding as upon a confession of guilt to fix the degree of the crime upon the entry of a plea of non vult contendere in a homicide case is reversible error.

— reversal — permission to plead anew.

3. Upon reversal of a conviction of murder because of the acceptance of a plea of non vult contendere as a confession of guilt, the cause will be remanded with directions to grant leave to accused to withdraw his plea and plead anew.

APPEAL by defendant from a judgment of the Court of Oyer and Terminer for Northampton County (Stewart, P. J.) convicting him of murder in the first degree, on his plea of non vult contendere. *Reversed.*

The facts are stated in the opinion of the court.

Mr. David B. Skillman, for appellant:

A plea of non vult contendere with a protestation of innocence is not a confession within the meaning of the Act of 1860.

Com. v. Horton, 9 Pick. 206; Com. v. Ingersoll, 145 Mass. 381, 14 N. E. 449; Com. v. Tilton, 8 Met. 232; Com. v. Holstine, 132 Pa. 357, 19 Atl. 278; 2 Bishop, Crim. Law, § 802; State v. La Rose, 71 N. H. 435, 52 Atl. 944; Buck v. Com. 107 Pa. 486.

Even if the plea be given the same force as a plea of guilty, the defendant, put to extremity, pleaded guilty to murder of no higher degree than all murder is presumed to be, namely, second degree.

Com. v. Lewis, Addison (Pa.) 282; Com. v. Drum, 58 Pa. 10.

The burden of proving the degree to be first lies on the commonwealth.

Com. v. McMurray, 198 Pa. 54, 82 Am. St. Rep. 787, 47 Atl. 952; Com. v. Barner, 199 Pa. 335, 49 Atl. 60.

It may be that evidence may be heard under a plea, non vult contendere, for the purpose of determining the amount of the fine to be imposed, but no issue is presented for trial under the indictment and no adjudication of guilt is authorized.

Tucker v. United States, 41 L.R.A. (N.S.) 70, 116 C. C. A. 62, 196 Fed. 260; Com. v. Horton, 9 Pick. 206; Com. v. Ingersoll, 145 Mass. 381, 14 N. E. 449; Com. v. Holstine, 132 Pa. 357, 19 Atl. 278; Com. v. Ferguson, 44 Pa. Super. Ct. 626.

The refusal of the court to permit the withdrawal of the plea of non vult contendere before sentence was passed was error.

Buck v. Com. 107 Pa. 486; Com. v. Gerrity, 1 Lack. L. Rec. 436; Little v. Com. 142 Ky. 92, 34 L.R.A. (N.S.) 257, 133 S. W. 1149, Ann. Cas. 1912D, 241.

Mr. Frank P. McCluskey for the Commonwealth.

Stewart, J., delivered the opinion of the court:

The appellant was under indictment in the oyer and terminer court of Northampton county charging him with the crime of murder. Upon being arraigned he pleaded non vult contendere. This plea was accepted by the court on the assumption that it was the equivalent of a plea of guilty, and the court thereupon proceeded by examination of

witnesses to determine the degree of guilt. At the conclusion of the examination, in open court, the defendant and his counsel being present, the court adjudged and determined that the degree of defendant's guilt, "convicted by his own confession," was "murder of the first degree." Exceptions to the order and findings of the court were dismissed, and thereupon the appropriate sentence of the law, death by electrocution, was pronounced upon and against the defendant. This appeal followed.

While there are several assignments of error, we may confine the discussion to a single point raised by the appeal from the adjudication, namely: Was error committed by the court in accepting the plea of non vult contendere as a plea of guilty, and proceeding thereunder to determine by examination of witnesses the degree of the crime and pronouncing of sentence accordingly? If this was error, it was of such serious import that a reversal of the judgment must follow inevitably. It is only in cases where a defendant charged with murder "shall be convicted by confession" that the court shall proceed by examination of witnesses to determine the degree of guilt and give sentence accordingly, whether of the first or second degree. Act March 31, 1860 (P. L. 382). The question immediately arises: Was this appellant "convicted by confession" of the crime of murder with which he stood charged? Certain it is that, except as the plea of non vult contendere entered in the case is in its legal acceptance a confession of guilt, the appellant did not stand convicted upon confession or otherwise, and the proceeding to determine the degree of the crime with which he was charged was extrajudicial and determined nothing. That the plea of non vult contendere is allowable in our jurisdiction, when entered with the leave of court, is conceded. Our reports contain a number of cases where it has been

Original law—
plea of non vult
contendere.

allowed, and the recognition it has received in them is too emphatic to dispute its admissibility under certain conditions; but this court has yet to recognize its applicability beyond cases involving, at most, imprisonment as the penalty, and in allowing it to this extreme limit we have extended it by judicial construction beyond the purpose for which it was originally intended and designed, which was simply to enable one charged with a misdemeanor to commute the penalty affixed by the payment of a fine. It is a stranger to our statutes, known only to our common law as imported and adopted by us by Statute of January 28, 1777. Under the common law as it stood at that period, the plea, when allowed, was at most an implied confession of guilt, but only in cases less than capital. The rule is thus stated by Hawkins in *Pleas of the Crown*, vol. 2, 8th Eng. ed. p. 466: "An implied confession is where a defendant, in a case not capital, doth not directly own himself guilty, but in a manner admits it by yielding to the King's mercy, and desiring to submit to a small fine; in which case, if the court think fit to accept of such submission, . . . the defendant shall not be estopped to plead not guilty to an action for the same fact," etc.

In Chitty's *Criminal Law*, 4th Am. ed. from 2d London ed. *431, the rule is thus stated: "An implied confession is where, in a case not capital, a defendant does not directly own himself to be guilty, but tacitly admits it by throwing himself on the King's mercy, and desiring to submit to a small fine, which the court may either accept or decline, as they think proper. If they grant the request, an entry is made to this effect, that the defendant non vult contendere cum domina regina et posuit se in gratiam curiæ."

So far as we can learn the plea was never regarded as more than an implied admission of guilt, neither in England nor in this country, unless in states, of which Massachusetts is an example, where it is made

the subject of statutory regulations. But the express point we wish to enforce is that neither in England nor in this country has the plea ever been allowable in capital cases. A distinguished American author, Mr. Bishop, in his *New Criminal Procedure*, 2d ed. § 802, has this to say in regard to it: "It is pleadable only by leave of court, and in light misdemeanors."

The reason for this limitation becomes apparent when we consider the extreme penalty that follows a conviction in what we call capital cases. The law is scrupulous to a degree in such cases to throw about the accused every reasonable protection, and requires that before conviction his guilt must be established by evidence which excludes all reasonable doubt. An implied confession of guilt cannot rise to the degree of certainty which would make it the equivalent of an express confession. In *State v. La Rose*, 71 N. H. 435, 52 Atl. 943, it is said: "The plea is in the nature of a compromise between the state and the defendant,—a matter not of right, but of favor. Various reasons may exist why a defendant, conscious of innocence, may be willing to forego his right to make defense, if he can be permitted to do so without acknowledging his guilt. Whether in a particular case he should be permitted to do so is for the court."

Appeal—
acceptance of
plea non vult
contendere as
confession of
guilt.

In *Doughty v. De Amorel*, 22 R. I. 158, 46 Atl. 838, referring to the plea of non vult, this is said: "Doubtless it is often used as a substitute for a plea of guilty, but it simply says that the defendant will not contend. This is not a confession of guilt, because an accused person might find himself without witnesses to establish his innocence, from their death, absence, or other cause, and hence waive a fruitless contest."

A very instructive discussion of the origin and limitations of the rule we are considering may be found in

the case of *Tucker v. United States*, 116 C. C. A. 62, 196 Fed. 260, as reported in 41 L.R.A. (N.S.) 70. The authorities we have cited are there reviewed, along with others, and the conclusions reached therefrom are thus stated: "The allowance of the 'implied confession' as a *nolo contendere* plea, thus defined to be the defendant's yielding to mercy in the punishment, 'and desiring to submit to a small fine,' necessarily implies, as we believe, that the case for such allowance must be within the class of misdemeanors for which punishment may be imposed by fine alone, although the offense may as well be punished by imprisonment, at the discretion of the court, either as an alternative of fine, or in addition thereto, or to enforce payment of the fine. That such desire (or request, express or implied) on the part of the accused 'to submit to a small fine' can neither serve to limit the fine to the minimum prescribed for the offense, nor constitute the measure of the fine which may be imposed within the exercise of judicial discretion,—that 'a small fine' is thus mentioned in the rule as a relative term, intending substantially less than the maximum,—we have no doubt. This provision, however, for such purpose in the submission as the object sought by the defendant in electing to submit without contest, requires construction of the rule accordingly, as limited to cases consistent with the purpose thus declared. So defined, the rule affords no ground for entertaining the plea, either in cases of felony, requiring infamous punishment to be imposed on conviction, or in cases of misdemeanor, for which the punishment must be imprisonment for any term, with or without a fine. Constrained to this interpretation of the narrow purpose and use of the plea at common law, by the express provisions of the rule thus handed down, we believe extension of the allowance to include even misdemeanors for which imprisonment must be imposed is unauthorized, however de-

sirable it may seem, without statutory provision therefor."

In the opinion filed by the learned president judge in the present case he cites, as sustaining his view, that the plea of *non vult contendere* is the same as the plea of guilty, from our own authorities, the cases of *Buck v. Com.* 107 Pa. 486, *Com. v. Holstine*, 132 Pa. 357, 19 Atl. 273, and *Com. ex rel. Dist. Atty. v. Jackson*, 248 Pa. 530, 94 Atl. 233. Our purpose has been to show that such plea is not admissible in capital cases, not disputing its applicability when the offense charged is of low grade. In the first of these cases the question was whether the plea of *nolo contendere* by the principal (no judgment or sentence having been imposed) was admissible in evidence on the trial of one charged as an accessory. It was held inadmissible because, even though the equivalent of a confession by the principal, it was as to the accessory *res inter alia acta*, and that the confession by the principal is not admissible upon the trial of the accessory to prove the guilt of the principal. The crime there charged was robbery. We have found no case in Pennsylvania, nor has our attention been directed to any, where the plea was held available in cases where the charge was robbery or other crime of like magnitude. The case cited does not rule the point, and no warrant can be found in it for the conclusion reached by the president judge in this. In the case of *Com. v. Holstine*, next cited, the plea was admitted where the offense charged was unlawful sales of intoxicating liquor; and it was there held, on the authority of *Buck v. Com. supra*, that the plea, "though not technically a plea of guilty, is so substantially, and justifies the court in imposing sentence." The other of the cases arose on a suggestion for a writ of *quo warranto*, which alleged that the defendants, who were school directors, had been separately indicted, charged with soliciting and accepting a bribe to influence their votes in their capacity as such offi-

cers, that they had each entered a plea of *nolo contendere*, and that judgment had been entered against them. It was there held that the plea precluded defendants from averring in *quo warranto* proceedings that they had not been convicted of the offense charged.

As will be seen, neither of these cases affords any ground whatever for the contention that the plea is available to one charged with a capital offense. We may add that in our examination of the subject we have discovered none here, or in other jurisdictions, nor has our attention been directed to any, which support any such view. In the very copious annotations to the case of *Tucker v. United States*, *supra*, in L.R.A., the editor's research has discovered no cases in which the plea has been admitted where the offense charged was of higher grade than statutory felony; the large majority of those cited being where simple misdemeanors were charged. Certainly there can be no reason

for extending its applicability to the higher crimes, and it may well be doubted at this day, in view of the significance given it by our own adjudications, when used within narrow limits, whether even as to these it has longer any proper purpose to serve; for if as to these it be the equivalent of a plea of guilty, as said in several of our cases where misdemeanors were charged, the distinction between the two is a distinction without a difference, and not worth preserving. However this may be, we decide nothing here with respect to its use, except that it is not a plea allowable in a capital case. It follows that the first assignment of error must be sustained.

The judgment accordingly is reversed, and the record is remanded, with direction that ~~appellant have leave to withdraw his plea of non vult contendere formerly pleaded, and plead anew to the indictment as though such plea had never been entered.~~
 ~~—reversal—~~
 ~~permission to~~
 ~~plead anew.~~

ANNOTATION.

Pleas of non vult contendere or guilty in capital case.

I. Plea of guilty:

- a. In general, 694.
- b. Withdrawing plea, 696.
- c. Determining punishment, 697.
- d. Miscellaneous, 700.

II. Plea of non vult contendere, 700.

1. Plea of guilty.

a. In general.

It is a general principle of law, in the absence of statute, that one may be executed upon a plea of guilty to a charge of a capital offense. *Territory v. Miller* (1886) 4 Dak. 173, 29 N. W. 71; *Com. v. Battis* (1904) 1 Mass. 95; *Opinion of Justices* (1864) 9 Allen (Mass.) 585.

The plea of guilty, made in open court, to an indictment, is sufficient to found a conviction, "even if to be followed by sentence of death . . . being deliberately made, under the deepest solemnities, with the advice of

counsel, and the protecting caution and oversight of the judge." 1 Greenl. Ev. § 216.

In *Re Meador* (1869) 1 Abb. (U. S.) 317, Fed. Cas. No. 9,375, the court said *arguendo*: "Take, for instance, the case of a person indicted for a capital or other offense, and who, on arraignment, instead of pleading 'not guilty' to the charge, elects, for reasons satisfactory to himself, to plead 'guilty;' if the indictment be sufficient in law, the court awards judgment against him; and this is judgment 'by the law of the land,' and as lawful under the Constitution as if he had been tried and found guilty by the judgment of his peers."

It has been said that a court has no power absolutely to refuse such plea. *Green v. Com.* (1866) 12 Allen (Mass.) 155.

A state statute providing that if a

person charged with murder shall be convicted on confession in open court, the court shall proceed by examination of witnesses to determine the degree of the crime and give sentence accordingly, does not, because it dispenses with a submission of the case to and a verdict by a jury, violate the 14th Amendment of the Federal Constitution, forbidding any state to deprive any person of life or liberty without due process of law. *Hallinger v. Davis* (1892) 146 U. S. 814, 86 L. ed. 986, 13 Sup. Ct. Rep. 105, where the court said: "The appellant, in voluntarily availing himself of the provisions of the statute and electing to plead guilty, was deprived of no right or privilege within the protection of the 14th Amendment. The trial seems to have been conducted in strict accordance with the forms prescribed by the Constitution and laws of the state, and with special regard to the rights of the accused thereunder. The court refrained from at once accepting his plea of guilty, assigned him counsel, and twice adjourned, for a period of several days, in order that he might be fully advised of the truth, force, and effect of his plea of guilty. Whatever may be thought of the wisdom of departing, in capital cases, from time-honored procedure, there is certainly nothing in the present record to enable this court to perceive that the rights of the appellant, so far as the laws and Constitution of the United States are concerned, have been in any wise infringed."

There is in general under the state constitutions no objection to a statute permitting the court to sentence to death without a jury on a plea of guilty to a capital charge.

California.—*People v. Noll* (1862) 20 Cal. 164; *People v. Lennox* (1885) 67 Cal. 118, 7 Pac. 260, 6 Am. Crim. Rep. 542; *People v. Miller* (1896) 114 Cal. 10, 45 Pac. 986; *People v. Chew Lan Ong* (1904) 141 Cal. 550, 99 Am. St. Rep. 88, 75 Pac. 186; *People v. Bellon* (1919) — Cal. —, 182 Pac. 420; *People v. Dabner* (1908) 153 Cal. 398, 95 Pac. 880.

Illinois.—*People v. Siracusa* (1916) 275 Ill. 457, 114 N. E. 133 (ebitar).

Iowa.—*State v. Cumberland* (1894) 90 Iowa, 325, 58 N. W. 885.

Massachusetts.—*Opinion of Justices* (1804) 9 Allen, 585; *Green v. Com.* (1866) 12 Allen, 155.

New Hampshire.—*State v. Almy* (1892) 67 N. H. 274, 22 L.R.A. 744, 28 Atl. 372.

Ohio.—*Craig v. State* (1892) 49 Ohio St. 450, 16 L.R.A. 358, 30 N. E. 1120.

Oklahoma.—*State v. Johnson* (1908) 21 Okla. 40, 22 L.R.A. (N.S.) 463, 96 Pac. 26 (opinion of the judges); *Opinion of Judges* (1911) 6 Okla. Crim. Rep. 18, 115 Pac. 1028.

Pennsylvania.—*Com. v. Cook* (1895) 166 Pa. 193, 31 Atl. 56; *Com. v. Dardafa* (1904) 210 Pa. 61, 59 Atl. 432; *Com. v. Johnson* (1905) 211 Pa. 640, 61 Atl. 246; *Com. v. SHROPE* (reported herewith) ante, 690; *Com. v. Christock* (1910) 38 Pa. Co. Ct. 337.

West Virginia.—*State v. Stevenson* (1908) 64 W. Va. 392, 19 L.R.A. (N.S.) 713, 62 S. E. 688; *State v. Stevenson* (1910) 67 W. Va. 553, 68 S. E. 286; *STATE v. HILL* (reported herewith) ante 687.

The constitutional right of trial by jury is not violated by a statute which provides for the determination by the court of the degree of crime on a plea of guilty of murder; the same does not violate the provision of the Constitution that the legislature shall not "make any law that shall subject any person to a capital punishment . . . without trial by jury." *State v. Almy* (N. H.) supra.

The provisions of a statute that "if the offense charged is murder, and the accused be convicted by confession in open court, the court shall examine the witnesses, and determine the degree of the crime, and pronounce sentence accordingly," are constitutional and valid. They do not violate the constitutional provision that "the right of trial by jury shall be inviolate." *Craig v. State* (Ohio) supra.

Under a statute substantially in the same terms as that in the *Craig Case*, the court, after a plea of guilty, examined witnesses and found the defendant guilty of murder in the first degree, and passed sentence of death

upon him, all of which was held to be in order. *People v. Noll* (Cal.) *supra*, where the court said: "The proceeding to determine the degree of the crime of murder after a plea of guilty is not a trial. No issue was joined upon which there could be a trial. There is no provision of the Constitution or of any statute which prevents a defendant from pleading guilty instead of having a trial by jury. If he elects to plead guilty to the indictment, the provision of the statute for determining the degree of the guilt, for the purpose of fixing the punishment, does not deprive him of any right of trial by jury."

In a case of a life sentence, the court said: "They were indicted for murder and pleaded guilty to that charge. The court was empowered to punish them by sentencing them to be hanged or to be confined in the penitentiary for the term of not less than fourteen years, and from that up to the period of their natural lives." *People v. Siracusa* (Ill.) *supra*.

It may be noted that in *People v. Chew Lan Ong* (1904) 141 Cal. 550, 99 Am. St. Rep. 88, 75 Pac. 186, *supra*, where the court found the degree to be the first degree, it was stipulated that the testimony taken at the preliminary examination of the defendant be introduced in evidence and used by the court in fixing the degree, and this was done.

It may be also noted that in *Jones v. Com.* (1874) 75 Pa. 403, 1 Am. Crim. Rep. 262, and in *Com. v. Morgenthau* (1913) 249 Pa. 139, 94 Atl. 551, the court on a plea of guilty in a murder case having determined the guilt as first degree, on appeal the supreme court found it to be the second degree.

A view contrary to the general rule was taken in Indiana, where it was held, under a constitutional provision that "in all criminal prosecutions the accused shall have the right to a public trial by an impartial jury in the county in which the offense shall have been committed," that the defendant may not waive the right to a trial in a criminal case unless the statute so provides, and it not being so provided in capital cases, a plea of guilty in

such a case is unauthorized. *Wartner v. State* (1884) 102 Ind. 51, 1 N. E. 65, 5 Am. Crim. Rep. 178 (where it was also provided by statute that the defendant "shall suffer death or be imprisoned in the state prison during life, in the discretion of the jury").

It may be noted in this connection that it has been held in Indiana that the court's error in sentencing the defendant to imprisonment for life without a jury cannot be reviewed after the time limit to appeal (*Frazier v. State* (1886) 106 Ind. 562, 7 N. E. 378), nor can it be reviewed by habeas corpus (*Lowery v. Howard* (1885) 103 Ind. 440, 3 N. E. 124, 5 Am. Crim. Rep. 278).

Sometimes the statute forbids the plea; see *State v. Genz* (1895) 57 N. J. L. 459, 31 Atl. 1051; *State v. Martin* (1919) — N. J. —, 106 Atl. 385; *People v. Smith* (1894) 78 Hun, 179, 28 N. Y. Supp. 912.

b. Withdrawing plea.

It is in general a matter of discretion of the trial court to refuse to permit the plea to be withdrawn, whether before sentence (*People v. Miller* (1896) 114 Cal. 10, 45 Pac. 986; *People v. Dabner* (1908) 153 Cal. 398, 95 Pac. 880; *People v. Bellon* (1919) — Cal. —, 182 Pac. 820; *Mounts v. Com.* (1889) 89 Ky. 274, 12 S. W. 311; *State v. Stevenson* (1910) 67 W. Va. 553, 68 S. E. 286; *STATE v. HILL* (reported herewith) ante, 687), after sentence but before entry of judgment (*People v. Lennox* (1885) 67 Cal. 113, 7 Pac. 260, 6 Am. Crim. Rep. 542), or after judgment (*State v. Stevenson* (1908) 64 W. Va. 392, 19 L.R.A. (N.S.) 713, 62 S. E. 688), not necessary to result.

Where, after a plea of guilty in a murder case, one witness was heard and the jury fixed the punishment at death, it was held no error to refuse before sentence the motion of the defendant to withdraw his plea. *Mounts v. Com.* (1889) 89 Ky. 274, 12 S. W. 311.

In *State v. Stevenson* (1910) 67 W. Va. 553, 68 S. E. 286, the court said: "In order to deprive the court of its discretionary power to refuse leave to withdraw a plea of guilty, it seems to be necessary to show that the

prisoner was uninformed or misadvised as to the nature of the charge against him and the effect of his plea, or induced by threats or promises to confess the crime. This mistake, misapprehension, promise, or inducement may relate to the manner and extent of punishment, but it must appear that something of this nature induced the plea."

(In *United States v. Dixon* (1807) 1 Cranch, C. C. 414, Fed. Cas. No. 14,968, the court permitted a prisoner to plead guilty to a capital offense, and later permitted him to withdraw the plea, which he did.)

But it is error to refuse to allow the withdrawal of a plea of guilty of a capital offense if it was not voluntarily made.

Thus one who, upon the day he is indicted for homicide, enters a plea of guilty because he is informed that the trial judge has stated that if he is to do so, he had better do it before the train leaves which would take him to a jail in another county, as mob violence is feared, and is immediately found guilty by the jury without evidence, they fixing the punishment at death, and is sentenced to death, and taken to such jail, is entitled to a new trial and permission to withdraw his plea. *Little v. Com.* (1911) 142 Ky. 92, 34 L.R.A.(N.S.) 257, 133 S. W. 1149, Ann. Cas. 1912D, 241.

And where the defendant pleaded guilty of murder to save himself from mob violence, and the jury without evidence returned a verdict of guilty, and the court sentenced him to life imprisonment, the judgment was vacated on the ground that the plea was not voluntary. *Sanders v. State* (1882) 85 Ind. 318, 44 Am. Rep. 29.

It was held to be error to receive a plea of guilty of murder from a man nineteen or twenty years of age, who did not understand English and was without counsel, and to refuse to allow the plea to be withdrawn. *Gardner v. State* (1883) 106 Ill. 76.

It has been held that a statute providing that "at any time before judgment the court may permit the plea of guilty to be withdrawn, and other plea or pleas substituted," is manda-

tory, so that where on a plea of guilty in a murder case, the court took evidence, announced that the circumstances were such that the defendant should be punished by death, and fixed a day for sentence, it was held to be error to refuse the defendant leave before sentence to withdraw his plea. *State v. Hortman* (1904) 122 Iowa, 104, 97 N. W. 981, where the statute further provided that, in cases of murder in the first degree, the jury, if tried to a jury upon a plea of not guilty, shall determine whether the defendant shall be punished by death or by imprisonment for life; if the defendant pleads guilty, the character of the punishment shall be determined by the court.

c. Determining punishment.

In some cases the statutes are not clear as to whether it is the court or the jury which is to determine the punishment, where that is not fixed. It has been held that the court on a plea of guilty is not precluded from sentencing a prisoner to death without a jury, though the statutes declare in general that the degree of punishment is to be determined by the jury.

Thus, in *Green v. Com.* (1866) 12 Allen (Mass.) 155, the court in a murder case sustained the trial court in sentencing the defendant without a jury, where the statute provided that a "person indicted for a capital crime may be arraigned before the court held by one justice, and if he pleads guilty, such court may award sentence against him according to law;" although the statutes also provided that "the degree of murder shall be found by the jury."

The same view had been already taken in *Opinion of Justices* (1864) 9 Allen (Mass.) 585, where the court said: "It is competent for the court, when held by a single justice, to arraign a person indicted for a capital crime, and if he pleads guilty, the court so held may proceed and award sentence against him, according to law," notwithstanding the provision that "the degree of murder shall be found by the jury," as that applies "only to cases where there is a trial of an indictment for murder on a general plea of not guilty, or on a plea of

guilty of murder in the second degree, and not guilty of murder in the first degree . . . it is not designed to repeal or alter the well-established rule of the common law, by which a party indicted for an offense, however grave its nature, may enter a plea of guilty thereto, if he sees fit so to do. In such a case, there is no issue to be submitted to a jury on which a verdict can be founded."

In *Territory v. Miller* (1886) 4 Dak. 178, 29 N. W. 71, it was held that on a plea of guilty of murder the court may sentence the defendant to death, although the statute provides that "every person convicted of murder shall suffer death, or imprisonment at hard labor in the territorial penitentiary for life, at the discretion of the jury . . . upon trial of an indictment for murder, the jury, if they find the defendant guilty, must designate in their verdict whether he shall be punished by death, or imprisonment for life at hard labor, and the judgment of the court shall be in accordance therewith."

But in *Green v. United States* (1913) 40 App. D. C. 426, 46 L.R.A. (N.S.) 1117, it was held that "where by statute the jury are authorized to inflict a death penalty for a crime which otherwise would be punishable by imprisonment, the court has no authority to receive a plea of guilty, and thereby withdraw the case from the jury," and in such a case it rightfully refuses to receive such plea.

In *Hamilton v. People* (1874) 71 Ill. 498, it was held that the court had power to sentence to imprisonment for life a person who pleads guilty of murder, where the statute provided: "No person shall be sentenced to death by any court, unless the jury shall have so found in their verdict upon the trial," and an earlier statute provided that in all cases where the party indicted shall plead "guilty," such plea shall be received and recorded, "and the court shall proceed to render judgment and execution thereon, as if he or she had been found guilty by jury."

Where the statute provides that the court shall fix the punishment, it is error for the jury to do so. Thus, the

justices suggested irregularity where the court left it to the jury to fix the punishment on a plea of guilty in a murder case, the statute providing that upon a plea of guilty the court shall determine whether the punishment should be death or imprisonment for life. *State v. Johnson* (1908) 21 Okla. 40, 22 L.R.A. (N.S.) 463, 96 Pac. 26 (note that this was an opinion of the judges, not a judicial decision).

It has been held in one case that the record should show the conclusion of the court. Thus, where the statute declared that "in all trials for murder, the jury before whom such trial is had, if they find the prisoner guilty thereof, shall ascertain in their verdict whether it be murder or manslaughter, and if such prisoner be convicted by confession in open court, the court shall proceed by examination of witnesses in open court to determine the degree of the crime, and shall pronounce sentence accordingly," the court said: "It appears that in the present case, on the trial below, after the testimony on the part of the prosecution had closed, the then defendant withdrew his plea of not guilty and pleaded guilty to the indictment, and was thereupon sentenced to be hung. Nothing appears on the record showing that witnesses were examined by the court after he had pleaded guilty, or that the court in any manner decided whether the offense were murder or manslaughter, as contemplated by the statute. This we think was an error," as the record should have shown what the conclusion of the court was. *M'Cauley v. United States* (1846) *Morris* (Iowa) 486. But compare, as to the presumption of regularity, *STATE v. HILL* (reported herewith) *ante*, 687.

Under a similar statute to that quoted in *M'Cauley v. United States* (Iowa) *supra*, it was held that on a plea of guilty the court should determine the degree and the sentence. *Ex parte Cole* (1919) — Neb. —, 174 N. W. 509, rehearing denied in (1919) — Neb. —, 174 N. W. 848.

Where the statute provided that, "upon a plea of guilty of a crime dis-

tinguished or divided into degrees, the court must, before passing sentence, determine the degree," it was held, where the defendant entered a plea of murder in the first degree, that the court must, nevertheless, determine the degree. *People v. Paraskevopolis* (1919) — Cal. App. —, 188 Pac. 585.

Under a statute providing that "if the accused pleads guilty of murder in the first degree, sentence of death or confinement in the penitentiary for life shall be pronounced upon him by the court, as may seem right, in the same manner and with like effect as if he had been found guilty by the verdict of a jury," it was held error for the court, after such plea had been received, and before pronouncing judgment thereon, to proceed, in the absence of the prisoner, to examine witnesses and hear from the special judge who presided at the time of receiving such plea statements respecting the circumstances and facts of the killing, whether such examination be for the personal satisfaction of the judge pronouncing the judgment of the court or to advise him as to the character of judgment that should be pronounced on said plea. *State v. Stevenson* (1908) 64 W. Va. 392, 19 L.R.A.(N.S.) 713, 62 S. E. 688.

On the other hand under some statutes the punishment is to be fixed by the jury. Thus the jury are not, by a plea of guilty, precluded from fixing the punishment at death where the statutes provide: "The punishment of murder in the first degree shall be death or imprisonment for life as the jury may determine," and "the punishment of murder in the first degree shall be death or imprisonment for life as the jury may determine. . . . If the jury shall find the respondent guilty of murder in the first degree, the punishment shall be life imprisonment unless the jury shall add to their verdict the words 'with capital punishment.'" *State v. Comery* (1915) 78 N. H. 6, 95 Atl. 670.

Texas cases.

It has been said that under the Texas statute, "in all cases in which the defendant pleads guilty to an indictment for murder: First, a jury

must be summoned; and, second, evidence must be introduced. A jury must be summoned as is required by law—that is, in the same manner as in all murder cases—unless waived by defendant. A jury must be impaneled, and this cannot be waived. As the jury 'must find of what degree of murder defendant is guilty,' evidence must be introduced. Why? To enable the jury to find the degree of murder, and properly fix the punishment," and the reception of incompetent evidence is error. *Martin v. State* (1896) 36 Tex. Crim. Rep. 632, 38 S. W. 194.

It is error to charge the jury on a plea of guilty in a murder case that such is a plea of guilty in the first degree, where the statute provides that "if any person shall plead guilty to an indictment for murder, a jury shall be summoned to find of what degree of murder he is guilty, and in either case they shall also find the punishment." *Sanders v. State* (1885) 18 Tex. App. 372.

The requirements of the statute that the plea of guilty shall not "be received unless it plainly appear that he (the prisoner) is sane and is uninfluenced by any consideration of fear, or by any persuasion or delusive hope of pardon, prompting him to confess his guilt," do not appear by a recital in the judgment that "after hearing the indictment read, the defendant's plea of guilty (after being duly and legally warned by the court in open court of the legal consequences of such plea, and after being so warned the defendant still persisted in pleading guilty)," etc. *Ibid*.

The prerequisites to acceptance of a plea of guilty must appear of record or the judgment will be reversed. *Coleman v. State* (1896) 35 Tex. Crim. Rep. 404, 33 S. W. 1083.

For cases where the court received the plea, and evidence was given before the jury which found the first degree, and the punishment death, see *Giles v. State* (1887) 23 Tex. App. 281, 4 S. W. 886; *King v. State* (1898) — Tex. Crim. Rep. —, 46 S. W. 813. The same seems to have been done in *Scott v. State* (1890) 29 Tex. App. 217, 15 S. W. 814. In *Burton v. State*

(1894) 33 Tex. Crim. Rep. 138, 25 S. W. 742, the jury found the second degree.

d. Miscellaneous.

Where the statute requires that "whenever any person prosecuted for murder or manslaughter pleads guilty, he shall, in his plea, designate whether he is guilty of murder in the first degree or in the second degree, or of manslaughter in the first degree or in the second degree," it is error to treat a plea in a murder case of "guilty as charged in the information" as a plea of guilty of murder in the first degree. *State v. Noah* (1910) 20 N. D. 281, 124 N. W. 1121.

It may be noted that in *State v. Valentina* (1904) 71 N. J. L. 552, 60 Atl. 177, the defendant in a murder case, on appeal, complained that the defendant's counsel, in opening the defense, declared that "the defendant, when arraigned in open court, made confession of the commission of this crime;" that it thereupon became the duty of the presiding judge to correct this statement and inform the jury that there was no such confession before them, to which the court said, *inter alia*: "I know of no rule, either at the common law or created by statute, which requires the judge presiding at a criminal trial to restrain the defendant's counsel from making such admission as to the guilt of his client as he may think proper; and I know of no authority possessed by this court, sitting in review, to animadvert on the discretion which the trial court, if not asked to interpose, might exercise on such an occasion."

II. Plea of non vult contendere.

It will be seen that it is held in *COM. v. SHROPE* (reported herewith) ante, 690, that the plea of non vult contendere is not allowable in a cap-

ital case. There seems to be little in the books on the subject.

In *People v. Lennox* (1885) 67 Cal. 113, 7 Pac. 260, 6 Am. Crim. Rep. 542, the court refused in a murder case to permit the defendant to withdraw his plea of not guilty, and to plead non vult contendere, but permitted him to withdraw his plea, and he then pleaded guilty.

A prisoner may not object to a refusal to accept his plea of guilty where the statute provides that "in no case shall the plea of guilty be received upon any indictment for murder; and if, upon arraignment, such plea of guilty should be offered, it shall be disregarded and a plea of not guilty entered, and a jury duly impaneled shall try the case in manner aforesaid; provided, however, that nothing herein contained shall prevent the accused of pleading non vult or nolo contendere to such indictment; the sentence to be imposed, if such plea be accepted, shall be the same as that imposed upon a conviction of murder of the second degree." *State v. Genz* (1895) 57 N. J. L. 459, 31 Atl. 1037. The court repudiated the contention of counsel that the legislature had no right to require the court to order a plea of not guilty to be entered against the deceased's protest.

Where the statute prohibited the acceptance of a plea of guilty on an indictment for murder, with the proviso that nothing in the act should prevent the accused pleading non vult, the sentence to be imposed, if such plea be accepted, to be imprisonment at hard labor for life, or the same imposed upon a conviction of murder in the second degree, it was held that there was no error in refusing to accept the plea of non vult. *State v. Martin* (1919) — N. J. —, 106 Atl. 335. B. B. B.

ALICE J. KILLAM, Plff. in Err.,
v.
NORFOLK & WESTERN RAILWAY COMPANY.

Virginia Supreme Court of Appeals — March 21, 1918.

(122 Va. 541, 96 S. E. 506.)

Nuisance — liability of railroad for.

1. A railroad company is liable for injury to abutting property for the operation of railroad appurtenances such as roundhouses, switch yards not connected with stations or depots, repair shops, or terminal plant, in such a way as to cause a nuisance to such property.

[See note on this question beginning on page 723.]

Railroad — liability for injury to neighboring property — acts in private capacity.

2. The liability of a railroad company for injury to private property by acts in its private, as distinguished from its public, capacity, is wholly independent of the liability under the Constitution for damaging property for public use.

Public service corporation — acts in private capacity.

3. A public service corporation may perform acts in its private, as distinguished from its public, capacity.

[See 22 R. C. L. 750.]

Railroads — liability for injury to abutting property.

4. Legislative authority, in the absence of constitutional restrictions, absolves a railroad company from liability to abutting property for injuries done in locating, constructing, change of construction, and operating its road, while acting in its public capacity.

[See 22 R. C. L. 912.]

Nuisance — legislative immunity — private acts of corporation.

5. When a public service corporation does acts in its private capacity, mere general legislative authority to establish, locate, and operate its works will not confer upon it immunity from liability for injuries resulting from a construction and operation of such works, which would have been deemed a private nuisance at common law.

[See 22 R. C. L. 913.]

Corporation — operation in public or private capacity.

6. Works constructed by a public

service corporation, not for the very public duties for which it was incorporated, but as incidental, adjunctive, or appurtenant thereto, will, in their operation, be considered and classed as in the private capacity of the corporation.

[See 20 R. C. L. 454.]

Public service corporation — applicability of maxim "Sic utere tuo."

7. A public service corporation in operating in its private capacity is subject to the maxim "Sic utere tuo ut alienum non lædas."

[See 20 R. C. L. 381, 454.]

Railroad — liability for hump in switch yard.

8. A railroad company is liable for creating a nuisance to neighboring property by the construction and operation of a hump for the purpose of distributing the loaded cars by gravity in a terminal yard which is not connected with a station or depot, but was located under separate charter, not to perform a duty to the public, but merely to handle a particular class of freight of the railroad company.

[See 22 R. C. L. 913.]

Nuisance — effect of legislative authority.

9. If the construction and operation of a switch yard by a railroad company falls within the same class as main-line construction and operation, general legislative authority confers immunity from liability for injury to neighboring property in the absence of constitutional limitation.

[See 20 R. C. L. 385.]

ERROR to the Circuit Court of the City of Norfolk to review an order overruling a demurrer to defendant's special plea and dismissing a suit brought to recover damages for the creation of a nuisance by it and for injury to plaintiff's property. *Order set aside.*

Statement by SIMS, J.:

This is an action at law by the plaintiff in error (hereinafter referred to as plaintiff) against the defendant in error (hereinafter referred to as defendant) for damages alleged in the declaration to consist of the diminution of the market and rental value of certain land, dwelling house, and other buildings, etc., thereon, located near the defendant's terminal yard at Lambert's Point. It is alleged that the tracks on such yard near to plaintiff's property were practically level when the dwelling house was erected, and that such damages were caused by the following alleged change of construction and subsequent operation by defendant of that portion of its tracks which are on the part of the said terminal yard near to plaintiff's said property; namely, that (as alleged in substance in the first count of the declaration) the defendant, within five years before the bringing of this suit, constructed a large embankment, called a "hump," commencing at a point about one-sixth of a mile eastwardly from plaintiff's property and rising in a westerly direction at a very steep grade until it has passed said property; that upon said embankment as it rises there was laid a double-track railroad; that such embankment is in close proximity to the plaintiff's dwelling house and the land on which it is located, all owned by plaintiff; that such embankment is 20 feet high opposite plaintiff's property, and continues to rise for a considerable distance westwardly beyond the same; that when defendant's trains of coal cars reach said terminal yard they are broken up, and cars, in trains of about twenty, are propelled by engines employed for the purpose (being other engines than those which brought the trains into the terminal yard) up the grade of said "hump," and are so disposed of, in a yard provid-

ed for the purpose just beyond the summit of the "hump," that they may be thence propelled by gravity to a point in said terminal yard where appliances are provided for the purpose of transferring the coal into other cars, into which latter cars the coal is transferred and thence moved to vessels awaiting same at the piers, into which vessels the coal is then loaded; that daily since said embankment was erected the operation of the defendant of its tracks thereon, day and night, continuously, to the extent of forty trains a day, in the transportation of coal cars up said grade along by the plaintiff's property, has been such that, because of such grade and the unusual amount of power required to propel said trains of coal cars up said grade (steam locomotives of very great power, using bituminous coal, being employed for that purpose), that in such locality of the plaintiff's property, "unusual, prolonged, and very loud and annoying noises and vibrations of the dwelling house on said lot have been produced, which vibrations caused the plastering on the ceilings and side walls of it to crack and fall, and vast volumes of smoke, soot, cinders, ashes, and gases were discharged from said locomotives, and coal dust has been shaken and blown from said cars, which fall upon said premises of the plaintiff, blackening and rendering dirty and unsightly the houses, fences, trees, and shrubs thereon, and entered the said dwelling house, settling upon the interior and the occupants (when occupied) and the contents thereof, and soiling the floors, walls, ceilings, doors, windows, furniture, furnishings, clothing, bedding, curtains, table coverings, food, and other articles therein, the same being accompanied by foul, offensive, and noisome odors which taint and corrupt the atmosphere; that damage and injury of the same nature, though

less in degree, was and is done to plaintiff's property by said trains of cars and locomotives returning over the tracks on said embankment; that the conditions whereof plaintiff . . . complains are of a permanent nature, and will continue indefinitely, —all of which have rendered the said dwelling house and premises unclean and uncomfortable, unhealthy, undesirable, and unfit for habitation, and have damaged the plaintiff's said property, and made it impossible to obtain and retain tenants, and caused a considerable loss of rent and great depreciation in the market and rental value of the same."

The count of the declaration mentioned alleges a common-law nuisance, and is substantially the same as the declarations in the Townsend and Terrell Cases, referred to in the opinion below.

The declaration is in two counts. The other count is substantially the same, except that it omits the allegation of damages caused by the return of the trains of cars and locomotives over the tracks on the embankment, and it alleges no loss of rental, but only depreciation of the market and rental value of the plaintiff's property, and claims the *just compensation* therefor guaranteed by our state Constitution.

The defendant filed a special plea to the declaration, setting up the defense of legislative privilege, claiming (in substance) immunity from any liability to the plaintiff for damages on the ground that its acts complained of by the plaintiff were all done under legislative authority contained in its charter and in the charter of the Norfolk Terminal Company, its predecessor in title, in strict conformity therewith and with due care and skill.

Omitting the formal parts, such special plea is as follows:

"(1) By act of the general assembly of Virginia, approved March 17, 1851, the Norfolk & Petersburg Railroad Company was chartered, with authority to construct and operate a railroad, with steam as a

motive power, from the city of Norfolk, Virginia, to the city of Petersburg, Virginia, and pursuant thereto, a line of railroad was constructed, and has been continuously so operated by said company, except that by successive charters, purchases, mergers, and consolidations, all enacted or authorized by the general assembly of Virginia, the said railroad has, from the year 1896 down to the present date, been owned and continuously operated, with steam as a motive power, by this defendant.

"(2) By act of the general assembly of Virginia, approved March 6, 1882, the Norfolk Terminal Company was chartered and authorized to construct and operate a railroad, with steam as a motive power, from any point on the lines of the Norfolk & Western Railroad Company, in the county of Norfolk, Virginia, to any point or points on the Norfolk harbor or Chesapeake bay, and to operate such railroad in conjunction with other railroads, and transport freight and passengers along its lines as a common carrier, and to construct, maintain, and use piers for the delivery of freight to connecting water carriers.

"(3) By said act said terminal company was authorized to consolidate with the Norfolk & Western Railroad Company.

"(4) By articles of consolidation executed October 16, 1889, the Norfolk Terminal Company was consolidated with the Norfolk & Western Railroad Company.

"(5) The entire property and corporate franchises, powers, and privileges of the Norfolk & Western Railroad Company, including all the property and corporate franchises, powers, and privileges of the *Norfolk Terminal Company*, were sold by order of the United States circuit court for the eastern district of Virginia, and said sale confirmed by decree of said court entered September 19, 1896, and that by an act of the general assembly of Virginia, approved January 15, 1896, it has been provided that whoever might be

come the purchaser of said property, franchises, powers, and privileges in the cause then pending in said court should be constituted a corporation under such name as they should select, and vested with title to said property, franchises, powers, and privileges, and that said purchasers thereafter adopted in due form the name of the Norfolk & Western Railway Company.

"(6) That on the — day of —, 1888, the ground upon which the tracks referred to in plaintiff's declaration, the operations over which are therein complained of, was owned by said Norfolk Terminal Company, and that said Norfolk Terminal Company in that year constructed tracks thereon which constituted a portion of its system of tracks for the reception, storing, retaining, and transporting the cars en route in a direct line of transportation from its connection with the lines of the then Norfolk & Western Railroad Company, in Norfolk county, Virginia, to the piers then erected and owned by the Norfolk Terminal Company on the Norfolk harbor, and thereafter, in the year 1891, the said Norfolk Terminal Company having in 1889 become consolidated with the Norfolk & Western Railroad Company, the said Norfolk & Western Railroad Company from time to time constructed on said ground other tracks, which were used for like purposes, all of which said tracks so situate upon the ground referred to in the plaintiff's declaration were, continuously therefrom until a short time prior to December, 1913, used by this defendant and its predecessors in title in its service of transportation for the specific purpose as hereinafter more specifically set out.

"(7) That in furtherance of its service of transporting coal and other freight from the states of Ohio and West Virginia, consigned for delivery to vessels at Norfolk, Virginia, it became necessary frequently to retrain the cars loaded with coal and other freight at various points on said road with a view

to efficient transportation over its lines connecting such retraining points.

"That such freight was and is delivered to such vessels at and from a structure called a coal pier, and said pier is connected with the lines of transportation of this defendant by tracks for the transportation of cars or containers and motor vehicles to propel the same.

"That the tracks heretofore, to wit, in 1888, constructed by this defendant and its predecessors in title, as aforesaid, over the lands in the plaintiff's declaration referred to as the location of what is therein termed as a 'hump,' and the immediate approaches thereto, were used from that time to the year 1913 as a route of transportation from one of said retraining points at Lambert's Point yards to points where said coal was transferred to the containers aforesaid, adapted to transporting said coal over said pier to said vessels.

"That a short time prior to December, 1913, it became necessary for this defendant, in the furtherance of its efforts to equip itself for the increasing demands of growing traffic, to alter the grade of its tracks over the said ground specified in the plaintiff's declaration by changing the grade from a level to an ascending grade with a rise of 1.2 feet in each 100 feet, which is a lighter grade than that adopted and in use by this defendant in numerous places on other portions of its main lines, in order that the cars retrained at the Lambert's Point yard might be transported in trains of thirty cars or less to a series of tracks on the defendant's system of railway from which all of said cars composing such trains might be drifted by gravity, one car at a time, to a place and apparatus near said coal pier, where the contents of said cars could be transferred in bulk to containers adapted to running along said piers to the side of said vessels, and that the injury complained of in the plaintiff's declaration is the noise, smoke, and cinders emitted from defendant's loco-

tives employed as the motive power for transporting said trains of cars upon the grade aforesaid; that said alteration was then begun, and was completed in December, 1913, and from that time until the institution of this action, and to the present time, this defendant has continuously used its tracks so changed in respect to grade over said grounds for the purposes aforesaid, which the defendant avers are and were used in the performance of its services and duties as a common carrier, and further avers that all the uses and services to which the said tracks have been, or are now being, subjected were and are in the exercise of its privileges and in furtherance of its public duties as a common carrier, as a service constituting an essential part of its direct acts of transportation, as aforesaid.

"(8) And defendant avers that all its conduct and acts and operations aforesaid have been done and conducted with the exercise of due care and diligence, and without negligence on its part."

There was a demurrer by the plaintiff to said plea, which was overruled by the court below by the order complained of, and the case is therefore presented to us upon said declaration and plea with the demurrer to the latter.

From the allegations of the plea and those of the declaration not denied by the plea the following material facts appear:

The Facts.

When in 1888 the ownership of the ground for right of way for the terminal yard above mentioned was acquired, and when the yard was located by the Norfolk Terminal Company, the predecessor in title of the defendant, the charter of the latter did not require it to locate the yard at the place it was in fact located. It might have been located "at any point on the Norfolk harbor or Chesapeake bay."

The "piers for the delivery of freight to connecting water carriers," mentioned in the charter, 6 A.L.R.—45.

were not thereby required to be located at the place they were in fact located, and they might have been located at any other place "on the Norfolk harbor or Chesapeake bay."

The terminal company, after it was organized and came into existence, never undertook to perform any duties of an independent common carrier. It never undertook to discharge any duties to the public with respect to the carriage of any freight originating on its line. No freight was received from or delivered by it to the public. It had no passenger or freight stations or depots. Its sole business was the construction and operation of a terminal yard as incidental, adjunctive, or appurtenant to the business of the Norfolk & Western Railroad Company (afterwards the Norfolk & Western Railway Company, the defendant), and this incidental, adjunctive, or appurtenant business was limited to the receiving of coal cars from the terminus of what was the main line of the defendant at Norfolk when this action was instituted, "storing, retraining, and transporting" such coal cars, i. e., storing, retraining, and distributing them to their places of destination on the coal piers for transfer of their contents into the vessels of connecting water carriers, including, of course, the returning of the empty coal cars to Norfolk to the principal carrier.

When the defendant acquired the ownership of the ground of the right of way of said yard, it constructed other tracks thereon, and operated the yard in the same way it had been operated, i. e., as incidental, adjunctive, or appurtenant to its business as a common carrier, i. e., as a switching yard for the distribution of such coal cars aforesaid at their destination.

The defendant, prior to its change of construction of a part of said terminal yard and method of operating such part of it, in 1913, complained of in the declaration, used a system of tracks thereon which ran practically on a level "for the reception,

storing, retraining, and transporting" (distributing) coal cars brought to it by its main line of railway.

There was in 1913 a change of method of construction and operation of a part of said terminal yard, consisting of the construction by defendant of a "hump" or embankment on the side of the yard nearest to plaintiff's property, the placing of two tracks, which had been located there on a level, on the ascending grade of such embankment so that they passed along, near, and opposite plaintiff's property at a height of about 20 feet above their former level, and the subsequent "transporting" of all the said coal cars to their destination on said piers, over such two tracks; that such subsequent operation by locomotives propelling such coal cars up such grade (although said construction and operation were all done with due care and skill) produced the noises, vibration, smoke, soot, dust, cinders, and gases, which then first began, and caused the loss of rent and injury to the market and rental values of plaintiff's property, alleged in the declaration as above noted.

The two tracks last above referred to, after such change in method of construction and operation of the yard aforesaid, were no longer used "for the reception, storing, (and) retraining" of said coal cars, but solely for "transporting" them, but such "transporting" of them was merely from the receiving portion of the yard, below the grade aforesaid, to the summit of the embankment or "hump" there were constructed in 1913 a series of tracks which again received such coal cars, and by means of the latter tracks going thence downgrade the coal cars were drifted by gravity, without the aid of any locomotives, and moved, one car at a time, to a place or apparatus near said coal piers where the contents of such coal cars were transferred in bulk

to containers which ran along said piers to the sides of vessels, and there deposited such coal into the vessels, its destination.

Messrs. Mann & Tyler, for plaintiff in error:

The facts alleged in the declaration and not controverted in the plea constitute a common-law nuisance, if not done with legislative authority.

Townsend v. Norfolk R. & Light Co. 105 Va. 22, 4 L.R.A.(N.S.) 87, 115 Am. St. Rep. 842, 52 S. E. 970, 8 Ann. Cas. 558; *Terrell v. Chesapeake & O. R. Co.* 110 Va. 340, 32 L.R.A.(N.S.) 371, 66 S. E. 55; *Tidewater R. Co. v. Shartzler*, 107 Va. 573, 18 L.R.A.(N.S.) 1053, 59 S. E. 407; *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 329, 27 L. ed. 739, 743, 2 Sup. Ct. Rep. 119.

When defendant erected the said embankment or "hump" and ran trains over the same, causing damage to plaintiff's property in the manner described, it became liable to the plaintiff for the "just compensation" guaranteed by the Constitution.

2 *Lewis, Em. Dom.* 3d ed. ¶ 890; *Swift & Co. v. Newport News*, 105 Va. 108, 3 L.R.A.(N.S.) 404, 52 S. E. 821; *Tidewater R. Co. v. Shartzler*, 107 Va. 562, 17 L.R.A.(N.S.) 1053, 59 S. E. 407.

Defendant was acting in its private, and not in its public, capacity in causing the damage and injury complained of.

Townsend v. Norfolk R. & Light Co. 105 Va. 22, 4 L.R.A.(N.S.) 87, 115 Am. St. Rep. 842, 52 S. E. 970, 8 Ann. Cas. 558; *Terrell v. Chesapeake & O. R. Co.* 110 Va. 340, 32 L.R.A.(N.S.) 371, 66 S. E. 55; *Southern R. Co. v. McMenamin*, 113 Va. 121, 73 S. E. 980; *Virginian R. Co. v. London*, 114 Va. 334, 76 S. E. 306; *Cogswell v. New York, N. H. & H. R. Co.* 103 N. Y. 10, 57 Am. Rep. 701, 8 N. E. 537; *Bohan v. Port Jervis Gaslight Co.* 122 N. Y. 18, 9 L.R.A. 711, 25 N. E. 246; *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 27 L. ed. 739, 2 Sup. Ct. Rep. 719; *Richards v. Washington Terminal Co.* 233 U. S. 546, 58 L. ed. 1088, L.R.A.1915A, 887; 34 Sup. Ct. Rep. 654; *Matthias v. Minneapolis, St. P. & S. Ste. M. R. Co.* 125 Minn. 224, 51 L.R.A.(N.S.) 1017, 146 N. W. 353; *Lewis, Em. Dom.* 3d ed. p. 654; *Tidewater R. Co. v. Shartzler*, 107 Va. 562, 17 L.R.A.(N.S.) 1053, 59 S. E. 407.

Messrs. R. M. Hughes, Jr., Waller R. Staples, Lucian H. Cocke, and Theodore W. Reath, for defendant in error:

The operation complained of was a public act of efficient transportation and delivery, defendant is not liable to the plaintiff for the performance of same without negligence.

1 Lewis, Em. Dom. § 365; Fisher v. Seaboard Air Line R. Co. 102 Va. 363, 46 S. E. 381, 1 Ann. Cas. 622; Beseman v. Pennsylvania R. Co. 50 N. J. L. 235, 13 Atl. 164; Wagner v. Bristol Belt Line R. Co. 108 Va. 594, 25 L.R.A. (N.S.) 1278, 62 S. E. 391; Terrell v. Chesapeake & O. R. Co. 110 Va. 340, 32 L.R.A. (N.S.) 371, 66 S. E. 55; Southern R. Co. v. McMenamin, 113 Va. 121, 73 S. E. 980; Tidewater R. Co. v. Shartzler, 107 Va. 562, 17 L.R.A. (N.S.) 1053, 59 S. E. 407; Baltimore & P. R. Co. v. Fifth Baptist Church, 108 U. S. 332, 27 L. ed. 744, 2 Sup. Ct. Rep. 719; Frazer v. Chicago, 186 Ill. 480, 51 L.R.A. 306, 78 Am. St. Rep. 296, 57 N. E. 1055; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175, 212 Ill. 103, 72 N. E. 219; St. Louis, S. F. & T. R. Co. v. Shaw, 99 Tex. 559, 6 L.R.A. (N.S.) 245, 122 Am. St. Rep. 663, 92 S. W. 30; D. M. Osborne & Co. v. Missouri P. R. Co. 147 U. S. 248, 37 L. ed. 155, 13 Sup. Ct. Rep. 299; Matthias v. Minneapolis, St. P. & S. Ste. M. R. Co. 125 Minn. 224, 51 L.R.A. (N.S.) 1017, 146 N. W. 353; Weyer v. Chicago, W. & N. R. Co. 68 Wis. 180, 31 N. W. 710; Omaha Southern R. Co. v. Beeson, 36 Neb. 361, 54 N. W. 557; Bennett v. Long Island R. Co. 181 N. Y. 431, 74 N. E. 418; Carroll v. Wisconsin C. R. Co. 40 Minn. 168, 41 N. W. 661; Church of Jesus Christ of L. D. S. v. Oregon Short Line R. Co. 36 Utah. 238, 23 L.R.A. (N.S.) 860, 140 Am. St. Rep. 819, 103 Pac. 243; Louisville & N. Terminal Co. v. Lellyett, 114 Tenn. 368, 1 L.R.A. (N.S.) 49, 85 S. W. 881; Southern R. Co. v. McMenamin, 113 Va. 132, 73 S. E. 980; Chicago v. Union Stock Yards & Transit Co. 164 Ill. 224, 35 L.R.A. 281, 45 N. E. 430; Chicago, R. I. & P. R. Co. v. Joliet, 79 Ill. 25; Illinois C. R. Co. v. Grabill, 50 Ill. 242; Austin v. Augusta Terminal R. Co. 108 Ga. 671, 47 L.R.A. 755, 34 S. E. 852; Wagner v. Bristol Belt Line R. Co. 108 Va. 605, 25 L.R.A. (N.S.) 1278, 62 S. E. 391.

Sims, J., delivered the opinion of the court:

There are two questions raised by the assignments of error: (a) One question being whether the provision of the Constitution of Virginia of 1902 on the subject of private property being "damaged" for public uses without just compensation does or does not, as to new construction and operation since such Constitution went into effect, annul the legislative privilege theretofore possessed by public service corporations, when acting in their public capacity, to damage private property without liability for damages, to the extent of making "just compensation;" and (b) the other question being whether in the instant case the defendant was acting in its public or private capacity in doing the acts complained of, and hence, whether it ever possessed the legislative privilege aforesaid pleaded by it in defense of the action.

In the view we take of the facts of this case and of the law applicable thereto, it will be necessary for us to consider only the latter question. Such question, it will be observed, is wholly independent of the constitutional question referred to, and rests upon principles which existed prior to the Constitution of 1902, and which have continued to exist since, independently of the constitutional provision mentioned above. Terrell v. Chesapeake & O. R. Co. 110 Va. 340, 348, 32 L.R.A. (N.S.) 371, 66 S. E. 55.

That a public service corporation may act in a private capacity, as distinguished from

its public capacity, is now well settled.

Townsend v. Norfolk R. & Light Co. 105 Va. 22, 4 L.R.A. (N.S.) 87, 115 Am. St. Rep. 842, 52 S. E. 970, 8 Ann. Cas. 558; Terrell v. Chesapeake & O. R. Co. supra; Southern R. Co. v. McMenamin, 113 Va. 121, 73 S. E. 980.

It is true that if a public service

Railroad—
liability for
injury to neighboring property
—acts in private
capacity.

Public service
corporation—
—acts in private
capacity.

corporation, in locating, constructing, or changing the construction, and in the operation of its works, acts in its public capacity, general

Railroads—liability for injury to abutting property.

legislative authority given it so to do, when strictly pursued, unless that

authority is limited or annulled by constitutional provision in the particular in question, will be construed to confer on the corporation immunity from all liability for damages, not imposed by statute law, for such location, construction, change of construction, and operation. Such immunity is inseparably attendant upon the sovereign right of eminent domain which the legislature exercises untrammelled and unabridged, save only as it may be restrained by the Constitution, and it will be construed to be conferred on such a corporation by necessary implication by general legislative enactment on the subject, where the corporation acts in its public capacity. In such case the harsh rule of *damnum absque injuria* applies in bar of all suits against the corporation for damages not allowed by statute. *Fisher v. Seaboard Air Line R. Co.* 102 Va. 363, 46 S. E. 381, 1 Ann. Cas. 622. But, notwithstanding this rule—

Nuisance—legislative immunity—private acts of corporation.

general legislative authority to establish, locate, and operate its works

will not confer upon it immunity from liability for damages resulting from a construction and operation of such works, which would have been deemed a private nuisance at common law.

It is further settled by such decisions that, if such works were not constructed for the very public duties for which the public service corporation was incorporated, but as incidental, adjunctive, or appurtenant thereto merely, however necessary to the performance of the

former duties, their operation will be considered and classed as an operation by the corporation in its private capacity.

Corporation—operation in public or private capacity.

In such case the rule "*Sic utero tuo ut alienum non lædas*" applies and controls the construction of the legislative enactment. The general legislative authority to locate, construct, and operate the latter character of works will not be construed by implication to confer the immunity from liability for damages aforesaid, and the harsh rule of *damnum absque injuria* has no application.

Public service corporation—applicability of maxim "Sic utere tuo."

This result, as pointed out by the opinion of this court delivered by Judge Keith, P., on rehearing in the *Townsend Case*, supra, may not be logical. As is there said: "Law is not an exact science. It has no invariable standard by which rights may be measured. It does not submit to inflexible rules of logic, nor can it, in its application to the varied affairs of men, always clothe itself in the form of a syllogism."

It will suffice here to say that such is the law, fixed by the decisions of this court above referred to and by the decisions of other courts of eminent authority therein cited.

Now, then, was the change of construction and operation complained of in the instant case done by the defendant in its private capacity?

It is true that the operation complained of in the *Townsend Case*, supra, was of a power house; in the *Terrell Case*, supra, it was of a roundhouse; and in the *McMenamin Case* it was not the transportation of cars through the switch yard which was complained of, but the operation of a coal chute and power house, firing of engines on the yard, and other incidents to the operation of the yard, which were subjects of complaint; but these cases involved, and were decided upon, precisely the same principle which is involved in the classification of a switch yard

of a railroad company, upon the inquiry of whether such construction and operation are done in the public or private capacity of such company.

In discussing this subject, 1 Lewis, Em. Dom. 3d ed. at page 450, says: "On general principles, when railroad appurtenances, such as a roundhouse, *switch yards*, repair shops, or *terminal plant*, cause a nuisance to neighboring property

by reason of noise, smoke, cinders, vibrations, etc., there may be a recovery. But there are authorities to the contrary."

Examination of the authorities cited by the learned author last quoted pro and con satisfies us that the text is supported by the greater weight of authority, and is impreguably sustained by reason and upon principle, where the switch yard operation complained of does not serve a passenger station or freight depot, so that such operation is not required of the railroad company in the discharge of its public duty in connection with such station or depot.

Further: The recent case of *Matthias v. Minneapolis*, St. P. & S. Ste. M. R. Co. 125 Minn. 224, 51 L.R.A.(N.S.) 1017, 146 N. W. 353, decided since Mr. Lewis's estimable work referred to was published, is directly in point on the question we have under consideration as presented in the instant case. That case involved a terminal yard, and, as in the instant case, the cars of freight were originally carried over tracks constructed and operated practically on a level. In that case, it is true, the ground acquired by the railroad company for its switch yard was in addition to the ground on which its original main-line tracks were located, and over which it for many years transported its cars of freight; but that circumstance, as we shall see, is immaterial. In 1912 the railroad company acquired additional land alongside of its original main-line track, on the opposite side of such original right

of way from the property of the plaintiff, and constructed a receiving yard on a part of such newly acquired land and a "hump" or embankment on another part of it, with an upgrade similar to that in the instant case, and thereafter diverted its cars of freight containing wheat, coming in over its main line, and "transported" such cars over the "hump," propelling them by locomotives to the summit of the "hump" to a series of tracks located on such summit, which there received such cars, and, by means of the latter tracks, going thence down grade, the cars of wheat were drifted by gravity, without the aid of any locomotives, and moved to the grain elevators, where the contents of such cars of wheat were transferred into the elevators,—its destination.

The "transportation" of the cars of wheat in the *Matthias Case* over the grade of the "hump" was precisely as much main-line transportation and no more than was the "transportation" of the cars of coal in the instant case, over the "hump." It was essentially the same operation in both cases, and that was a switching operation. In a certain sense, it is true, it was but a link in the transportation of the cars from their point of original shipment, perhaps in a distant state, over the main line of the railroad company until they reached its terminal yard, being detrained at such terminal yard to be retrained and carried over the "hump," as perhaps they had been detrained, switched, and retrained at various other switch yards at certain ends of divisions of the company's main line before they reached the terminal yard in question, where switch yards for that purpose were provided by the company. But it is the construction of such very appurtenances and their operation which are not main-line construction, or operation, of the very public service for which the railroad company was incorporated, unless they serve stations or depots as aforesaid. They are, in such a

case as the Matthias Case and the instant case, essentially merely appurtenant,—mere incidental construction and operation,—however necessary to the transportation service of the company, and their construction and operation necessarily fall within the same classification and rule applicable thereto as round-houses, coal chutes, etc., and their operation.

Accordingly, in the Matthias Case, the railroad company was held liable in damages for a similar nuisance at common law, with similar results as alleged in the declaration in the instant case. In the Matthias Case, as in the instant case, the entrance or approach to the plaintiff's property was not interfered with by the railroad company. No part of the plaintiff's property was taken in either case. In the Matthias Case the new construction and operation complained of was about 600 feet from the plaintiff's dwelling house, on the opposite side of the railroad's original main-line-tracks right of way, whereas in the instant case the operation complained of was on the same side of defendant's right of way as the plaintiff's property.

The change of method of operating said terminal yard in the instant case consisted, in ultimate fact, in withdrawing the two tracks ascending the rising grade of the "hump" or embankment from their prior function of serving in part as tracks "for the reception, storing, (and) retraining" of cars, and the subsequent use of such tracks for the "transportation" of cars of coal; but such transportation was essentially a rehandling,—a retraining,—a switching yard transportation. Such "transportation" of such cars necessarily occurs in all handling of through freight in switch yards. It was, in ultimate fact, a switching operation,—a switching of coal cars from one receiving yard below to another receiving yard above, upon the summit of the "hump" or embankment, where "a series of tracks

of defendant's" terminal yard again received such cars, from whence they were drifted, one car at a time, on their way to containers, which received their contents in bulk, and, in turn, distributed the coal at different places along the piers by depositing it in vessels there awaiting it.

Moreover, in the instant case, the conclusion that the new construction and operation of a part of the terminal yard, complained of in the declaration, was but an operation merely incidental to the duties of the defendant, which it performed in its public capacity, is apparent when we consider the original relationship of the defendant and its predecessor in title, the Norfolk & Western Railroad Company, to the Norfolk Terminal Company, and its operation of this terminal yard. Prior to the acquisition by the Norfolk & Western Railroad Company and defendant of such yard, their main line terminated at Norfolk. They had not undertaken, nor did their charters impose upon them, any duties whatever to operate such yard. The Norfolk Terminal Company constructed and operated this yard under its charter, not as a common carrier, with the public duty imposed by law on all common carriers of freight on whom the right of eminent domain is conferred by statute, of receiving and transporting all freight tendered to it by the public for transportation. It never assumed or undertook to discharge that public duty, although perhaps its charter was broad enough to have authorized it to do so. It never equipped itself with any depot or other facilities for that purpose. The only duty it ever performed or undertook to perform was the mere duty of operating a terminal yard, or switch yard, for the defendant's predecessor, the Norfolk & Western Railroad Company, so as to distribute a portion of a particular kind of freight brought to Norfolk by the last-named company, to wit, the cars of coal destined to vessels of connecting water carriers. In perform-

Railroad—
liability for
hump in switch
yard.

ing such a duty it was not performing a duty to the public such as the Norfolk & Western Railroad Company was then performing as a common carrier in bringing such freight to Norfolk. It was performing only a contract duty to the latter company, and a duty of precisely the same character as might have been performed by a transfer company, incorporated or unincorporated, carrying passengers or freight from the terminus of the Norfolk & Western Railroad Company's line to wharves or vessels or to the stations or depots of other carriers located in or near Norfolk (Kentucky & I. Bridge Co. v. Louisville & N. R. Co. (C. C.) 2 L.R.A. 289, 2 Inters. Com. Rep. 351, 37 Fed. 567), or as might have been performed by any other incorporated company supplying the Norfolk & Western Railroad Company, under contract, with light, heat, or power, or any other like service incident and even necessary for the performance of its duty as a common carrier. And it was a duty neither the Norfolk & Western Railroad Company nor defendant could have been compelled to allow the Norfolk Terminal Company to perform. (See the case last above cited.)

Therefore, when the Norfolk Terminal Company constructed and while it operated said terminal yard, it is plain it was performing no duty which the Norfolk & Western Railroad Company was required by its charter or by other statute to perform. Moreover, it was performing no public duty, imperatively imposed by law on it upon its undertaking such business, but merely (as above stated) a contract duty to the Norfolk & Western Railroad Company, which it was *permissively* authorized to perform by its charter. Clearly, then, the original construction and subsequent operation of said terminal yard by the Norfolk Terminal Company fell within the classification of the power house operation in the Townsend Case, *supra*.

This becomes more apparent

when the permissive character of the charter of the Norfolk Terminal Company, with respect to the location of the terminal yard, is compared with that of the legislative act relied on by the defendant in the Townsend Case. The statute in that case provided: "The said company shall have power to construct, lease, purchase or acquire by consolidation with any other company or companies, and operate and maintain in the city or county of Norfolk, or both, and in any other city, town or village in the said county, suitable works, machinery and plants for the manufacture of electricity. . . ."

In the opinion of this court, delivered by Judge Keith, P., on rehearing, in reference to such legislative authority, it is said: "It will be seen that the language is not imperative, but permissive, and that it does not confer statutory sanction for the commission of a nuisance in any way whatever, and most assuredly cannot be said to confer it in express terms, 'or by clear and unquestionable implication from the powers given,' so that it cannot be fairly said that 'the legislature contemplated the doing of the very act which occasioned the injury, and immunity is not to be presumed from a general grant of authority.'"

As noted in the statement of facts about the charter of the Norfolk Terminal Company, it did not designate the location of the terminal yard. By the express terms of such charter, it might have been located "at any point on the Norfolk harbor or Chesapeake bay." Hence, upon the reasoning in and upon the principle on which the Townsend Case rests, the construction and operation of said terminal yard by the Norfolk Terminal Company must be classed as action by that company in its private capacity, merely incidental to the public service of the Norfolk & Western Railroad Company, whom it served, and not protected by the shield of legislative privilege aforesaid.

This being so, it is apparent that

upon the subsequent acquisition of the terminal yard, its operation by the Norfolk & Western Railroad Company, and later by the defendant, the Norfolk & Western Railway Company, was the same character of service to themselves, namely, in their private capacity. The defendant, therefore, would have been liable in damages for the nuisance at common law alleged in the declaration in the instant case under the Townsend Case and other authorities above cited had the nuisance been caused by the original operation of the terminal yard by it, and is so liable for the new construction and operation of the terminal yard complained of in the plaintiff's declaration. Such new construction and operation are material in the instant case only as bearing on the beginning of the injury alleged and the consequent commencement of the running of the Statute of Limitations.

The case of *Fisher v. Seaboard Air Line R. Co.* 102 Va. 363, 46 S. E. 381, 1 Ann. Cas. 622, however, is strongly urged by the defendant upon our attention as being opposed to the conclusion we have reached, above stated. As pointed out in the Townsend and Terrell Cases, *supra*, the Fisher Case involved a main-line change of construction and operation of the railroad company, and hence action of the latter in its public capacity. As we have noted above, for such action, if in strict pursuance of the legislative authority and performed with due care and skill, the legislative privilege, subject only to such liability as the statute law provides, is an absolute bar to the assertion against the railroad company of any liability for damages, if such legislative privilege exists. It does exist as to main-line construction and operations of a railroad company, if the legislative authority invoked has been strictly pursued, and such authority has not been limited or annulled in any particular by the Constitution of the state. As to any construction or operation by a railroad com-

pany, however, which is not in its public, but in its private, capacity, general legislative privilege is no bar to the assertion against it of liability for damages for any action which creates a nuisance at common law, although the legislative authority be unlimited and be not annulled in any particular by the Constitution of the state. Hence the Fisher Case in no way conflicts with our conclusion aforesaid.

The same reason which distinguishes the Fisher Case from the instant case also distinguishes therefrom the following cases relied on for defendant, namely: *Bennett v. Long Island R. Co.* 181 N. Y. 431, 74 N. E. 418; *Chicago v. Union Stock Yards & Transit Co.* 164 Ill. 224, 35 L.R.A. 281, 45 N. E. 430; *Chicago R. I. & P. R. Co. v. Joliet*, 79 Ill. 25; *Illinois C. R. Co. v. Grabill*, 50 Ill. 241; *Carroll v. Wisconsin C. R. Co.* 40 Minn. 168, 41 N. W. 661.

Defendant also relies on the case of *Church of Jesus Christ of L. D. S. v. Oregon Short Line R. Co.* 36 Utah, 238, 23 L.R.A. (N.S.) 860, 140 Am. St. Rep. 819, 103 Pac. 243. That was a switch yard case. It was an action to recover damages for injuries to plaintiff's church property, alleged to have been caused by the annoyance of noise *only* of trains and engines on tracks lawfully constructed and operated for purposes of switching and making up of trains near the church. The court in that case, it is true, held that switch yards do not fall within the same class as roundhouses, coal chutes, etc., and that railroads as to the operation of their switch yards enjoy the same immunity from liability for damages as they do with respect to main-line operations, because of legislative privileges. But as we have seen, such a holding, in that broadness of application, is unsound in principle and opposed to other authority. And in that case it is conceded that if, instead of the mere annoyance from noise only, there had been a physical disturbance or interference with the prop-

erty right by the casting of soot, cinders, etc., upon the property, a vibration of it, or the emission of smoke, physically injuring the property and causing a nuisance of that character, the plaintiff would have been entitled to recover damages. On this point the court in its opinion, 36 Utah, at page 247, said: "To obtain relief for the latter consequences in a case of nuisance no constitutional nor statutory enactment was necessary."

We merely note the latter view in passing, but we do not wish to be understood as agreeing with the conclusion of law there stated. In our opinion, both upon principle and upon the overwhelming weight of authority, which it would be out of

place here to cite, if a switch yard construction and operation falls within the same class as main-line construction and operation, and consequently within the immunity from liability for damages afforded by legislative privilege, then, unless the legislative authority is limited or annulled in some particular by the state Constitution, no action for damages in such case would lie.

The case of Louisville & N. Terminal Co. v. Lellyett, 114 Tenn. 368, 1 L.R.A.(N.S.) 49, 85 S. W. 881, is also relied on for defendant. But in that case the operation of a switch yard as well as of a roundhouse, coal chute, an upgrade track construction to coal bins, and operation of engines and cars thereon, were complained of, and the injury resulting from the operation of the switch yard was perhaps the gravamen of the case according to the proof. And the court in its opinion draws no distinction between the switch yard operation and the other operations complained of, but classes the former, as well as the latter, as being done by the railroad company in its private capacity, which is in accord with the true principle involved and with our holding above.

Numerous other decisions are cited for plaintiff and defendant, but

they bear chiefly upon the constitutional question first above mentioned, which it is unnecessary for us to consider in the instant case, and hence any detailed reference to such cases would needlessly prolong this opinion.

For the foregoing reasons we are of opinion that there was error in the order complained of, and the same will be set aside and annulled, the demurrer of the plaintiff to the plea of the defendant aforesaid will be sustained, and the case will be remanded to the trial court for further proceedings to be had therein not in conflict with this opinion.

Petition for rehearing denied.

NOTE.

As is shown by the annotation following SOUTHERN R. CO. v. FISHER, post, 723, which treats the general question of the operation of a railroad as a nuisance to property, the general rule is that the non-negligent operation of a railroad proper does not constitute an actionable private nuisance as to property affected by the smoke, noise, vibration, etc., attendant upon such operation, and that a considerable number of cases apply the same rule to terminals, yards, switches, shops, coaling stations, watering places, and other properly located appurtenances which are essential to the proper operation of the road, but that some courts have made a distinction as to such incidental but necessary appurtenances to railroading, the selection of the sites for which rests in the discretion of the railroad company, and which, because they do not serve the public directly, are regarded as maintained in a private, rather than a public, capacity, holding that such appurtenances, if so located as to injure the adjoining or neighboring property, are actionable nuisances, even though such injury was the result of the careful, proper, and reasonable use thereof.

The holding in the reported case (KILLAM v. NORFOLK & W. R. Co. ante, 701), to the effect that the terminal

yard in controversy, which was maintained for the sole purpose of handling coal, was operated in a private capacity, so that because injurious to adjoining property it constituted an actionable private nuisance, is illustrative of the class of cases which maintain the above-noted exception to the general rule. However, this case is somewhat novel because of the fact that the terminal or switching yard in controversy was located and maintained by a company organized solely for that purpose, and which did not act as a common carrier serving the public, the object being to receive from the defendant railroad company at its main-line terminal trains of coal cars, and store, sort, and distribute the same to their proper destination for transfer of the coal to connecting

water carriers, which yard was subsequently taken over by the defendant railroad company and operated in the same way and for the same purpose as theretofore, but as incidental, adjunctive, or appurtenant to its business as a common carrier. This, of course, strengthens the argument that the yard was operated in a private, rather than a public, capacity.

For other cases which treat incidental but necessary appurtenances to railroading, but which do not serve the public directly, as maintained for private purposes so as to withdraw the shield of general legislative privilege and render the company liable for injury to property resulting from their use irrespective of the manner of operation, see subdivision II. of the annotation hereinbefore referred to.

C. P. INGMUNDSON, Appt.,
v.
MIDLAND CONTINENTAL RAILROAD, Respnt.

North Dakota Supreme Court — July 1, 1919.

(— N. D. —, 173 N. W. 752.)

Nuisance — pollution of air.

1. An owner of land, as an incident to his property right, is entitled to use and enjoy such land free from the pollution of air thereupon so as to amount to a nuisance, and for the violation of this right an action in the nature of trespass to realty can be maintained.

[See note on this question beginning on page 723.]

Pleading — nuisance — smoke.

2. In an action where the complaint alleges, among other things, that the defendant railway company caused large volumes of gas, noxious vapors, large quantities of thick black smoke,

oil, and steam, and large quantities of cinders to be cast upon the land of the plaintiff, to his damage, it is held that the plaintiff states a cause of action.

[See 20 R. C. L. 420.]

Headnotes by BRONSON, J.

(Robinson, J., dissents.)

APPEAL by plaintiff from a judgment of the District Court for Stutsman County (Coffey, J.) in favor of defendant in an action brought to recover damages for injury to plaintiff's property occasioned through the operation of defendant's railroad. *Reversed.*

The facts are stated in the opinion of the court.

(— N. D. —, 173 N. W. 752.)

Messrs. Knauf & Knauf, for appellant:

Where property is "damaged" by the laying and usage of railroad tracks adjacent to it, the railroad company must respond in such damages as are sustained, when those damages are of a substantial nature and affect the direct physical condition or value of the property to its injury.

Gottschalk v. Chicago, B. & Q. R. Co. 14 Neb. 550, 16 N. W. 475, 17 N. W. 120; Hastings & G. I. R. Co. v. Ingalls, 15 Neb. 123, 16 N. W. 762; Omaha & P. Valley R. Co. v. Rogers, 16 Neb. 117, 19 N. W. 603; Chicago, K. & N. R. Co. v. Hazels, 26 Neb. 364, 42 N. W. 93; Burlington & M. River R. Co. v. Reinhackle, 15 Neb. 279, 48 Am. Rep. 342, 18 N. W. 69; Republican Valley R. Co. v. Fellers, 16 Neb. 169, 20 N. W. 127; Omaha & N. P. R. Co. v. Janacek, 30 Neb. 276, 27 Am. St. Rep. 399, 46 N. W. 478; Sioux City & P. R. Co. v. Weimer, 16 Neb. 272, 20 N. W. 349; Atchison & N. R. Co. v. Boerner, 34 Neb. 240, 33 Am. St. Rep. 637, 51 N. W. 842; Illinois C. R. Co. v. Turner, 194 Ill. 575, 62 N. E. 798; Campbell v. Metropolitan Street R. Co. 82 Ga. 320, 9 S. E. 1078; Tidewater R. Co. v. Shartzer, 107 Va. 562, 17 L.R.A. (N.S.) 1053, 59 S. E. 407; 1 Lewis, Em. Dom. 2d ed. 537; Rigney v. Chicago, 102 Ill. 64; McCarthy v. Metropolitan Board of Works, L. R. 8 C. P. 191; Chicago v. Taylor, 125 U. S. 161, 31 L. ed. 638, 8 Sup. Ct. Rep. 820.

Messrs. George W. Thorp and Russell D. Chase, for respondent:

The complaint does not state facts from which damages, either direct or consequential, can be inferred, and plaintiff's injuries, if any sustained, do not result in damages contemplated by the law.

Hyde v. Minnesota, D. & P. R. Co. 29 S. D. 220, 40 L.R.A. (N.S.) 48, 136 N. W. 92; Rigney v. Chicago, 102 Ill. 64; P. Ballantine & Sons v. Public Service Corp. 86 N. J. L. 331, L.R.A. 1915A, 369, 91 Atl. 95; Ridley v. Seaboard & R. Co. 118 N. C. 996, 32 L.R.A. 708, 24 S. E. 730; Bischof v. Merchants' Nat. Bank, 75 Neb. 838, 5 L.R.A. (N.S.) 486, 106 N. W. 996; Cleveland, C. C. & St. L. R. Co. v. King, 23 Ind. App. 573, 55 N. E. 875; Pond v. Metropolitan Elev. R. Co. 112 N. Y. 186, 8 Am. St. Rep. 734, 19 N. E. 487; Byrne v. Minneapolis & St. L. R. Co. 38 Minn. 212, 8 Am. St. Rep. 668, 36 N. W. 339; 20 R. C. L. 465; Irvine v. Oelwein, L.R.A. 1916E, 1013, note 2; Soderburg v. Chi-

cago, St. P. M. & O. R. Co. 167 Iowa, 123, 149 N. W. 82; Ottumwa v. Nicholson, 161 Iowa, 473, L.R.A. 1916E, 983, 143 N. W. 439, 6 N. C. C. A. 123; Turner v. J. M. Brooks & Sons, 151 Ky. 310, L.R.A. 1916E, 958, 151 S. W. 948; Parsons v. Uvalde Electric Light Co. 106 Tex. 212, L.R.A. 1916E, 960, 163 S. W. 1.

Smoke, trembling of the earth, noises, etc., due to the ordinary operation of a railway, are not injuries resulting in actionable damages, and the facts as set forth in this complaint do not state a cause of action.

Smith v. St. Paul, M. & M. R. Co. 39 Wash. 355, 70 L.R.A. 1018, 109 Am. St. Rep. 889, 81 Pac. 840; DeKay v. North Yakima & Valley R. Co. 71 Wash. 648, 129 Pac. 574; Clute v. North Yakima & Valley R. Co. 62 Wash. 531, 114 Pac. 518; Taylor v. Chicago, M. & St. P. R. Co. 85 Wash. 592, L.R.A. 1915E, 634, 148 Pac. 887; Carroll v. Wisconsin C. R. Co. 40 Minn. 168, 41 N. W. 661; Stuhl v. Great Northern R. Co. 186 Minn. 158, L.R.A. 1917D, 317, 161 N. W. 501; Matthias v. Minneapolis, St. P. & St. Ste. M. R. Co. 125 Minn. 224, 51 L.R.A. (N.S.) 1017, 146 N. W. 353; Bennett v. Long Island R. Co. 181 N. Y. 431, 74 N. E. 418; Hearst v. New York C. & H. R. R. Co. 215 N. Y. 268, 109 N. E. 490; Pennsylvania R. Co. v. Marchant, 119 Pa. 541, 4 Am. St. Rep. 659, 13 Atl. 690; Pennsylvania Coal Co. v. Sanderson, 113 Pa. 126, 57 Am. Rep. 445, 6 Atl. 453; Pennsylvania R. Co. v. Lippincott, 116 Pa. 472, 2 Am. St. Rep. 618, 9 Atl. 871; Bell v. Ohio & P. R. Co. 25 Pa. 161, 64 Am. Dec. 687; Austin v. Austin Terminal R. Co. 108 Ga. 671, 47 L.R.A. 755, 34 S. E. 852; Randle v. Pacific R. Co. 65 Mo. 325; Proprietors of Locks & Canals v. Nashua & L. R. Corp. 10 Cush. 385; Presbrey v. Old Colony & N. R. Co. 103 Mass. 1; Van De Vere v. Kansas City, 107 Mo. 83, 28 Am. St. Rep. 396, 17 S. W. 695; Smith v. Southern P. R. Co. 146 Cal. 164, 106 Am. St. Rep. 17, 79 Pac. 868; Eachus v. Los Angeles Consol. Electric R. Co. 103 Cal. 614, 42 Am. St. Rep. 149, 37 Pac. 750; Fairchild v. Oakland & B. S. R. Co. 176 Cal. 629, 169 Pac. 388; Gilbert v. Greeley, S. L. & P. R. Co. 13 Colo. 501, 22 Pac. 814; Harrison v. Denver City Tramway Co. 54 Colo. 593, 44 L.R.A. (N.S.) 1164, 131 Pac. 409; Beseman v. Pennsylvania R. Co. 50 N. J. L. 235, 13 Atl. 164; Thomason v. Seaboard Air Line R. Co. 142 N. C. 318, 55 S. E. 205; Atchison, T. & S. F. R. Co. v. Armstrong, 71 Kan. 366, 1 L.R.A. (N.S.)

113, 114 Am. St. Rep. 474, 80 Pac. 978; Louisville & N. Terminal Co. v. Lell-yett, 1 L.R.A. (N.S.) 49, note; Dolan v. Chicago, M. & St. P. R. Co. 118 Wis. 362, 95 N. W. 385; Fink v. Cleveland, C. C. & St. L. R. Co. 181 Ind. 539, 105 N. E. 116; Grand Rapids & I. R. Co. v. Heisel, 38 Mich. 62, 31 Am. Rep. 306; Louisville R. Co. v. Foster, 108 Ky. 748, 50 L.R.A. 813, 57 S. W. 480; Morgan v. Des Moines & St. L. R. Co. 64 Iowa, 589, 52 Am. Rep. 462, 21 N. W. 96; Richards v. Washington Terminal Co. 233 U. S. 546, 58 L. ed. 1088, L.R.A. 1915A, 887, 34 Sup. Ct. Rep. 654; Baltimore & P. R. Co. v. Fifth Baptist Church, 108 U. S. 317, 27 L. ed. 739, 2 Sup. Ct. Rep. 719; St. Anthony's Church v. Pennsylvania R. Co. L.R.A. 1915E, 623, 125 C. C. A. 629, 207 Fed. 897; Dunsmore v. Central Iowa R. Co. 72 Iowa, 182, 33 N. W. 456; Parrot v. Cincinnati, H. & D. R. Co. 10 Ohio St. 624; Harrison v. New Orleans P. R. Co. 34 La. Ann. 462, 44 Am. Rep. 438; Peel v. Atlanta, 85 Ga. 138, 8 L.R.A. 787, 11 S. E. 582.

Bronson, J., delivered the opinion of the court:

This is an action for damages occasioned by the defendant by reason of causing smoke, noxious vapors, cinders, etc., to be cast upon the property and home of the plaintiff through the operation of its railroad.

At the time of the trial the defendant objected to the introduction of any evidence, upon the ground that the complaint failed to state facts sufficient to constitute a cause of action. The objection was sustained. Thereupon the defendant moved for a directed verdict in favor of the defendant, and this motion was granted. Pursuant thereto verdict was rendered, and judgment entered thereafter in favor of the defendant for dismissal with prejudice and costs. The plaintiff has appealed from the judgment rendered, and specifies as error the action of the trial court in sustaining the objection and granting the motion of the defendant. The sole question involved upon this appeal is whether the complaint states a cause of action.

The complaint alleges that the defendant, as a common carrier, oper-

ates its railroad through the city of Jamestown, on, over, upon, and adjacent to block 29 therein. The plaintiff is the owner of lot 8 in such block, upon which there is a house wherein he dwells with his family. Among other things, the complaint alleges as follows, with respect to the engines of the defendant: "That the said engines moving and passing on and over the premises herein described cause to and permit to escape large volumes and quantities of gas and other noxious vapors, and large quantities of thick, dense, black smoke, oil, and steam, large quantities of cinders, and to throw and scatter the same upon, in, and against said home and premises and lots; make great noises thereat, upon and about said premises; and create great vibrations, movements, and shaking of the ground in said lot and of the house thereon, and of plaintiff's dishes, tables, beds, and furniture therein, and of the said premises and the whole thereof," etc.

This states a cause of action as against a general objection to the complaint. The owner of land possesses the right to use and enjoy the same free from the

Nuisance—
pollution of air.

pollution of air thereupon so as to amount to a nuisance. This is a property right incident to his ownership of the land.

Pleading—
nuisance—
smoke.

For violation of this right an action in the nature of trespass to realty may be maintained. *Vaughan v. Bridgham*, 193 Mass. 392, 9 L.R.A. (N.S.) 695, 79 N. E. 739; *Ponder v. Quitman Ginnery*, 122 Ga. 29, 49 S. E. 746; *Lamm v. Chicago, St. P. M. & O. R. Co.* 45 Minn. 71, 10 L.R.A. 268, 47 N. W. 455. See 29 Cyc. 1152, 1154, 1155, 1184, 1187.

It therefore follows that the judgment should be reversed and a new trial ordered, with costs to the appellant. It is so ordered.

Christianson, Ch. J., Grace, J., and Nuessle, District Judge, concur.

Robinson, J., dissenting:

This is an appeal from a judg-

ment in favor of defendant on a directed verdict. When the case was called for trial defendant objected to any evidence under the complaint on the ground that it did not state facts sufficient to constitute a cause of action.

The complaint not only fails to state a cause of action, but also it shows that plaintiff has no cause of action. It avers that defendant is a railroad corporation, and as such it operates the railway running south from the Northern Pacific Railway depot in Jamestown; that upon its right of way of the width of 100 feet adjacent to block 29, in Jamestown, defendant keeps and maintains certain raised and graded railroad tracks; that plaintiff owns and resides on lot 8, in block 29; that before the construction of defendant's railway the lot was worth \$5,600; that near to said lot and home the defendant has put up unsightly buildings and sheds, which it keeps and maintains, and on said railway adjacent to said lot 8 defendant operates steam engines, freight and passenger cars, and that the engines permit the escape of large volumes of gas and noxious vapors and cinders and scatter the same on said lot and home premises and cause great vibrations of the ground; and that it has depreciated the value of said home in the sum of \$2,600.

In reading such a complaint the court must take judicial notice of such facts as are commonly known

to intelligent persons within the jurisdiction of the court. We must take judicial notice of the fact that defendant does operate a little railroad running south from Jamestown, with small engines and light trains, and not with any such mogul engines and trains as pass over the main line of the Northern Pacific Railway. We take judicial notice of the fact that the passing trains of the Northern Pacific and of other railroads do cause a slight tremor of the earth and do emit some vapor and cinders, which often tend to lessen the value of adjacent property and cause a loss which is known as *damnum absque injuria*; but in the operation of its railroad the defendant is strictly within its legal rights.

In so far as the complaint asserts mere exaggerations, which are known to be untrue, it should be disregarded.

Birdzell, J., being disqualified, did not participate; W. L. Nuessle, J., of the sixth judicial district, sitting in his stead.

NOTE.

The authorities upon the general question of the operation of a railroad as a nuisance to property are collated in the annotation following *Southern R. Co. v. Fisher*, post, 723, the decision in the reported case (*INGMUNDSON v. MIDLAND CONTINENTAL R. Co.* ante, 714) being treated in subd. I., thereof.

SOUTHERN RAILWAY COMPANY, Plff. in Certiorari, v.

D. A. FISHER.

Tennessee Supreme Court — August 22, 1918.

(140 Tenn. 428, 205 S. W. 126.)

Nuisance — operation of railroad — liability.

1. A railroad company is liable to abutting owners for the maintenance of a nuisance in the necessary and careful switching of its cars at a terminal not used in connection with a depot or station, since in such location and operation it is acting in its private capacity.

[See note on this question beginning on page 723.]

—switch yards — test of liability.

2. The test of liability of a railroad company for maintenance of a nuisance in the way of switch tracks is that the corporation is acting in its private as distinguished from its public capacity in doing the act complained of.

[See 20 R. C. L. 454; 22 R. C. L. 912.]

—exercise of public functions — liability.

3. Consequential injuries to private property which necessarily follow the shifting of cars with reasonable care by a railroad company in exercising its public functions are *damnum absque injuria*, since individuals must suffer inconvenience for the public accommodation.

[See 20 R. C. L. 454; 22 R. C. L. 913.]

CERTIORARI to the Court of Civil Appeals to review a judgment affirming a judgment of the Circuit Court for Shelby County (Capell, J.) in plaintiff's favor in an action brought to recover damages for injuries alleged to have been sustained by the construction and maintenance of defendant's switch yards. *Affirmed*.

The facts are stated in the opinion of the court.

Mr. Caruthers Ewing, for plaintiff in certiorari:

A common carrier must provide itself with terminal facilities for use in switching operations.

Moore, Carr. p. 250; Georgia R. & Bkg. Co. v. Maddox, 116 Ga. 64, 42 S. E. 315.

In locating, erecting, and operating certain structures wherein a common carrier does those things which are not essentially incidental to transportation, the carrier acts in a private capacity, and with respect thereto its liability is the same as one engaged wholly in private pursuits as contradistinguished from the performance of a public duty.

Louisville & N. Terminal Co. v. Jacobs, 109 Tenn. 743, 61 L.R.A. 188, 72 S. W. 954; Louisville & N. Terminal Co. v. Lellyett, 114 Tenn. 368, 1 L.R.A. (N.S.) 49, 85 S. W. 881; Beseman v. Pennsylvania R. Co. 50 N. J. L. 235, 13 Atl. 164; Cogswell v. New York, N. H. & H. R. Co. 103 N. Y. 10, 57 Am. Rep. 701, 8 N. E. 537; Garvey v. Long Island R. Co. 159 N. Y. 323, 70 Am. St. Rep. 550, 54 N. E. 57, 6 Am. Neg. Rep. 338; Daniel v. Ft. Worth & R. G. R. Co. 96 Tex. 327, 72 S. W. 578; Terrell v. Chesapeake & O. R. Co. 110 Va. 340, 32 L.R.A. (N.S.) 371, 66 S. E. 55; Dunsmore v. Central Iowa R. Co. 72 Iowa, 182, 33 N. W. 456; Dolan v. Chicago, M. & St. P. R. Co. 118 Wis. 362, 95 N. W. 385; Baltimore & P. R. Co. v. Fifth Baptist Church, 108 U. S. 317, 27 L. ed. 739, 2 Sup. Ct. Rep. 719; Roman Catholic Church v. Pennsylvania R. Co. L.R.A. 1915E, 623, 125 C. C. A. 629, 207 Fed. 897; Georgia R. & Bkg. Co. v. Maddox, 116 Ga. 64, 42 S. E. 315; Atchison, T. & S. F. R. Co. v. Armstrong, 71 Kan.

366, 1 L.R.A. (N.S.) 113, 114 Am. St. Rep. 474, 80 Pac. 978; Taylor v. Seaboard Air Line R. Co. 145 N. C. 400, 122 Am. St. Rep. 455, 59 S. E. 129.

The making up and breaking up of trains is essentially a switching operation, and the discharge of public duties requires that this be done with as little delay as possible and at such proximity to freight and passenger stations as will not delay the performance of other duties owed to the public.

Illinois C. R. Co. v. Clarkson, — Tenn. —, 28 Am. & Eng. R. Cas. N. S. 459; Louisville & N. R. Co. v. Robertson, 9 Heisk. 276; Haley v. Mobile & O. R. Co. 7 Baxt. 239; Southern R. Co. v. Pugh, 95 Tenn. 419, 32 S. W. 311; Iron Mountain R. Co. v. Dies, 98 Tenn. 655, 41 S. W. 860, 3 Am. Neg. Rep. 273; Towles v. Southern R. Co. 103 Fed. 405.

The rule of liability as relates to the location, establishment, and operation of roundhouses, coal chutes, sand bins, engine houses, machine shops, etc., is wholly different from that which controls the location and establishment of tracks and the operation of trains over same.

Iron Mountain R. Co. v. Bingham, 87 Tenn. 522, 4 L.R.A. 622, 11 S. W. 705; Sharp v. United States, 191 U. S. 341, 48 L. ed. 211, 24 Sup. Ct. Rep. 114; Roman Catholic Church v. Pennsylvania R. Co. L.R.A. 1915E, 623, 125 C. C. A. 629, 207 Fed. 897; St. Louis, I. M. & S. R. Co. v. Norris, 35 Ark. 622; Austin v. Augusta Terminal R. Co. 108 Ga. 671, 47 L.R.A. 755, 34 S. E. 852; Georgia R. & Bkg. Co. v. Maddox, 116 Ga. 64, 42 S. E. 315; Chicago, M. & St. P. R. Co. v. Darke, 148 Ill. 226, 35 N. E. 750; Dwenger v. Chicago & G. T. R. Co. 98

(140 Tenn. 428, 205 S. W. 126.)

Ind. 153; Atchison & N. R. Co. v. Gar-
side, 10 Kan. 552; Ottawa, O. C. & C.
G. R. Co. v. Larson, 40 Kan. 301, 2
L.R.A. 59, 19 Pac. 661; Atchison, T. &
S. F. R. Co. v. Armstrong, 71 Kan. 366,
1 L.R.A. (N.S.) 113, 114 Am. St. Rep.
474, 80 Pac. 978; Carroll v. Wisconsin
C. R. Co. 40 Minn. 168, 41 N. W. 661;
Romer v. St. Paul City R. Co. 75 Minn.
211, 74 Am. St. Rep. 455, 77 N. W. 825;
Randle v. Pacific R. Co. 65 Mo. 325;
Beseman v. Pennsylvania R. Co. 50 N.
J. L. 235, 13 Atl. 164; Beideman v. At-
lantic City R. Co. — N. J. Eq. —, 19
Atl. 731; Thomason v. Seaboard Air
Line R. Co. 142 N. C. 300, 55 S. E. 198;
Taylor v. Seaboard Air Line R. Co. 145
N. C. 400, 122 Am. St. Rep. 455, 59 S.
E. 129; Parrot v. Cincinnati, H. & D.
R. Co. 10 Ohio St. 624; Bell v. Ohio
& P. R. Co. 25 Pa. 161, 64 Am. Dec.
687; Pennsylvania R. Co. v. Lippincott,
116 Pa. 472, 2 Am. St. Rep. 618, 2 Atl.
618; Pennsylvania R. Co. v. Marchant,
119 Pa. 541, 4 Am. St. Rep. 659, 13 Atl.
690; Jones v. Erie & W. Valley R. Co.
151 Pa. 30, 17 L.R.A. 758, 31 Am. St.
Rep. 722, 35 Atl. 134; St. Louis, S. F.
& T. R. Co. v. Shaw, 99 Tex. 559, 6
L.R.A. (N.S.) 245, 122 Am. St. Rep. 663,
92 S. W. 30; Hatch v. Vermont C. R.
Co. 25 Vt. 49; Richmond Traction Co.
v. Murphy, 98 Va. 104, 34 S. E. 982;
Fisher v. Seaboard Air Line R. Co. 102
Va. 363, 46 S. E. 381, 1 Ann. Cas. 622;
Smith v. St. Paul, M. & M. R. Co. 39
Wash. 355, 70 L.R.A. 1018, 109 Am. St.
Rep. 889, 81 Pac. 840; DeKay v. North
Yakima & Valley R. Co. 71 Wash. 648,
129 Pac. 574; Taylor v. Chicago, M. &
St. P. R. Co. 85 Wash. 592, L.R.A. 1915E,
634, 148 Pac. 887; Hanlin v. Chicago
& N. W. R. Co. 61 Wis. 521, 21 N. W.
623.

The cases which have recognized or
declared liability for consequential in-
jury arising from the proximity of
switching operations are based on a
constitutional or statutory liability for
such taking and "damaging" of prop-
erty as relates to the exercise of the
right of eminent domain.

Chicago v. Taylor, 125 U. S. 161, 31
L. ed. 638, 8 Sup. Ct. Rep. 820; Chicago
G. W. R. Co. v. First M. E. Church, 50
L.R.A. 488, 42 C. C. A. 178, 102 Fed.
85; Mason City & Ft. D. R. Co. v. Wolf,
78 C. C. A. 589, 148 Fed. 961; Rigney
v. Chicago, 102 Ill. 64; Chicago, M. &
St. P. R. Co. v. Darke, 148 Ill. 226, 35
N. E. 750; Vanderburgh v. Minneapolis,
98 Minn. 329, 6 L.R.A. (N.S.) 741, 108
N. W. 480; Matthias v. Minneapolis, St.

P. & S. Ste. M. R. Co. 125 Minn. 224, 51
L.R.A. (N.S.) 1017, 146 N. W. 353;
Theobald v. Louisville, N. O. & T. R. Co.
66 Miss. 279, 4 L.R.A. 735, 14 Am. St.
Rep. 564, 6 So. 230; Stowers v. Postal
Telegraph Cable Co. 68 Miss. 559, 12 L.R.A.
864, 24 Am. St. Rep. 290, 9 So. 356;
Alabama & V. R. Co. v. Bloom, 71 Miss.
247, 15 So. 72; Root v. Butte, A. & P.
R. Co. 20 Mont. 354, 51 Pac. 155; Gotts-
chalk v. Chicago, B. & Q. R. Co. 14 Neb.
550, 16 N. W. 475, 17 N. W. 120; Gulf,
C. & S. F. R. Co. v. Fuller, 63 Tex. 467;
Gainsville, H. & W. R. Co. v. Hall, 78
Tex. 169, 9 L.R.A. 298, 22 Am. St. Rep.
42, 14 S. W. 259; Rainey v. Red River,
T. & S. R. Co. 99 Tex. 276, 3 L.R.A.
(N.S.) 590, 122 Am. St. Rep. 622, 89
S. W. 768, 90 S. W. 1096, 13 Ann. Cas.
580; Tidewater R. Co. v. Shartzer, 107
Va. 562, 17 L.R.A. (N.S.) 1053, 59 S.
E. 407.

Mere consequential damages are not
recoverable even where by Constitution
or statute the exercise of the right of
eminent domain involves payment for
property taken "or damaged."

Austin v. Augusta Terminal R. Co.
108 Ga. 671, 47 L.R.A. 755, 34 S. E. 852;
Wylie v. Elwood, 184 Ill. 281, 9 L.R.A.
726, 23 Am. St. Rep. 673, 25 N. E. 570;
Atchison, T. & S. F. R. Co. v. Arm-
strong, 71 Kan. 366, 1 L.R.A. (N.S.)
113, 114 Am. St. Rep. 474, 80 Pac. 978;
Randle v. Pacific R. Co. 65 Mo. 325;
Pennsylvania R. Co. v. Lippincott, 116
Pa. 472, 2 Am. St. Rep. 618, 9 Atl. 871;
Pennsylvania R. Co. v. Marchant, 119
Pa. 541, 4 Am. St. Rep. 659, 13 Atl.
690; Fisher v. Seaboard Air Line R.
Co. 102 Va. 363, 46 S. E. 381, 1 Ann.
Cas. 622; Smith v. St. Paul, M. & M.
R. Co. 39 Wash. 355, 70 L.R.A. 1018,
109 Am. St. Rep. 889, 81 Pac. 840; De
Kay v. North Yakima & Valley R. Co.
71 Wash. 648, 71 Pac. 574.

Mr. Earl King also for plaintiff in
certiorari.

Messrs. Wilson & Armstrong, for de-
fendant in certiorari:

Where a railroad maintains terminal
yards and terminal conveniences, which
it is at liberty to locate at another place,
and which amount to a nuisance to
adjoining landowners, it is liable for
the damage caused by such location and
operation regardless of negligence.

Louisville & N. Terminal Co. v.
Jacobs, 109 Tenn. 727, 61 L.R.A. 188,
72 S. W. 954; Louisville & N. Terminal
Co. v. Lellyett, 114 Tenn. 368, 1 L.R.A.
(N.S.) 49, 85 S. W. 881; Baltimore &
P. R. Co. v. Fifth Baptist Church, 108

U. S. 317, 27 L. ed. 739, 2 Sup. Ct. Rep. 719; *Cogswell v. New York, N. H. & H. R. Co.* 103 N. Y. 10, 8 N. E. 537; *Chicago G. W. R. Co. v. First M. E. Church*, 50 L.R.A. 488, 42 C. C. A. 178, 102 Fed. 85; *Missouri, K. & T. R. Co. v. Mott*, 70 L.R.A. 579, note; *Southern R. Co. v. McMenamin*, 113 Va. 121, 73 S. E. 980; *Missouri, K. & T. R. Co. v. Perry*, 46 Tex. Civ. App. 374, 102 S. W. 1169; *Missouri, K. & T. R. Co. v. Anderson*, 36 Tex. Civ. App. 121, 81 S. W. 781; *Wylie v. Elwood*, 134 Ill. 281, 9 L.R.A. 726, 23 Am. St. Rep. 673, 25 N. E. 570; *Matthias v. Minneapolis, St. P. & S. Ste. M. R. Co.* 125 Minn. 224, 51 L.R.A.(N.S.) 1017, 146 N. W. 353.

The true distinction between liability and nonliability is, in operating its main line a railroad acts in its public capacity, while in locating and operating its terminals, it acts in its private capacity, and is liable to the same extent as would be an individual.

Louisville & N. Terminal Co. v. Jacobs, 109 Tenn. 727, 61 L.R.A. 188, 72 S. W. 954; *Louisville & N. Terminal Co. v. Lelleyett*, 114 Tenn. 368, 1 L.R.A. (N.S.) 49, 85 S. W. 881; *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 27 L. ed. 739, 2 Sup. Ct. Rep. 719; *Cogswell v. New York, N. H. & H. R. Co.* 103 N. Y. 10, 57 Am. Rep. 701, 8 N. E. 537; *Chicago & G. W. R. Co. v. First M. E. Church*, 50 L.R.A. 488, 42 C. C. A. 178, 102 Fed. 85; *Missouri, K. & T. R. Co. v. Mott*, 70 L.R.A. 579, note; *Southern R. Co. v. McMenamin*, 113 Va. 121, 73 S. E. 980; *Missouri, K. & T. R. Co. v. Perry*, 46 Tex. Civ. App. 374, 102 S. W. 1169; *Missouri, K. & T. R. Co. v. Anderson*, 36 Tex. Civ. App. 121, 81 S. W. 781; *Wylie v. Elwood*, 134 Ill. 281, 9 L.R.A. 726, 23 Am. St. Rep. 673, 25 N. E. 570; *Matthias v. Minneapolis, St. P. & S. Ste. M. R. Co.* 125 Minn. 224, 51 L.R.A.(N.S.) 1017, 146 N. W. 353.

Williams, J., delivered the opinion of the court:

This suit grows out of the construction and maintenance by the railway company of its Forrest terminal yards, located just east of the eastern city boundary line and about 6 miles from the company's depots in the city of Memphis, which city is the western terminus of the company's extensive system of railways in this state. These yards are something above 1 mile in length, with a

width of about 250 feet at a point opposite the property of Fisher, plaintiff below.

Fisher was the owner of a parcel of realty fronting 650 feet on Southern avenue, which highway intervened between his holding and the railway right of way. On this parcel he had erected a suburban residence, about 1 mile east of the city boundary line, and when the terminal yards were constructed the same extended a short distance to the east of this residence. A roundhouse in the yards is about 3,900 feet from Fisher's house, a coal chute about 4,700 feet, and the nearest fixed structure approximately $\frac{1}{2}$ mile. In front of the residence is a series of about seventeen railroad tracks, one being the main line track and the others used for the purpose of making up freight trains, parking cars and work trains, etc. These tracks, or some of them, are also used to get engines into the roundhouse and sand house, and rolling stock to the coal chute.

In one of the counts of the declaration damages were sought to be recovered on account of the lessening of the permanent value of plaintiff's property by reason of the conditions produced by the defendant in the operation of the yards; noise, smoke, cinders, gases from the low-grade coal used in the engines, etc., amounting to a nuisance, according to the averments of the declaration.

The trial judge charged the jury as follows: "If you find from a preponderance of the evidence that after the yards were constructed and the defendant began its operations in the yards, that the manner in which the operations were conducted in that the noise of switching operations, blowing of whistles and ringing of bells, smoke, soot, cinders, resulting from the use of the terminal yards, popping of cars and jarring of the residence from switching operations in the yards and other noises attendant upon the use of the yards, because of their volume, proximity, and character, caused plaintiff material distress,

discomfort, or injury, and that the permanent value of plaintiff's property was materially decreased or damaged, then you will find for the plaintiff."

The railway company does not controvert that it is liable for damages inflicted by reason of the operation of fixed structures, such as the roundhouse, coal chute, etc., and of engines or cars thereto, but contends that there is no liability because of the necessary and non-negligent switching operations in the making up and breaking up of trains in the yards.

A verdict and judgment for \$6,000 was the result of the trial in the circuit court; and on appeal the court of civil appeals affirmed the judgment, though there was a division of the judges on the point of the soundness of the above contention of defendant company as to such switching operations.

Abandoning all other questions, the railway company has reduced its contention in its petition for certiorari to a single point: That the switching of cars incident to breaking up and making up trains is the discharge by it of a public duty, which duty requires that this be done with as little delay as practicable and at such proximity to its freight and passenger stations as will not unduly delay the performance of other duties owed the public by it as a common carrier. It is sought to distinguish such engine and car movements in the terminal yards, as being the exercise of a necessary public function, from the operation of fixed structures and movements of rolling stock to and from same, which are admitted to be referable to the private capacity or powers of the company, with consequent liability therefor upon its part even though the operation be non-negligent.

Counsel of both parties rely upon *Louisville & N. Terminal Co. v. Lellyett*, 114 Tenn. 368, 1 L.R.A. (N.S.) 49, 85 S. W. 881, and the language of certain paragraphs of that decision would at least seemingly tend

to support the respective insistences. In the *Lellyett* Case, it was held that damage caused by the entrance and exit of trains from the station and switching trains in operating the road should be segregated and distinguished from the operation of switch yards and fixed structures.

The railway company relies upon this paragraph of that decision, particularly the italicized words: "The roads have the right to accommodate their increasing traffic and travel without liability, so long as their trains are operated without negligent disregard of the comfort and usable value of the plaintiff's property, and for this purpose to lay such additional tracks, side-tracks, and switches into and through the station as may be required to accommodate such travel and traffic, both passenger and freight; and it is *only for the additional conveniences of roundhouses, sand houses, coal bins, coal chutes*, and the switch yards and tracks necessary to operate *such additional conveniences*, which might be located elsewhere, though not so advantageously, perhaps, that plaintiff can complain if they materially damage the plaintiff's property."

Upon this excerpt is based the defendant's argument that train-making switching must be excluded.

Plaintiff Fisher relies upon the following paragraphs immediately following the above in the same decision:

"There has been no effort made to distinguish between the damage caused by the entrance of trains and passing of trains and exit of trains from the station and switching trains in operating the road, and the operation of the switch tracks, the coal bins, coal chutes, roundhouse, sand house, and other facilities introduced and operated as part of the terminal facilities.

"It is only for the latter that plaintiff has a right of action, and proof should have been confined to that feature of the situation, and not to the general discomfort and dam-

age caused by the entering and departure of trains from the station, as well as the operation of the other facilities."

On these paragraphs the argument is based that the operation of switch tracks, in terminal yards proper, away from the station, for whatsoever purpose, may be looked to in estimating plaintiff's damages.

The language of the court in the *Lellyett Case* is apparently ambiguous, due in a measure to the fact that the terminal yards and the station grounds or yard there involved were in part identical, or lay side by side. In the instant case, the terminal yards are over 5 miles distant from the defendant's depots in the city. The question is one of much importance, since by far the greater damage has accrued to plaintiff from the switching of cars in the making up and breaking up of trains for transportation trips over the division. As noted, the fixed structures in the yards are not near the home of the plaintiff.

The true test for distinction between cases of liability and nonliability of a railway company for the maintenance of a nuisance in the way of switch tracks is: Was the company acting in its private capacity, as distinguished from its public function, when operating the claimed nuisance? *Louisville & N. Terminal Co. v. Jacobs*, 109 Tenn. 727, 61 L.R.A. 192, 72 S. W. 957.

If the operation of the tracks for any of the purposes to which they are devoted may be attributed to the corporation's public functions, then whatever consequential annoyance may necessarily follow from the shifting of cars with reasonable care is *damnum absque injuria*, since the inconvenience of private individuals must be suffered for the public accommodation.

It is not always easy to determine in a given case where the one function ends and the other begins; but the tendency of the later decisions

is to classify terminal yards with coaling stations, roundhouses, etc., as falling within the private functions of the corporation, which, while incidental to duties of a public character, do not, as to manner and place of exercise, directly concern the public. The location of such a yard admits of a wide latitude in the choice of sites, and the inclination of the courts is against immunity from liability for the results of non-negligent nuisances committed in and about them. 20 R. C. L. p. 454.

Holding in mind throughout that we are concerned with a yard that is not operated as a part of or in connection with station grounds, in order that the ruling to be made may not be construed as having application to switching operations thereon, we hold that the court of civil appeals properly affirmed the judgment of the circuit court. For reasons:

(a) The yards here in question are divisional yards, in which the switching is not confined to the traffic of the Memphis station, as one of ^{operation of} ~~many constituent~~ ^{railroad-} ~~units of the division; and the tracks~~ ^{liability.} in it are not devoted principally to the business of that station when cars are separated or combined in the making up of trains. Thus there is focused at one point and imposed on one neighborhood a burden that is peculiarly special, perhaps not borne by any other on the division.

(b) The location of the yards was one made at the option and in the discretion of the railway company; no considerations of public convenience, operative where depots are to be located, were imposed. In a case involving a switch yard proper, on which it seems there were no other terminal facilities, such as coal chutes, roundhouse, etc., it was said: "Their location and operation are of no public concern, except as indirectly affecting the transportation problem. In selecting a place for these, the railroad acts as an individual attending to his private

Nuisance—
switch yards—
test of liability.

—exercise of
public functions
—liability.

business, and must be responsible as such for injuries to the property rights of others flowing from such selection and subsequent operation. In other words, in the location and operation of these incidental transportation facilities the railroad company has a free hand, and may not shield itself from responsibility for damage to others behind any rule of public necessity or authorization by law. It is different from freighthouses and yards for receiving and delivering carload shipments. Public necessity, and sometimes statutes, demand that such be located for public convenience." *Matthias v. Minneapolis, St. P. & S. Ste. M. R. Co.* 125 Minn. 224, 51 L.R.A.(N.S.) 1017, 146 N. W. 353, citing and quoting from *Louisville & N. Terminal Co. v. Lellyett*, supra.

(c) In the making up of trains at a station, as well as in traffic

switching, it may be that a nearby owner of property might not be held to be in a position to recover damages. We have no such case to decide. If so, it might be said that he would then receive a reciprocal benefit in the advance in values which attends the location of depots. No such benefit mitigates the disadvantages and inconveniences suffered by plaintiff Fisher, whose premises are damaged without any prospect of his being able to sell same for use in the construction of wholesale houses, warehouses, etc., which usually grow up around freight stations.

The case made by the railway company is a border-line one. We confess that we have reached the indicated conclusion after hesitation; but, for the reasons set forth, we are constrained to direct the entry of a judgment of affirmance.

ANNOTATION.

Operation of railroad as nuisance to property.

I. Operation of road proper, 723.

II. Terminals, yards, and other appurtenances, 729.

I. Operation of road proper.

The universally accepted rule is to the effect that the operation of a lawfully constructed railroad in an ordinarily prudent and careful manner, without negligence or abuse, does not, by reason of the attendant noise, smoke, vibration, and other objectionable features which are necessarily incident thereto and which are common to the public at large, constitute an actionable nuisance, since the doing of that which has been lawfully authorized cannot constitute a nuisance.

United States.—*Baltimore & P. R. Co. v. Fifth Baptist Church* (1883) 108 U. S. 317, 27 L. ed. 739, 2 Sup. Ct. Rep. 719; *Richards v. Washington Terminal Co.* (1914) 233 U. S. 546, 58 L. ed. 1088, L.R.A.1915A, 887, 34 Sup. Ct. Rep. 654; *Chicago G. W. R. Co. v. First M. E. Church* (1900) 50 L.R.A. 488, 42 C. C. A. 178, 102 Fed. 85; *Roman*

Catholic Church v. Pennsylvania R. Co. (1913) L.R.A.1915E, 623, 125 C. C. A. 629, 207 Fed. 897, appeal dismissed in (1915) 237 U. S. 575, 59 L. ed. 1119, 35 Sup. Ct. Rep. 729; *Miller v. Long Island R. Co.* (1880) Fed. Cas. No. 9,580a.

District of Columbia.—*Neitzey v. Baltimore & P. R. Co.* (1886) 5 Mackey, 34; *Academy of the Sacred Heart v. Philadelphia, B. & W. R. Co.* (1911) 36 App. D. C. 372.

Georgia.—*Georgia R. & Bkg. Co. v. Maddox* (1902) 116 Ga. 64, 42 S. E. 315.

Illinois.—*Illinois C. R. Co. v. Grabill* (1869) 50 Ill. 241; *Chicago & E. I. R. Co. v. Loeb* (1884) 118 Ill. 203, 8 N. E. 460, 59 Am. Rep. 341; *Wylie v. Elwood* (1890) 134 Ill. 281, 9 L.R.A. 726, 23 Am. St. Rep. 673, 25 N. E. 570; *Chicago, M. & St. P. R. Co. v. Darke* (1893) 148 Ill. 226, 35 N. E. 750; *Cleveland, C. C. & St. L. R. Co. v. Pattison* (1896) 67 Ill. App. 351; *Kuhn v. Illinois C. R. Co.* (1903) 111 Ill. App. 323.

Indiana.—*Pittsburgh, C. & St. L. R. Co. v. Brown* (1879) 67 Ind. 45, 33 Am.

Rep. 73; Pittsburgh, C. C. & St. L. R. Co. v. Welch (1894) 12 Ind. App. 433, 40 N. E. 650.

Iowa.—Dunsmore v. Central Iowa R. Co. (1887) 72 Iowa, 182, 33 N. W. 456.

Kansas.—Atchison, T. & S. F. R. Co. v. Armstrong (1905) 71 Kan. 366, 1 L.R.A.(N.S.) 113, 114 Am. St. Rep. 474, 80 Pac. 978.

Kentucky.—Lexington & O. R. Co. v. Applegate (1839) 8 Dana, 289, 33 Am. Dec. 497; Louisville & N. R. Co. v. Orr (1891) 91 Ky. 109, 15 S. W. 8.

Louisiana.—Tucker v. Vicksburg, S. & P. R. Co. (1910) 125 La. 689, 51 So. 689.

Michigan.—Grand Rapids & I. R. Co. v. Heisel (1878) 38 Mich. 62, 31 Am. Rep. 306.

Minnesota.—Carroll v. Wisconsin C. R. Co. (1889) 40 Minn. 168, 41 N. W. 661; Matthias v. Minneapolis, St. P. & S. Ste. M. R. Co. (1914) 125 Minn. 224, 51 L.R.A.(N.S.) 1017, 146 N. W. 353.

Missouri.—Randle v. Pacific R. Co. (1877) 65 Mo. 325.

New Jersey.—Pennsylvania R. Co. v. Angel (1886) 41 N. J. Eq. 316, 56 Am. Rep. 1, 7 Atl. 432; Pennsylvania R. Co. v. Thompson (1889) 45 N. J. Eq. 870, 19 Atl. 622; Beseman v. Pennsylvania R. Co. (1888) 50 N. J. L. 235, 13 Atl. 164, affirmed on appeal below in (1890) 52 N. J. L. 221, 20 Atl. 169; Beideman v. Atlantic City R. Co. (1890) — N. J. Eq. —, 19 Atl. 731.

New York.—Hearst v. New York C. & H. R. R. Co. (1915) 215 N. Y. 268, 109 N. E. 490, modifying on other grounds (1914) 163 App. Div. 475, 148 N. Y. Supp. 586, which reversed (1914) 84 Misc. 606, 147 N. Y. Supp. 869; Colgate v. New York C. & H. R. R. Co. (1906) 51 Misc. 503, 100 N. Y. Supp. 650, modified on other grounds in (1907) 122 App. Div. 908, 107 N. Y. Supp. 1123; Willson v. New York C. & H. R. R. Co. (1913) 146 N. Y. Supp. 208; Corcoran v. New York C. R. Co. (1917) 100 Misc. 192, 165 N. Y. Supp. 341; First Baptist Church v. Utica & S. R. Co. (1848) 6 Barb. 313; Hentz v. Long Island R. Co. (1852) 13 Barb. 646; Anderson v. Rochester, L. & N. F. R. Co. (1854) 9 How. Pr. 553. But see to the contrary First Baptist

Church v. Schenectady & T. R. Co. (1848) 5 Barb. 79.

North Carolina.—Thomason v. Seaboard Air Line R. Co. (1906) 142 N. C. 300, 55 S. E. 198; Taylor v. Seaboard Air Line R. Co. (1907) 145 N. C. 400, 122 Am. St. Rep. 455, 59 S. E. 129.

Ohio.—Parrot v. Cincinnati, H. & D. R. Co. (1858) 10 Ohio St. 624; Cincinnati Connecting Belt R. Co. v. Burski (1904) 26 Ohio C. C. 486.

Oklahoma.—Choctaw, O. & G. R. Co. v. Drew (1913) 37 Okla. 396, 44 L.R.A.(N.S.) 38, 130 Pac. 1149.

Pennsylvania.—Bell v. Ohio & P. R. Co. (1855) 25 Pa. 161, 64 Am. Dec. 687; Pennsylvania R. Co. v. Lippincott (1887) 116 Pa. 472, 2 Am. St. Rep. 618, 9 Atl. 871; Pennsylvania R. Co. v. Marchant (1888) 119 Pa. 541, 4 Am. St. Rep. 659, 13 Atl. 690.

South Dakota.—Hyde v. Minnesota, D. & P. R. Co. (1912) 29 S. D. 220, 40 L.R.A.(N.S.) 48, 136 N. W. 92 (dictum).

Tennessee.—Louisville & N. Terminal Co. v. Lellyett (1904) 114 Tenn. 368, 1 L.R.A.(N.S.) 49, 85 S. W. 881.

Texas.—Ft. Worth & D. C. R. Co. v. Beauchamp (1902) 95 Tex. 496, 58 L.R.A. 716, 93 Am. St. Rep. 864, 68 S. W. 502; Passons v. Missouri, K. & T. R. Co. (1911) — Tex. Civ. App. —, 137 S. W. 435, on subsequent appeal in (1913) — Tex. Civ. App. —, 154 S. W. 239.

Utah.—Stockdale v. Rio Grande Western R. Co. (1904) 28 Utah, 201, 77 Pac. 849; Church of Jesus Christ of L. D. S. v. Oregon Short Line R. Co. (1909) 36 Utah, 238, 23 L.R.A.(N.S.) 860, 140 Am. St. Rep. 819, 103 Pac. 242.

Virginia.—Fisher v. Seaboard Air Line R. Co. (1904) 102 Va. 363, 46 S. E. 381, 1 Ann. Cas. 622.

Washington.—Dolan v. Chicago, M. & St. P. R. Co. (1903) 118 Wis. 362, 95 N. W. 385. And see Taylor v. Chicago, M. & St. P. R. Co. (1915) 85 Wash. 592, L.R.A.1915E, 634, 148 Pac. 887.

In Roman Catholic Church v. Pennsylvania R. Co. (1913) L.R.A.1915E, 623, 125 C. C. A. 629, 207 Fed. 897, appeal dismissed in (1915) 237 U. S. 575, 59 L. ed. 1119, 35 Sup. Ct. Rep. 729, it was said that it was "a principle well established by reason and authority

that the consequential, incidental, and unavoidable annoyance or damage resulting to the occupiers of land adjacent to a duly organized railroad from its non-negligent and careful operation does not constitute an actionable nuisance."

Such incidental annoyances as unavoidably follow the ordinary operation of a railroad established pursuant to legislative authority are *damnum absque injuria*, the doctrine being founded on necessity and the doing of a lawful act in a lawful way. *Baltimore & P. R. Co. v. Fifth Baptist Church* (1883) 108 U. S. 317, 27 L. ed. 739, 2 Sup. Ct. Rep. 719; *Richards v. Washington Terminal Co.* (1914) 233 U. S. 546, 58 L. ed. 1088, L.R.A.1915A, 887, 34 Sup. Ct. Rep. 654; *Neitzey v. Baltimore & P. R. Co.* (1886) 5 Mackey (D. C.) 34; *Beseman v. Pennsylvania R. Co.* (1888) 50 N. J. L. 235, 13 Atl. 164, affirmed on opinion below in (1889) 52 N. J. L. 221, 20 Atl. 169; *Cincinnati Connecting Belt R. Co. v. Burski* (1904) 26 Ohio C. C. 486; *Ross v. Cincinnati, L. & N. R. Co.* (1905) 27 Ohio C. C. 135.

And it has been held that the legislature may, when deemed necessary for the public good, and without providing compensation, expressly permit or require that a railroad company in operating its road shall do that which would, on common-law principles and without the authorization, be deemed a nuisance, in consequence of which such an operation under legislative sanction is not a legal nuisance. *Pittsburgh, C. & St. L. R. Co. v. Brown* (1879) 67 Ind. 45, 33 Am. Rep. 73 (holding that no actionable nuisance is created by the blowing of locomotive whistles in accordance with a statute requiring that engines shall, when approaching a highway crossing and are not less than 80 nor more than 100 rods therefrom, continuously blow their whistles until they have fully passed the crossing); *London, B. & S. C. R. Co. v. Truman* (1885) L. R. 11 App. Cas. 45, 55 L. J. Ch. N. S. 354, 54 L. T. N. S. 250, 50 J. P. 388, 84 Week. Rep. 657, 22 Eng. Rul. Cas. 80 (holding that no actionable nuisance was created by the location and operation of

stockyards on property adjoining that of plaintiff); *Bennett v. Grand Trunk R. Co.* (1901) 2 Ont. L. Rep. 425, 1 Can. Ry. Cas. 451 (holding same as next preceding case). And see *Hammersmith & C. R. Co. v. Brand* (1869) L. R. 4 H. L. 171, 21 L. T. N. S. 238, 18 Week. Rep. 12, 1 Eng. Rul. Cas. 623, 7 Eng. Rul. Cas. 380. And in the North Carolina case of *Taylor v. Seaboard Air Line R. Co.* (1907) 145 N. C. 400, 122 Am. St. Rep. 455, 59 S. E. 129, it was said: "It is out of the question in this advanced age, to apply to railways, our great arteries of commerce, the doctrines of the common law in relation to nuisances."

And where a railroad company has acquired the right to use a street as a railroad right of way by continuous user for the prescriptive period, it has been held that an abutting owner cannot object to such user on the ground that it constitutes a public nuisance which especially injures his property. *Kakeldy v. Columbia & P. S. R. Co.* (1905) 37 Wash. 675, 80 Pac. 205.

But the great weight of authority is to the effect that general legislative grants of privileges or powers to railroad companies to construct and operate their roads and such other works and appurtenances as are necessary and expedient for the maintenance and operation of the roads do not authorize them to construct and maintain a nuisance to private property by the location and use of their property in such an unreasonable or heedless way as to materially interfere with the use and enjoyment of private property.

United States.—*Baltimore & P. R. Co. v. Fifth Baptist Church* (1883) 108 U. S. 317, 27 L. ed. 739, 2 Sup. Ct. Rep. 719; *Richards v. Washington Terminal Co.* (1914) 233 U. S. 546, 58 L. ed. 1088, L.R.A.1915A, 887, 34 Sup. Ct. Rep. 654; *Chicago G. W. R. Co. v. First M. E. Church* (1900) 50 L.R.A. 488, 42 C. C. A. 178, 102 Fed. 85.

California.—*Voorheis v. Tidewater Southern R. Co.* (1919) — Cal. App. —, 182 Pac. 797.

District of Columbia.—*Academy of the Sacred Heart v. Philadelphia, B. & W. R. Co.* (1911) 36 App. D. C. 372.

Georgia.—*Georgia R. & Bkg. Co. v. Maddox* (1902) 116 Ga. 64, 42 S. E. 315.

Illinois.—*Chicago, M. & St. P. R. Co. v. Darke* (1893) 148 Ill. 226, 35 N. E. 750.

Minnesota.—*Anderson v. Chicago, M. & St. P. R. Co.* (1902) 85 Minn. 337, 88 N. W. 1001.

New Jersey.—*King v. Morris & E. R. Co.* (1867) 18 N. J. Eq. 397; *Pennsylvania R. Co. v. Angel* (1886) 41 N. J. Eq. 316, 56 Am. Rep. 1, 7 Atl. 432.

New York.—*Cogswell v. New York, N. H. & H. R. Co.* (1886) 103 N. Y. 10, 57 Am. Rep. 701, 8 N. E. 537; *Spring v. Delaware, L. & W. R. Co.* (1895) 88 Hun, 385, 34 N. Y. Supp. 810, affirmed on opinion below in (1898) 157 N. Y. 692, 51 N. E. 1094; *Garvey v. Long Island R. Co.* (1899) 159 N. Y. 323, 70 Am. St. Rep. 550, 54 N. E. 57, 6 Am. Neg. Rep. 338, affirming (1896) 9 App. Div. 254, 41 N. Y. Supp. 397; *Hearst v. New York C. & H. R. R. Co.* (1915) 215 N. Y. 268, 109 N. E. 490; *Corcoran v. New York C. R. Co.* (1917) 100 Misc. 192, 165 N. Y. Supp. 341.

North Carolina.—*Thomason v. Seaboard Air Line R. Co.* (1906) 142 N. C. 300, 55 S. E. 198; *Taylor v. Seaboard Air Line R. Co.* (1907) 145 N. C. 400, 122 Am. St. Rep. 455, 59 S. E. 129.

Oklahoma.—*Choctaw, O. & G. R. Co. v. Drew* (1913) 37 Okla. 396, 44 L.R.A. (N.S.) 38, 130 Pac. 1149.

Texas.—*Rainey v. Red River, T. & S. R. Co.* (1905) 99 Tex. 276, 3 L.R.A. (N.S.) 590, 122 Am. St. Rep. 622, 89 S. W. 768, 90 S. W. 1096, 13 Ann. Cas. 580.

In *Baltimore & P. R. Co. v. Fifth Baptist Church* (1883) 108 U. S. 317, 27 L. ed. 739, 2 Sup. Ct. Rep. 719, *supra*, it was said that the acts that a legislature may authorize, which without such authorization would constitute nuisances, are those which affect the public at large so that an authorization to a railroad company to construct and operate a road does not affect a claim of an individual to damages for special and private injury not experienced by the public at large. And a legislative grant authorizing a railroad company to construct and operate a railroad has no effect to relieve it from liability to answer for a nuisance, unless such nuisance arose as a necessary and natural result of the proper operation of its road.

Cleveland, C. C. & St. L. R. Co. v. Pattison (1896) 67 Ill. App. 351. And in *Richards v. Washington Terminal Co.* (1914) 233 U. S. 546, 58 L. ed. 1088, L.R.A.1915A, 887, 34 Sup. Ct. Rep. 654, it was said that the true rule is that, while the legislature may legalize what otherwise may be a public nuisance, it may not confer immunity from action for a private nuisance of such a character as to amount in effect to a taking of private property for public use.

Consequently, negligence, or carelessness, and want of due care in the operation of the rolling stock of a railroad, may render the road a nuisance with respect to property so situated as to be specially affected thereby, and give rise to a remedy therefor.

United States.—*Roman Catholic Church v. Pennsylvania R. Co.* (1913) L.R.A.1915E, 623, 125 C. C. A. 629, 207 Fed. 897, appeal dismissed in (1915) 237 U. S. 575, 59 L. ed. 1119, 35 Sup. Ct. Rep. 729. But see *Miller v. Long Island R. Co.* (1880) Fed. Cas. No. 9,580a.

California.—*Voorheis v. Tidewater Southern R. Co.* (1919) — Cal. App. —, 182 Pac. 797.

District of Columbia.—*Neitzey v. Baltimore & P. R. Co.* (1886) 5 Mackey, 34.

Illinois.—*Cleveland, C. C. & St. L. R. Co. v. Pattison* (1896) 67 Ill. App. 351.

Indiana.—*Pittsburgh, C. C. & St. L. R. Co. v. Welch* (1894) 12 Ind. App. 433, 40 N. E. 650.

Michigan.—*Grand Rapids & I. R. Co. v. Heisel* (1878) 38 Mich. 62, 31 Am. Rep. 306.

Missouri.—*Randle v. Pacific R. Co.* (1877) 65 Mo. 325.

New Jersey.—*King v. Morris & E. R. Co.* (1867) 18 N. J. Eq. 397; *Beideman v. Atlantic City R. Co.* (1890) — N. J. Eq. —, 19 Atl. 731.

New York.—*Hearst v. New York C. & H. R. R. Co.* (1915) 215 N. Y. 268, 109 N. E. 490; *Colgate v. New York C. & H. R. R. Co.* (1906) 51 Misc. 503, 100 N. Y. Supp. 650, modified on other grounds in (1907) 122 App. Div. 908,

107 N. Y. Supp. 1123; *Willson v. New York C. & H. R. R. Co.* (1913) 146 N. Y. Supp. 208.

North Carolina.—*Thomason v. Seaboard Air Line R. Co.* (1906) 142 N. C. 300, 55 S. E. 198.

Oklahoma.—*Choctaw, O. & G. R. Co. v. Drew* (1913) 37 Okla. 396, 44 L.R.A. (N.S.) 38, 130 Pac. 1149.

South Dakota.—*Hyde v. Minnesota, D. & P. R. Co.* (1912) 29 S. D. 220, 40 L.R.A. (N.S.) 48, 136 N. W. 92 (dictum).

Tennessee.—*Iron Mountain R. Co. v. Bingham* (1889) 87 Tenn. 522, 4 L.R.A. 622, 11 S. W. 705; *Harmon v. Louisville, N. O. & T. R. Co.* (1889) 87 Tenn. 614, 11 S. W. 703.

Texas.—*Ft. Worth & D. C. R. Co. v. Beauchamp* (1902) 95 Tex. 496, 58 L.R.A. 716, 93 Am. St. Rep. 864, 68 S. W. 502; *Passons v. Missouri, K. & T. R. Co.* (1911) — Tex. Civ. App. —, 137 S. W. 435.

Illustrative of this rule, it was held in *Neitzey v. Baltimore & P. R. Co.* (1886) 5 Mackey (D. C.) 34, where a railroad company converted a public street in front of plaintiff's premises into a freight yard by loading and unloading its cars thereon and leaving them there when not in use, and caused continued annoyance by jarring, smoke, noise, and the handling of freight having offensive odors, that the operation of its road in such a manner constituted an actionable private nuisance.

And in *Iron Mountain R. Co. v. Bingham* (1889) 87 Tenn. 522, 4 L.R.A. 622, 11 S. W. 705, it was held that the use of tracks laid in a street in front of plaintiff's premises for ordinary switching purposes, and the unreasonable stopping of trains and the parking of cars, together with unnecessary smoke and noise, constituted an unlawful and improper use of the street, the franchise merely permitting its use for ordinary railroad purposes, amounting to an actionable private nuisance. Again, in *Harmon v. Louisville, N. O. & T. R. Co.* (1889) 87 Tenn. 614, 11 S. W. 703, it was held that all such uses by a railroad company of a street in front of plaintiff's premises in excess of what is necessary for the or-

dinary and proper operation of the road, such as running trains faster than permitted by law, making dangerous switches, parking cars, using it as a switchyard, keeping engines and trains standing unnecessarily long, if amounting to a destruction of plaintiff's rights, constitute actionable private nuisances. And in *Galveston, H. & S. A. R. Co. v. Miller* (1906) — Tex. Civ. App. —, 93 S. W. 177, it was held that the turning of a right of way along a street into a switchyard, to the irreparable damage of the adjoining property, constituted a private nuisance as to such property. And that merely allowing long freight trains to stand a long time on a public street constitutes an unlawful obstruction to the free use of abutting business property and is a nuisance. See *Voorheis v. Tidewater Southern R. Co.* (1919) — Cal. App. —, 182 Pac. 797. And in *Galveston, H. & S. A. R. Co. v. DeGroff* (1909) 102 Tex. 433, 21 L.R.A. (N.S.) 749, 118 S. W. 134, reversing on other grounds (1908) — Tex. Civ. App. —, 110 S. W. 1006, it was assumed that the use by a railroad company of its tracks in a street in front of plaintiff's premises for switching cars in making up and distributing trains, as a part of the work of an adjoining yard, worked a nuisance. And in *Cleveland, C. C. & St. L. R. Co. v. Pattison* (1896) 67 Ill. App. 351, it was held that the standing of engines and stock trains on tracks adjoining plaintiff's premises, to such an extent as to render the same unhealthy and deprive him of the wholesome and comfortable enjoyment thereof, constituted an actionable nuisance. So, in *Pittsburgh, C. C. & St. L. R. Co. v. Welch* (1894) 12 Ind. App. 433, 40 N. E. 650, where cars loaded with malodorous freight were unlawfully or wrongfully suffered to stand on the tracks adjoining plaintiff's hotel premises an unreasonable length of time, it was held that such condition constituted an actionable private nuisance. Again, in *Hearst v. New York C. & H. R. R. Co.* (1915) 215 N. Y. 268, 109 N. E. 490, modifying (1914) 163 App. Div. 475, 148 N. Y. Supp. 586, which reversed (1914) 84 Misc. 606, 147 N. Y. Supp. 869, it was held that

the use of a siding along main tracks near plaintiff's high-class residential property for the standing of long trains of live stock for many hours at a time was such an unreasonable, unauthorized, and unlawful use of such track as to constitute a nuisance, the practice being very detrimental to plaintiff's property because of the foul odors which penetrated the same. So, in *Colgate v. New York C. & H. R. R. Co.* (1906) 51 Misc. 503, 100 N. Y. Supp. 650, modified on other grounds in (1907) 122 App. Div. 908, 107 N. Y. Supp. 1123, where a railroad company so operated its line adjoining plaintiff's property in the residence section of a city as to permit live stock trains to be stalled on such tracks, with the accompanying noise and offensive odors at all hours of the day and night, and also permitted unnecessary whistling and bell ringing to the great interference with the reasonable use of plaintiff's property, it was held that an actionable nuisance was created. And in *Willson v. New York C. & H. R. R. Co.* (1913) 146 N. Y. Supp. 208, it was held that the burning of soft coal and the continued storing of offensive live stock cars on an ordinary siding in the vicinity of a select residential portion of a city, to the material injury of neighboring property, constituted an actionable nuisance, where the burning of the soft coal was unnecessary and the legislature had not expressly authorized the construction and use of such siding for such a purpose.

And in *Grand Rapids & I. R. Co. v. Heisel* (1878) 38 Mich. 62, 31 Am. Rep. 306, it was said that a railroad may become a private nuisance, as by leaving cars standing for an unreasonable time in front of one's premises, unnecessary noises, and running trains at unwarrantable speed.

In *Ft. Worth & D. C. R. Co. v. Beauchamp* (1902) 95 Tex. 496, 58 L.R.A. 716, 93 Am. St. Rep. 864, 68 S. W. 502, it was held that where a railroad company in transporting a car of high explosives unnecessarily and unreasonably delayed it at a point where it exploded, so as to subject plaintiff's neighboring property to danger for a

longer time than would have attended a transportation made with reasonable despatch, such keeping of the car at that place was a nuisance, rendering the company liable for the injury to such property by the explosion.

In *INGMUNDSON v. MIDLAND CONTINENTAL R. Co.* (reported herewith) ante, 714, evidently proceeding upon the theory that excessive pollution of the air by a railroad company to the injury of adjacent property constitutes a private nuisance, it was held that as against a general objection a complaint which alleged that the defendant railroad company caused large quantities of gas and other noxious vapors, as well as thick black smoke, oil, steam, and cinders to be cast in and over the plaintiff's house and premises, and caused great noises and vibrations, stated a cause of action as for a nuisance in the nature of trespass to realty.

In *Passons v. Missouri, K. & T. R. Co.* (1911) — Tex. Civ. App. —, 137 S. W. 435, it was held that the making of unnecessary noise by the blowing of whistles and escaping of steam on defendant's right of way adjoining plaintiff's property, when materially injurious, constitutes a private actionable nuisance.

In *King v. Morris & E. R. Co.* (1867) 18 N. J. Eq. 397, it was held that the use of locomotives which continually threw burning coals upon the property adjoining the right of way constituted an actionable nuisance as to such property.

And the adoption and use of unusual or unnecessary methods in the operation of a railroad proper, with the result that private property is taken or seriously injured, amounts to an actionable private nuisance, the injury not being one shared by the public at large. Thus, in *Richards v. Washington Terminal Co.* (1914) 233 U. S. 546, 58 L. ed. 1088, L.R.A.1915A, 887, 34 Sup. Ct. Rep. 654, where a railroad company installed a fanning system in a tunnel so that gases and smoke were unnecessarily forced upon plaintiff's land to his special and private injury, it was held that such operation constituted an actionable private nuisance.

sanee. And in *Hearst v. New York C. & H. R. R. Co.* (1915) 215 N. Y. 268, 109 N. E. 490, modifying (1914) 163 App. Div. 475, 148 N. Y. Supp. 586, which reversed (1914) 84 Misc. 606, 147 N. Y. Supp. 869, where defendant continually used its two main tracks and two sidings on its right of way adjoining plaintiff's valuable residence property in New York city for the purpose of switching and sorting the cars in incoming trains to be forwarded to different terminal yards, it was held that such practice, where it specially injured plaintiff's property, was so unreasonable, unauthorized, and unlawful as to constitute an actionable private nuisance. So, in *Pennsylvania R. Co. v. Angel* (1886) 41 N. J. Eq. 316, 56 Am. Rep. 1, 7 Atl. 432, where defendant continually used its tracks in front of plaintiff's premises for the purposes of a station and terminal yard, such as distributing cars, making up trains, standing locomotives and stock trains, etc., to the great injury of such premises from the noise, smell, smoke, etc., whereas it only had a right of way at such point, it was held that such unnecessary and unauthorized use of the street constituted a nuisance especially injurious to plaintiff, and therefore actionable. This decision was followed in *Pennsylvania R. Co. v. Thompson* (1889) 45 N. J. Eq. 870, 19 Atl. 622, which involved a similar state of facts. But in connection with the two last cases see *Beideman v. Atlantic City R. Co.* (1890) — N. J. Eq. —, 19 Atl. 731, wherein it was held that the use of defendant's main tracks in front of plaintiff's premises for switching, making and unmaking trains, etc., did not constitute an actionable nuisance in the absence of a showing of abuse or negligent use of defendant's franchise, although plaintiff's premises were seriously injured and made almost uninhabitable. The court distinguished the *Angel Case* upon the ground that the decision therein was upon the theory that the railroad company abused its privileges. But the facts of the cases are so similar that it is hard to recognize any such distinction.

II. Terminals, yards, and other appurtenances.

The general rule that the ordinary and usual operation of a railroad proper does not constitute an actionable nuisance has been held to apply under similar circumstances to the location, maintenance, and operation of terminal yards, engine houses, repair shops, switches, sidetracks, stock pens and yards, coaling stations, watering places, and in fact all works which are essential to the proper operation of the road.

Georgia.—*Georgia R. & Bkg. Co. v. Maddox* (1902) 116 Ga. 64, 42 S. E. 315.

Illinois.—*Illinois C. R. Co. v. Grabill* (1869) 50 Ill. 241.

Louisiana.—*Tucker v. Vicksburg, S. & P. R. Co.* (1910) 125 La. 689, 51 So. 689.

Maryland.—*Davis v. Baltimore & O. R. Co.* (1905) 102 Md. 371, 62 Atl. 572; *Northern C. R. Co. v. Oldenburg & Kelley* (1914) 122 Md. 236, 89 Atl. 601.

New Jersey.—*Ridge v. Pennsylvania R. Co.* (1899) 58 N. J. Eq. 172, 43 Atl. 275.

New York.—*Friedman v. New York & H. R. Co.* (1903) 89 App. Div. 38, 85 N. Y. Supp. 404, affirmed on opinion below in (1905) 180 N. Y. 550, 73 N. E. 1123.

North Carolina.—*Thomason v. Seaboard Air Line R. Co.* (1906) 142 N. C. 300, 55 S. E. 198; *Taylor v. Seaboard Air Line R. Co.* (1907) 145 N. C. 400, 122 Am. St. Rep. 455, 59 S. E. 129.

Ohio.—*Ross v. Cincinnati, L. & N. R. Co.* (1905) 27 Ohio C. C. 135.

Oklahoma.—*Choctaw, O. & G. R. Co. v. Drew* (1913) 37 Okla. 396, 44 L.R.A. (N.S.) 38, 130 Pac. 1149.

Wisconsin.—*Dolan v. Chicago, M. & St. P. R. Co.* (1903) 118 Wis. 362, 94 N. W. 335.

England.—*London, B. & S. C. R. Co. v. Truman* (1885) L. R. 11 App. Cas. 45, 55 L. J. Ch. N. S. 354, 54 L. T. N. S. 250, 50 J. P. 388, 34 Week. Rep. 657, 22 Eng. Rul. Cas. 80.

Canada.—*Bennett v. Grand Trunk R. Co.* (1901) 2 Ont. L. Rep. 425, 1 Can. Ry. Cas. 451.

For instance, in *Ross v. Cincinnati, L. & N. R. Co.* (Ohio) *supra*, in speaking of a railroad terminal, the court

said: "In the absence of all charges of negligence, or want of due diligence in the selection of a location, or bad faith, we incline to the view that these terminals must be put on the same footing as the main tracks of a railroad, and that the nuisance and annoyance they may inflict must be said to be *damnum absque injuria*." And in *Dolan v. Chicago, M. & St. P. R. Co.* (1903) 118 Wis. 362, 95 N. W. 385, where stock pens and yards were complained of as a nuisance to neighboring property, the court argued as follows: "If a railway company exercises reasonable and proper diligence and care in the location of its yards and in its management, it has performed its whole duty. Impossibilities cannot be required. Duties cannot be imposed, and punishments inflicted simply because the duties have been performed. If injury results to others, it must in such case be *damnum absque injuria*. The same rule must apply which applies to noise and smoke and steam resulting from the operation of the railroad. If these annoyances result simply from the necessary and proper operation of the road, they must be borne. If the company use the best and most improved devices to prevent injury to others, it is protected by its franchises. If it is negligent in this regard, it must respond in damages, if a nuisance is thereby created. 2 Wood, Nuisances, 3d ed. § 755. So, in the case of stockyards, the railway company must use all reasonable diligence in the location of its yards to avoid injury to others, and must manage them with approved methods, using all reasonable skill to prevent their becoming a nuisance. It cannot unnecessarily or unreasonably locate its yards in close proximity to dwellings or business houses, to their injury, without incurring liability. It must, doubtless, in order to perform its duty, place the yards in a reasonably practicable and convenient location in the vicinity of its station, for the reception and shipping of cattle, but it must at the same time place them where they will do the least possible injury to others. If these requirements be fulfilled, and if the yards be

operated without negligence, and with that skill and diligence to avoid noise and noxious smells therefrom which the importance of the duty demands, there can be no liability, even though injury may result to others. Such injury, like many others, is simply one of the penalties we have to pay for the conveniences of modern methods of transportation." In *Georgia R. & Bkg. Co. v. Maddox* (1902) 116 Ga. 64, 42 S. E. 315, it was said that "injuries and inconveniences to persons residing near such works, from noises of locomotives, rumbling of cars, vibrations produced thereby, and smoke, cinders, and soot, and the like, which result from the ordinary and necessary, and therefore proper, use and conduct of such works, are not nuisances, but are the necessary concomitants of the franchise granted."

And it has been held that the noises attendant upon the careful and proper operation of a properly located railroad switch yard without any physical interference with neighboring property, and which affect alike all within hearing distance thereof, cannot be regarded as a public nuisance to a religious society having a church upon such property and whose services are disturbed and interrupted by the noises. *Church of Jesus Christ of L. D. S. v. Oregon Short Line R. Co.* (1909) 36 Utah, 238, 23 L.R.A. (N.S.) 860, 140 Am. St. Rep. 819, 103 Pac. 243. And see *Jordan v. Utah R. Co.* (1916) 47 Utah, 519, 156 Pac. 939.

And the use of temporary as distinguished from permanent yards and roundhouses, erected merely to enable the company to make changes and improvements in its system as required by statute, will not, in the absence of any negligent operation or abuse, be enjoined as a nuisance at the suit of owners of neighboring property, injured by the smoke, gases, and noises emanating therefrom. *Herrlich v. New York, C. & H. R. R. Co.* (1910) 70 Misc. 115, 126 N. Y. Supp. 311.

And where the railroad yards and roundhouses are located by prescriptive right, the injury to near-by property resulting from their non-neg-

ligent use has been said to be *damnum absque injuria*. *Ibid*.

However, in some jurisdictions it has been held that an exception to the general rule should be made in the case of such incidental but necessary facilities in railroading as shops, roundhouses, and switch yards, other than those used for receiving and delivering carload shipments which must be located for public convenience, the selection of the sites for which rests in the discretion of the railroad company and which, because they do not serve the public directly, are of no particular public concern except as indirectly affecting the transportation problem, the theory being that in selecting a place for such appurtenances the railroad company acts as an individual attending to his private business, and must be responsible for injuries to the property rights of others flowing from such selection and subsequent operation, or, in other words, that in locating such incidental transportation facilities the railroad company has a free hand, and cannot shield itself from responsibility for damage resulting from the private nuisance behind any rule of public necessity or authorization by law. The following cases adhering to this rule hold that railroad shops, roundhouses, switch yards, etc., which do not serve the public directly and are seriously injurious to near-by property, constitute private nuisances as to such adjacent property, although properly located and operated, and irrespective of whether the use of the particular site selected is authorized by the legislature or not, the railroad company having acted at its peril not to create a nuisance: *Matthias v. Minneapolis, St. P. & St. Ste. M. R. Co.* (1914) 125 Minn. 224, 51 L.R.A.(N.S.) 1017, 146 N. W. 353 (holding such to be the rule with respect to the switch yard in suit, although the location was conceded proper in the sense that none other could have been found where less people would have been affected by its operation); *Cogswell v. New York, N. H. & H. R. Co.* (1886) 103 N. Y. 10, 57 Am. Rep. 701, 8 N. E. 537 (holding same as preceding case as to an engine

house and coal bins); *Corcoran v. New York C. R. Co.* (1917) 100 Misc. 192, 165 N. Y. Supp. 341 (holding that "the rule which grants immunity to a railroad corporation from liability for injuries caused by the conduct of its road applies only to the ordinary operation of the railroad itself, and not to the maintenance of roundhouses, turntables, power houses, etc., at particular places," and that "as to such structures and their use, if injurious to adjoining owners, a railroad corporation possesses no greater rights and is subject to the same liability as a private corporation, and may not locate them so as to injure the property of others, except by express or implied legislative sanction which must be imperative, and not permissible"); *Louisville & N. Terminal Co. v. Jacobs* (1903) 109 Tenn. 727, 61 L.R.A. 188, 72 S. W. 954 (holding that a railroad company in locating a roundhouse does so in its private capacity, and acts at its peril as to any injury necessarily resulting to adjacent property from even a reasonable use); *Louisville & N. Terminal Co. v. Lellyett* (1904) 114 Tenn. 368, 1 L.R.A.(N.S.) 49, 85 S. W. 881 (holding that even the non-negligent operation of a roundhouse, sand house, coal chutes and bins, and the tracks used in operating the same, when injurious to neighboring property, constitutes a nuisance, but that the rule does not extend to switch tracks necessarily operated at stations for switching so as to permit the entry and exit of trains); *SOUTHERN R. Co. v. FISHER* (reported herewith) ante, 717 (holding that the true test of the liability of a railroad company for a nuisance in maintaining switch tracks and terminal yards is whether the company was acting in its private capacity as distinguished from its public function when operating such yards, and that it is so acting when it locates a terminal yard not used in connection with a depot or station, wherefore it is liable to abutting owners for the maintenance of a nuisance in the necessary and careful operation of such yard); *Rainey v. Red River, T. & S. R. Co.* (1905) 99 Tex. 276, 3 L.R.A.(N.S.) 950, 122 Am. St. Rep. 622,

89 S. W. 768, 90 S. W. 1096, 18 Ann. Cas. 580, reversing on other grounds (1904) — Tex. Civ. App. —, 80 S. W. 95 (holding that the location and operation of a railroad terminal, needlessly located so near to private property as to seriously damage the same, constituted an actionable nuisance at least where absolute power to select the site had not been conferred on the company); Missouri, K. & T. R. Co. v. Anderson (1904) 36 Tex. Civ. App. 121, 81 S. W. 781 (holding that the unauthorized use of a right of way for a switch yard, to the material injury of adjoining property, constituted a private nuisance); Texas & P. R. Co. v. Taylor (1918) — Tex. Civ. App. —, 200 S. W. 1117 (holding that it was no defense that it was more convenient to construct and operate the roundhouse at the location complained of than at another, or that the railroad company was not negligent in constructing or operating it); Texas & P. R. Co. v. Reeves (1918) — Tex. Civ. App. —, 202 S. W. 814 (holding same as next preceding case); Terrell v. Chesapeake & O. R. Co. (1909) 110 Va. 340, 32 L.R.A. (N.S.) 371, 66 S. E. 55 (holding that a railroad company, in selecting a place for firing, cleaning, and repairing its engines, acted in its private capacity so that when the use of the site selected was specially detrimental to adjacent property, such use was a nuisance, even in the absence of any negligence in the performance of the work done); Chesapeake & O. R. Co. v. Greaver (1909) 110 Va. 350, 66 S. E. 59 (holding same as next preceding case); Southern R. Co. v. McMenamin (1912) 113 Va. 121, 73 S. E. 980 (holding that a railroad company in locating and operating a power station, and coal chutes for coaling its engines, acts in a private capacity so as to render it liable for a nuisance to adjoining property, even in the absence of negligent operation); KILLAM v. NORFOLK & W. R. Co. (reported herewith) ante, 701 (holding that the rule applies to terminal yards for the handling of coal, which are operated in a private capacity and cause a nuisance to adjoining property). And see also Missouri, K. &

T. R. Co. v. Perry (1907) 46 Tex. Civ. App. 374, 102 S. W. 1169, wherein the court applied the rule announced in the Rainey Case (Tex.) *supra*, to a turntable and water tank on its right of way adjoining plaintiff's premises. Of course, such rule does not apply where the location and operation of the necessary appurtenances were reasonable and for the public good, such fact taking the case out of the exception, and bringing it within the general rule. St. Louis, S. F. & T. R. Co. v. Shaw (1906) 99 Tex. 559, 6 L.R.A. (N.S.) 245, 122 Am. St. Rep. 663, 92 S. W. 30, so holding with respect to a freight depot and necessary sidings and spurs. And in London, B. & S. C. R. Co. v. Truman (1885) L. R. 11 App. Cas. 45, 55 L. J. Ch. N. S. 354, 54 L. T. N. S. 250, 50 J. P. 388, 34 Week. Rep. 657, 22 Eng. Rul. Cas. 80, where a railroad company was authorized to locate stockyards "in such places as should be deemed eligible," it was expressly held that the location and non-negligent operation of a stockyard on property adjoining that of plaintiff did not constitute an actionable nuisance, although, but for such authorization, the maintenance of the yards in controversy would have been a nuisance; and this notwithstanding a site could have been selected where plaintiff's property would not have been injured, the court having been of the opinion that the company, under the facts, was not bound to consult the wishes and convenience of third persons. This case was followed in Bennett v. Grand Trunk R. Co. (1901) 2 Ont. L. Rep. 425, 1 Can. Ry. Cas. 451, which involved similar facts.

And it has been held that the construction and operation of a switch or spur track over private property, in such close proximity to adjoining residence property as seriously to damage the same by vibration, smoke, soot, etc., is a nuisance under Utah Rev. Stat. 1898, § 3506, which provides that anything obstructing the free use of property so as to interfere with its comfortable enjoyment is a nuisance entitling an injured property owner to an injunction as well as damages.

And under either the general rule

or the exception thereto it follows that negligence in the improper selection of site, or the improper maintaining and operation of structures and appurtenances incidental to the operation of the road, may render a particular terminal yard, shop, or other appurtenance a nuisance as to property injuriously affected thereby.

United States.—*Baltimore & P. R. Co. v. Fifth Baptist Church* (1883) 108 U. S. 317, 27 L. ed. 739, 2 Sup. Ct. Rep. 719; *Chicago G. W. R. Co. v. First M. E. Church* (1900) 50 L.R.A. 488, 42 C. C. A. 178, 102 Fed. 85.

Georgia.—*Georgia R. & Bkg. Co. v. Maddox* (1902) 116 Ga. 64, 42 S. E. 315.

Illinois.—*Illinois C. R. Co. v. Grabill* (1869) 50 Ill. 241; *Wylie v. Elwood* (1890) 134 Ill. 281, 9 L.R.A. 726, 23 Am. St. Rep. 673, 25 N. E. 570; *Kuhn v. Illinois C. R. Co.* (1903) 111 Ill. App. 323.

Indiana.—*Ohio & M. R. Co. v. Simon* (1872) 40 Ind. 278.

Iowa.—*Shively v. Cedar Rapids, I. F. & N. W. R. Co.* (1887) 74 Iowa, 169, 7 Am. St. Rep. 471, 37 N. W. 133.

Louisiana.—*Tucker v. Vicksburg, S. & P. R. Co.* (1910) 125 La. 689, 51 So. 689.

Minnesota.—*Anderson v. Chicago, M. & St. P. R. Co.* (1902) 85 Minn. 337, 88 N. W. 1001.

Missouri.—*Bielman v. Chicago, St. P. & K. C. R. Co.* (1892) 50 Mo. App. 151.

New Jersey.—*Ridge v. Pennsylvania R. Co.* (1899) 58 N. J. Eq. 172, 43 Atl. 275.

New York.—*Spring v. Delaware, L. & W. R. Co.* (1895) 88 Hun, 385, 34 N. Y. Supp. 810, affirmed on opinion below in (1898) 157 N. Y. 692, 51 N. E. 1094; *Garvey v. Long Island R. Co.* (1899) 159 N. Y. 323, 70 Am. St. Rep. 550, 54 N. E. 57, 6 Am. Neg. Rep. 338, affirming (1896) 9 App. Div. 254, 41 N. Y. Supp. 397.

North Carolina.—*Thomason v. Seaboard Air Line R. Co.* (1906) 142 N. C. 300, 55 S. E. 198; *Taylor v. Seaboard Air Line R. Co.* (1907) 145 N. C. 400, 122 Am. St. Rep. 455, 59 S. E. 129; *Staton v. Atlantic City Coast Line R. Co.* (1910) 153 N. C. 432, 69 S. E. 413.

Oklahoma.—*Choctaw, O. & G. R. Co. v. Drew* (1913) 37 Okla. 396, 44 L.R.A. (N.S.) 38, 130 Pac. 1149.

Pennsylvania.—*Sproson v. Philadelphia & R. R. Co.* (1913) 54 Pa. Super. Ct. 30.

Texas.—*Missouri, K. & T. R. Co. v. Passons* (1913) — Tex. Civ. App. —, 154 S. W. 239.

England.—*Smith v. Midland R. Co.* (1877) 37 L. T. N. S. 224, 25 Week. Rep. 861.

In such a case it has been said that the maxim, "Use your own property so as not to injure another," is applicable. *Illinois C. R. Co. v. Grabill* (1869) 50 Ill. 241. It is as much the duty of a railroad company as of an individual so to use its property as not to injure others. *Wylie v. Elwood* (1890) 134 Ill. 281, 9 L.R.A. 726, 23 Am. St. Rep. 673, 25 N. E. 570.

For instance, some courts, proceeding upon the theory that the location of yards, terminals, shops, etc., is a matter which admits of a wide latitude in choice of sites, have held that railroad companies, in the absence of express authorization, cannot place and operate them wherever they think proper, without reference to the property and rights of others. See generally to this effect the following cases:

United States.—*Baltimore & P. R. Co. v. Fifth Baptist Church* (1883) 108 U. S. 317, 27 L. ed. 739, 2 Sup. Ct. Rep. 719; *Chicago G. W. R. Co. v. First M. E. Church* (1900) 50 L.R.A. 488, 42 C. C. A. 178, 102 Fed. 85.

Illinois.—*Wylie v. Elwood* (1890) 134 Ill. 281, 9 L.R.A. 726, 23 Am. St. Rep. 673, 25 N. E. 570.

Minnesota.—*Anderson v. Chicago, M. & St. P. R. Co.* (1902) 85 Minn. 337, 88 N. W. 1001.

Missouri.—*Bielman v. Chicago, St. P. & K. C. R. Co.* (1892) 50 Mo. App. 151.

New Jersey.—*Pennsylvania R. Co. v. Angel* (1886) 41 N. J. Eq. 316, 56 Am. Rep. 1, 7 Atl. 432; *Pennsylvania R. Co. v. Thompson* (1889) 45 N. J. Eq. 870, 19 Atl. 622.

New York.—*Spring v. Delaware, L. & W. R. Co.* (1895) 88 Hun, 385, 34 N. Y. Supp. 810, affirmed on opinion below in (1898) 157 N. Y. 692, 51 N. E. 1094;

Garvey v. Long Island R. Co. (1899) 159 N. Y. 323, 70 Am. St. Rep. 550, 54 N. E. 57, 6 Am. Neg. Rep. 338, affirming (1896) 9 App. Div. 254, 41 N. Y. Supp. 397.

North Carolina.—Thomason v. Seaboard Air Line R. Co. (1906) 142 N. C. 300, 55 S. E. 198.

Oklahoma.—Choctaw, O. & G. R. Co. v. Drew (1913) 37 Okla. 396, 44 L.R.A. (N.S.) 38, 130 Pac. 1149.

In *Wylie v. Elwood* (1890) 134 Ill. 281, 9 L.R.A. 726, 23 Am. St. Rep. 673, 25 N. E. 570, where an immense coal shed operated by heavy machinery was located in the heart of a city in a locality thickly settled, it was held that the same constituted an actionable nuisance as to those living on adjoining property, where the operation of the shed destroyed their comfort and injured their health, the court saying that "the selection of a locality where damages are inflicted in preference to one where damages will not be inflicted cannot be said to be necessary to the ordinary and prudent operation of the road. . . . This structure, though not a nuisance per se, became such by reason of the particular locality in which it was situated." So, in *Spring v. Delaware, L. & W. R. Co.* (1895) 88 Hun, 385, 34 N. Y. Supp. 810, affirmed on opinion below in (1898) 157 N. Y. 692, 51 N. E. 1094, where a railroad company erected and operated very large coal trestles, bins, or pockets within 57 feet of plaintiff's residence premises, when it could have selected another site not quite as convenient, it was held that such erection and the use thereof constituted a private nuisance, at least in the absence of express statutory authority so to locate and operate it. And in *Daniel v. Ft. Worth & R. G. R. Co.* (1903) 96 Tex. 327, 72 S. W. 578, it seems to have been assumed that a large coaling hoist and platform, the maintenance of which injured adjoining property, constituted an actionable nuisance as to such property. In *Baltimore & P. R. Co. v. Fifth Baptist Church* (1883) 108 U. S. 317, 27 L. ed. 739, 2 Sup. Ct. Rep. 719, where a railroad company located its engine house and repair shop so close to church property that the noise,

smoke, etc., rendered it almost unendurable as a place of worship, it was held that the engine house and shop constituted an actionable nuisance, since they could have been located elsewhere. And in *Choctaw, O. & G. R. Co. v. Drew* (1913) 37 Okla. 396, 44 L.R.A. (N.S.) 38, 130 Pac. 1149, where the defendant railroad company located and operated a roundhouse, switches, turntable, and cinder pit so near the plaintiff's residence as to kill vegetation and render the place unfit for habitation, it was held that a private actionable nuisance was thereby created, it appearing that such appurtenances might have been constructed at another suitable location where injuries of the nature inflicted upon plaintiff would not have been inflicted upon anyone's property. In *Chicago G. W. R. Co. v. First M. E. Church* (1900) 50 L.R.A. 488, 42 C. C. A. 178, 102 Fed. 85, where a railroad company erected a station and water hydrant at which practically all trains stopped, so close to a church as to envelop it in smoke and fill it with offensive odors, etc., it was held that such appurtenances constituted a private nuisance, for which the law would afford redress. In *Bielman v. Chicago, St. P. & K. C. R. Co.* (1892) 50 Mo. App. 151, it was held that the location of stockyards and pens within 25 feet of plaintiff's residence, and the use of the same to such an extent as to render the premises almost totally unfit for use as a dwelling, constituted a most damaging nuisance, although the yards and pens were managed with ordinary care and kept about as well as other well-conducted establishments of the kind. In *Thomason v. Seaboard Air Line R. Co.* (1906) 142 N. C. 300, 55 S. E. 198, where the railroad company erected on a lot adjoining plaintiff's residence a coal chute and trestle pointed directly towards his house, and in such close proximity as to constantly cause fear of injury to both property and person by reason of the negligent and careless management of the cars and locomotives using the trestle, it was held that an actionable private nuisance was established. In *Sproson v. Philadelphia &*

R. R. Co. (1913) 54 Pa. Super. Ct. 30, it was held that an actionable nuisance as to plaintiff's property was shown where it appeared that defendant maintained and operated an open railroad yard on adjoining property in such a way that noxious gases, etc., rendered plaintiff's dwelling almost untenable, and that it was entirely practicable to have avoided such trouble by the erection of a shelter shed, ventilating flues, and electric fans. But the mere fact that switch yards, etc., are placed near houses occupied as residences, does not necessarily make such appurtenances a nuisance. *Georgia R. & Bkg. Co. v. Maddox* (1902) 116 Ga. 64, 42 S. E. 315 (holding that this may be true, even though the houses were built before the establishment of the terminal yard in question); *Ridge v. Pennsylvania R. Co.* (1899) 58 N. J. Eq. 172, 43 Atl. 275. And in *Excelsior Products Mfg. Co. v. Kansas City Southern R. Co.* (1914) 263 Mo. 142, 172 S. W. 359, Ann. Cas. 1917B, 1047, it was held that the placing by a railroad company of "bunk" cars, used as living quarters for its laborers, upon a switch track along its right of way and adjacent to plaintiff's property, upon which was a large quantity of corded wood, did not in itself, and because of the fact that the ordinary course of living included the washing of clothes and the building of fires, create a nuisance so as to render the company liable for loss caused by fire kindled upon the right of way by the laborers to heat water to wash their clothes.

And the unnecessary and unusual or improper use of terminal yards, etc., to the extreme detriment of adjoining property, has also been held to constitute a private nuisance.

Thus, in *Georgia R. & Bkg. Co. v. Maddox* (Ga.) 42 S. E. 315, *supra*, where the defendant railroad company unnecessarily, and merely for its own convenience, operated a terminal yard on Sundays to such an extent that the noise and smoke materially interfered with the holding of religious services in near-by churches, it was held that such unnecessary operation of the

yard constituted a private nuisance which could be enjoined.

And in *Staton v. Atlantic Coast Line R. Co.* (1910) 153 N. C. 432, 69 S. E. 413, where the railroad company used a spur track adjoining plaintiff's dwelling, built to an ice plant and not intended for general railway purposes, and not being at a freight depot, for the purpose of loading and unloading cars and general switch purposes at all times of the day and night, and to the great disturbance of plaintiff and injury to his property, it was held that such unauthorized use of the spur constituted an actionable nuisance.

In *Illinois C. R. Co. v. Grabill* (1869) 50 Ill. 241, where the railroad company so maintained and conducted a stock pen located near plaintiff's property as to generate noxious and unwholesome gases to the extent of depriving plaintiff of the comfortable use and enjoyment of his property, it was held that a private nuisance was created. To the same effect are *Shively v. Cedar Rapids, I. F. & N. W. R. Co.* (1887) 74 Iowa, 169, 7 Am. St. Rep. 471, 37 N. W. 133, and *Anderson v. Chicago, M. & St. P. R. Co.* (1902) 85 Minn. 337, 88 N. W. 1001. And upon similar facts a like conclusion was reached in *Ohio & M. R. Co. v. Simon* (1872) 40 Ind. 278.

In *Kuhn v. Illinois C. R. Co.* (1903) 111 Ill. App. 323, where defendant negligently allowed the smokestacks on its roundhouse to get so low that the smoke and gases caused material damage to plaintiff's property, it was held that the unlawful use of the defendant's property constituted an actionable private nuisance. And to the same effect is *Tucker v. Vicksburg, S. & P. R. Co.* (1910) 125 La. 689, 51 So. 689. So in *Smith v. Midland R. Co.* (1877) 37 L. T. N. S. (Eng.) 224, 25 Week. Rep. 861, where a railway company used a siding and shed for cleaning engines in a careless and negligent manner, to the injury of plaintiff's adjoining residence property, it was held that such use was a private nuisance, which should be abated.

In *Garvey v. Long Island R. Co.* (1899) 159 N. Y. 323, 70 Am. St. Rep.

550, 54 N. E. 57, 6 Am. Neg. Rep. 338, affirming (1896) 9 App. Div. 254, 41 N. Y. Supp. 397, the continued operation by a railroad company in a terminal yard, of its turntables, in such a manner as unnecessarily to cause

vibration in plaintiff's dwelling on adjoining premises to its great damage, together with the casting thereon of much smoke and accompanied by harassing noises, was held to constitute a private nuisance. G. J. C.

CHARLES L. CLUNE, Respt.,

v.

SCHOOL DISTRICT NO. 3 of the Town of Buchanan, Outagamie County, Appt.

Wisconsin Supreme Court—January 5, 1918.

(166 Wis. 452, 166 N. W. 11.)

School — suspension of — effect.

1. A school district cannot avoid liability for the contract wages of a teacher by suspending the school.

[See note on this question beginning on page 742.]

— contract hiring teacher — validity.

2. A contract by school trustees for the hiring of a teacher, made at a meeting when all were present and signed by all of them, is valid although not as formal as it might have been.

[See 24 R. C. L. 615.]

— collateral attack on certificate.

3. The validity of a teacher's certificate cannot be attacked in an action by him to recover his salary, if the statute places authority to nullify certificates in the county and state superintendents of schools.

— inability to perform contract — deduction from salary.

4. No deduction can be made from

the salary of a school-teacher because of destruction of the schoolhouse by fire, which prevents him from performing his duties as teacher, unless such deduction is provided for in the contract.

[See 24 R. C. L. 619.]

— duty to mitigate damages.

5. Failure of a school-teacher to obtain other employment upon destruction of the schoolhouse by fire does not relieve the district from liability for his contract wages, if he was informed that the directors intended to rent space for a school, which would require him to hold himself in readiness to perform his contract, and his efforts to secure other employment failed.

[See 8 R. C. L. 442.]

APPEAL by defendant from a judgment of the Municipal Court for Outagamie County (Spencer, J.) in favor of plaintiff in an action brought to recover an amount alleged to be due for services rendered in teaching in the defendant district. *Affirmed.*

Statement by Kerwin, J.:

This action was brought to recover for services in teaching school in the defendant's district for the period of nine months commencing on the 6th day of September, 1915, at \$45 per month. The complaint alleged that the plaintiff was a duly qualified school-teacher, and held a certificate authorizing him to teach

in the public schools in the county of Outagamie, Wisconsin. The defendant denied the allegation that the plaintiff was duly qualified, and alleged, among other things, fraud and collusion in procuring his certificate, and set up the specific acts that constitute fraud and collusion.

On motion the allegations in the answer setting up fraud and collu-

sion were stricken out. The case was tried by the court and the following findings made:

"1. That the plaintiff held a second-grade teacher's certificate duly issued to him on the 31st day of August, A. D. 1914, by the county superintendent of schools in and for Outagamie county, Wisconsin, authorizing the plaintiff to teach in Outagamie county for a term of three years from the date thereof, which certificate was not annulled and was in full force and effect, and that the plaintiff was in all respects duly qualified to teach the defendant's school during the school year 1915 and 1916.

"2. That on the 5th day of June, A. D. 1915, the school board of the defendant school district, at a meeting duly held at which all members were present, unanimously voted to hire the plaintiff, and entered into a contract with the plaintiff to teach defendant's school in said district for the term of nine months, commencing on the 6th day of September, A. D. 1915, for which the defendant district agreed to pay to the plaintiff the sum of forty-five (\$45) dollars per month, and the said contract was reduced to writing and signed by all the members of the school board of defendant district and by plaintiff, and a copy of plaintiff's certificate to teach, together with said contract, was filed with the clerk of the defendant district as the statutes provide; and there was also signed by the school board of defendant district and plaintiff, exhibit 'B,' and delivered to plaintiff, bearing date May 29, 1915, but was in fact signed by the school board of the defendant and plaintiff on the 5th day of June, A. D. 1915.

"3. That the electors of defendant school district, at a regular meeting, determined to have nine months' school, beginning the first Monday of September, A. D. 1915.

"4. That the plaintiff was at all times ready and willing to teach the school of the defendant district, and was ready and willing to comply with all the conditions of his said

contract in every respect, and this was made known to defendant.

"5. That after the making of said contract and before the commencement of said term, the schoolhouse of said defendant district was totally destroyed by fire.

"6. That on the 14th day of August, A. D. 1915, the school board of said defendant district held a regular meeting in conjunction with a building committee of defendant school district, at which meeting it was decided to let a contract for building a new schoolhouse for said district to the Mielke Construction Company for the sum of twenty-two hundred sixty-five (\$2,265) dollars.

"7. That the schoolhouse contracted to be built was not constructed, and while the plaintiff was informed by members of the school board of the defendant district at different times that it would rent a room or place for holding school, the defendant never furnished a schoolhouse or room of any kind for plaintiff to teach school in, and prevented the plaintiff from performing the conditions of his said contract, all without any fault or neglect on plaintiff's part.

"8. That the defendant, without just cause or legal right for so doing, breached its contract with plaintiff.

"9. That the plaintiff made due demand of defendant for the amounts due him according to the terms of said contract after the same became due, and before the commencement of this action, but said demand was refused.

"10. That plaintiff did not in any way, either expressly or impliedly, consent to a termination or alteration of his said contract, and held himself in readiness and was willing to teach defendant's school and perform as provided in and by the terms of said contract, from which employment he was never discharged, and that during said term he earned no wages in other employment.

"11. That nothing has been paid under said contract by the defend-

ant to the plaintiff; that the plaintiff has been damaged in the sum of four hundred five (\$405) dollars; that the interest thereon from commencement of this action amounts to \$8.08."

And found as conclusions of law:

"1. That the plaintiff was in all respects duly qualified and authorized to teach defendant's school during the school year of 1915 and 1916.

"2. That said contract entered into by and between the plaintiff and the defendant was in all respects legal and valid, and was breached by the defendant.

"3. That the plaintiff is entitled to judgment against the defendant in the sum of four hundred five (\$405) dollars damages, and eight and 8-100 (\$8.08) dollars interest, together with the costs and disbursements of this action."

Judgment was entered accordingly in favor of the plaintiff and against defendant, from which this appeal was taken.

Mr. L. P. Fox, for appellant:

Unless the person making a contract for the teaching of school in the district has a legal certificate, and if the school board makes a contract with any other person than one who is legally qualified, such contract is not valid.

35 Cyc. 1070, IV.; *Goose River Bank v. Willow Lake School Twp.* 1 N. D. 26, 26 Am. St. Rep. 605, 44 N. W. 1002; *Wells v. People*, 71 Ill. 532; *School Directors v. Newman*, 47 Ill. App. 364; *School Directors v. Jennings*, 10 Ill. App. 643; *McCloskey v. School Dist.* 134 Mich. 235, 96 N. W. 18; *Smith v. School Dist.* 69 Mich. 589, 37 N. W. 567.

Defendant was entitled, under the pleadings, to introduce evidence before the trial court to show the invalidity of the certificate and the fraud and collusion practised in the issuing of the same.

Walker v. Goldsmith, 14 Or. 125, 12 Pac. 553; *Earle v. Earle*, 91 Ind. 27; *Thompson v. McCorkle*, 136 Ind. 484, 43 Am. St. Rep. 334, 34 N. E. 813, 36 N. E. 211; 35 Cyc. 1067; *Morrow v. Ostrander*, 13 Hun, 219; *Stone v. Fritts*, 169 Ind. 361, 15 L.R.A.(N.S.) 1147, 82 N. E. 792, 14 Ann. Cas. 295;

Brown v. Owen, 75 Miss. 319, 23 So. 35.

A contract which was never authorized by any vote or at any meeting is void, although signed by all the members of the board.

Manthey v. School Dist. 106 Wis. 340, 82 N. W. 132; *McNulty v. School Directors*, 102 Wis. 261, 78 N. W. 439; *School Dist. v. Baier*, 98 Wis. 22, 73 N. W. 448; *State Bank v. Kienberger*, 140 Wis. 517, 122 N. W. 1132; *Caxton Co. v. School Dist.* 120 Wis. 374, 98 N. W. 231.

The defendant school district is not liable to plaintiff for his wages, when the schoolhouse, where he was to teach, was totally destroyed by fire in June or July of the year 1915, and before the 6th of September, 1915, all of which plaintiff knew, being a resident and voter of the school district.

Hall v. School Dist. 24 Mo. App. 213.

A school district meeting, acting within the powers granted it by law, can take action that will, in effect, abrogate a contract previously entered into by the school board.

Webster v. School Dist. 16 Wis. 316; *Hemingway v. Joint School Dist.* 118 Wis. 294, 95 N. W. 116; *Davis v. Public Schools*, 175 Mich. 105, 140 N. W. 1001.

Mr. A. H. Krugmeier for respondent.

Kerwin, J., delivered the opinion of the court:

The respondent held a second-grade teacher's certificate issued to him on the 31st day of August, 1914, by the county superintendent of schools of Outagamie county. The certificate was in due form and valid upon its face.

Some question is made by counsel for appellant to the effect that the contract of hiring was not valid. Careful examination of the record convinces us that this contention is without merit.

It is claimed by appellant that the contract was not made by the board, but by the school officers in their individual capacity. It is true that the proceedings with reference to employing the respondent were not as formal as they might have been, but it appears that all of the school officers were present and made the contract, and that in effect

the contract was made by the school board. It was signed by all the officers and the respondent, and we think the record sufficiently shows that it was authorized by the board. Dolan v. Joint School Dist. 80 Wis. 155, 49 N. W. 960. The court found that the school board met on the 5th day of June, 1915, that all members were present, and that it unanimously voted to hire the respondent. These findings are supported by the evidence, and sufficiently show an employment of the respondent. Mendel v. School Dist. 121 Wis. 80, 98 N. W. 932; Pearson v. School Dist. 144 Wis. 620, 140 Am. St. Rep. 1043, 129 N. W. 940.

School—contract hiring teacher—validity.

It is further contended that the court erred in striking out the portion of the answer referred to in the statement of facts. This contention is based upon the theory that the appellant had the right to show that the respondent was not a qualified teacher, and that he obtained his certificate through fraud.

It is plain from the provisions of our statutes that the matter of issuance and annulment of teachers' certificates, licensing persons to teach the common schools, is placed under the control of the county and state superintendents. Section 461, Statutes, provides, among other things, that it shall be the duty of every county superintendent to examine and license teachers in his district, and to annul certificates as provided by law. Section 451 provides that each superintendent shall establish a standard of attainment in each branch of study, which must be reached by each applicant before receiving a certificate. Section 452 provides for appeal to the state superintendent for re-examination in case an applicant is refused a certificate, and further provides that the superintendent may annul certificates if satisfied the person to whom a certificate has been granted was not qualified. Section 453 also empowers the county superintendent to annul a teacher's certificate

upon charges affecting the teacher's moral character, learning, or ability to teach. Section 497 provides for an appeal to the state superintendent from any decision of the county superintendent, and § 497a provides that no review of the decisions of the state superintendent on matters decided by him shall be had unless proceedings by certiorari or other appropriate action be brought within thirty days after such determination by him.

We think it clear that no error was committed in striking out the portions of the answer referred to. The action of the superintendent being within his jurisdiction, no review was proper in this action. State ex rel. Cook v. Houser, 122 Wis. 534, 100 N. W. 964; 17 Am. & Eng. Enc. Law, 2d ed. 1056; Wood v. Chamber of Commerce, 119 Wis. 367, 96 N. W. 835.

It is insisted that appellant was discharged from performing its contract with respondent, even if a valid contract were made, on account of the destruction of the schoolhouse by fire. There was no stipulation in the contract to that effect, and no provision for deduction on account of destruction of the schoolhouse by fire, or otherwise. Under such circumstances no deduction could be made without the consent of the respondent. School Directors v. Crews, 23 Ill. App. 367; Smith v. School Dist. 69 Mich. 589, 37 N. W. 567; Cashen v. School Dist. 50 Vt. 30; Charles-town School Twp. v. Hay, 74 Ind. 127; Libby v. Douglas, 175 Mass. 128, 55 N. E. 808; Dewey v. Union School Dist. 43 Mich. 480, 38 Am. Rep. 206, 5 N. W. 646.

It is also contended that the appellant was discharged from performing its contract with respondent on account of the action of the special school meeting in voting to suspend the school. The respondent was an employee of the appellant, and the relations between appellant and re-

—collateral
attack on
certificate.

—inability to
perform con-
tract—deduction
from salary.

spondent were contractual. The appellant, therefore, could not abrogate the contract or modify it without the consent of the respondent. *Board of Education v. State*, 100 Wis. 455, 76 N. W. 351; *Jones v. United States*, 96 U. S. 24, 29, 24 L. ed. 644, 646; *McKay v. Barnett*, 21 Utah, 239, 50 L.R.A. 371, 60 Pac. 1100.

It is further argued that in any event the damages were excessive because the respondent should have sought other employment and mitigated the damages. We do not think this contention can be sustained. In the instant case the respondent was obliged to and did hold himself in readiness to comply with the terms of his contract, and it further appears that he did make some effort to obtain another position as teacher, but failed. After

destruction of the schoolhouse there was some talk by members of the school board, which information was conveyed to respondent, that appellant would rent a place for holding school. We think upon the whole record no reduction of damages should be allowed, that the findings of the court below are supported by the evidence, and that the respondent is entitled to recover; therefore the judgment below should be affirmed.

NOTE.

The question as to the right of a teacher to compensation while school is closed is the subject of the annotation following *BOARD OF EDUCATION v. COUCH*, post, 742.

BOARD OF EDUCATION of the City of Hugo, Choctaw County, Plff.
in Err.,
v.

O. L. COUCH.

Oklahoma Supreme Court — January 9, 1917.

(— Okla. —, 162 Pac. 485.)

School — closed for quarantine — pay of teacher.

C.'s contract as a teacher provided for a term of nine months and contained no provision for deduction in compensation during times when school is closed. Before the close of the term the school was closed by order of the board of health on account of the prevalence of a contagious disease in the district, and remained closed for the period of one month, during which time C., as directed by the superintendent of schools, held himself in readiness to resume his duties, which he did, completing his term. Held, that C. is entitled to recover the full compensation agreed upon.

[See note on this question beginning on page 742.]

Headnote by KANE, J.

ERROR to the District Court for Choctaw County (Hardy, J.) to review a judgment in favor of plaintiff in an action brought to recover a month's salary as principal of one of the ward city schools for the time it was closed by order of the board of health. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Stephenson & Darrough for plaintiff in error.

Messrs. Hammonds & Hammonds and Couch & O'Keefe for defendant in error.

Kane, J., delivered the opinion of the court:

This was an action commenced by the defendant in error, plaintiff below, against the plaintiff in error, defendant below, for the purpose of recovering one month's salary as principal in one of the ward schools of the city of Hugo. Upon trial to the court there was judgment for the plaintiff, as prayed for, to reverse which this proceeding in error was commenced. Hereafter the parties will be called "plaintiff" and "defendant," respectively, as they appeared in the trial court.

It seems that the plaintiff was employed by the defendant as principal in one of the ward schools and to teach the sixth and seventh grades for the school year 1912-13, a period of nine months, commencing on the 9th day of September, and continuing to the 16th day of May, at a salary of \$90 per month; that he entered upon the performance of his duties on the 9th day of September, and continued therein until the 1st day of February, 1913, when an epidemic of smallpox broke out in the city of Hugo; thereupon the board of health, acting under authority conferred upon it by statute, issued an order closing said schools during the prevalence of said disease; thereupon the superintendent of schools instructed the teachers, and among them the plaintiff, to hold themselves in readiness to resume their duties as soon as the schools were permitted to be reopened; that said schools were reopened and plaintiff resumed his duties at the end of one month, and continued to carry out his contract to the end of the term. The defendant admitted the execution of the contract and the facts generally as alleged by the plaintiff, but contended that, the schools being closed by the board of health, acting under legal authority, such action rendered further per-

formance of the contract illegal for both plaintiff and defendant, and therefore no recovery could be had by the plaintiff for the month of suspension from duty.

We are of the opinion that the court below decided the case correctly in rendering judgment for the plaintiff. The case of Randolph v. Sanders, 22 Tex. Civ. App. 381, 54 S. W. 621, seems to us to be directly in point. In that case the schools were closed on account of the prevalence of an epidemic disease, and the reopening thereof was temporarily postponed by authority of the city authorities and health officers of the state and city and county during the period of three months. Discussing the effects of this suspension upon the right of one of the school-teachers to recover his salary for the time the school was closed, Mr. Chief Justice James, who delivered the opinion for the court, says: "Plaintiff was not consulted as to the closing of the schools as aforesaid, but was informed and required by the executive school board that she should hold herself ready to resume her duties under said contract as soon as the health authorities would permit the schools to be opened, and the executive council should so direct; that plaintiff accordingly held herself ready at all times up to May 15, 1899, to resume her duties, . . . and the requirement of her that she remain in readiness to resume work at any time she might be called upon, and that she remained ready. In view of this, we are of opinion that it cannot be said that the schools were closed, or the term shortened, in the sense of the contract. . . . Had the act of closing of the schools been intended as permanent on January 6, 1899, or at any date afterward, plaintiff's right to compensation after such time would probably not have existed. But the schools were never discontinued, only suspended temporarily, and were liable to open at any time. Plaintiff was notified that she was to be ready to work

School—closed
for quarantine—
pay of teacher.

when the schools resumed, and this might have occurred any day. There was no dereliction or fault on her part in any respect. Had the schools been closed permanently, she would have been able to seek other employment; but, as it was, she was held as a teacher under her contract, and the city cannot, in justice, claim that her time so spent was not in the actual service of the schools. Under the circumstances we think the warrant was in conformity with the ordinance requiring that the services be rendered, and the salary due, for which it should issue."

Other cases to the same effect, which tend to throw light upon the subject under discussion, are *Barker v. Hodgson*, 3 Maule & S. 267, 105 Eng. Reprint, 612, cited in 38 Am. Rep. 211, note; *San Antonio Brewing Asso. v. Brents*, 39 Tex. Civ. App. 443, 88 S. W. 368; *Carthage v. Gray*, 10 Ind. App. 428, 37 N. E. 1059, cited in Ann. Cas. 1914D, 142, note; *Libby v. Douglas*, 175 Mass. 128, 55 N. E. 808; *McKay v. Barnett*, 21 Utah, 239, 50 L.R.A. 371, 60 Pac. 1100; *Baylies v. Fettyplace*, 7 Mass. 325; *Dewey v. Union School Dist.* 43 Mich. 480, 38 Am. Rep. 206, 5 N. W. 646.

Counsel for defendant in their brief say that the case of *School*

Dist. v. Howard, 5 Neb. (Unof.) 340, 98 N. W. 666, is the only case precisely in point, and that it sustains their view. In that case it does not appear whether the teacher was instructed by a superior to hold himself ready to resume his duties as soon as the schools were permitted to open, but it does appear that, after the closing, the schools did not open again for the school year. In the case at bar the schools were never discontinued—only suspended temporarily; and the teachers were instructed to hold themselves ready to resume their duties when the schools reopened, which might occur any day.

In our judgment, the board of education might have stipulated that the plaintiff should have no compensation during the time the schools were closed on account of the prevalence of a contagious disease, but, not having done so, and the suspension being temporary, it cannot deny him compensation for the time lost on account of the temporary suspension from duty.

For the reasons stated, the judgment of the court below is affirmed.

All the Justices concur, except *Hardy, J.*, before whom the cause was tried below.

ANNOTATION.

Right of teacher to compensation while school is closed.

I. In absence of special provision in contract:

- a. Epidemic, 742.
- b. Destruction of schoolhouse, 744.
- c. Shortening of term, 745.
- d. Holiday, 746.

II. Under special provision in contract, 746.

I. In absence of special provision in contract.

a. Epidemic.

A school-teacher is, according to the weight of authority, entitled to compensation for a period during which the school is closed by reason of the prevalence of an epidemic.

Indiana.—*Carthage v. Gray* (1894) 10 Ind. App. 428, 37 N. E. 1059.

Kansas.—*Smith v. School Dist.* (1913) 89 Kan. 225, 131 Pac. 557, Ann. Cas. 1914D, 139.

Massachusetts.—*Libby v. Douglas* (1900) 175 Mass. 128, 55 N. E. 808.

Michigan.—*Dewey v. Union School Dist.* (1880) 43 Mich. 480, 38 Am. Rep. 206, 5 N. W. 646.

Nebraska.—*Compare School Dist. v. Howard* (1904) 5 Neb. (Unof.) 340, 98 N. W. 666.

Oklahoma.—See **BOARD OF EDUCATION v. COUCH** (reported herewith) ante, 740.

Oregon.—*Compare Goodyear v.*

School Dist. (1889) 17 Or. 517, 21 Pac. 664, stated at length *infra*, II.

Texas.—*Randolph v. Sanders* (1899) 22 Tex. Civ. App. 331, 54 S. W. 621.

Utah.—*McKay v. Barnett* (1900) 21 Utah, 239, 50 L.R.A. 371, 60 Pac. 1100.

The existence of an epidemic, causing the closing of a school, is not such an act of God as will discharge the school board from liability on its contract. *Carthage v. Gray* (Ind.) *supra*, wherein the court said: "But the closing of a school by the order of a school board or a board of health is not the act of God, however prudent and necessary it may have been to make such order. It was one of the contingencies which might have been provided against by the contract, but was not. It was the misfortune of the appellant, and if the appellee was present, ready and willing to teach the school (which is alleged in the complaint and not denied in the answer), the fact that no pupils were provided her by the school board will not deprive her of recovering her wages under the contract. There is no averment that she was discharged for the term as soon as the order was made to close the school. Such could not have been the case, for the contagion might have terminated at any time, and the school opened again, and if then the appellee had not been present to teach the same, there might have been a liability on her part for damages for breach of the contract. There is nothing to show that she was not bound to hold herself in readiness to teach whenever called upon to resume her duties. Under the contract, her compensation was not confined to the actual number of days taught in the term, unless the omission occurred through her fault or through some cause for which she should be held responsible."

So in *Dewey v. Union School Dist.* (Mich.) *supra*, it was said: "Beyond controversy, the closing of the schools was a wise and timely expedient; but the defense interposed cannot rest on that. It must appear that observance of the contract by the district was caused to be impossible by act of God. It is not enough that great difficulties were encountered, or that there existed

urgent and satisfactory reasons for stopping the schools. But this is all the evidence tended to show. The contract between the parties was positive and for lawful objects. On one side school buildings and pupils were to be provided, and on the other personal service as teacher. The plaintiff continued ready to perform, but the district refused to open its house and allow the attendance of pupils, and it thereby prevented performance by the plaintiff. Admitting that the circumstances justified the officers, and yet there is no rule of justice which will entitle the district to visit its own misfortune upon the plaintiff. He was not at fault. He had no agency in bringing about the state of things which rendered it eminently prudent to dismiss the schools. It was the misfortune of the district, and the district and not the plaintiff ought to bear it. The occasion which was presented to the district was not within the principle contended for. It was not one of absolute necessity, but of strong expediency. To let in the defense that the suspension precluded recovery, the agreement must have provided for it. But the district did not stipulate for the right to discontinue the plaintiff's pay on the judgment of its officers, however discreet and fair, that a stoppage of the schools is found a needful measure to prevent their invasion by disease, or to stay or oppose its spread or progress in the community; and the contract cannot be regarded as tacitly subject to such a condition."

Similarly in *Libby v. Douglas* (Mass.) *supra*, the court said that the prevalence of an epidemic "made the keeping open of the school unwise, but not impossible." See to the same effect *Randolph v. Sanders* (Tex.) and *McKay v. Barnett* (Utah) *supra*, wherein the court also emphasized the fact that the teacher was ordered to hold himself in readiness for the resumption of the school.

But where the school has been closed by an act of law, no recovery can be had on the contract. *School Dist. v. Howard* (Neb.) *supra*. In that case it appeared that the school was closed

by the board of health in pursuance of an ordinance, and not by the school authority. It was held that since the school was not closed by the school board, but by the ordinance, the plaintiff could not recover, because the performance of the contract was prevented by an act of the law which made its observance illegal. The court said: "It is not claimed that the board of health did not have authority to close the school, or that the order was illegal in any respect. This being so, that order, so long as it remained in force, was a valid legal prohibition against the continuance of the school, and the district, by force of law, was unable to complete its contract. Had the board of health failed to act, and had the school been closed by the district on its own motion, then the rule contended for by the defendant in error, and followed in the case of *Dewey v. Union School Dist.* (1880) 43 Mich. 480, 38 Am. Rep. 206, 5 N. W. 646, and *Libby v. Douglas* (1900) 175 Mass. 128, 55 N. E. 808, might be invoked. But the action of the district in closing the school was not voluntary. It was the act of the law, which the district and all others were compelled to obey."

School Dist. v. Howard (1904) 5 Neb. (Unof.) 340, 98 N. W. 666, *supra*, is distinguished in the reported case, wherein it appeared that, while the schools were ordered to be closed by the board of health, the school authorities instructed the teachers to hold themselves in readiness to resume their duties.

b. Destruction of schoolhouse.

It is generally held that where a schoolhouse is destroyed by fire, or is otherwise rendered unfit for use, a teacher may recover for the time during which school was closed. *School Directors v. Crews* (1887) 23 Ill. App. 367; *Corn v. Board of Education* (1890) 39 Ill. App. 446; *Charlestown School Twp. v. Hay* (1881) 74 Ind. 127; *Smith v. School Dist.* (1888) 69 Mich. 589, 87 N. W. 567.

In *School Directors v. Crews* (Ill.) *supra*, it appeared that the plaintiff entered into a contract to teach school for a period of five months. He taught

one month, when the schoolhouse was destroyed by fire. The plaintiff alleged that he was ready and willing to perform his contract, but was unable to do so through the fault of the school board in not furnishing another school room. The court held that the directors were liable for the entire contract term, since fulfillment of the contract was not made impossible by an act of God, the destruction of the schoolhouse being a mere hardship which would not relieve them, there being no evidence in the case to show that they could not furnish another school room, thereby complying with their contract.

In *Corn v. Board of Education* (1890) 39 Ill. App. 446, wherein it appeared that the board could not procure another school, the court said: "The contract entered into between plaintiff in error and defendant in error was an absolute one, only conditional as to a few minor requirements, and with these he strictly complied, and no question of their performance was raised at the trial below. By their contract, defendants in error agreed to employ the plaintiff in error to teach school for a period of four months, at a salary of \$45 per month. It was a contract to do a thing possible in itself, without condition, and the promisors are liable for the breach thereof, even though it was beyond their power to perform it, for by their unconditional contract they ran the risk of undertaking to perform it, when they might have provided against it by contract."

In *Charlestown School Twp. v. Hay* (1881) 74 Ind. 127, it appeared that a schoolhouse was destroyed by fire. On discovering that the house was destroyed, the teacher notified the school director, who told her to procure another place to conduct the school; she secured another building and informed the trustees, who promised to furnish it. It was never furnished, nor was the teacher informed that her services were dispensed with, but she was put off from time to time by promises to provide a house. It was held that performance of the contract on the part of the teacher was prevented

by the board, and that the destruction of the school building did not excuse performance by it.

In *Smith v. School Dist.* (Mich.) *supra*, the court said that the teacher was not bound to find another house to conduct the school, nor was she bound to find other employment for the rest of the term.

In *Cashen v. School Dist.* (1877) 50 Vt. 30, the facts were similar to those in the preceding case. The court said: "The report shows that the plaintiff performed the contract on her part without default or shortcoming. She kept the school so long as a place was provided in which to keep it. She held herself ready to keep it through the entire term. She was not discharged from the contract, nor repudiated in any way. But on the contrary she was given to understand that she was expected to be ready and able to resume her service of teaching, it being treated as contingent, at most, whether a place would be provided for the continuation of the school. She did the service for which she was employed in just the way the employer enabled and required her to do it. This was a performance of the contract on her part, entitling her to be paid according to the terms of the contract."

In *CLUNE v. SCHOOL DIST.* (reported herewith) *ante*, 736, it was held that the teacher could recover. The contract was to teach for a period of nine months. After the making of the contract and before the commencement of the term, the schoolhouse was destroyed by fire. The teacher sued to recover for the period during which school was closed, being ready and willing to go on with her agreement. It was held that the board was not discharged from liability because of the destruction of the schoolhouse, there being no stipulation in the contract providing for reduction in salary in the case of such an emergency.

In *Vaughan v. Hindman* (1911) 145 Ky. 507, 140 S. W. 641, it was not decided whether the teacher had a right to compensation after the destruction of the school, but it was held that he could not recover against a superin-

tendent who was without authority to provide another school room.

But it was held in *Hall v. School Dist.* (1887) 24 Mo. App. 213, that, since the contract provided that the teacher was to teach a certain specified school, the continued existence of that school for the required period must have been contemplated by the parties, and that, in their contract, the condition that the schoolhouse should exist for such a period should be implied.

c. Shortening of term.

A teacher who has contracted for a term of specified length is entitled to compensation for the full term, though the term is thereafter shortened by the school authorities. *Smith v. School Dist.* (1915) 89 Kan. 225, 131 Pac. 557, Ann. Cas. 1914D, 139; *Rudy v. School Dist.* (1888) 30 Mo. App. 113; *Bromley v. School Dist.* (1874) 47 Vt. 381.

In *Smith v. School Dist.* (Kan.) *supra*, it appeared that the school was closed before the end of the term because it was getting late and the boys were needed for farm work. It was held that the teacher could recover for the entire term.

It was held in *Bromley v. School Dist.* (Vt.) *supra*, that the teacher could recover for the entire term, it appearing that the district became dissatisfied with his school, only one or two of the scholars attending, whereby he was compelled to close, and the committee told him to hold himself in readiness to begin again.

A school district is not relieved from liability according to its contract by showing that there are not sufficient funds in the treasury to pay the agreed compensation, and that for this reason it has closed the school. *Rudy v. School Dist.* (1888) 30 Mo. App. 113. In that case it appeared that the school district, by its directors, entered into a written contract with the plaintiff to teach its district school for a period of ten months. The plaintiff taught for eight months when the directors closed the school, because the levy made for school purposes for that year was not sufficient to pay for a ten-months' term. The

court held that in order to prove that the contract was "ultra vires" it must be shown that not enough revenue was provided to carry on the full term, and not merely that not enough funds were collected and turned in to the treasurer for the school board. If the collector failed to collect the taxes, or if he collected them and failed to turn them over to the treasurer, it does not follow that the teacher's contract is thereby canceled. See also *Morley v. Power* (1882) 10 Lea (Tenn.) 219, stated *infra*, subdivision II.

d. Holiday.

A teacher may recover compensation for holidays when school is closed, contracts of teaching for a certain specified period being construed as subject to days of vacation according to public usage. *Board of Education v. State* (1898) 7 Kan. App. 620, 52 Pac. 466; *School Dist. v. Gage* (1878) 39 Mich. 484, 33 Am. Rep. 421; *Holloway v. School Dist.* (1886) 62 Mich. 153, 28 N. W. 764; *Central Bd. of Edu. v. Stephenson* (1884) 16 W. N. C. (Pa.) 124.

In *School Dist. v. Gage* (1878) 39 Mich. 484, 33 Am. Rep. 421, *supra*, the action was by a school-teacher for compensation. The defendant contended, among other things, that there should be a deduction made for days on which the school was closed. It was held that no deduction would be made for holidays. "In regard to deductions for holidays we are of opinion that school management should always conform to those decent usages which recognize the propriety of omitting to hold public exercises on recognized holidays; and that it is not lawful to impose forfeitures or deductions for such proper suspension of labor. Schools should conform to what may fairly be expected of all institutions in civilized communities. All contracts for teaching during periods mentioned must be construed of necessity as subject to such days of vacation, and public policy as well as usage requires that there should be no penalty laid upon such observances." See to the same effect, *Holloway v. School Dist.* (1886) 62 Mich. 153, 28 N. W. 764.

In *Central Bd. of Edu. v. Stephenson* (Pa.) *supra*, it appeared that the board of directors of a subschool district had power, in the exercise of its own discretion, to order vacations. The central board of education had directed that a shorter vacation be given than the one which the school district board ordered. The plaintiff, a principal, in obedience to the order of the subschool district board, ordered the vacation. In an action to recover pay for the period of vacation not authorized by the central board, it was held that since the directors of the subdistrict had a supervision over the subdistrict schools, and fixed the teachers' pay and duties, etc., the plaintiff was obliged to obey the order, and did not forfeit his salary during the time of the vacation.

In *Board of Education v. State* (Kan.) *supra*, it appeared that the board of education determined to close the schools for Thanksgiving day and the day following, and to allow the teachers full pay for the month without making any deductions for the days on which the school should be closed. In an action to prevent full payment, it was held that a court of equity ought not to interfere to stop such payment, full power having been vested in the board by law to regulate such details of administration.

But it has been held that, though a teacher has been required by the board to teach additional days to make up for holidays, he cannot recover additional compensation for these days. *Benton Twp. v. Parker* (1913) 85 Ohio C. C. 251, wherein the court said *obiter*: "The teacher was not required to teach the five extra days, and he had a right to recover his full salary without any substitution therefor."

II. Under special provision in contract.

Under a teacher's contract providing for a term of nine months "unless sooner discontinued by order of the directors," it has been held that if the school is discontinued because of the prevalence of an epidemic the teacher is not entitled to compensation for the period of the discontinuance. *Goodyear v. School Dist.* (1889)

17 Or. 517, 21 Pac. 664. In that case the court said: "In the case at bar there is an express provision for a discontinuance, to which the parties have agreed, in the event, as we understand it, that it should become necessary, for any proper cause, to stop or discontinue the schools during some period of the contract. That the presence of diphtheria or other contagious and dangerous diseases would be such a cause or urgent necessity as would justify the directors, within the sense of the contract, to discontinue the school until the dangers arising therefrom should pass, in our judgment is too manifest to be disputed; and, as a consequence, during such discontinuance, there would be no liability to pay or duty to perform the services of a teacher. By the terms of the contract, there is a suspension of it during that period; nor was the plaintiff discharged in consequence thereof, as claimed by the defendant."

That decision was followed without opinion in *Gilroy v. School Dist.* (1889) 17 Or. 522, 21 Pac. 665.

In *Randolph v. Sanders* (1899) 22 Tex. Civ. App. 331, 54 S. W. 621, a contract power to close the school was held not to be applicable to a temporary closing because of an epidemic. The court said: "Had the act of closing of the schools been intended as permanent, on January 6, 1899, or at any date afterward, plaintiff's right to compensation after such time would probably not have existed. But the schools were never discontinued, only suspended temporarily, and were liable to open at any time. Plaintiff was notified that she was to be ready to work when the schools resumed, and this might have occurred any day. There was no dereliction or fault on her part in any respect. Had the schools been closed permanently, she would have been able to seek other employment, but, as it was, she was held as a teacher under her contract, and the city cannot in justice claim that her time so spent was not in the actual service of the schools. Under the circumstances we think the warrant was in conformity with the ordi-

nance requiring that the services be rendered, and the salary due for which it should issue."

In *Tripp v. School Dist.* (1880) 50 Wis. 651, 7 N. W. 840, it was held that a provision in a teacher's contract, whereby the board "reserve the right to close the school at any time if not satisfactory to us," was unauthorized and void, and that after a closing of the school thereunder the teacher could recover compensation for the remainder of the term. The court said: "If this judgment can be sustained it must be sustained upon the ground that the school boards of the several school districts of this state may, if they see fit, compel all teachers of district schools to teach the same to the satisfaction of the respective boards who hire them, instead of to the satisfaction of the people who compose the district, or in a manner most beneficial to the pupils in attendance, or as a good, competent, and faithful teacher ought to teach the same. Certainly no such power is expressly conferred upon district school boards by the statutes, and we do not think that the good order, efficiency, or usefulness of the common schools of the state would be promoted by holding that such power was conferred upon them by implication, or by a liberal construction of the statutes in their favor."

A contract provision that a stated salary shall be paid for "time actually occupied in school" has been held not to warrant a deduction from the salary of the teacher for a time when the school was closed by reason of an epidemic. *McKay v. Barnett* (1900) 21 Utah, 239, 50 L.R.A. 371, 60 Pac. 1100, wherein the court said: "It is claimed by counsel for the defendant that by the following terms of the contract, to wit, 'for the time actually occupied in school,' the right of the plaintiff is limited to that time exclusively, and, as she was not actually occupied in school during the period of sixteen days that the schools were closed, the treasurer properly refused to pay said warrant. Such a construction of that clause would neutralize the clearly implied provisions

of the contract before mentioned, and permit the board of education to close the schools as often and for as long periods of time as they might choose to do so during the life of the contract, without the consent of the plaintiff, and without compensating her for the loss of employment, notwithstanding she is bound to serve for the whole period mentioned in the contract, or until it is terminated by the board in the manner therein specified, and keep herself in readiness to perform her duties as teacher whenever required to do so by the board. During such periods the plaintiff could not, without violating the contract, enter into any other permanent engagements. Such a construction would make the contract unreasonable and oppressive. We are of the opinion that the parties did not intend that said clause should have the effect contended for by counsel for defendant. It was simply intended to prohibit the plaintiff from drawing her salary during any vacation which the board might grant her, or during the time in which she might, from sickness or some other excusable cause, be unable temporarily to discharge her duties when the schools were in session."

In *Charlestown School Twp. v. Hay* (1881) 74 Ind. 127, an agreement to pay a stated sum, "or such portion thereof as shall be due the said teacher at \$2.25 per day, . . . for services she actually performed," was held not to authorize a deduction for a period when the school was closed because of the burning of the schoolhouse. Referring to the foregoing provision of the contract, the court said: "The appellant contends that, no matter what may prevent the teacher from actually conducting the school, her right to compensation

must be confined to the days in which the school is actually taught by her. Notwithstanding the clause quoted, we are clear that the appellee is entitled to compensation, if the failure to actually conduct the school each day of the term was caused by the wrongful act or omission of the township authorities."

In *Morley v. Power* (1882) 10 Lea (Tenn.) 219, the contract in suit provided that a teacher engaged for a year should be paid "\$60 per month for his services." School began in September, and in the following March the school directors discontinued all schools in the district on account of lack of funds. The teacher continued to teach until the following June. After sustaining the power of the directors to close the school, the court said, with respect to the contract: "If now, in view of these facts, we place ourselves in the situation of the contracting parties, and endeavor to ascertain what they meant by the words used, it is difficult to avoid the conclusion that their meaning was that Morley was employed as a teacher for the succeeding scholastic year, and was to be paid \$60 per month for his actual services in teaching while the schools were kept open. The contract does not say, and clearly they had no intention that it should say, that he was to be paid \$60 for each month of the entire year. It says '\$60 per month for his services,' that is, for each month's service rendered as a teacher. It is not pretended that he had any duties to perform when the schools were not in session, or that he did in fact perform any services during that period. He was to be paid for services at the rate specified per month." M. J. Q.

E. A. SANBORN, Respt.,
v.

GRANT A. DENTLER, Guardian, etc., of Benjamin F. Woodman, Appt.

Washington Supreme Court — June 22, 1917.

(97 Wash. 149, 166 Pac. 62.)

Evidence — transaction with insane person — book entries.

1. Book entries of charges made by a physician in treating an insane patient are not within a statute excluding evidence of a person in interest as to any transaction had by him when suing an insane person.

[See note on this question beginning on page 756.]

Pleading — bill of particulars — medicines furnished — exclusion of evidence.

2. Failure of a physician suing for the value of services rendered and medicines furnished, to give a bill of particulars as to the medicines in response to demand, precludes his giving evidence as to such items at the trial, under a statute providing that when an account is sued upon, unless the plaintiff within ten days after demand shall deliver a verified bill of particulars, he is precluded from giving evidence thereof.

[See 21 R. C. L. 481.]

Physician — waiver of proof of right to practise.

3. One sued for value of the services of a physician rendered in another

state cannot, after depositing a sum admitted to be due, defend upon the ground that plaintiff has not proved his right to practise in the state where the services were rendered.

Tender — deposit in court as.

4. A deposit in court has the same effect as a tender, to admit that plaintiff is entitled to recover in some amount.

Evidence — deposition — failure to object.

5. The guardian of an insane person who permits without objection book entries of a physician to be read into a deposition in a suit to recover for services to the ward cannot complain at the trial that the deposition was read in evidence without requiring the production of the books.

APPEAL by defendant from a judgment of the Superior Court for Pierce County (Clifford, J.) denying motions for nonsuit and for a new trial after verdict in favor of plaintiff in an action brought to recover for services rendered by him as a physician. *Modified and affirmed on condition.*

The facts are stated in the opinion of the court.

Mr. Grant A. Dentler, for appellant:

A physician cannot recover for professional services unless he shows compliance with the statute of the state regulating the practice of medicine.

30 Cyc. 1593; Jackson School Twp. v. Farlow, 75 Ind. 118; Wooley v. Bell, 33 Tex. Civ. App. 399, 76 S. W. 797; Swift v. Kelly, — Tex. Civ. App. —, 133 S. W. 901; Gill v. Everman, 94 Tex. 209, 59 S. W. 531; Conkey v. Carpenter, 106 Mich. 1, 63 N. W. 990; O'Beirne v. Carey, 150 N. Y. Supp. 666; Deaton v. Lawson, 40 Wash. 486, 2 L.R.A. (N.S.) 392, 111 Am. St. Rep. 922, 82 Pac. 879; Harding v. Hagar, 60 Me. 340; North Chicago Street R. Co. v. Cotton, 140 Ill.

486, 29 N. E. 899; Thompson v. Seattle, R. & S. R. Co. 71 Wash. 436, 128 Pac. 1070; Plath v. Mullins, 87 Wash. 403, 151 Pac. 811.

It makes no difference whether plaintiff was testifying orally after refreshing his memory from the book, or was reading directly from his book; either was a plain violation of the statute.

Goldsworthy v. Oliver, 93 Wash. 67, 160 Pac. 4; Chlopeck v. Chlopeck, 47 Wash. 258, 91 Pac. 966; Shorett v. Knudsen, 74 Wash. 448, 133 Pac. 1029; White v. Walker, 84 Wash. 652, 147 Pac. 409; Knight v. Everett, 152 N. C. 118, 67 S. E. 328.

Objections as to the form of the ques-

tion put in the course of a deposition should be taken at the time. Those that go to the substance of the testimony because it is in its nature inadmissible may be entertained, though not made until the deposition is presented at the trial.

Howard v. Fogler, 15 Me. 447; Polleys v. Ocean Ins. Co. 14 Me. 141; Hennessey v. Metropolitan L. Ins. Co. 74 Conn. 699, 52 Afl. 490; Alspaugh v. Dillon, 83 Conn. 65, 75 Atl. 82; Madera R. Co. v. Raymond Granite Co. 3 Cal. App. 668, 87 Pac. 27; Angell v. Rosenbury, 12 Mich. 259; Chapman v. Greene, 27 S. D. 178, 130 N. W. 30; Erk v. Simpson, 137 Ga. 608, 73 S. E. 1065; Georgia R. & E. Co. v. Bailey, 9 Ga. App. 106, 70 S. E. 607.

An objection to secondary evidence of the contents of books, papers, and records is not waived if not taken at the time of taking the deposition, if the parties were present.

Nichol v. McCalister, 52 Ind. 586; Horseman v. Todhunter, 12 Iowa, 230; Johnson v. Mathews, 5 Kan. 118; Dickinson v. Clarke, 5 W. Va. 280; Atlantic Mut. F. Ins. Co. v. Fitzpatrick, 2 Gray, 279; Fisk v. Tank, 12 Wis. 306, 78 Am. Dec. 737.

Messrs. Rickabaugh & McElroy, for respondent:

Pleading will not be stricken for failure to furnish a bill of particulars where the party furnishes all the information he can.

Mosheim v. Pawn, 44 N. Y. S. R. 792, 18 N. Y. Supp. 166; Sullivan v. Waterman, 21 R. I. 72, 41 Atl. 1006; Ammidown v. Century Rubber Co. 27 Jones & S. 460, 14 N. Y. Supp. 769.

The granting or withholding of a bill of particulars is within the sound discretion of the court.

Spencer v. Ft. Orange Paper Co. 74 App. Div. 74, 77 N. Y. Supp. 257; Henry v. Navy Yard Route, 94 Wash. 526, 162 Pac. 584; Morrisette v. Wood, 128 Ala. 505, 30 So. 630.

An error, to be reversible on appeal, must be one that is prejudicial to appellant, and where such error would not change the verdict the court will not grant a new trial by reason of the same.

Carroll v. Centralia Water Co. 5 Wash. 613, 32 Pac. 609, 33 Pac. 431; Keating v. Pacific Steam Whaling Co. 21 Wash. 415, 58 Pac. 224.

Defendant by his tender admitted every fact which plaintiff was bound to prove to maintain his action.

Southern R. Co. v. Slade, 192 Ala.

568, 68 So. 867; Young v. Borzone, 26 Wash. 4, 66 Pac. 135, 421; Newman v. Levi, 74 W. Va. 223, 81 S. E. 1038; Brunswick Realty Co. v. University Invest. Co. 43 Utah, 75, 134 Pac. 608; Hinds v. Cottle, 143 Mass. 310, 9 N. E. 654; Currier v. Jordan, 117 Mass. 260; Bacon v. Charlton, 7 Cush. 581.

Plaintiff's account book would have been proper evidence.

Ah How v. Furth, 13 Wash. 550, 43 Pac. 639; Darling v. Brown, 2 Can. S. C. 26; Foster v. Coleman, 1 E. D. Smith, 85; Larue v. Rowland, 7 Barb. 108; West v. Van Tuyl, 119 N. Y. 620, 23 N. E. 450.

Objections to depositions which might have been obviated if made when they were taken come too late when made for the first time at the trial, when it is proposed to read them.

1 Thomp. Trials, 2d ed. § 701; Cable Co. v. Mathers, 72 W. Va. 807, 79 S. E. 1079; Ralph v. Taylor, — R. I. —, 85 Atl. 941; Chicago, R. I. & G. R. Co. v. Trout, — Tex. Civ. App. —, 152 S. W. 1137; Boykin v. Collins, 20 Ala. 230; Currier v. Brackett, 18 Me. 59; Ward v. Whitney, 3 Sandf. 399; Fifth Ave. Library Soc. v. Cavanaugh, 186 Ill. App. 123; Crosswhite v. Chattanooga Brewing Co. 10 Ala. App. 425, 65 So. 298.

Holcomb, J., delivered the opinion of the court:

In this action respondent sued upon an account to recover \$3,500 for medical services and medicines furnished to Mr. and Mrs. Benjamin F. Woodman, citizens of Washington, while sojourning in the state of Massachusetts. A verdict was rendered for \$2,000. Motions for nonsuit at the conclusion of plaintiff's case and for a new trial after verdict were made and denied.

The services alleged to have been performed covered a period extending from about October 1, 1911, to April 7, 1912. Mrs. Woodman died about January 25, 1912, while being treated in Massachusetts, and shortly after April 7, 1912, Mr. Woodman returned to Washington, and thereafter was adjudged to be insane and the appellant was appointed his guardian. This suit was instituted against the guardian of the estate of the insane person. Respondent alleged in his original complaint that the services were to

be rendered and medicines furnished to Mr. and Mrs. Woodman under a sort of special employment by Mr. Woodman to render such services and attend to Woodman and wife at any and all times, to the exclusion of all other business, and that such services were so rendered and medicines so furnished, and that by reason thereof the services were lumped in the sum of \$3,500, which was intended to cover all the physician's time, medicines furnished, and consultations. It was also alleged that respondent left a practice at Somerville, Massachusetts, and that the greater portion of the services rendered for Mr. and Mrs. Woodman were in the city of Boston, requiring much time in going to and from Somerville to attend the patients in Boston.

Shortly after the institution of this action, appellant deposited with the clerk of the court the sum of \$761.55, and notified respondent thereof, and that the same was deposited under the provisions of § 486, Rem. Code. Subsequently, appellant moved to require the respondent to make his complaint more specific, which motion the court granted. Respondent then served and filed an amended complaint, setting out in detail each and every visit made to Mr. and Mrs. Woodman and each and every other service performed and the value thereof, and set out in paragraph seven of the amended complaint a very long list of medicines alleged to have been furnished the patients; alleging therein that the exact amount of medicines given at each visit, or its value, cannot be positively ascertained, but that from two to six prescriptions for both Benjamin F. Woodman and his wife were made up from the medicines specified, and that the fair value of such medicines cannot be given for each visit, but would aggregate in excess of \$500, compounded and delivered. Appellant thereupon moved to strike, or, in the alternative, to make more specific paragraph seven of the amend-

ed complaint by stating what medicine, and the quantity thereof, plaintiff furnished Benjamin Woodman, and what medicine, and the quantity thereof, he furnished the wife of Benjamin Woodman upon each visit to them, and what was the fair and reasonable value of the medicine furnished at each such visit to either or both of them. This motion the court denied, and this is one of the errors relied upon by appellant.

It is contended by respondent that the requiring of a bill of particulars is a matter of discretion with the court, and that respondent was excused from furnishing the bill of particulars of these items under the allegation in connection therewith that the exact amount of medicine given at each visit, or its value, could not be positively ascertained, and that the fair value of such medicine given at each visit could not be stated.

It is true that in many cases the requirement of a bill of particulars is a matter of discretion with the court; but under our practice, under Rem. Code, § 284, when an account is sued upon, unless the party, within ten days after demand therefor in writing by the adverse party, shall deliver to the adverse party a verified bill of particulars of the items of the account, he is precluded from giving evidence thereof, and in case an itemized account stated is defective, the court may order a further account. It was shown at the trial that the respondent kept an account book with all his accounts shown therein, and that the particular items of account with Mr. and Mrs. Woodman were kept in that book in the ordinary course of business, together with other accounts, and all the items of the visits and memoranda as to the nature of the ailments with which the patients were suffering were kept therein. In *Plummer v. Weil*, 15 Wash. 427, 46 Pac. 648, we held that an allegation in connection with the bill of particulars, to the effect that it was impossible for the

party relying thereon to comply with the order of the court any better than he had already done, or to make the bill of particulars any more specific on the points directed in the order of the court, furnished no excuse; and it was stated that the bill of particulars furnished was insufficient, and "its insufficiency cannot be excused upon the ground that plaintiff kept no books and cannot specify the services, or state their value. He assumed the burden of so doing when he brought his action in the present form. . . . 'The failure to keep an account of these services is the fault of the plaintiff, and he must suffer for it, if anyone.'"

Again, in *Moore v. Scharnikow*, 48 Wash. 564, 94 Pac. 117, it was said: "In a mercantile account, or in any account which is made up of several and distinct items, it is proper for the court to require that the value of each article be separately stated. So also a physician, since he bases the value of his services on the number of visits made the patient or the number of prescriptions given him, may be required to set out in his bill of items the charge made for each visit, or each prescription."

It certainly was as possible for respondent to itemize the quantity and value of the medicine furnished by him at each visit, when making his entries in his book, as it was for him to itemize the number and length of his visits, the nature of the other services performed by him, and the kind of medicines furnished. If he could not, he is the

Pleading—bill of particulars—medicines furnished—exclusion of evidence.

one who should suffer. Under the statute heretofore quoted, we think his evidence as to the amount and value of the medicines furnished should have been excluded for his failure to furnish, upon demand, a bill of particulars thereof.

There was no evidence furnished by respondent that he was, at the times mentioned in his amended

complaint, a regularly qualified and practising physician in the state of Massachusetts. For this reason, appellant claims that a nonsuit should have been granted, since it was necessary for respondent to prove his qualifications to practise in order to recover. Respondent testified by deposition that he had practised in the state of Massachusetts something more than forty years. It is contended that, by the laws of Washington, respondent could not recover without proving that he was admitted and licensed to practise. While this may be true, it must be considered that appellant, by depositing a sum of money which he admitted to be due to respondent, admitted that respondent was entitled to recover something as a physician, having sued as a physician, and that appellant is not now in a position to urge that failure of proof.

Physician—waiver of proof of right to practise.

In this connection it is contended by appellant that the deposit is not the same as a tender, in order to avoid the force and effect of the law relating to a tender, as stated in *Young v. Borzone*, 26 Wash. 4, 66 Pac. 135, 421. There it was held that a plea of tender, with payment into court, conclusively admits plaintiff's cause of action as to the amount tendered. In what respect a deposit in the court for the benefit of the plaintiff is different from a tender, appellant does not make entirely clear. The law provides that a tender made before action, and the bringing of the amount of the tender into court, entitle the defendant to recover all costs of suit, if the allegations in regard to tender be found true; and the statute, Rem. Code, § 486, requiring deposit in court, provides that the defendant in any action pending shall at any time deposit with the clerk of the court, for the plaintiff, the amount which he admits to be due, together with costs that have accrued, and notify the plaintiff thereof, and if plaintiff shall refuse

to accept the same in discharge of the action, and shall not afterwards recover a larger amount than that deposited with the clerk, exclusive of interest and costs, he shall pay all costs that may accrue from the time such money was so deposited. This is simply a provision for making tender by paying into court after the action has been commenced, and by the terms of the

**Tender—deposit
in court as.**

statute itself it amounts to an admission that there is the amount due that has been deposited. This has the same effect as a tender, strictly considered, of admitting that the plaintiff is entitled to recover in some sum. It does not admit that the contract is as alleged by plaintiff or that the basic measure of recovery is as alleged. *Young v. Borzone, supra*. This contention we consider untenable.

It is next contended that, under the provisions of Rem. Code, § 1211, excluding evidence of a party in interest as to any transaction had by him or any statement made to him when suing a deceased or insane person, all the evidence of appellant as to transactions between him and B. F. Woodman, the insane person, should have been excluded. The testimony of respondent was taken in Massachusetts by deposition. The testimony as to the nature of the employment of respondent was taken by depositions of other witnesses, and the evidence thereof given by respondent in his deposition was excluded at the trial. Respondent testified to his account book, and read therefrom the items of the account kept by him in the book. Appellant himself was there present, acting as attorney for himself and his ward. He conducted the cross-examination of the witness at the taking of the deposition. The deposition shows that he examined the book and questioned respondent as to certain entries he found therein, and during the cross-examination the fol-

6 A.L.R.—48.

lowing questions and answers were made:

Question: Doctor, you kept a book, didn't you, of the visits and services?

Answer. Yes.

Q. And in testifying in your direct examination in reference to these services and what you did, you read from that book?

A. Yes.

Q. You have that book with you?

A. Yes; right here.

Q. And in that book you kept other accounts besides this?

A. Yes.

Q. And in direct examination you also read from certain memoranda as to the afflictions and diseases with which Mr. and Mrs. Woodman were suffering?

A. Yes.

Q. The memoranda were made at the time you observed the sickness?

A. Yes. Not all at once, as there were conditions as they went along.

Q. As the conditions developed you made additions?

A. Yes.

During the direct examination of respondent at the taking of the deposition, in answer to a question, he said: "These are the original entries from my book, and I have a right to read these." He then proceeded to read the items contained in his book.

It is thus shown that the book was properly qualified and would have been admitted in evidence under the rule announced by this court in *Ah How v. Furth*, 13 Wash. 550, 43 Pac. 639. Appellant, being there present at the taking of the deposition, made no objection to the reading of the contents of the book into evidence in the deposition, and did not call for the annexation of the book to the deposition as an original exhibit. At the trial, he objected to the reading of any of the answers given by respondent, and a great deal of the testimony given by respondent, not constituting strictly the reading of

entries found in the book, was excluded, the court saying that the statute seemed to draw the line at anything that a deceased or insane person might dispute if living or sane. It is contended, however, that the court afterwards frequently permitted answers of the respondent to questions which constituted, to a great extent, testimony as to transactions had by him with Mr. Woodman. Among other things, the following is complained of: Respondent was asked, "For what purpose did Mr. Woodman call at his office?" This was objected to at the trial on the ground that the plaintiff was disqualified to testify to any conversation or transaction with Mr. Woodman. The objection was overruled and the answer was read, as follows: "To get me to examine him and prescribe for him." The question then followed: "Did you make an entry in your book of that charge?" The answer was "Yes." This is the most nearly objectionable of any of the testimony of the respondent by deposition that was admitted by the court. This ruling was made by the court just prior to his ruling that nothing could be read and considered by the jury except the entries from the book testified to by the respondent. In view of this, we do not think it material, or that it probably influenced or prejudiced the jury in any way as evidence which they considered which was incompetent.

In the *Ah How Case*, supra, it was held that the testimony of respondent that he worked at the house of the intestate, and as to the character of the work performed by him, was not testimony in relation to a transaction had by him with, or any statement made to him by, such intestate. "Such testimony related solely to acts of the witness alone, and was entirely competent," — citing authorities

For the same reason, we consider that the testimony by deposition of this respondent, which was admitted, came within the same rule. These book entries, together with other corroborating testimony independent of the respondent's testimony, covered every material feature of respondent's case sufficiently to entitle him to recover something in his action.

*Evidence—
transaction with
insane person—
book entries.*

Nor do we think that the objection of appellant to the testimony of respondent as to his book entries, by reading them into the deposition instead of producing the book, can now avail him. He stood by and permitted entries in the book to be read into the evidence at the taking of the deposition at a very great distance from the scene of the trial. If he had then objected to the secondary evidence or demanded the annexation of the book to the deposition, the question might have been obviated. The rule is well established that if a party present at the taking of a deposition allows secondary evidence to be received without objection he is precluded thereafter from raising such questions. 6 Enc. Pl. & Pr. pp. 588-599.

*—deposition—
failure to object.*

We find no other error in the record sufficient to justify a reversal, except the error as to the bill of particulars. That was a substantial and prejudicial error, and would justify a reversal. We believe, however, that justice will be done to both parties if respondent be allowed to remit from the verdict the sum of \$500, covered by the paragraph in his complaint concerning the furnishing of medicines, and allow the recovery to stand for the remainder of \$1,500, with interest and the cost below.

It is therefore ordered that, if respondent shall remit the sum of \$500 from the recovery below within thirty days, the judgment shall stand for the sum of \$1,500, with interest from June 26, 1916, and the costs in the court below. If re-

spondent shall fail and refuse so to remit within the time specified, a new trial shall be granted. Appellant will recover costs of appeal.

Ellis, Ch. J., Mount, Parker, and Fullerton, JJ., concur.

NOTE.

The question whether the admissibility of the books of account of a

party who offers them in evidence in his own favor is affected by the statutes which declare that an interested party may not be a witness in his own behalf, as against the executor, administrator, or representative of the other party to the transaction, is discussed in the annotation appended to *JEFFORDS v. MULDROW*, post, 756, which shows the conclusion reached in the reported case (*SANBORN v. DENTLER*, ante, 749) to be in accord with the weight of authority.

S. E. JEFFORDS, Admr., etc., of Mrs. E. R. Gee, Resp't.,
v.

J. F. MULDROW, Appt.

South Carolina Supreme Court — June 30, 1916.

(104 S. C. 388, 89 S. E. 357.)

Evidence — transaction with person since deceased — entry in account book.

Testimony by a merchant having an account against a person since deceased, that the items in his books of original entry were made by him, is not prohibited by a statute making incompetent testimony as to transactions with persons since deceased.

[See note on this question beginning on page 756.]

APPEAL by defendant from a judgment of the Common Pleas Circuit Court for Florence County (Prince, J.) in plaintiff's favor, in an action on a promissory note alleged to have been given by defendant to plaintiff's intestate. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Willcox & Willcox and S. M. Wetmore, for appellant:

Testimony by defendant that the items in his books of original entry were made by him was not incompetent.

Standridge v. Powell, 11 S. C. 549; *Brown v. Moore*, 26 S. C. 160, 2 S. E. 9; *Sullivan v. Latimer*, 38 S. C. 166, 17 S. E. 701.

Messrs. Hicks & Muldrow also for appellant.

Messrs. McNeill & Oliver and D. Gordon Baker, for respondent:

Defendant's testimony was incompetent.

Standridge v. Powell, 11 S. C. 549.

Gary, Ch. J., delivered the opinion of the court:

This is an action on a promissory note, alleged to have been made by the defendant, in favor of plaintiff's intestate. The defendant, who is engaged in merchandising, set up a counterclaim for goods sold and delivered by him to the intestate. His Honor the presiding judge ruled that § 438 of the Code of Civil Procedure rendered the defendant incompetent as a witness to prove that the items in his books of original entry were made by him, on the ground that such testimony related to a transaction between

him and a person deceased at the time of such examination. The defendant appealed upon a single exception, raising the question whether said ruling was erroneous. In the case of *Rookhart v. Dean*, 21 S. C. 597, the court said: "Plaintiff's testimony was not incompetent under §. 400 [now § 438] of

Evidence—
transaction with
person since
deceased—
entry in
account book.
the Code, as he only testified to acts of his own with which he in no way, by his own testimony, attempted to connect the deceased, such connection being made by another witness."

It was held in *Foggette v. Gaffney*, 33 S. C. 303, 12 S. E. 260, that, in an action against the administrator of a deceased debtor to recover the value of work done in building and repairing houses, plaintiff had the right to testify as to what work was done by him on the premises of intestate, in intestate's presence, on the ground that such testimony related alone to his own acts, with which he did not, by such testimony, attempt to connect the deceased. In *Williams v. Mower*, 35 S. C. 206, 14 S. E. 483, it was held that § 400 (now 438) of the Code does not prohibit the plaintiff from testifying to the fact that he had conversations with defendant's intestate as to a certain matter, and when, where, and in whose presence such conversation was had; the statements of witnesses, or of deceased, not being disclosed. It was held in *Trimmier v. Thompson*, 41 S. C. 125, 19 S. E.

291, that testimony by plaintiff to the effect that defendant's intestate knew that the plaintiff had done certain printing for which he, the plaintiff, has sued, and the amount of the account therefor; that defendant's intestate had brought the work to plaintiff's office, and was there every day while the work was being done,—was not incompetent, it not being made to appear that the plaintiff knew these facts by communications from the deceased. In *Sullivan v. Latimer*, 38 S. C. 158, 17 S. E. 701, it was held that the word "transaction" in the Code implies mutuality; something done by both in concert, in which both take some part. See also *Richards v. Munro*, 30 S. C. 284, 9 S. E. 108; *Griffin v. Earle*, 34 S. C. 246, 13 S. E. 473; *Marshall v. Mitchell*, 59 S. C. 523, 38 S. E. 158; *Dyson v. Jones*, 65 S. C. 308, 43 S. E. 667. The testimony offered by the plaintiff was preliminary in its nature, and was merely intended to lay the foundation for the introduction of the books in evidence, for the purpose of proving by the books, and not by the testimony of the defendant, the transaction between him and the intestate. The entry of the items of account by the defendant, in his books of original entry, was not the act of both parties to the transaction, but of the defendant alone; and from such act mutuality cannot be implied, as it was not "something done by both parties in concert," nor "in which both took some part."

Reversed.

ANNOTATION.

Death of adverse party as affecting evidence with respect to book account.

I. Admissibility in support of claim:

- a. In general, 756.
- b. Where entries were made by deceased party or his agent, 758.

II. Competency of interested party to prove books of account:

- a. In general, 759.
- b. Under statutes expressly permitting party to attest books of account, 765.

I. Admissibility in support of claim.

a. In general.

It is not the purpose of this annotation to deal with the general question whether a party's books of account are admissible in evidence in his own favor, but, premising them to be admissible in an action between the origi-

nal parties to the transaction forming the basis of suit, to discuss the question whether their admissibility is affected by statutes declaring that an interested party may not be a witness in his own behalf as against the executor, administrator, or representative of the other party to the transaction.

The weight of authority is to the effect that books of account, if properly authenticated, are admissible in evidence to establish a claim against a person deceased. See:

Colorado.—*Haines v. Christie* (1901) 28 Colo. 502, 66 Pac. 888.

Iowa.—*Orcutt v. Hanson* (1887) 70 Iowa, 604, 31 N. W. 950; *Dysart v. Furrow* (1894) 90 Iowa, 59, 57 N. W. 644.

Massachusetts.—*Dexter v. Booth* (1861) 2 Allen, 559.

Mississippi.—*Bookout v. Shannon* (1882) 59 Miss. 378.

Nebraska.—*Martin v. Scott* (1881) 12 Neb. 42, 10 N. W. 532.

New York.—*West v. Van Tuyl* (1890) 119 N. Y. 620, 23 N. E. 450; *Knight v. Cunningham* (1875) 6 Hun, 101; *McGoldrick v. Wilson* (1879) 18 Hun, 443; *Young v. Luce* (1892) 50 N. Y. S. R. 253, 21 N. Y. Supp. 225; *Re Runions* (1911) 71 Misc. 641, 130 N. Y. Supp. 1039.

Washington.—*SANBORN v. DENTLER* (reported herewith) ante, 749.

And this although the entries in it were made by the claimant himself. *Re Runions* (N. Y.) supra.

The contrary view is supported by *Chandler v. Woodward* (1907) 7 Penn. (Del.) 54, 76 Atl. 623; *Nance v. Callender* (1898) — Tenn. —, 51 S. W. 1025, and *Leverett v. Wherry* (1890) 4 Tex. App. Civ. Cas. (Willson) 284, 15 S. W. 121,—set forth at length infra.

As showing the rationale of the decisions which hold a party's books of account to be admissible under such circumstances, reference may be made to the following cases:

In *Haines v. Christie* (1901; Colo.) supra, in holding that the inhibition imposed by a statute which provides that no party to a proceeding, directly interested in the event thereof, shall be allowed to testify therein of his own motion or in his own behalf when

any adverse party defends as the heir of a deceased person, does not extend to books of account between a party to a proceeding and a deceased person if the proper preliminary proofs are made, the court said: "Such books were admissible at common law for the reason that when it appeared that they were made up, or contained entries made as a part of the ordinary and regular course of business, the ordinary motives for untruth would be removed, and that they therefore contained a true statement of the matters to which such entries refer."

Under a statute providing that books of account containing charges by one party against the other, made in the ordinary course of business, are receivable in evidence only where the books show a continuous dealing with persons generally, or several items of charges at different times against the other party, in the same book, and it is shown by the party's oath, "or otherwise," that they are his books of original entry, and that the charges were made at or near the time of the transaction therein entered, "unless satisfactory reasons appear for not making such proof," and the charges are verified by the party or clerk who made the entries, to the effect that they believe them just or true, "or a sufficient reason must be given why the verification is not made," the books of account of a party who is himself incompetent to testify are admissible to establish his claim against the estate of a deceased person. *Martin v. Scott* (Neb.) supra. The court said: "The language of our statute above quoted seems to have been chosen with reference to all cases where by reason of the death or disability from any cause of the party making the entries in the account books to make the proper verification; and in all such cases it either dispenses with the verification or lets in such as the nature of the case will admit."

Books of account are not the testimony of a party in the sense that they are inadmissible under the statute prohibiting a party from giving testimony against the estate of a deceased

person. *Bookout v. Shannon* (Miss.) *supra*.

Where, in an action upon a claim against a decedent's estate, a witness testified to making out bills correctly copied from plaintiff's book of account and rendering them to the testator, and the defendant refuses to produce such bills, the book of account is admissible in evidence as presenting the best secondary evidence of their contents. *Wright v. Hicks* (1901) 61 App. Div. 489, 70 N. Y. Supp. 675.

Limitations of rule.

In an action against an executor to recover the price of goods sold and delivered to the wife of the testator in his lifetime, the plaintiff's books of account, though admissible to prove the charges and circumstances of the delivery of the goods to the testator's wife, are not admissible to prove that credit was given to the testator. *Dexter v. Booth* (1861) 2 Allen (Mass.) 559.

And the plaintiff cannot be permitted to testify in an action against an administrator, in explanation and interpretation of entries in his book of accounts. *Remick v. Rumery* (1899) 69 N. H. 601, 45 Atl. 574.

Minority view.

In *Chandler v. Woodward* (1907) 7 Penn. (Del.) 54, 76 Atl. 623, it was held that a statute prohibiting an adverse party from testifying in actions by or against executors, administrators, or guardians as to any transaction with or statement by the testator, intestate, or ward operates to exclude books of original entry offered for the purpose of establishing the rendition of services by the plaintiff, notwithstanding a statute providing that "a book of original entries, regularly and fairly kept, shall, together with the oath or affirmation of the plaintiff, be admitted in evidence to charge the defendant with the sums therein contained for goods sold and delivered, and other matters properly chargeable in an account."

Under a statute providing that "in actions or proceedings by or against the executors, administrators, or guardians, in which judgments may be rendered for or against them, neither

party shall be allowed to testify against the other as to any transactions with or statement by the testator, intestate, or ward unless called to testify thereto by the opposite party," private books and memoranda made by the complainant are not competent and admissible as evidence to charge the estate of a decedent. *Nance v. Callender* (1898) — Tenn. —, 51 S. W. 1025.

An account is not admissible in an action against an administrator on an account against his intestate, under a statute providing that in an action on account supported by affidavits the account shall be taken as prima facie evidence of its correctness unless the defendant files a denial upon oath, such account being a transaction between the plaintiff and the decedent. *Leverett v. Wherry* (1890) 4 Tex. App. Civ. Cas. (Willson) 284, 15 S. W. 121.

b. Where entries were made by deceased party or his agent.

The objection to the admission of books of account, based on their character as transactions with the deceased, disappears where the entries therein were made by the deceased person himself (*Spears v. Spears* (1875) 27 La. Ann. 537; *Ward v. Leitch* (1869) 30 Md. 326; *Roberts's Estate* (1889) 126 Pa. 102, 17 Atl. 588; *Smith v. Smith* (1916) 105 S. C. 393, 89 S. E. 1032), or his agent, even though such agent is the party plaintiff (*Robertson v. O'Neill* (1912) 67 Wash. 121, 120 Pac. 884), as in such case they are admissible as declarations against interest.

An entry in an account book is properly admitted in evidence in support of a claim against the estate of a decedent where it appears that it had been exhibited to the decedent and approved by him. *Britian v. Fender* (1906) 116 Mo. App. 93, 92 S. W. 179.

A book kept by the deceased himself and containing charges against him is competent evidence against his estate. *Smith v. Smith* (1916) 105 S. C. 393, 89 S. E. 1032.

In an action upon account for money advanced and services rendered to the deceased in his lifetime, entries made in the books of the deceased by

the plaintiff, in his capacity of book-keeper, are admissible in his favor where the book appears to have been kept in the usual course of business, since in such case the plaintiff made the entries not for himself, but for his principal and as his agent, and the books were the books of the principal and admissible as evidence against him. *Robertson v. O'Neill* (Wash.) *supra*.

Testimony given by plaintiff that entries were made in a memorandum book by a third person at the direction of the defendant's decedent, to whom the third person read them aloud, is objectionable as relating to a personal transaction or communication between the witness and the deceased person. *Herrington v. Winn* (1891) 60 Hun, 285, 14 N. Y. Supp. 612.

II. Competency of interested party to prove books of account.

a. In general.

Owing in part to differences in the wording of statutes declaring interested parties incompetent to testify in an action involving transactions with a person since deceased or insane, and in part to a difference of opinion as to whether such testimony relates to a transaction with the deceased or insane person, the decisions on the question whether an interested party is a competent witness to lay the foundation for the introduction into evidence of his books of account exhibit a variety of conclusions.

That he is not disqualified as a witness is held, on various grounds presently to be discussed, in

Alabama.—*Warten v. Black* (1915) 195 Ala. 93, 70 So. 758 (obiter); (but compare *Dismukes v. Tolson* (1880) 67 Ala. 386).

California.—*Roche v. Ware* (1886) 71 Cal. 375, 60 Am. Rep. 539, 12 Pac. 284; *Cowdery v. McChesney* (1899) 124 Cal. 363, 57 Pac. 221; *City Sav. Bank v. Enos* (1901) 135 Cal. 167, 67 Pac. 52; *Stuart v. Lord* (1903) 138 Cal. 672, 72 Pac. 142; *Colburn v. Parrett* (1915) 27 Cal. App. 541, 150 Pac. 786 (except as to correctness).

Florida.—*Robinson v. Dibble* (1880) 17 Fla. 457; *Lewis v. Meginniss*

(1892) 30 Fla. 419, 12 So. 19; *Chapin v. Mitchell* (1902) 44 Fla. 225, 32 So. 875.

Georgia.—*Strickland v. Wynn* (1873) 51 Ga. 600.

Illinois.—*Alling v. Brazee* (1887) 27 Ill. App. 595; *McGlasson v. Housel* (1906) 127 Ill. App. 360; *Miller v. Pratz* (1913) 179 Ill. App. 204; *Niehols v. Cunningham* (1913) 181 Ill. App. 190; *Carney v. Baker* (1916) 202 Ill. App. 396.

Iowa.—*Cummins v. Hull* (1872) 35 Iowa, 253; *Dysart v. Furrow* (1894) 90 Iowa, 59, 57 N. W. 644.

Kansas.—*Anthony v. Stinson* (1867) 4 Kan. 211.

Maine.—*Silver v. Worcester* (1881) 72 Me. 322.

Massachusetts.—*Dexter v. Booth* (1861) 2 Allen, 559.

Mississippi.—*Bookout v. Shannon* (1882) 59 Miss. 378.

New Hampshire.—*Snell v. Parsons* (1880) 59 N. H. 521.

New York.—*Bellows v. Bender* (1914) 87 Misc. 187, 149 N. Y. Supp. 548 (though not as to correctness); (see also *Knight v. Cunningham* (1875) 6 Hun, 105; *Davis v. Seaman* (1892) 64 Hun, 572, 19 N. Y. Supp. 260).

North Carolina.—*Leggett v. Glover* (1874) 71 N. C. 211.

Rhode Island.—*Cargill v. Atwood* (1898) 18 R. I. 303, 27 Atl. 214.

South Carolina.—*JEFFORDS v. MULBROW* (reported herewith) ante, 755.

Pennsylvania.—*Keener v. Zartman* (1891) 144 Pa. 179, 22 Atl. 889; *White's Estate* (1875) 11 Phila. 100.

Washington.—*Ah How v. Furth* (1896) 13 Wash. 550, 43 Pac. 639.

Wisconsin.—*Sucke v. Hutchinson* (1897) 97 Wis. 373, 72 N. W. 880.

The contrary view is held in

Alabama.—*Dismukes v. Tolson* (1880) 67 Ala. 386 (but see *Warten v. Black* (1915) 195 Ala. 93, 70 So. 758).

Arkansas.—*Miller v. Jones* (1877) 32 Ark. 337 (as to correctness).

Nebraska.—*Martin v. Scott* (1881) 12 Neb. 42, 10 N. W. 532.

Nevada.—*Schwartz v. Stock* (1901) 26 Nev. 128, 65 Pac. 351 (explaining *Jones v. Gammans* (1876) 11 Nev. 249).

Texas.—*Watson v. Dodson* (1912) — Tex. Civ. App. —, 143 S. W. 329.

In some cases the view has been taken that while a party may identify his book of account and testify that the entries therein were contemporaneous with the transaction to which they relate, he may not testify to their correctness (see *Miller v. Jones* (Ark.) *supra*; *Stuart v. Lord* (1903) 138 Cal. 672, 72 Pac. 142; *Colburn v. Parrett* (1915) 27 Cal. App. 541, 150 Pac. 786; *Knight v. Cunningham* (1875) 6 Hun (N. Y.) 105; *Davis v. Seaman* (1892) 64 Hun, 572, 19 N. Y. Supp. 260; *Bellows v. Bender* (1914) 87 Misc. 187, 149 N. Y. Supp. 548). But in other cases he has been held, without qualification, competent to testify, to prove his book entries. And in *Dysart v. Furrow* (1894) 90 Iowa, 59, 57 N. W. 644, it is expressly held that his testimony that the entries in his book of account are correct does not relate to a personal transaction or communication between himself and the deceased.

As above noted, there is a difference of opinion as to whether the testimony of a party laying the foundation for the introduction into evidence of his books of account relates to a "transaction or communication" with the decedent, or simply to his own act. As holding that it does not involve a transaction or communication with the decedent, see *Robinson v. Dibble* (1880) 17 Fla. 457; *Lewis v. Meginniss* (1892) 30 Fla. 419, 12 So. 19; *Dysart v. Furrow* (1894) 90 Iowa, 59, 57 N. W. 644; *Bookout v. Shannon* (1882) 59 Miss. 378; *JEFFORDS v. MULBROW* (reported herewith) ante, 755; *Ah How v. Furth* (1896) 13 Wash. 550, 43 Pac. 639. *Contra*, *Dismukes v. Tolson* (1880) 67 Ala. 386; *Watson v. Dodson* (1912) — Tex. Civ. App. —, 143 S. W. 329; and compare *Miller v. Jones* (1877) 32 Ark. 337; *Stuart v. Lord* (1903) 138 Cal. 672, 72 Pac. 142; *Colburn v. Parrett* (1915) 27 Cal. App. 541, 150 Pac. 786; *Knight v. Cunningham* (1875) 6 Hun (N. Y.) 105; *Davis v. Seaman* (1892) 64 Hun, 572, 19 N. Y. Supp. 260; *Bellows v. Bender* (1914) 87 Misc. 187, 149 N. Y. Supp. 548.

The ground upon which the party is ordinarily held competent to testify is, however, not that the testimony is not of the description prohibited by the statute, but that such statutes do not apply to cases where the interested party was competent at common law to testify. See

California.—*Stuart v. Lord* (1903) 138 Cal. 672, 72 Pac. 142.

Florida.—*Chapin v. Mitchell* (1902) 44 Fla. 225, 32 So. 875.

Georgia.—*Strickland v. Wynn* (1873) 51 Ga. 600.

Illinois.—*Alling v. Brazee* (1887) 27 Ill. App. 595.

Iowa.—*Cummins v. Hull* (1872) 35 Iowa, 253.

Massachusetts.—*Dexter v. Booth* (1861) 2 Allen, 559.

New Hampshire.—*Snell v. Parsons* (1880) 58 N. H. 521.

North Carolina.—*Leggett v. Glover* (1874) 71 N. C. 211.

Rhode Island.—*Cargill v. Atwood* (1893) 18 R. I. 303, 27 Atl. 214.

Where the fact to be proved by the books of account or memoranda is not a personal transaction with the decedent, the other party is, of course, a competent witness to attest their correctness. See *Warten v. Black* (1915) 195 Ala. 93, 70 So. 758.

The plaintiff in an action against a decedent's estate may properly be allowed to testify that he made out the account sued on and sent it by another to be presented to defendant's testator, and that the account sent contained the items and amounts, such testimony not relating to a transaction or communication with the decedent. *Trimmier v. Thompson* (1893) 41 S. C. 125, 19 S. E. 291.

The plaintiff may not make explanatory statements concerning his method of bookkeeping. *Smith v. Scott* (1909) 51 Wash. 330, 98 Pac. 763.

For more particular information as to the character of the statute involved in each case, and of the evidence admitted or excluded thereunder, the reader is referred to the subjoined presentation of

The cases in detail.

In *Dismukes v. Tolson* (1880) 67 Ala. 386, it was held that, as the prin-

ciple of the statute prohibiting a party from testifying as to any transaction with or statement by any deceased person whose estate is interested in the result of the suit is applicable to all cases involving a direct, immediate conflict of interest between the proposed witness and the estate of the decedent where the purpose or effect of such evidence is to diminish the rights of the decedent or of those claiming in succession under him, a party is not a competent witness to prove book entries made by him which had reference to a transaction with the deceased during his lifetime. The court said: "These entries were a mere written declaration of the fact that the defendants had paid for the corn which they purchased from the deceased in his lifetime. They were contemporaneous with the principal fact of payment, and are regarded in the eye of the law as verbal acts, being part and parcel of the *res gestæ*. 1 Greenl. Ev. § 120. They clearly constituted a part of the transaction with the deceased, and come within the statutory prohibition. To allow a defendant to prove such entries by his own oath against the estate of a decedent would be to permit him to accomplish indirectly what he is prohibited from doing directly by the express mandate of the statute."

But in *Warten v. Black* (1915) 195 Ala. 93, 70 So. 758, the court expresses its disapproval of *Dismukes v. Tolson* (Ala.) *supra*, saying: "It would be a matter of curious reflection to find that our statute, which was intended to enlarge the competency of parties as witnesses in consonance with modern theories of evidence, had in a very important particular the effect of imposing a disqualification where none existed at the common law."

In *Miller v. Jones* (1877) 32 Ark. 337, it was held that the incompetency of a party to testify as to transactions between himself and the defendant's intestate precluded him from proving by his own testimony the correctness of the account exhibited with his complaint, where such account stated or was founded on a transaction between himself and the defendant's intestate.

In certain California cases, it has been stated in general terms that a party may himself lay the foundation for the introduction in evidence of his books of account in an action against the estate of a deceased person (*Roche v. Ware* (1886) 71 Cal. 375, 60 Am. Dec. 539, 12 Pac. 284; *Cowdery v. McChesney* (1899) 124 Cal. 363, 57 Pac. 221; *City Sav. Bank v. Enos* (1901) 135 Cal. 167, 67 Pac. 52); but in *Stuart v. Lord* (1903) 138 Cal. 672, 72 Pac. 142, it was remarked that it may be going too far to say that a party may testify as to the correctness of books kept by him, and that his testimony should be limited to the fact that he kept books of original entries made at the time of the transaction, and to the identity of the books produced. And this is expressly held in *Colburn v. Parrett* (1915) 27 Cal. App. 541, 150 Pac. 786, in which the court, after pointing out that in *Roche v. Ware* (Cal.) *supra*, the plaintiff did not testify or offer to testify, and the question concerning his right to be a witness for the purpose of making the preliminary proof of correctness of his books of account arose as an incident to a discussion of the sufficiency of the evidence that had been produced to sustain the plaintiff's case, and noting the criticism made in *Stuart v. Lord* (Cal.) *supra*, said: "The purpose of the rule stated in § 1880 of the Code of Civil Procedure is to prevent a plaintiff in an action to recover upon a claim against the estate of a deceased person, from giving testimony which would in itself tend to establish plaintiff's claim or demand. We cannot escape the conclusion that this purpose would be disregarded and the rule of the statute would be violated if the plaintiff were permitted to testify (and in this instance to give the only testimony) to the effect that the entries made by him at or about the time of the transactions to which they related were true and correct. This is, in substance, the same as to allow him to testify that he rendered to the decedent the services mentioned, and that they were of the value stated in the account."

In *Stuart v. Lord* (Cal.) *supra*, it

is said, with reference to the rule permitting a plaintiff in a suit on a claim against a decedent's estate to give the preliminary evidence necessary to the admission of his books of account, that while this is apparently an encroachment on the statutory rule declaring a party incompetent to testify as to transactions with persons since deceased in actions by or against one claiming through such deceased person, it is explained by reference to the fact that even under the common-law rule by which any party interested was incompetent as a witness, a party was allowed to testify to matters not embraced in the issues but incidentally arising during the course of the trial, and which were in the nature of preliminary proof to lay the foundation for other evidence and addressed solely to the court, such, for instance, as proof of the loss or destruction of a document to admit secondary evidence of its contents, or the death of a subscribing witness to admit proof of his handwriting, and that the Code provision was not intended to be more rigid with respect to testimony of a plaintiff in a suit against the estate of a deceased person than was the common law with respect to parties in general.

A person offering his books of account in evidence is not precluded by the statute from making oath that the books so offered are books of original entry of the contemporaneous transactions therein set down of the party so offering them, as this does not involve testifying to a transaction or communication with the deceased. *Lewis v. Meginniss* (1892) 30 Fla. 419, 12 So. 19; *Robinson v. Dibble* (1880) 17 Fla. 457.

In *Chapin v. Mitchell* (1902) 44 Fla. 225, 32 So. 875, it was held that a statute providing that no person shall be excluded from testifying as a witness by reason of his interest in the event of the action or because he is a party thereto, provided, however, that no party or person interested shall be examined as a witness in regard to any transaction or communication between such witness and a person at the time of such examination

deceased, insane, or lunatic, against the executor, administrator, heir at law, next of kin, assignee, etc., of such deceased person, or the assignee or committee of such insane person or lunatic, unless the adverse party shall testify thereto on his own behalf, being intended to enlarge and not restrict the competency of witnesses, does not prohibit a party from making his suppletory oath as to his books of account which, by a prior statute, have been declared to be admissible upon such oath.

A party may, notwithstanding the statute, testify that a book which he proposes to offer in evidence is his original book of entry, it not being the intention of such statute to restrict the admission of evidence, but to enlarge the rule for its admission. *Strickland v. Wynn* (1873) 51 Ga. 600.

Section 3 of the Illinois Evidence Act which provides that where, in any civil action, the claim or defense is founded on a book account, any party may give the testimony necessary to admit the books, is not qualified by § 2 of that act, which provides that no party to a civil action shall be allowed to testify therein in his own behalf "by virtue of the preceding section"—which provides that no person shall be disqualified as a witness in any civil suit, except as thereafter stated, by reason of his interest in the event thereof, when the adverse party sues or defends as executor, etc.; and a party plaintiff in a suit where the defendant defends as the representative of a deceased person may, therefore, testify in identification of his account book that the same is a book of original entries, and that the entries therein were made by himself in the regular course of business, and are true and just. *Alling v. Brazee* (1887) 27 Ill. App. 595; *McGlasson v. Housel* (1906) 127 Ill. App. 360; *Miller v. Pratz* (1913) 179 Ill. App. 204; *Nichols v. Cunningham* (1913) 181 Ill. App. 190; *Carney v. Baker* (1916) 202 Ill. App. 396.

In *Cummins v. Hull* (1872) 35 Iowa, 253, it is said that the statute which excludes parties who are rendered generally competent to testify, in

cases where the adverse party is an executor or administrator, was not intended as a restriction upon the rules of evidence with respect to the competency of witnesses as they existed prior to the enactment of such statute.

In *Dysart v. Furrow* (1894) 90 Iowa, 59, 57 N. W. 644, it was held that an examination as to the facts required to be shown preliminary to the introduction of a book of account,—namely, that the book is one of original entries, that the charges therein were made at or about the time of the transaction, and that the entries therein are correct,—is not an examination in regard to personal transactions or communications between the witness and the deceased within the meaning of the statute declaring that “no party to any action or proceeding . . . shall be examined as a witness in regard to any personal transaction or communication between such witness and a person at the commencement of such examination deceased, insane, or lunatic.”

In *Anthony v. Stinson* (1867) 4 Kan. 211, it was held that a party seeking to establish a set-off against a claim asserted by the administratrix of a decedent was a competent witness to prove that a book of accounts offered in evidence was his book of original entries.

In *Dexter v. Booth* (1861) 2 Allen (Mass.) 559, it was held that the statute excluding testimony of a party where the other party is dead does not disable a party from giving his testimony suppletory to his books of account in any case where he could have done so before, and to the same extent.

The disqualification of a party to testify in an action against a decedent's estate will not preclude him from testifying that his books of account are books of original entry, containing entries contemporaneous with the transactions under investigation. *Bookout v. Shannon* (1882) 59 Miss. 378.

Section 329 of the Nebraska Code of Civil Procedure, which provides that “no person having a direct in-

terest in the result of any civil cause or proceeding shall be a competent witness therein when the adverse party is an executor, administrator, or legal representative of a deceased person, unless,” etc., operates to exclude the plaintiff as a witness in his own behalf, even for the purpose of proving his account book. *Martin v. Scott* (1881) 12 Neb. 42, 10 N. W. 532.

In *Schwartz v. Stock* (1901) 26 Nev. 128, 65 Pac. 351, it was held that under the Nevada statute (§ 379 of the Practice Act) which provides: “No person shall be allowed to testify under the provisions of §§ 376 and 377 when the other party to the transaction is dead or when the opposite party to the action or the person for whose immediate benefit the action or proceeding is prosecuted or defended is the representative of a deceased person, when the facts to be proven transpired before the death of such deceased person,” one claiming property as the surviving member of a firm as against the executrix of his alleged partner was not a competent witness for the purpose of authenticating his books and testifying to the correctness of the transactions therein contained. The court said with regard to the case of *Jones v. Gammons* (1876) 11 Nev. 249, cited by counsel as holding to the contrary, that the objection to the competency of the witness therein taken was expressly waived upon appeal, and the question, therefore, not involved in the decision of the case.

To permit a party to testify to his books of original entry after the death of the party charged is not objectionable as permitting him to testify to matters which had occurred between himself and the deceased, in the lifetime of the deceased. *Ibid.*

The exception made in the statute providing that a party may testify in any civil cause except when the adverse party is an executor or administrator or insane person, unless, etc., does not create an exception to the right which the party had at common law to give in evidence his books of account, supported by his oath. *Snell v. Parsons* (1880) 59 N. H. 521.

In *Knight v. Cunningham* (1875) 6

Hun (N. Y.) 105, it was said that the plaintiff's right to prove the correctness of his books himself or to make any statement with regard to them against a deceased person is extremely doubtful, but that it was unnecessary to examine the question because the testimony was not objected to nor the question presented upon proper exceptions.

The testimony of the plaintiff in proof of the correctness of his books is incompetent under § 829 of the Code of Civil Procedure, which prohibits a party or one interested in the outcome of an action by or against the representatives of a deceased person to testify "concerning a personal transaction or communication" between the witness and such deceased person. *Davis v. Seaman* (1892) 64 Hun, 572, 19 N. Y. Supp. 260.

The prohibition of § 829 of the New York Code of Civil Procedure, which provides that a party or person interested in the event of the suit, or a person from, through, or under whom he derives his interest, shall not be examined as a witness against the executor, administrator, or a survivor of a deceased person, or the committee of a lunatic or a person deriving his title or interest from, through, or under a deceased person or lunatic, concerning a personal transaction or communication between the witness and the deceased person or lunatic, except, etc., does not exclude a party from testifying, to identify his books of account, that he kept no clerk and that his custom was to make entries therein in the usual course of business with regularity, though he may not testify that his account with the decedent in his book was a true transcript of the transaction between him and the decedent. *Bellows v. Bender* (1914) 87 Misc. 187, 149 N. Y. Supp. 548.

The effect of a statute declaring that a party may be a witness in his own behalf, though he may not testify as to any matter between him and a person deceased where the latter's administrator or executor is a party, is not to narrow the operation of the Book-debt Statute under which a par-

ty is permitted to prove his account by his own oath up to \$60. *Leggett v. Glover* (1874) 71 N. C. 211.

The court will not, however, permit a party seeking to establish a claim against the estate of a lunatic, to verify an account so as to make it prima facie evidence under a statute enacting "that in any action instituted in any courts of this state upon an account for goods sold and delivered, a verified itemized statement of such account shall be received in evidence, and shall be deemed prima facie evidence of its correctness." *Nall v. Kelly* (1915) 169 N. C. 717, 86 S. E. 627.

The plaintiff may testify to the identity of his books of account notwithstanding the other party to the cause of action is dead, this being a case in which he could have been a witness for this purpose at common law, and hence within the exception of Pub. Stat. Rhode Island, chap. 214, § 33, which provides that whenever an executor or administrator is a party to the suit, the other party shall not be admitted to testify upon his own offer, "otherwise than now by law allowed." *Cargill v. Atwood* (1893) 18 R. I. 303, 27 Atl. 214.

One who is prohibited by law from testifying in an action brought by an administrator as to transactions between himself and the decedent may not testify that entries in his book of account against the decedent were made by him at the time of such transactions, and that the book was correctly kept. *Watson v. Dodson* (1912) — Tex. Civ. App. —, 143 S. W. 329.

A witness, though a party and interested in the outcome of the suit, is competent for the purpose of proving book entries, notwithstanding a statute providing: "Nor, where any party to a thing or contract in action is dead, or has been adjudged a lunatic and his right thereto or therein has passed, either by his own act or the act of the law, to a party on the record who represents his interest in the subject in controversy, shall any surviving party to such thing or contract, or any other person whose interest shall be adverse to the said right of such

deceased or lunatic party, be a competent witness to any matter occurring before the death of said party." *Keener v. Zartman* (1891) 144 Pa. 179, 22 Atl. 889.

A claimant against a decedent's estate, though incompetent as a witness in his own behalf, may give evidence in support of his book entries. *White's Estate* (1875) 11 Phila. (Pa.) 100.

An account book kept by the plaintiff, showing services rendered by him to defendant's decedent, is not inadmissible as relating to a "transaction had by him with or any statement made to him by" the decedent, but relates solely to acts of the witness alone, and is therefore competent. *Ah How v. Furth* (1896) 13 Wash. 550, 43 Pac. 639.

The testimony of the plaintiff in an action on a contract for sawing lumber, made with defendant's agent, since deceased, that he measured such lumber and entered the amount so sawed in his books, is admissible, such testimony not relating to a transaction or communication with the agent within the meaning of the statute. *Sucke v. Hutchinson* (1897) 97 Wis. 373, 72 N. W. 880.

b. Under statutes expressly permitting party to attest books of account.

In several jurisdictions the competency of the party to attest his books of account, in cases where the transaction is the proper subject of book account, is expressly declared by statute.

In Kentucky, the admissibility of books of original entry where the adverse party is dead is expressly permitted by a statute (Civ. Code, § 606, subsec. 7) which provides that "a person may testify for himself as to the correctness of original entries made by him . . . in an account book according to the usual course of business, though the person against whom they were made may have died or become of unsound mind."

So, in an action by an administrator upon a note executed to his intestate, in which the defendant pleaded payment in lumber, entries made by defendant in a book in the usual

course of business, and such as the business required to be made, were competent evidence for him, and he had the right to testify that they were correct, although he may not testify that he furnished the decedent with lumber. *Freeman v. Deer Bros.* (1893) 14 Ky. L. Rep. 813.

The statute, being but declaratory of the common law, does not apply to entries which at the common law were inadmissible, such as entries of cash paid to or for the decedent. *Proctor v. Proctor* (1904) 118 Ky. 474, 81 S. W. 272; *Clark v. Clark* (1906) 122 Ky. 145, 91 S. W. 284.

And a final entry closing an account as "settled by note" is not an entry made "according to the usual course of business," within the meaning of the statute. *Estes v. Jackson* (1899) 21 Ky. L. Rep. 859, 53 S. W. 271.

In *Callihan v. Trimble* (1888) 10 Ky. L. Rep. 36, it was held that this statute applies only to the account books of merchants, tradesmen, and others whose business requires that an account of their transactions should be kept in a book, and not to entries made by persons of transactions which are not connected with their business; and therefore that, in an action by a surviving partner against a physician upon an account for merchandise, it was not competent for the defendant, in support of his plea of payment, to testify as to the correctness of entries of payments by him to the deceased partner which he had entered at the time of the several payments in an account book kept by him for the purpose.

In Missouri, the statute provides that "in actions for the recovery of any sum or balance due on account, and when the matter at issue and on trial is proper matter of book account, the party living may be a witness in his own favor, so far as to prove in whose handwriting his charges are, and when made, and no further." *Anchor Mill. Co. v. Walsh* (1891) 108 Mo. 277, 32 Am. St. Rep. 600, 18 S. W. 904.

In Ohio, the statute expressly permits a plaintiff in an action to estab-

lish a claim against a decedent's estate to testify that an account book produced by him is his book of original entries, and that the entries therein were made by him at the time they purport to have been made. *Bogart v. Cox* (1890) 4 Ohio C. C. 289, 2 Ohio C. D. 551.

In Vermont, a statute expressly provides that in actions of book account, and where the matter at issue and on trial is a proper matter of book account, the party living may be a witness in his own favor so far as to prove in whose handwriting his charges are, and when made. See *Thrall v. Seward* (1865) 37 Vt. 573; *Wyman v. Wilcox* (1893) 66 Vt. 26, 28 Atl. 321.

Such statute, however, does not render him a competent witness to testify generally in relation to the items

of his account. *Hunter v. Kittredge* (1868) 41 Vt. 359.

Nor does such statute make the party a competent witness to authenticate an entry which is not a proper subject of book charge. *Jewett v. Winship* (1869) 42 Vt. 204.

In Wyoming, the statute which prohibits a party from testifying where the adverse party is an executor or administrator expressly provides that if the claim or defense is founded on a book account a party may testify that the book is his account book, and that it is a book of original entries, that the entries were made by himself, a person since deceased, or a disinterested person nonresident of the county, whereupon the book shall be competent evidence. See *Hay v. Peterson* (1896) 6 Wyo. 419, 34 L.R.A. 581, 45 Pac. 1073. E. S. O.

PRUDENTIAL INSURANCE COMPANY OF AMERICA, Plff. in Err.,
v.
ADA T. STEWART.

United States Circuit Court of Appeals, Ninth Circuit — November 13, 1916.

(150 C. C. A. 272, 237 Fed. 70.)

Insurance — computation of premium dates — what governs.

The date of delivery, not that of execution, controls in determining the days for payment of premiums under an insurance policy providing that it shall not take effect until delivery, and that the premiums shall be paid at that time and thereafter quarter annually, although it also recites the dates for premium payments computed from that upon which the policy was executed.

[See note on this question beginning on page 774.]

ERROR to the District Court of the United States for the Southern Division of the Western District of Washington (Cushman, District Judge) to review a judgment in favor of plaintiff in an action brought to recover the amount alleged to be due on a life insurance policy. *Affirmed.*

The facts are stated in the opinion of the court.

Argued before Gilbert, Morrow, and Hunt, Circuit Judges.

Mr. S. A. Keenan for plaintiff in error.

Messrs. S. Warburton and Boyle, Brockway, & Boyle for defendant in error.

Gilbert, Circuit Judge, delivered the opinion of the court:

This was an action to recover on a life insurance policy. The application for insurance was made on February 2, 1915. The policy was is-

sued and bore date February 19, 1915, but it was not delivered until April 15, 1915, and on that date the first premium was paid. The application contained the provision: "That said policy shall not take effect until the same shall be issued and delivered by the said company, and the first premium paid thereon in full."

The policy contained the following: "Premium.—Twelve and 70/100 dollars, payable on the delivery of this policy and thereafter quarter annually at the home office of the company."

It contained a provision that, in the payment of any premium under the policy except the first, a grace of one month, without interest, would be allowed, during which time the policy would remain in force. The insured died on July 19, 1915, and within the period of grace after the expiration of three months, if the three months are to be reckoned from the date of the delivery of the policy and the payment of the first premium. By the terms of the contract as above stated, therefore, the policy was still in existence at the time of the death of the insured, and the plaintiff was entitled to recover unless the date of the payment of the second premium was fixed at an earlier date by a certain other provision of the policy. That provision follows the clause above quoted, so that the whole provision is as follows: "Twelve and 70/100 dollars payable on the delivery of this policy and thereafter quarter annually at the home office of the company, or, as provided under the heading 'Provisions' on the second page hereof, in exchange for the company's receipt on or before the 19th day of February, May, August, and November in every year during the continuance of this policy."

It is the contention of the plaintiff in error that the clause beginning with the word "or" is controlling; that, although the policy was not delivered until April 15, 1915, and did not take effect until that day, the second quarterly payment of pre-

mium became due on the 19th day of May, and, not having been paid, the policy lapsed on June 19th. In *McMaster v. New York L. Ins. Co.* 183 U. S. 25, 46 L. ed. 64, 22 Sup. Ct. Rep. 10, the court said: "We are dealing purely with the question of forfeiture, and the rule is that, if policies of insurance contain inconsistent provisions or are so framed as to be fairly open to construction, that view should be adopted, if possible, which will sustain, rather than forfeit, the contract."

In *Thompson v. Phenix Ins. Co.* 136 U. S. 287, 297, 34 L. ed. 408, 413, 10 Sup. Ct. Rep. 1023, the court said: "If a policy is so drawn as to require interpretation, and to be fairly susceptible of two different constructions, the one will be adopted that is most favorable to the insured. This rule, recognized in all the authorities, is a just one, because those instruments are drawn by the company."

The contract of insurance in the present case contained, as we have seen, two inconsistent provisions; one, that the policy took effect only upon the issuance and delivery thereof, and the premium was to be payable on such delivery, and thereafter quarter annually; the other, that the premiums were to be paid on the 19th day of February, May, August, and November in each year. The contract was fairly susceptible of two different constructions. This court would not be justified in ruling that the insured had not the right to assume that the first provision was controlling. He had stipulated in his application that the insurance was to take effect from the date of the delivery of the policy, and he may have assumed,—and it is not an unreasonable assumption,—that the second provision in regard to the date of payment, which begins with the word "or," was intended to present an alternative, and to give him the option to decide whether he would pay in accordance with the terms of the first provision or those of the second. The construction which the plaintiff in er-

ror contends for would require the assured to ignore a plain provision of the contract and to pay a premium for insurance which he never received. We think the court below committed no error in ruling that the policy was still in force at the date of the death of the insured.

**Insurance—
computation of
premium dates—
what governs.**

Decisions construing policies of a similar nature favorably to the insured are *Stinchcombe v. New York L. Ins. Co.* 46 Or. 316, 80 Pac. 213; *Stramback v. Fidelity Mut. L. Ins. Co.* 94 Minn. 281, 102 N. W. 731; *Cilek v. New York L. Ins. Co.* 97 Neb. 56, 149 N. W. 49, 1071; *Halsey v. American Cent. L. Ins. Co.* 258 Mo. 659, 167 S. W. 951.

The plaintiff in error relies upon decisions such as *McConnell v. Provident Sav. Life Assur. Soc.* 34 C. C. A. 663, 92 Fed. 769. But in that case the policy did not take effect upon delivery, and, by the express terms of the policy, the dates for the payment of subsequent premiums were fixed with reference to the date of the policy, and there was no ambiguity in the terms of the policy. The other cases cited are similar to the case just noted, with the exception of *Mutual L. Ins. Co. v. Stegall*, 1 Ga. App. 611, 58 S. E. 79. In that case the policy, dated August 30, 1904, contained the provision that annual premiums should be paid in advance on August 30th, and on that date each year thereafter. The insured did not accept the policy until November 19, 1904. He died in October the following year. In that case, as in this, it was stipulated that the policy should not become effective until its delivery and the payment of the first premium, but

it differed from the policy in the case at bar in that it contained no provision that the succeeding annual premiums should be payable annually thereafter. The court held that the policy became void for the failure of the insured to pay the second annual premium on August 30, 1905. That conclusion seems to have been influenced by the statute of the state which provided that a policy of life insurance "runs from midday of the date of the policy and the time must be estimated accordingly, if the policy is limited to a specified number of years." The state statute and the difference in the terms of the policies render the decision inapplicable here.

It would have been a very easy matter for the plaintiff in error to prepare a policy which was not ambiguous. If it intended not to be bound by the provision that the policy took effect on delivery, and that the premiums were payable quarterly yearly thereafter, it should have made known its intention in plain words. We think the court below committed no error in directing the jury to return a verdict for the defendant in error.

The judgment is affirmed.

NOTE.

The date from which life insurance periods are to be computed is considered in the annotation following *WILKINSON v. COMMONWEALTH INS. CO.* post, 774. Other cases sustaining the view taken in the reported case (*PRUDENTIAL INS. CO. v. STEWART*, ante, 766), that the date of delivery of the policy controls, are cited in subdivision III. b, of that note.

BESSIE W. WILKINSON, Appt.,
v.
COMMONWEALTH LIFE INSURANCE COMPANY.

Kentucky Court of Appeals — October 5, 1917.

(176 Ky. 833, 197 S. W. 557.)

Insurance — premium period — date for reckoning.

The time for payment of the recurring premiums on a life insurance policy must be reckoned from the date of the policy, and not from the time of delivery, although the policy provides that it shall not be in force until delivery, and, because of illness of the soliciting agent, it is not delivered until several days after its date, and the policy cannot be reformed to make the premium period date from delivery.

[See note on this question beginning on page 774.]

APPEAL by plaintiff from a judgment of the Circuit Court for Nelson County dismissing an action brought to reform a life insurance policy.
Affirmed.

The facts are stated in the Commissioner's opinion.

Messrs. Frank E. Daugherty, E. N. Fulton, and John A. Fulton for appellant.

Tait v. New York L. Ins. Co. 1 Flipp. 288, Fed. Cas. No. 13,726.

Messrs. Kelley & Kelley, R. C. Cherry, and Burnett, Batson, & Cary, for appellee:

Clay, C., filed the following opinion:

The insured having agreed to and accepted a date for annual premium payment, the beneficiary is bound thereby.

On September 30, 1914, the Commonwealth Life Insurance Company issued to Joseph M. Wilkinson a policy insuring his life in favor of his wife, Bessie W. Wilkinson, in the sum of \$5,000. Her husband died on December 10, 1915, and she brought this suit against the company to reform the policy, on the ground of mutual mistake of the parties or fraud on the part of the company, and to recover on the policy when thus reformed. On final hearing the action was dismissed, and she appeals.

Meridian L. Ins. Co. v. Milam, 172 Ky. 75, L.R.A.1917B, 103, 188 S. W. 879; Sydnor v. Metropolitan L. Ins. Co. 26 Pa. Super. Ct. 521; Tibbits v. Mutual Ben. L. Ins. Co. 159 Ind. 671, 65 N. E. 1033; Thomas v. Prudential Ins. Co. 158 Ind. 461, 63 N. E. 795; Jewett v. Northwestern Nat. L. Ins. Co. 149 Mich. 79, 112 N. W. 734; Methvin v. Fidelity Mut. Life Asso. 129 Cal. 251, 61 Pac. 1112; McConnell v. Provident Sav. Life Assur. Soc. 34 C. C. A. 663, 92 Fed. 769; Bryan v. National L. Ins. Asso. 21 R. I. 149, 42 Atl. 513; Wilkie v. New York Mut. L. Ins. Co. 146 N. C. 520, 60 S. E. 427; Mutual L. Ins. Co. v. Stegall, 1 Ga. App. 611, 58 S. E. 79; Tigg v. Register Life & Annuity Ins. Co. 152 Iowa, 720, 133 N. W. 322; Forch v. Western Life Indemnity Co. 157 Ill. App. 244; Rose v. Mutual L. Ins. Co. 240 Ill. 45, 88 N. E. 204; Armstrong v. Provident Sav. Life Assur. Soc. 2 Ont. L. Rep. 771; Klein v. New York L. Ins. Co. 104 U. S. 88, 26 L. ed. 662; Howell v. Knickerbocker L. Ins. Co. 44 N. Y. 276, 4 Am. Rep. 675; 6 A.L.R.—49.

The facts are as follows: The written application for the policy was dated September 15, 1914. The insured was examined September 19, 1914, but the report thereof was not forwarded to the company until several days later. The application was accepted, and the policy issued and dated on September 30, 1914. The policy was then sent to the soliciting agent at New Hope, in Nelson county, for the purpose of delivery to the insured, who lived at Bloomfield, in the same

county. Before the policy reached the soliciting agent, he was adjudged of unsound mind and sent to the state hospital, and in a short time the policy was returned by the Postoffice Department to the home office of the company at Louisville. The policy was then sent, with other policies, in care of a special agent, for delivery. While at Bloomfield on October 15th for the purpose of delivering this policy, the special agent met G. R. Elder, who informed him that he had assisted the soliciting agent in securing the policy, and that the policy should be turned over to him for delivery. The special agent then delivered the policy to Elder, who gave him a check for the premium, less the agent's commission, with the understanding that he would see the insured on Saturday, October 17th, and if he refused to accept the policy the check which Elder gave was to be returned. On Saturday, October 17th, Elder gave the policy to Wilkinson, who examined it and deposited it in a box at the Citizens' Bank, where it remained until his death. On Monday, October 25, 1915, the insured was taken ill, and was carried to the Jewish Hospital in Louisville, where an operation was performed upon him. His wife accompanied him to the hospital, but found it necessary to return to her home on November 6, 1915. On examining her husband's papers on Tuesday, November 9th she found the formal notice from the company of the maturity of the second premium on the policy. She called up the local agent, G. R. Elder, and asked his advice. Elder agreed to meet her at the hospital on November 10th, where she gave him a letter, with a check to the insurance company, and requested him to mail it for her, which he did on his return to Bloomfield that night. The check not only included the amount of the premium, \$78.65, for the ensuing year, but also the estimated interest during the period of grace. On November 17, 1914, the company

wrote the insured at Bloomfield that, in view of the fact that the period of grace had expired, it would be necessary for him to furnish evidence of his good health, in order to authorize a reinstatement of the policy, and that the check would be held, and not cashed, until the necessary evidence was furnished. On November 24, 1915, the company wrote that, not having received the necessary proof of the insured's good health, it returned the check, but, on furnishing the necessary proof, the check might be sent to the company, and then would be received in settlement of the premium for the ensuing year. It further appears that prior to August 20, 1915, notice that the second annual premium would be due on September 30, 1915, was sent to the insured at Bloomfield, Kentucky. The premium not then being paid, a second notice was sent during the first week in October, 1915. Both of these notices were received by the insured. On October 26th the secretary of the company wrote a letter to the insured, advising him that the grace period of thirty days allowed for the payment of his premium would expire on October 30th and suggesting that, if inconvenient to pay the full premium, he might send a check for \$19.67, and execute three notes in favor of the company for \$19.66 each, which notes were inclosed. The letter and notes are made part of the deposition of the appellant. No response to either of these notices was made to the company.

The application, which was signed by Joseph M. Wilkinson, contained the following provision: "I also declare that it is understood on behalf of myself and any beneficiary under any policy issued by the said company on my life upon this application that the company shall not be liable until the application has been received, approved, the policy issued thereon by the company and delivered to me, and premium paid during my good health."

The application called for a twenty-year term policy, and provided that the premium of \$78.65 should be paid annually. The policy issued pursuant to the application is what is commonly called a convertible twenty-year term policy. On the face of the policy is the following provision: "This contract is made in consideration of the application for this policy, hereby made a part thereof, and the payment of the first premium of \$78.65, and the payment of a like amount at the home office of the company on or before the 30th day of September of each year for the term of twenty years, or until the prior death of the insured."

It is further stated in the face of the policy: "That the benefits and provisions stated on the second page thereof form a part of this contract as fully as if recited at length over the signature hereto affixed."

Under the head of "Benefits and Provisions" is the following: "Should this policy lapse by non-payment of premium, it may be reinstated at any time upon satisfactory evidence of insurability and the payment of past-due premium, with 5 per cent interest thereon, and, should the company require it, any other indebtedness of the insured to the company."

With reference to "grace" in the payment of premiums, we find the following: "In case of default in the payment of any premium when due, this policy will be continued in force for the full amount for one month, subject to a charge for interest at the rate of 5 per cent per annum, and payment of premium may be made during that time without evidence of insurability."

Under the head of "Payment of Premiums" is the following provision: "The first premium must be paid during the lifetime and good health of the insured and upon delivery of this policy. All premiums are due and payable annually in advance, but they may be paid in semiannual or quarterly instal-

ments, at the home office of the company in the city of Louisville, Kentucky, or they may be paid elsewhere to authorized agents on or before the dates when due, in exchange for receipts signed by the president, vice president, secretary, or treasurer, and countersigned by such agent. If any premium, or note given therefor, be not paid when due, this policy shall become null and void."

It will be observed that the check for the second premium was sent to the company on November 10, 1915. If that premium was due September 30, 1915, then the payment was not within the one month's grace provided by the policy. On the other hand, if the second premium was not due until October 17, 1917, then the payment was made within one month from that date, and was therefore in time.

After setting out the foregoing provisions of the application, and certain provisions of the policy, the petition alleges, in substance, that, among other things in the application, it was provided that, should any contract or policy issue thereon, it should not become effective until the payment of the first premium and the delivery of the policy to the insured while he was in good health, and thereupon the policy became effective, and the subsequent premiums were payable annually in advance, at the beginning of each year of insurance, or within one month thereafter, with 5 per cent annual interest thereon from the time when due. It is further alleged that at the time of the delivery of the policy and the payment of the first annual premium on October 17, 1914, "either by the fraud of the defendant or by the mistake of said insured and the defendant, said policy of insurance was erroneously dated as being issued, signed, and delivered on the 30th day of September, 1914, whereas in fact said policy was not delivered and the first annual premium paid thereon until October

17, 1914, and the correct and true date when each of said annual premiums became due and payable was October 17th of each year, and not September 30th each year, as erroneously stated in said policy, and by the terms of said contract the insured had only one month after the 17th of each October in each year for the payment of said annual premium of \$78.65, with 5 per cent interest thereon from the time when due."

There was no direct evidence of actual fraud or mutual mistake on the part of the parties, but it is insisted for the appellant that, where the application for a term policy stipulates that the liability of the company shall not begin until the policy is delivered and paid for during the good health of the insured, it is such character of constructive fraud or inequitable conduct or gross mistake for the company to antedate such policy by seventeen days before delivery, and thus make the subsequent annual premiums payable seventeen days earlier each year, as will authorize a court of equity, after loss, to reform such policy, both as to the date thereof and the erroneous date specified for payment of subsequent annual premiums, and then enforce payment of the policy. This is not a case where the company agreed to insure the applicant for a period of thirteen months, and the soliciting agent, without authority from the insured, requested the company to date the policy six days before its delivery, and then stated to the insured, at the time of the delivery of the policy, that the policy conformed to the agreement between him and the company. In such a case, it was held that the policy should not have borne the unauthorized date requested by the agent without the knowledge of the insured, but should, in accordance with the general practice in such matters, have been dated the day of its issue, and the subsequent premiums have been made payable on the same

day in each succeeding year. It was also held that the omission of the insured to read the policy when delivered was not such negligence as would estop him from denying that the policy conformed to the agreement between him and the company, in view of the fact that the agent, at its time of delivery, assured him that the policy did conform to such agreement. Under these circumstances the court concluded that the insured was entitled to insurance for a period of thirteen months from the date of the issue of the policy, and, as his death occurred within that period, his administrator was permitted to recover. *McMaster v. New York L. Ins. Co.* 183 U. S. 25, 46 L. ed. 64, 22 Sup. Ct. Rep. 10.

Nor does the case fall within the rule announced in the case of *Cecil v. Kentucky Livestock Ins. Co.* 165 Ky. 211, 176 S. W. 986. There Cecil applied for insurance on a stallion named Great Ward. The application was signed on March 26, 1913. It reached the company on March 29th. The policy was issued on the 29th, but was antedated to March 26th, the date of the application. It was delivered to Cecil on April 1st, and the premium was then paid. On March 27, 1914, the stallion died. The company having denied that the policy was in force when the stallion died, Cecil brought suit to recover on the policy. The petition alleged that Cecil made application to the defendant to insure him against loss by the death of his horse for a period of one year; that it was agreed between the parties that the application was to become a part of the contract of insurance in the event the application was accepted; that the contract of insurance should not be in force until the policy should be delivered to Cecil and the premium paid for one year's insurance during the life and good health of "Great Ward;" that the application was accepted on March 29, 1913, and the policy executed on that day, but was dated on

March 26, 1913, and was subsequently delivered to Cecil on April 1, 1913, when the premium was paid. The petition further alleged that by the terms of said contract the company's liability did not commence until delivery of the policy to Cecil, and the payment of the premium by him on April 1, 1913, but by mutual mistake and oversight of the parties it was made to read to insure said horse from March 26, 1913, at noon, to March 26, 1914, noon, when according to the contract the policy should have been written to insure appellant against loss from the 1st day of April, 1913, noon, to the 1st day of April, 1914, noon. In other words, the petition not only set forth the agreement actually made by the parties—that is, to insure the horse from April 1, 1913, to April 1, 1914—but clearly alleged that by mutual mistake of the parties the policy was made to insure the horse from March 26, 1913, to March 26, 1914, instead of from April 1, 1913, to April 1, 1914, as provided by the original agreement between the parties. Under these circumstances, this court held the petition good on demurrer. In the case under consideration, there is neither pleading nor proof to the effect that the parties made any other agreement than that set forth in the contract of insurance.

It is clear, from the proof in this case, that the policy was not antedated at all. In accordance with the common practice of insurance companies, it was dated the day it was issued, and subsequent annual premiums were made payable on the same day in the succeeding years. Ordinarily only a few days elapse between the date a policy is issued and the date it is delivered. In this case the delay in the delivery of the policy grew out of the fact that the soliciting agent, to whom it was sent, became insane, and was not due to any fault on the part of the company. When the policy was delivered, no representation was made to the insured that would tend in the least to mislead

him as to the time the subsequent premiums would become due. The policy provided that they should become due on September 30th in each year. Whether the insured observed this fact, or not, we cannot say. He did examine the policy and accept it as the contract between him and the company. Even if there then existed any substantial reason why he should not have ascertained the date of payment of subsequent premiums, this reason no longer existed when he received in the month of August a notice that the second annual premium would be due on September 30, 1915, and a second notice during the first week in October, and also the letter on October 26th, advising him that the period of grace would expire on October 30th. Notwithstanding these facts, he made no claim of fraud or mistake in the policy as to the time when the premiums were due and payable. He asked for no change, and none was made. Indeed, the claim of fraud or mistake now made is based entirely on the fact that as the insured paid for one year's insurance, and as the policy was not delivered and did not become effective until October 17th, seventeen days after its date, subsequent premiums should have been made payable on October 17th in succeeding years, and not on the date the policy was issued. To uphold this contention would result in the making of a contract which the parties themselves did not make. While it is true that policies of insurance generally provide that they shall not take effect until the payment of the first premium and their delivery during the good health of the insured, yet, as before stated, it is the common practice of insurance companies to date policies on the day they are issued, and the mere fact that there is always a time between the issuance of a policy and its delivery, during which it is provided that no liability shall attach, is not such

Insurance—
premium period
—date for
reckoning.

evidence of fraud or mistake as will authorize the court to change the time and terms of payment expressly provided in the policy itself. On the contrary, the beneficiary will stand in the shoes of the insured, and will be held bound by the terms of the policy which the company issued, and the insured accepted and retained, without objecting or asking that it be reformed, until the policy was forfeited by the nonpayment of premiums on the dates fixed by the policy. This view of the question is supported by the great weight of authority.

Sydnor v. Metropolitan L. Ins. Co. 26 Pa. Super. Ct. 521; Tibbits v. Mutual Ben. L. Ins. Co. 159 Ind. 671, 65 N. E. 1033; Jewett v. Northwestern Nat. L. Ins. Co. 149 Mich. 79, 112 N. W. 734; Methvin v. Fidelity Mut. Life Asso. 129 Cal. 251, 61 Pac. 1112; Wilkie v. New York Mut. L. Ins. Co. 146 N. C. 520, 60 S. E. 427; Tigg v. Register Life & Annuity Ins. Co. 152 Iowa, 720, 133 N. W. 322; Rose v. Mutual L. Ins. Co. 240 Ill. 45, 88 N. E. 204. It follows that plaintiff's petition was properly dismissed.

Judgment affirmed.

ANNOTATION.

Date from which life insurance premium periods are to be computed.

I. Introductory, 774.

II. Where delivery of policy is not essential to completion of contract:

a. Specific date provided for payment of premium:

1. General rule, 775.

2. Application of rule:

(a) Subsequent payment of premium, 775.

(b) Payment of premium in advance, 777.

3. Rule in Oregon, 779.

1. Introductory.

An interesting and important question concerning the forfeiture of policies for the nonpayment of premiums has arisen out of the practice of insurers to date the policy as of the date of the application for insurance, or of its execution and issuance, and to make the subsequent premiums due and payable on the anniversary of that date.

The policy usually contains an express provision that it is not to take effect as a contract of insurance until the first premium has been paid, during the lifetime and good health of the insured, or else its taking effect is conditioned on the delivery of the policy to the insured. Thus the policy does not take effect as a contract until a somewhat later date than is stated in the policy as the commencement of the insurance. The result is an

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inconsistency in the terms of the contract. Under one provision, after the condition has been performed, the insured is entitled to insurance for the period of one year. But the policy also provides that if subsequent premiums are not paid on the date specified, which is usually the date of the application, or the date of the execution, of the policy, the policy shall be forfeited. By this provision the recurring premiums are made payable in less than a year after the contract becomes effective. In brief the insurer, by one provision, protects the insured for one year, and by another stipulates that the failure to pay the next premium at the end of a period less than one year forfeits the policy. One provision provides for a whole year's insurance, while another provision limits the insurance to a period of less than a year.

It is the purpose of this note, therefore, to discuss the cases which have determined, in such a situation, the date from which the premium periods are to be computed.

II. Where delivery of policy is not essential to completion of contract.

a. Specific date provided for payment of premium.

1. General rule.

When a policy, conditioned to take effect on the payment of the first premium, expressly specifies the date from which the premium period is to be computed, and makes that date the day on which the recurring premiums are due and payable, such date must control, regardless of the date on which the policy is delivered.

United States.—*McConnell v. Provident Sav. Life Assur. Soc.* (1899) 34 C. C. A. 663, 92 Fed. 769.

California.—*Thomas v. Northwestern Mut. L. Ins. Co.* (1904) 142 Cal. 79, 75 Pac. 665.

Illinois.—*Forch v. Western Life Indemnity Co.* (1910) 157 Ill. App. 244.

Indiana.—*Tibbits v. Mutual Ben. L. Ins. Co.* (1903) 159 Ind. 671, 65 N. E. 1033.

Iowa.—*Tigg v. Register Life & Annuity Ins. Co.* (1911) 152 Iowa, 720, 133 N. W. 322.

Kentucky.—See *WILKINSON v. COMMONWEALTH L. INS. CO.* (reported herewith) ante, 769.

North Carolina.—*Wilkie v. New York Mut. L. Ins. Co.* (1908) 146 N. C. 513, 60 S. E. 427.

Rhode Island.—*Bryan v. National L. Ins. Asso.* (1899) 21 R. I. 149, 42 Atl. 513.

Canada.—*Armstrong v. Provident Sav. Life Assur. Soc.* (1901) 2 Ont. L. Rep. 771.

B. Application of rule.

(a) Subsequent payment of premium.

In *McConnell v. Provident Sav. Life Assur. Soc.* (1899) 34 C. C. A. 663, 92 Fed. 769, the policy in suit contained the following provisions: "(1) This policy does not go into effect until the first premium has been actually paid during the lifetime and good

health of the within-named insured. (2) Failure to pay any premium or semiannual or quarterly instalment thereof, when due, thereupon will terminate this policy. (3) The annual premium on this policy may be paid by quarterly instalments, as hereinafter stated, on or before the 27th day of April, July, October, and January in each year." The policy was dated on the 27th of April, and was delivered on the 9th of May. By the terms of the policy the second premium was due on the 27th of July, but on that date remained unpaid. On July 28th the insured died. It was contended that the premium was to be computed from the date of the delivery of the policy, and that therefore the death of the insured was within the premium period. The court held that the parties were bound by their express contract to compute premium periods from the date of the execution of policy, and that therefore the insured's death was not within the period.

In *Forch v. Western Life Indemnity Co.* (1910) 157 Ill. App. 244, the policy in question was executed and issued on June 3, 1907, on an application dated May 23, 1907, but was not delivered until June 6, 1907. The application contained the following provision, which was made a part of the contract: "This application . . . shall not take effect until the first premium shall have been paid, during my continuance in sound health, and the policy shall have been executed and issued by the company." On the other hand, the policy stated that the first premium paid was "the premium for term insurance for the period terminating on the 3d day of June, 1908," and provided for "a like sum annually thereafter on or before the 3d day of June in every year during the continuance of this contract." It was the contention of the plaintiff that the insurance did not become effective until the delivery of the policy and therefore the premium periods ought to be computed from that date. The court held that the periods were to be computed from the date expressly specified in the policy as the date on which the premium was due and payable.

In *Tibbits v. Mutual Ben. L. Ins. Co.* (1903) 169 Ind. 671, 65 N. E. 1083, the policy in suit contained the following provision: "This policy witnesseth that the Mutual Benefit Life Insurance Company, in consideration of the . . . sum of \$22.52 to it in hand paid by John C. Tibbits, and of the quarter annual premium of \$22.52 to be paid at or before 12 o'clock M. on the 25th day of April, July, October, and January, in every year, during the continuance of this policy, does insure the life of John C. Tibbits . . . in the amount of \$2,000 for the term of life, payable to Addie L. Tibbits, wife of John C. Tibbits, in case she survives the insured. . . . Provided, that in case the said premiums shall not be paid on or before the several days hereinbefore mentioned for the payment thereof . . . then, and in every such case, this policy shall cease and determine," etc. The insured died on August 10th, and it was admitted that the quarterly premium due on July 25th remained unpaid. It was claimed, however, that, though the policy was dated April 25th, it was not delivered to the insured until April 30th, at which date the first premium was paid, and therefore, the next quarterly premium did not become due until the 30th day of July instead of the 25th day of July, as was contended by the appellee. In holding the policy void for the nonpayment of the premium, the court said: "Without regard to the time of the delivery of the policy, or of its taking effect, they had the right to fix the date at which each premium should become due. They did agree that the first quarter-annual premium should be payable July 25, 1898, at or before 12 o'clock M. of that day. Any other day in the month, before or after July 25th, might have been named by them, or the premium for the whole year might have been made payable on a day named in the policy. Both parties would have been bound by such an agreement. If at the time of the application for the policy the insured had executed his promissory note for the first quarter-annual premium, payable July 25, 1898, at or before noon, cer-

tainly, in the absence of fraud or mistake, he would have been bound to pay it at that time. He accepted the policy as it was written, with the stipulation that the premiums should be paid at or before certain days and hours. No objection was made by the insured to the terms of the policy, and he kept it by him until he died. No claim was made by him that there was a mistake in the instrument, or that the premiums were not payable precisely as stated. . . . We can discover no inconsistency in the conditions of the policy as to the time when the premiums became due, nor as to the effect of a failure, without sufficient excuse, to pay them when due. The exact time at which the premiums were to be paid was clearly designated, and the subsequent clause of forfeiture, declaring that 'in case the said premium shall not be paid on or before the several days hereinbefore mentioned for the payment thereof, . . . then, and in every such case, this policy shall cease and determine,' did not have the effect of changing and extending the time within which payment of the premiums might be made, so as to authorize their payment after noon and at any time during the several days on which they were made payable. The clause of the policy fixing the time of payment is definite and particular. The clause providing for the forfeiture, in case of the nonpayment of a premium, is general in its terms, and does not undertake to fix the time of payment, but expressly refers to the preceding clause. The construction contended for by the appellant would render nugatory the clause which definitely fixed the time for the payment of the premiums. Such a reading of the instrument would violate a well-established rule of construction, and cannot be adopted."

In *Armstrong v. Provident Sav. Life Assur. Soc.* (1901) 2 Ont. L. Rep. 771, the policy sued on was dated on August 23, but was not delivered until October 4th. The application contained the provision: "The insurance hereby applied for shall not be binding on the society until the first premium due thereon has been actually received

by the said society or its authorized agent during my lifetime and good health." In the policy the provision was in these words: "This policy does not go into effect until the first premium thereon has been actually paid during the lifetime and good health of the assured." It was contended by the plaintiff that as the first premium was not in fact paid until the 4th of October that point of time must be considered the commencement of the premium periods, instead of August 23d as provided in the policy. The court followed the American case of *McConnell v. Provident Sav. Life Assur. Soc.* (1899) 34 C. C. A. 663, 92 Fed. 769, *supra*, and held that the premium periods were to be computed as of the date of the execution of the policy, which was made the date for the payment of the recurring premiums.

(b) Payment of premium in advance.

In *Thomas v. Northwestern Mut. L. Ins. Co.* (1904) 142 Cal. 79, 75 Pac. 665, the suit was on a policy dated January 25, 1898, which provided that the premium was to be paid in advance. The policy acknowledged the receipt of the first payment and provided that the recurring premiums were to be paid on the 25th day of January and July of each year. The policy was delivered on February 17, 1899. No further premium was paid and the insured died on February 7, 1899. The insurer disclaimed liability on the ground of a forfeiture for nonpayment of premium due as specified in the policy. The assured insisted that the premium periods ought to be computed from the date of the delivery of the policy, because from that time only was the insurance in effect, and therefore the insured's death was within the period determined by the payment of the first premium. The court held that the express stipulation in the policy for the payments on the 25th of January and July governed, and that those dates marked the commencement of the premium periods.

In *Tigg v. Register Life & Annuity Ins. Co.* (1911) 152 Iowa, 720, 188 N. W. 322, it appeared that the insured made an application for insurance on

August 7th and executed his note for the premium. On September 23d a policy was issued and forwarded to him. The insured died the 22d of the following October without having paid the note for the first or second premium. The policy contained an express stipulation that the premiums were to be paid on the 7th day of August of every year. Another provision stipulated that "this policy shall not take effect until the first premium shall have been paid while the insured is in good health." There was also a clause providing that "a grace of thirty days (during which the policy will remain in full force) is granted for the payment of all premiums after they became due." It was conceded that the policy remained in force for a period of thirty days after the second payment was due, but the difficulty arose over the date the second premium became due and payable. It was contended by the appellee that the premium was due August 7th as provided by the contract. The appellant contended that the time was computed from September 23d, the date the policy was issued. It was held that the express stipulation that the payments were to be made on August 7th controlled, and that the premium periods were to be computed from that date. The court said: "That an insurance contract, when of doubtful meaning or expressed in ambiguous language, is to be construed the more strictly against the insurer is well settled; but the long-established canons of construction are not to be ignored in so doing. One of these is that, when possible, all the conditions of a contract are to be construed so as to give effect to each. This is accomplished by the construction stated, which seems reasonable, and, as it gives to the assured precisely what he paid for, is just. To hold otherwise, and as contended by appellant, would do violence to the language employed in the policy, and accord it a meaning not to be inferred therefrom."

In *Wilkie v. New York Mut. L. Ins. Co.* (1908) 146 N. C. 513, 60 S. E. 427, it appeared that the premium was required to be paid in advance with the

application, and if granted, the policy was to become participating on that date. The application was received and granted on November 22d, and the policy was delivered on the 2d of December, 1901. Indorsed on the policy, was a notice to the insured and the beneficiary that "the insurance year begins on November 22d." The policy contained the following provisions: (1) "This policy is automatically non-forfeitable from date of issue, as follows: If any premium is not duly paid, and if there is no indebtedness to the company, this policy will be indorsed for the amount of paid-up insurance specified in column two of the table on the second page hereof, on written request therefor within six months from the date to which premiums were duly paid. If no such request is made, the insurance will automatically continue from said date for the amount stated at the head of column three of said table (\$2,000) for the term specified therein (two years and two months), and no longer." (2) "This agreement is made in consideration of the sum of \$63.66, the receipt of which is hereby acknowledged, and of the payment of a like sum on the 22d day of November thereafter, in every year during the continuance of this policy, until twenty full years' premiums shall have been paid." The plaintiff contended that "two full premiums for two years had been paid, this carried the insurance to 2 December, 1903, and that by the terms of the contract the insurance was automatically continued from the latter date for two years and two months, which would carry it to 2 February, 1906, and as the insured died on 26 January, 1906, the policy was in full force and effect at the time of his death." The defendant, on the contrary, insisted that "the date from which the count of time must be made is 22 November, 1901, according to the stipulations of the contract and the notice to the insured, at the time of the delivery of the policy to him, that the insurance year would begin 22 November, which date, in 1901, was the beginning of the first insurance year; and that, this being so, the insurance,

when extended according to the contract, expired 22 January, 1906,—just four days before the death of the insured." It was held that the premium periods were to be computed from November 22d, according to the contract and notice to be insured on the delivery of the policy. The court said: "The policy provides that, if no request for paid-up insurance is made, the policy will automatically continue in force for two years and two months from the date to which premiums are duly paid. The question, then, is presented, To what date had premiums been fully paid, under the terms of this policy? Manifestly, as we read the contract, and in view of the law applicable to such cases, to 22 November, 1903. . . . If we accept the contention of the plaintiff that 22 December is the beginning of the insurance year, within the meaning of the parties to this contract, we are met by the positive and clearly inconsistent provision that the full term of the insurance will end 22 November, and that her share of the profits and the benefits under the policy shall then accrue to her as the beneficiary, if the premiums have been paid to that date. This provision is, of course, in conflict with the plaintiff's contention, because, if the insurance became effective 22 December, 1901, and the insurance year was therefore to commence on that date and end on the corresponding date of each and every year thereafter, the full term would thereby be extended, contrary to the express provision of the policy, nine days, at least, beyond the date fixed for its termination. A construction of the policy which will produce such a result is, of course, not admissible. Payment being required in advance, the premium paid when the policy was actually issued would run until the next pay day should come—that is, until 22 November, 1902."

In *Bryan v. National L. Ins. Asso.* (1899) 21 R. I. 149, 42 Atl. 513, the plaintiff sued to recover on a policy dated March 22, 1890, which required the payment of "\$1 on the 15th of each month for twenty years." The application was dated March 18th, 1890,

at which time the first payment was made. On December 15th, 1891, the last payment was made. The insured died on January 28th, 1892. The company disclaimed liability on the ground of nonpayment of the premium. It was contended by the plaintiff that the policy had not lapsed because, the payments being due on the 15th of each month, the first payment did not fall due until April 15th, 1890, and therefore the payment made on the 15th of December, 1891, was not due until the 15th of January. Hence another payment was not due until February 15th, 1892, and that therefore the policy was in force. It was held that the premium periods began on the issuance of the policy, and that each premium period thereafter began on the 15th of each succeeding month, and that therefore the policy had lapsed.

8. Rule in Oregon.

In Oregon, it is the rule that though the policy, in express terms, stipulates for the commencement of premium periods, if there is a provision that the policy does not take effect until the payment of the first premium, the premium periods are to be computed from the date on which the premium is paid. *Stinchcombe v. New York L. Ins. Co.* (1905) 46 Or. 316, 80 Pac. 213. In that case it appeared that the application was made on May 5th, 1894, and the policy was issued on July 10th. By its terms the policy was not to be in force until the actual payment and acceptance of the premium during the lifetime and good health of the insured. There was no binding receipt accompanying the policy. On July 24, 1894, the policy was delivered and the insured paid two full years' premiums in advance. By the terms of the policy the premiums were made payable on the 5th of May of each year, the anniversary of the application. The insured died on July 3, 1896, without having paid the premium for 1896, and the company refused payment of the policy on the ground of forfeiture for nonpayment of premium. In an action on the policy the company contended that the insured was bound by the express stipulation that premiums

were due and payable on the 5th of every May. The beneficiary claimed that the insurance was in effect only from the delivery date, and that therefore the premium periods ought to be computed from that time. It was held by the court that the premium periods were to be computed from the date of the delivery of the policy, on the ground that the company assumed no liability until the delivery of the policy. The court said: "We have, therefore, only to look to the terms of the policy to ascertain when it became effective as an insurance upon the life of Stinchcombe, and to determine the conditions upon which it might be continued in force, as well as those the nonobservance of which would entail a forfeiture. There was a care, it will be seen, on the part of the company, that the policy should not be in force—that is, that the company should not itself become liable—except on the concurrent existence of certain conditions, namely, the actual payment of the premium during the lifetime and good health of the applicant. He might have been living and in good health, but without the actual payment of the premium no liability would have been incurred on its part, and that because, as the condition reads, the policy 'shall not be in force.' . . . If, therefore, the policy was not to be in force to bind the company until the concurrence of the conditions designated, it is a most reasonable and fair deduction that it was also not intended that it should become effective, as it concerned the assured, at a date prior to their fulfilment. The defendant either insured Stinchcombe from the 5th day of May, or it did not insure him until the 24th day of July, when the policy was delivered and the premium paid and accepted by it. It is certain that it did not make itself liable until the latter date, and are we to suppose that, without engagement to that purpose, the company intended to collect the premium and the insured to pay for insurance he did not have? Rather would the deduction be to the contrary. And such is our interpretation of the contract, that it did not become effective and binding as an

insurance upon the life of Stinchcombe until such latter date, either to fix the liability of the company or to require the insured to pay for insurance in the meanwhile."

b. Specific date not provided for payment of premium.

When a policy is conditioned to take effect on the payment of the first premium, but no date is specified for the payment of recurring premiums, the premium period is to be computed from the date of the execution of the policy. *Rose v. Mutual L. Ins. Co.* (1909) 240 Ill. 45, 88 N. E. 204; *Cilek v. New York L. Ins. Co.* (1914) 97 Neb. 56, 149 N. W. 49, 1071.

Thus in *Rose v. Mutual L. Ins. Co.* (Ill.) supra, it appeared that the application for insurance was made on May 12, 1904. The application provided that the policy to be issued should not take effect until the first premium was paid during the life and good health of the insured. There was no express stipulation as to when the premium should be paid. On May 23d the application was accepted and the policy issued. The policy was delivered to the insured on July 17th, at which time the premium was paid. No other premium was paid and the insured died on August 3d of the following year. The policy provided for thirty days' grace in paying premiums. It was held that the premium periods were to be computed from the date the policy was executed, and not from the date of its delivery, and that therefore the company was not liable. The court said: "The insurance commenced to run from the acceptance of the premium while the insured was in good health and the policy acknowledged the receipt of the premium. An actual delivery of the policy to the insured was not essential to the validity of the contract, and the rule is that a policy becomes binding on the insurer when signed and forwarded to the insurance broker to whom the application for insurance was made, to be delivered to the insured. . . .

Where an application is made for insurance there is no liability until the application is accepted, but the acceptance and issuing of the policy

completes the contract. An unqualified acceptance of the application, and placing the completed policy in the hands of an agent for delivery, without condition, complete the contract.

. . . To hold that an insurance policy is not in effect until the date of its delivery, contrary to its own terms, and where there is no agreement of that kind, would throw every case of insurance into doubt and uncertainty by leaving the term to depend upon oral testimony. It would unsettle the contracts of the parties, and it is neither the practice nor the function of courts to make contracts for parties different from those which they have made for themselves. The averments of the declaration are to be construed against the pleader, and it must be held that the policy was in force when the application was approved, the insurance paid, and the policy signed and issued at the office of the company."

In *Cilek v. New York L. Ins. Co.* (Neb.) supra, it appeared that an application dated June 13th was received on June 23d and the policy executed on that date. On June 26th the policy was delivered to the insured and the premium paid. The application contained a clause that the company would incur no liability under the application until it had been received and approved by the company at the home office, and the premium actually paid during the lifetime and good health of the applicant. No date was specified for the payment of the premiums. It was contended by the insurance company that the premium periods began on June 13th, the date of the application, but the court held that the policy became effective on the day the application was approved and the policy executed.

III. Where delivery of policy is essential to completion of contract.

a. View that period is computed from date specified in policy.

In California, Georgia and Pennsylvania, the view is taken that though there is an express provision that the policy shall not take effect until its delivery, nevertheless, if the policy

expressly stipulates the date on which the premiums are to be paid, that date must control, regardless of the date on which the delivery was actually made. *Methvin v. Fidelity Mut. Life Asso.* (1900) 129 Cal. 251, 61 Pac. 1112; *Mutual L. Ins. Co. v. Stegall* (1907) 1 Ga. App. 611, 58 S. E. 79; *Sydnor v. Metropolitan L. Ins. Co.* (1904) 26 Pa. Super. Ct. 521.

In *Methvin v. Fidelity Mut. Life Asso.* (Cal.) *supra*, this view was upheld in spite of a statute providing that "a contract in writing takes effect on its delivery to the party in whose favor it is made, or to his agent." Civ. Code, § 1626. The theory of the decision is that necessarily some little time must elapse between the execution of the policy, and its delivery, and that this phase of the contract is well understood by both parties when they enter into the agreement for the insurance. In that case the policy in suit was signed on July 30, 1895, at Philadelphia. The policy provided as follows: "The same shall not be binding until delivered during the lifetime and good health of the applicant and until the first payment due hereon has been made." The policy, with a receipt for the first payment, was forwarded to the local agent in Los Angeles. The receipt read as follows: "Received from Theodore Robert of Los Angeles, Calif., owner of policy No. 060,809, \$24.96, in payment of quarterly dues, payable and due on the 30th day of July, 1895, which pays such dues up to the 30th day of October, 1895." The receipt was countersigned by the local agent on the 3d of September, 1895. After the insured's death, the company denied any liability under the policy on the ground of forfeiture because of the nonpayment of the second premium. In an action on the policy it was contended by the plaintiff that the first premium period began to run on the 3d day of September, the date of the delivery and payment of the first premium, instead of the 13th of July, as declared in the policy and also in the receipt of the first payment delivered with it. The lower court upheld this contention. On appeal this decision was reversed,

the court holding that since there were no conflicting provisions in the policy, and no ambiguities, the parties were bound by their contract, which specified that the premiums should be computed as of the date of the policy. The court said: "The [lower] court finds that said policy of insurance was issued on the 3d day of September, 1895, and the premium paid on said policy was paid for the period of three months from the 3d day of September, 1895. This finding is not supported by the evidence, but is in direct conflict with it. The policy was executed, as appears on its face, July 30, 1895. Necessarily some little time must elapse between its execution in Philadelphia and delivery in Los Angeles, which both parties to the contract, of course, well understood; and without the provision contained in the policy that it would not be binding until delivered, the same result would have followed. 'A contract in writing takes effect upon its delivery to the party in whose favor it is made, or to his agent.' Civ. Code, § 1626. If it were not delivered until September 3d, the date when the receipt was countersigned by the local agent, that would not alter the case. The payments are expressly specified in the policy to be due and payable on or before the 30th day of July, October, January, and April every year. The first payment under the terms of the policy ran from the 30th of July to the 30th of October, and this payment was received and receipted for by the company, and therefore the company cannot complain that it was not paid before the time at which it was received. As further evidence that there could be no misunderstanding as to when the second payment became due under the terms of the policy, the receipt given to Robert for the first payment expressly declares that the same 'pays such dues up to the 30th day of October, 1895.' In addition to the plain declaration in the policy, and also in the receipt, as to the time when the payments are to be made, the evidence shows that Robert well understood the same."

In *Mutual L. Ins. Co. v. Stegall*

(1907) 1 Ga. App. 611, 58 S. E. 79, the policy in suit was dated on August 30, 1904, and contained the provision that the annual premium should be paid on the delivery of the policy and on the 80th day of August in each year thereafter. The insured did not accept the policy until November 19, 1904. Death occurred in October of the following year without the premium having been paid on August 30th as expressly provided in the policy, and the insurer disclaimed liability on the ground of forfeiture for the nonpayment of the second annual premium. The plaintiff contended that, since the policy became effective only on its delivery and the payment of the first premium on November 19th of the preceding year, the insured's death in October was within the period. The company insisted on the express terms of its policy stipulating for the payment of premiums on August 30th. The court held that the premium periods were to be computed from the date expressly specified in the policy, even though the policy was conditioned to become effective on its delivery, which had actually taken place at a subsequent date. In its opinion the court cited and followed the California case of *Methvin v. Fidelity Mut. Life Asso.* (1900) 129 Cal. 251, 61 Pac. 1112, *supra*, which the court said "is in full accord with what we now decide."

In *Sydnor v. Metropolitan L. Ins. Co.* (1904) 26 Pa. Super. Ct. 521, the policy contained the following provisions: (1) No obligation is to be "assumed by the company until the first premium has been paid." (2) The quarter-annual premium of \$9.34 (is due and payable) on or before the delivery of this policy, and of a like amount on or before the 31st day of March, June, September, and December of each and every year during the life of the insured." (3) "The acceptance by the company at any time of a premium past due is to be taken as an act of grace by the company, and not as a precedent, nor as a waiver of any of the policy conditions." The policy was executed on March 31st, and tendered to the insured on April 2d, but was not delivered on that day because

the insured could not pay the premium. The policy was retained by the local agent until April 26th, on which date the insured paid the first premium and the agent delivered the policy. The insured did not pay the premium that fell due on the last day of September according to the due date as specified in the policy, but payment was tendered the company on October 14th, which was within six months of the date of the delivery of the policy. The insured died October 14th, and the company disclaimed any liability under the policy. In an action to recover the face of the policy it was contended that the policy contemplated the payment of the premiums quarterly from the time the policy became effective as a binding contract, and that the payment of the first premium on April 26th paid for insurance to July 26th, that the payment of the second premium paid for three months' additional insurance, or until October 26, and, the insured having died before the expiration of this period, that the company was liable. The court held that the parties were bound by the express terms of the policy, and that therefore the premium periods were to be computed as of the date specified in the policy, saying: "The parties made their own contract, which is free from ambiguity and must be enforced according to its terms. The contention of the appellant would write into the contract terms upon which the parties never agreed. The policy did not become a binding contract until the first premium was paid; there could have been no recovery upon the policy had the insured died between March 31 and April 26, 1902; that, however, was not the fault of the company, but because the insured had failed to comply with the condition precedent to the assumption of liability by the insurer, the payment of the consideration for the undertaking to indemnify. The policy which the defendant company tendered did not require that the first premium should be paid upon any particular day, but it did covenant that the premium should be paid on or before the delivery of the policy, and that it should become a binding con-

tract only when the first premium was paid. When the first premium was paid and the policy was delivered, the parties became bound by its covenants. The defendant agreed to pay upon the death of Hester Baer,—not within a definite time, but whenever she might die,—upon condition that upon each one of four specific days in each and every year during the life of the insured a certain premium should be paid, as the consideration for the indemnity furnished. The contract was not that the insured should pay the first premium upon the date of the policy, and the others quarterly thereafter. The fact that the time when the policy could be delivered was uncertain may have had some influence in leading the parties to abstain from fixing a specific date for the payment of the first premium. Whatever the reason may have been, the time for the payment of that premium was left dependent upon the delivery of the policy. After the first premium was paid the terms of the contract left no room for doubt as to the time when future payments were to be made; when in the flight of time one of the days specified by the contract arrived, a payment must be made, or the company would cease to be bound. The third premium became due on the last day of September and a payment rendered on October 14 was not in time."

b. View that period is computed from date of delivery.

In Minnesota and Missouri, and also in a Federal case arising in the state of Washington, the view has been taken that the premium periods are to be computed from the date of the delivery of the policy and the payment of the first premium, when the taking effect of the policy is conditioned on these contingencies, though the policy, in express terms, stipulates for the payment of the premiums on a specific date. *PRUDENTIAL INS. CO. v. STEWART* (reported herewith) ante, 766; *Stramback v. Fidelity Mut. L. Ins. Co.* (1905) 94 Minn. 281, 102 N. W. 731; *Halsey v. American Cent. L. Ins. Co.* (1914) 258 Mo. 659, 167 S. W. 951.

In *PRUDENTIAL INS. CO. v. STEWART* (reported herewith) ante, 766; it ap-

peared that the application for insurance contained the following provision: "Said policy shall not take effect until the same shall be issued and delivered by the said company, and the first premium paid thereon in full." The policy was issued and bore the date February 19, 1915, but it was not delivered until April 15, 1915, and on that date the first premium was paid. The policy also contained the following provision: "Twelve and $\frac{7}{100}$ dollars, payable on the delivery of this policy and thereafter quarter-annually at the home office of the company, or as provided under the heading 'Provisions' on the second page hereof, in exchange, August and November in every year during the continuance of this policy." The insured died on July 19, 1915, and within the period of grace after the expiration of three months, if the three months were reckoned from the date of the delivery of the policy and the payment of the first premium. Therefore, unless the date of the payment of the second premium was fixed at an earlier date by other provisions of the policy, the policy was still in existence at the time of the death of the insured, and plaintiff was entitled to recover by the express terms of the contract. In holding that the date from which the premium periods were to be computed was the date of delivery and payment of the first premium, the court said: "The contract of insurance in the present case contained, as we have seen, two inconsistent provisions; one that the policy took effect only upon the issuance and delivery thereof, and the premium was to be payable on such delivery, and thereafter quarter-annually; the other that the premiums were to be paid on the 19th day of February, May, August, and November in each year. The contract was fairly susceptible of two different constructions. This court would not be justified in ruling that the insured had not the right to assume that the first provision was controlling. He had stipulated in his application that the insurance was to take effect from the date of the delivery of the policy, and he may have assumed—and it is

not an unreasonable assumption—that the second provision in regard to the date of payment, which begins with the word ‘or,’ was intended to present an alternative, and to give him the option to decide whether he would pay in accordance with the terms of the first provision or those of the second. The construction which the plaintiff in error contends for would require the assured to ignore a plain provision of the contract and to pay a premium for insurance which he never received. We think the court below committed no error in ruling that the policy was still in force at the date of the death of the insured. . . . It would have been a very easy matter for the plaintiff in error to prepare a policy which was not ambiguous. If it intended not to be bound by the provision that the policy took effect on delivery and that the premiums were payable quarterly yearly thereafter, it should have made known its intention in plain words.”

In *Stramback v. Fidelity Mut. L. Ins. Co.* (1905) 94 Minn. 281, 102 N. W. 731, the policy in suit contained the following provision: “This contract is made in consideration of the written application of the above-named insured, which is made a part hereof, a copy of which is hereto attached, and the payment in advance to said company of \$55.02 on the delivery of this policy, and thereafter to the company at its head office in the city of Philadelphia, upon the 8th day of the months of September and March in every year until the premiums for fifteen full years shall have been duly paid to the said company.” Among the general provisions in the policy is one to the effect that the application forms the sole basis of the contract, which shall not be operative or binding until actual payment of the initial premium and the delivery of the policy during the lifetime and good health of the insured. The application was made on August 25th, was issued on September 8th, and delivered on September 24th, at which time the insured paid the first premium. According to the findings, the delivery of the policy and the payment of the first premium were concurrent acts.

The policy and application were both silent as to the commencement of the premium periods. It was contended by the company that the periods were to be computed from the date of the execution of the policy according to the usual course of the insurance business. The plaintiff took the position that, since the insurance was operative only from the delivery of the policy, the date of delivery should control the premium periods. In holding that the premium periods began on the delivery of the policy, the court said: “In our judgment, the significant thing is the payment of the premium in advance, and not the date of its payment; and the insured, when furnished with the policy, was entitled to assume that by the payment of the semiannual premium he had paid for half a year’s insurance, and he was advised that all subsequent premiums were required to be paid on the 8th of March and September; but what was there to call his attention to the fact that the period of insurance was to date from the day of such payments? If such is the custom and practice of insurance companies, and the insured had knowledge of it, the record is silent upon that point. The argument is advanced that it would tend to much confusion if insurance policies were required to run from the date of their delivery, instead of the date of their issuance; but, on the other hand, it may be said that the insured could be deprived of insurance already paid for, were the company permitted to fix conditionally the inception of the term of insurance at the date of the policy, dependent upon subsequent payment and delivery. This period between the dating of the policy and its delivery, under such construction, would inure to the benefit of the company, for it is conceded that if the insured in this case had died between the issuance of the policy September 8, and the payment of the premium and delivery of the policy September 24, the company would not have been liable. Our conclusion on this point is that it was contemplated by the parties, as gathered from their conduct and the documents, not only

that the policy became effective September 24, but also that the insurance paid for by the initial premium had its inception September 24."

In *Halsey v. American Cent. L. Ins. Co.* (1914) 258 Mo. 659, 167 S. W. 951, it appeared that the insured made application for insurance on the 24th day of May, 1906. The policy was issued on the 31st day of May, 1906, and was delivered to the insured on the 5th day of June, 1906. On the 31st of May of the following year the local agent of the company was tendered a check for the payment of the second premium. Thereupon he was advised by the agent that he did not have the company's receipt for the premium and was not authorized to accept the payment or to bind the company in the matter. The insured died the 5th day of June, 1907. The material parts of the application were as follows: "I, Augustus C. Halsey, of St. Louis, Missouri, hereby propose to insure my life with the American Central Life Insurance Company to the amount of \$10,000. . . . The annual premium to be made payable in advance on the 24th day of May. . . . I hereby expressly agree that there shall be no contract of insurance until a policy shall have been issued and delivered to me when in good health, and the premium paid to said company or its duly authorized agent during my lifetime. . . . The failure to pay any premium or obligation given to the company therefor at the time the same become due . . . shall render any policy issued upon this application void and terminate all liability to the company thereon, except as otherwise provided in said policy. . . . This application and policy hereby applied for, taken together, shall constitute the entire contract between the parties hereto." The material parts of the policy were as follows: "The American Central Life Insurance Company of Indianapolis, Indiana, in consideration of the agreements and warranties in the printed and written application for this policy of insurance and of the loan certificate given the company, all of which are hereby made a part of this contract, and of the pay-

6 A.L.R.—50.

ment in cash in advance of the sum of \$307, hereby insures the life of Augustus C. Halsey, hereinafter called the 'insured,' of the city of St. Louis, state of Missouri, for a period of one year from the 24th day of May, 1906, and in consideration of the further payment in cash of \$307 on or before the 24th day of May and every year thereafter during the continuance of this policy until fifteen full annual premiums shall have been paid, hereby promises to pay \$10,000 to the insured's executors. . . . The payment of the first annual premium hereon is a condition precedent to the taking effect hereof, and it is expressly agreed that this policy shall not become binding upon the company until said premium is actually paid during the lifetime and good health of the insured, and that the delivery of this policy without such payment shall not be a waiver of such precedent condition." It was held that the premium periods were to be computed from the date of the delivery of the policy, on the ground that the insurance company could not charge for a full year's insurance and only protect the insured for a period less than that time. The court said: "All the courts of the country, both state and Federal, give a very liberal construction to contracts of insurance, and never permit a miscarriage of justice by a technical or narrow construction thereof. While this record discloses the fact that the application for the insurance of the deceased was dated May 24, 1906, and that the premiums were payable upon that date, yet that was not all of the contract between the parties. The policy itself was just as important a factor in the agreement as was the application for the insurance. The policy was dated May 31, 1906, but it was not delivered until June 5th of that year, which by its express terms was not to become effective until delivered, and the first annual premium paid, which was done on June 5, 1906. Under the terms of this contract, which consisted of the application and the policy issued in pursuance thereto, the deceased was clearly insured for one full year from

June 5, 1906, to the last minute of June 4, 1907. That being unquestionably true, and the tender made of the second premium by the brother of the deceased on May 31, 1907, while the policy was still in full force and effect, was clearly made within the time agreed to by the parties, if the entire contract is to be considered as a whole. If this is not true, then by parity of reasoning advanced by counsel for appellant, the policy was never in force, for the simple reason that the first premium was not paid on May 24, 1906, but was paid on the 5th of June, 1906, the date the policy, by its terms, went into effect. This very act of the parties, under the facts and circumstances in the case, puts a practical construction upon the contract made and entered into between them, namely, that each succeeding annual premium should be paid during the life of the policy, and thereby keep it in full force and effect for the period of time stated therein. If this is not the true meaning of the parties, then the appellant is driven to the conclusion that the deceased paid for a full year's insurance, but under the terms of the policy he was only entitled to about eleven and one-half months of insurance. This, nor any other court, should allow an insurance company to thus stultify itself after taking the premium for a full year, and then escape liability by interposing the technical question that by the application for the policy the insured agreed to pay the premium long before it was due."

IV. Where policy is antedated.

a. By request of insured.

When a policy is antedated at the request of the insured, the agreement is binding on both parties, and the premium periods begin on the date so inserted. *Johnson v. Mutual Ben. L. Ins. Co.* (1906) 75 C. C. A. 22, 143 Fed. 950; *Jewett v. Northwestern Nat. L. Ins. Co.* (1907) 149 Mich. 79, 112 N. W. 734.

In *Johnson v. Mutual Ben. L. Ins. Co.* (Fed.) *supra*, it appeared that the application was made on December 24, 1890. In the application the insured

requested the company to antedate his policy on November 11th, 1890. This was done to obtain a cheaper rate. The policy was issued on January 15th, 1891, on which date the insured paid the year's premium. Subsequent premiums were fixed to fall due on the 11th of November in each ensuing year, as per the requests of the insured in his application. The insured paid the premiums for the following two years on November 11th, 1893. The policy provided for extended insurance in case of default in the payment of any premium after two full years' premiums had been paid. It was contended by the plaintiff that this extended insurance began to run on January 15th, the anniversary of the delivery of the policy, but the company insisted that the date from which it was to be computed was the anniversary of the date the premium periods became due. The court held that the premium periods were to be computed from the date agreed on by the parties, and that the plaintiff was bound thereby, saying: "That both the insured and the company regard the first premium payment as carrying the policy only to the 11th of November, 1891, and not to the 15th of the following January, is conclusively shown by their subsequent course of dealing. . . . [And] we are unable to sustain the contention of the administratrix that the premium payments continued the policy in full force until the 15th of January, 1894. Such a construction is irreconcilable with that which the unambiguous conduct of the parties shows that they adopted for their own guidance. It is not of vital importance to determine their motives in the adjustment of the premium payments, but it is fairly inferable, unless we shut our eyes and ignore well-known methods employed in the insurance business, that the rule of the company was to regard the age of the applicant for insurance as being that at his nearest birthday, and that as the insured desired to obtain a lower premium rate, which was to endure during the life of the policy, he was willing to allow his first premium payment to cover a short period an-

terior to the date of his policy so that he might be accepted as of the age of forty-four."

In *Jewett v. Northwestern Nat. L. Ins. Co.* (Mich.) *supra*, it appeared that the insured made application for insurance on August 11th, and paid the first premium on the same date. By the request of insured the policy was dated August 1st. The policy was delivered on August 18th. The following year, after the second premium was due, the insured wrote the company for a statement of the amount of premium due, and in response to the statement received, on November 4th, mailed the company the past-due premium with interest. On November 7th the company sent the insured a receipt for the premium, acknowledging it as the quarterly premium due August 1st. No further premiums were paid, and the insured died November 17th. The policy provided that the insurance covered the life of the insured, "in the amount of \$500, commencing on the 1st day of August, 1902, at noon, for a period of five years, and in the amount of \$1,000, commencing on the 1st day of August, 1907, at noon, and continuing for a period of five years." On the question whether the premium periods were to be computed from the date of delivery or the date specified in the policy, the court held that, though the policy was antedated, the parties were bound by their express contract as to the commencement of the premium periods, saying: "He [the insured] deliberately chose his form of policy, with full knowledge of all its terms and conditions. There is no claim of any unfair conduct on the part of the company. The application and the policy indicate that the policies under this form of insurance were to commence on the 1st day of some month. Mr. Jewett chose to have his policy dated the 1st of August, rather than the 1st of September following. The terms of the policy are so clear and explicit that 'he who runs may read' it and understand. It provided for the payment of \$100 to cover the first annual premium for one year, running from the 1st day of August to the 1st day of

August following. It provided that the premiums thereafter should be paid in quarterly instalments of \$25 each on or before the 1st day of certain months, and that failure to pay as provided should result in the forfeiture of the policy. There is always a time between the application for a policy and its issuance by the company where it is expressly so provided that liability does not attach. That fact, however, does not operate to change the times and terms of payment expressly provided in the policy itself. The contention of the learned counsel is that, inasmuch as the policy in question was not in force until the 18th day of August, therefore the payments of the quarterly premiums were postponed eighteen days."

b. By fraud of agent.

Where an agent interlines in the application, "Please date policy same as application," without the consent or knowledge of the insured, and the insurer antedates the policy to conform to the date of the application, the premium period is to be computed from the date of the execution of the policy.

McMaster v. New York L. Ins. Co. (1901) 183 U. S. 25, 46 L. ed. 64, 22 Sup. Ct. Rep. 10. In that case it appeared that the insured made an application for insurance on December 12, 1893. By express agreement he was to pay the first year's premium on the delivery to him of the policies, and the policies were not to take effect until they were delivered. The application said nothing as to when the policies should be dated, but after it was signed the agent, for his own purposes, inserted a request to the insurer, "Please date policy same as application." This was done without the consent or knowledge of the insured, and he never knew that these words had been written in the application. The application was forwarded to the company and the policies were issued and dated December 18th, 1893. They were delivered to the insured on December 26, 1893, at which time the insured asked the agent if the policies were as represented and if they insured him for thirteen months.

The agent informed the insured that the policies covered a period of thirteen months from the date of delivery, and the insured paid the first annual premium. The policies, although dated December 18th and in force from that date, provided for the payment of premium on December 12th of each year. The insured died on January 18th of the following year, and the question arose as to whether the insurance was forfeited by the failure to pay the second annual premium within thirty days after December 12th. The insurance company's contention was that the insured, having requested that the policies should be issued as of the same date as the application, was estopped from denying that the premiums were due on that date, although the policies were dated December 18th. The plaintiff insisted that, since the policies became effective only on their delivery and the payment of the first premium, therefore the premium periods ought to be computed from the date of the delivery of the policies. The court in its decision held that neither contention was correct; that the premium periods were not to be computed from either the date of the application or the date of the delivery of the policies, but from the date of the execution of the policy, and that therefore, under the facts, the payment of the first year's premium made the policies nonforfeitable for a period of thirteen months from that date. The court said: "To hold the insurance forfeitable for nonpayment of another premium within the year for which payment had already been fully made would be to contradict the legal effect under the applications and policies of the first annual payment. Clearly, such a construction is uncalled for, if the words, 'the 12th day of December in every year thereafter,' could be assumed to mean in every year after the year for which the premiums had been paid. But if not, taking all the provisions together, and granting that the words included December 12, 1894, nevertheless it would not follow that forfeiture

could be availed of to cut short the thirteen months' immunity from December 18, 1893, as the premiums had already been paid up to December 18, 1894. And the company could not be allowed on this record, by making the second premium payable within the period covered by the payment of the first premium, to defeat the right to the month of grace which had been proffered as the inducement to the applications, and had been relied on as secured by the payment. If death had occurred on December 18, 1894, or between the 12th and 18th, it is quite clear that recovery could have been had, and as the contracts were for life, and were not determinable (at least, for twenty years) at a fixed date, but only by forfeiture, it appears to us that the applicable rules of construction forbid the denial of the month of grace in whole or part. It is worthy of remark that it was specifically provided that after the policies had been in force one full year they should become incontestable on any other ground than nonpayment of premiums, and we suppose it will not be contended that if any other ground of contest had existed and death had occurred between December 12 and December 18, 1894, the company would have been cut off from making its defense, because the policies had been in force 'one full year' from December 12. And if not in force until December 18, the date of actual issue, how can it be said that liability to forfeiture accrued before the twelve months had elapsed? The truth is, the policies were not in force until December 18, and as the premiums were to be paid annually, and were so paid in advance on delivery, the second payments were not demandable on December 12, 1894, as a condition of the continuance of the policies from the 12th to the 18th. And as the policies could not be forfeited for nonpayment during that time, the month of grace could not be shortened by deducting the six days which belonged to McMaster of right."

A. S. M.

J. W. KNIGHT, Plff. in Err.,
v.
ALAMO MANUFACTURING COMPANY.

Michigan Supreme Court — March 30, 1916.

(190 Mich. 223, 157 N. W. 24.)

Corporation — preferred stock — right to sue for dividends.

1. An ordinary certificate of preferred stock in a corporation providing for cumulative dividends does not entitle the holder to an action against the corporation for the dividends until they have been declared.

[See note on this question beginning on page 802.]

Definition — dividend.

2. The word "dividend" in a certificate of preferred stock of a corporation does not mean merely profits, but profits which have been set aside by the directors in dividends.

[See 7 R. C. L. 283.]

Corporation — right to compel declaration of dividends.

3. A stockholder may resort to equity to compel directors to declare dividends when there are profits from which they should be declared.

[See 7 R. C. L. 294.]

Appeal — right judgment — wrong reason.

4. A right judgment will not be reversed because a wrong reason was assigned for it.

Evidence — proof of profits for dividends.

5. Evidence that the secretary of a corporation told stockholders that the

corporation had commercial paper from which dividends might be paid, but that the banks would not advance money on it at that time, and that they would get their dividends in a stated number of days, does not prove profits applicable to dividends.

Corporation — payment of dividends without declaration — effect.

6. That the secretary of a corporation has been in the habit of paying dividends without the action of the directors, which were subsequently approved by the stockholders, does not entitle stockholders to sue for subsequent undeclared dividends.

[See 7 R. C. L. 295.]

— unauthorized payment to some — effect.

7. An unauthorized payment of dividends to a few preferred stockholders of a corporation is not equivalent to a declaration of a dividend in favor of all preferred stockholders.

ERROR to the Circuit Court for Hillsdale County (Chester, J.) to review a judgment in favor of defendant in an action brought to recover stock dividends alleged to be due and unpaid. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. C. A. Shepard and B. E. Sheldon, for plaintiff in error:

After the declaration of a dividend by a corporation, it cannot, at a subsequent meeting of its board of directors, rescind such declarations; nor can it, for the obvious and confessed purpose of defeating its payment, make an assessment on stock payable on the same day as was a previously declared dividend.

9 Am. & Eng. Enc. Law, 692.

Lack of profits should be the only contingency to postpone a stated payment; anything less than this would be bad faith.

M'Laughlin v. Detroit & M. R. Co.
8 Mich. 100.

Mr. F. A. Lyon, for defendant in error:

A stockholder does not become a creditor of the corporation so that he may maintain a suit at law against the company for dividends until such dividends have been declared by the board of directors, and the funds set aside for the payment of such dividends.

Cook, Corp. ¶¶ 267-271, 524, 534, note 2, ¶¶ 545, 554B; Lockhart v. Van Alstyne, 31 Mich. 76, 18 Am. Rep. 156; American Steel & Wire Co. v. Eddy, 130

Mich. 266, 89 N. W. 952; Wedemeyer v. Hindelang, 161 Mich. 600, 126 N. W. 708; New York, L. E. & W. R. Co. v. Nickals, 119 U. S. 296, 30 L. ed. 363, 7 Sup. Ct. Rep. 209; Taft v. Hartford, P. & F. R. Co. 8 R. I. 310, 5 Am. Rep. 575; Field v. Lamson & G. Mfg. Co. 162 Mass. 388, 27 L.R.A. 136, 38 N. E. 1126; Miller v. Ratterman, 47 Ohio St. 141, 24 N. E. 496; Shaffer v. McCulloch, 113 C. C. A. 535, 192 Fed. 801; Hamlin v. Toledo, St. L. & K. C. R. Co. 36 L.R.A. 826, 24 C. C. A. 271, 47 U. S. App. 422, 78 Fed. 664; Corgan v. George F. Lee Coal Co. 218 Pa. 386, 120 Am. St. Rep. 891, 67 Atl. 655, 11 Ann. Cas. 838.

It was also necessary for the plaintiff in his declaration to allege, as well as to prove, upon the trial, before he could recover in this action at law, that the defendant corporation, by its board of directors, had declared a dividend and set the same aside for the payment to the preferred stockholders.

Cook, Corp. ¶ 542, note 5; Hill v. Atoka Coal & Min. Co. — Mo. —, 21 S. W. 508.

Even though an illegal dividend may have been paid on some of the preferred stock, the other preferred stockholders cannot claim a similar dividend, there being no profits.

Cook, Corp. § 540, notes 2-4; Hamblock v. Clipper Lawn Mower Co. 148 Ill. App. 618; Berryman v. Bankers' L. Ins. Co. 117 App. Div. 730, 102 N. Y. Supp. 695.

The directors are not compelled to pay out a dividend on either common or preferred stock so long as in their good judgment the interests of the company will be better served by retaining the profits in the treasury for the purpose of carrying on the business of the company.

Cook, Corp. § 545; Hunter v. Roberts, 83 Mich. 63, 47 N. W. 131; Schell v. Alston Mfg. Co. 149 Fed. 439; Gehrt v. Collins Plow Co. 156 Ill. App. 102; New York, L. E. & W. R. Co. v. Nickals, 119 U. S. 296, 30 L. ed. 363, 7 Sup. Ct. Rep. 209.

Person, J., delivered the opinion of the court:

This action was brought in a justice's court, and the nature of plaintiff's claim is fairly explained by his declaration, which reads as follows: "Plaintiff declares verbally in assumptit on the following clause in certificate No. 189 of pre-

ferred stock of the Alamo Manufacturing Company, of Hillsdale, Michigan; to wit, "This stock is entitled to a cumulative dividend of 7 per cent per annum, payable semi-annually, on the 1st day of September, and the 1st day of March of each year." Plaintiff says the dividend for September, 1913, and for March, 1914, have neither been paid, and the amount due plaintiff at the commencement of this suit was \$72.60, for which plaintiff asks judgment."

From a judgment rendered by the justice in favor of plaintiff, an appeal was taken to the circuit court, where a verdict was directed for the defendant. The case is brought here by writ of error.

It will be observed that plaintiff's pleading does not aver that any dividend was declared by the defendant company for either September, 1913, or March, 1914, and no such dividends were, in fact, declared. This, together with the claim that there were no profits from which either dividend could have been declared, constitutes the defense in the case.

Plaintiff admits that dividends upon his stock are payable only from such profits as the company may make; and he also admits that, as a general rule, an action at law will not lie for a dividend until it has been duly declared by the directors of the company. But, notwithstanding these admissions, he insists that the terms of his certificate, which was authorized by a resolution of the board of directors, constitute an absolute promise to pay dividends in March and September of each year, if there are profits from which they can be paid, and that therefore the existence of such profits is a legitimate question to be determined by a jury.

In this the plaintiff is entirely wrong. His is an ordinary certificate of preferred stock, and contains no unusual provisions. It does entitle him to dividends in March and September of each year, if on those dates there are profits in the

possession of the company which the directors, in the exercise of a fair discretion, believe can properly be distributed as dividends. And, being cumulative, these dividends, if there are no profits at the time which can properly be used to pay them, stand over until there are such profits. But to let a jury determine whether there are or are not profits, and, if there are any, to let it determine whether those profits may properly be distributed among the stockholders, would be equivalent to letting a jury declare the dividend. This, of course, is not the law; and, if each stockholder might call in a jury at his pleasure to determine whether a dividend should be declared, corporations would be short-lived affairs and of but little value.

**Corporation—
preferred stock—
right to sue
for dividends.**

"It is a well-recognized principle of law that the directors of a corporation, and they alone, have the power to declare a dividend of the earnings of a corporation, and to determine its amount." *Hunter v. Roberts*, 83 Mich. 63, 47 N. W. 131.

"The property of the corporation belongs in law to the corporation, and not to the stockholders. This is just as true of the profits earned by a corporation as it is of its other assets. The stockholders of a corporation may have the equitable right to insist that the profits from the corporate business shall be divided among them, but they have no legal right to any share therein, nor is there any indebtedness to them on the part of the corporation, so as to entitle them to maintain an action against it, until a dividend has been made or declared." 2 Clark & M. Priv. Corp. § 517(b).

The word "dividend" in plaintiff's certificate of stock does not mean simply profits, but it does mean such profits, or such portion of the profits, as the directors, by proper resolution, have ordered distributed among the stockholders. As was said in *Allegheny v. Pittsburg, A. & M. Pass. R. Co.*

**Definition—
dividend.**

179 Pa. 414, 36 Atl. 161: A dividend "differs from profits in being taken by competent authority out of the joint property of the partnership or company, and transferred to the separate property of the individual partners or stockholders."

The thing that plaintiff's certificate of stock says he is entitled to is the declaration of a dividend in March and in September of each year, if on those dates there are profits in the hands of the company that ought justly to be divided among the stockholders. And if directors wrongfully refuse to declare a dividend when one ought to be declared, the stockholder may have his remedy in equity; but he cannot maintain an action at law until it has been declared.

**Corporation—
right to compel
declaration of
dividends.**

"Except as to this right of priority over common stock, preferred stock is subject, in so far as the payment of dividends is concerned, to substantially the same rules as common stock, unless they are rendered inapplicable by express provision." 2 Clark & M. Priv. Corp. § 417(e).

The circuit judge was right in holding that this action cannot be maintained, and, being right in his conclusion, the judgment would not be reversed even had he failed to assign a right reason for it.

**Appeal—right
judgment—
wrong reason.**

In directing a verdict for the defendant company the circuit judge did not expressly put it upon the ground that the dividends had not been declared by the board of directors, although he says he had that reason in mind. What he did say in his instructions to the jury was that, in his judgment, it had not been shown that there were any profits from which a dividend could have been declared. And in this, too, we think he was right. The books of the company were not produced for the purpose of determining whether there were profits or not. The secretary testified that

the company had not made any profits from which either of these dividends could have been declared. And the only evidence offered by the plaintiff to show the existence of profits was certain statements made to the plaintiff and others by the secretary at various times before the action was begun, to the effect that the company had "gilt-edge paper" for \$35,000 or \$36,000, but that the banks would not advance money on it at that time. It was also shown that the secretary had held out hopes to the preferred stockholders that they would get their dividends in thirty, or sixty, or ninety days. This came far short of proving profits. The company might have had that amount of good securities, and much

**Evidence—
proof of profits
for dividends.**

more, without having made any profits. To determine whether or not a company has made profits sometimes requires a very nice balancing of assets with indebtedness and expenses. Nothing of that kind was attempted in this case.

It appears from the record that previous to September, 1913, the secretary of the company had been in the practice of paying dividends upon the preferred stock without any formal resolution or declaration by the board of directors authorizing him to do so. These payments had been reported each year to the stockholders at their annual meeting, and no objection to the practice had been expressed. The plaintiff seems to claim some kind of support for this action from that method of paying the dividends. But we cannot see how he is to get any benefit from it. The payments were unauthorized, but, where stockholders have thus actually distributed profits by unanimous consent, they may be estopped from asserting any claim to recover them back. *Barnes v. Spencer & B. Co.* 162 Mich. 509, 139 Am. St. Rep. 587, 127 N. W. 752. An irregular practice of this kind cannot be held to

abrogate the well-settled and essential rule of law that dividends must be determined upon and declared by the board of directors before a stockholder can maintain an action at law for their recovery.

**Corporation—
payment of
dividends with-
out declaration—
effect.**

It also appears that a comparatively small portion of the preferred stock, the exact amount not being shown, had been sold by the company under what the secretary called a guaranty. The certificates issued for the preferred stock thus sold were like all of the other certificates of preferred stock, and the so-called guaranties were contained in papers separate and distinct from the certificates. These guaranties consisted of promises, in substance, to resell the stock for the purchaser within a certain limited time if he should so desire. Some of these promises were signed by the company and others by various parties connected with the company. The secretary testified that these stocks so sold under a promise to effect a resale had always been considered by the company as of the nature of loans, and that in consequence thereof dividends were paid upon these stocks in September, 1913, and in March, 1914, when they were not paid upon the other preferred stock. It is urged by the plaintiff that such payment of dividends upon the so-called guaranteed stock ought to be treated as a declaration of dividends upon the preferred stock generally. It is true that dividends must be pro rata and equal upon all stock of the same class. And it is also true that these promises of resale did not at all affect the character of the stock promised to be resold. It was still simply preferred stock and of the same class as the other preferred stock. But in this case there was no resolution by the board of directors directing the payment of these dividends upon the so-called guaranteed stock, and, so far as the

record shows, the dividends were paid without authority. An unauthorized payment of dividends to a few preferred stockholders cannot be held equivalent to the declaration of a dividend in favor of all preferred stockholders.

The judgment is affirmed.

Stone, Ch. J., and Kuhn, Ostrand-
er, Bird, Moore, Steere, and Brooke,
JJ., concur.

This case, having been submitted on briefs without oral argument, was reassigned after the death of Justice McAlvay.

NOTE.

The general subject of "Rights of holders of preferred stock in respect to dividends" is treated in the annotation following ENGLANDER v. OSBORNE, post, 802. The general principle declared in the reported case (KNIGHT v. ALAMO MFG. Co. ante, 789), that the declaration of dividends and the amount is generally a matter for the exercise of the discretion and judgment of the directors, is stated and exemplified in subdivision II. of that note. The question as to the remedies of the preferred stockholders is treated in subdivision XIV. of that note.

LUKE A. SPEAR

v.

ROCKLAND-ROCKPORT LIME COMPANY et al.

Maine Supreme Judicial Court—April 5, 1915.

(118 Me. 285, 98 Atl. 754.)

Corporation — priority of preferred stock — debenture bonds.

1. A holder of preferred stock in a corporation is not entitled to a preference over holders of debenture bonds subsequently issued.

[See note on this question beginning on page 802.]

— power to compel declaration of dividends.

2. Where the right to a corporate dividend is clear a court of equity will interfere to compel the directors to declare it.

[See 7 R. C. L. 294.]

— enforcement of rights of stockholders.

3. Rights of holders of preferred stock in a corporation will be enforced in equity against the corporation in accordance with the terms of the contract.

[See 7 R. C. L. 287.]

— right to accumulated profits.

4. The directors of a corporation may in their discretion refuse to appropriate profits to the payment of preferred dividends unless the contract provides otherwise.

[See 7 R. C. L. 286.]

— right of preferred stockholders.

5. A holder of preferred stock in a corporation can compel the declara-

tion of dividends when other classes of stockholders cannot, only when they are provided for or guaranteed in his contract.

[See 7 R. C. L. 285.]

— funds needed to pay debts.

6. A holder of preferred stock in a corporation cannot claim dividends out of funds that are needed for, or that properly should be applied to, the payment of debts.

[See 7 R. C. L. 285.]

— provision for semiannual dividends.

7. A provision for semiannual dividends in a certificate of preferred stock in a corporation requires the payment of dividends semiannually if there are net earnings.

Contracts — preferred stock — construction against corporation.

8. A contract in a certificate of preferred stock in a corporation should be construed most strongly against the corporation.

Corporation — profit on balance sheet — fund available for dividends.

9. A profit shown by the balance sheet of a corporation does not prove that there are funds immediately available for dividends.

Action — suit to compel payment of dividends — attack on sale of corporation.

10. Fraud and collusion or an abuse of discretion on the part of directors of a corporation in the sale of its entire property cannot be availed of in a suit to compel payment of a dividend.

[See 7 R. C. L. 294.]

Corporation — right to object to payment of bonds.

11. After assets of a corporation have been applied to the payment of debenture bonds, a holder of preferred stock cannot insist that the money should have been applied to payment of dividends on his stock and

the bonds permitted to run for a longer time.

Pleading — allegation of profits — effect on demurrer.

12. An allegation that profits are available to pay dividends is not conclusive on demurrer if the specific allegations in the bill indicate that such profits do not exist.

[See 21 R. C. L. 450.]

Corporation — remedy upon ceasing to do business.

13. When a corporation has ceased to do business the remedy of a holder of preferred stock is a bill to wind it up rather than one to compel payment of dividends.

— conditions of resort to equity.

14. Application to the directors for the payment of a dividend, or reasons why it would be ineffectual, is necessary to enable a stockholder to maintain a bill in equity to compel payment of the dividend.

EXCEPTIONS by plaintiff to the rulings of the Supreme Judicial Court for Knox County, in equity, sustaining a demurrer to a bill filed to require defendants to declare and pay a dividend upon preferred stock. *Overruled.*

The facts are stated in the opinion of the court.

Mr. R. I. Thompson for plaintiff.

Mr. A. S. Littlefield for defendants.

Savage, Ch. J., delivered the opinion of the court:

Bill in equity by a preferred stockholder, for himself and in behalf of all other preferred stockholders, against the Rockland-Rockport Lime Company and its directors, for the purpose of requiring a declaration of "a dividend of 7 per cent, payable on the 1st days of March and September of each year, with interest on each dividend from the time it became due, until the date of the bill." The case comes before this court on exceptions to the sustaining of the defendants' demurrer.

The facts stated in the bill, and which must be taken on the demurrer to be true, are these: The defendants' corporation was organized in 1900 for the purpose of the manufacture and sale of lime. Its capital stock of \$2,000,000 was divided into preferred and common stock. Eight hundred and twenty-

five thousand dollars of preferred, and \$875,000 of common, stock have been issued. Each kind of stock was of the par value of \$100 a share.

On January 23, 1901, the plaintiff purchased ten shares of preferred stock, which he still owns. He received a certificate of stock which contained an agreement "that the preferred stock is entitled, out of the net earnings of the company, to a semiannual, preferential, cumulative dividend at the rate of 7 per centum per annum, and no more, payable on the 1st days of March and September in each year, to be paid or provided for before any dividend shall be set apart or paid on common stock, that in case of liquidation or dissolution, the preferred stock shall be paid in full at par, together with accrued and unpaid dividends, before any payment is made on the common stock," and so forth.

January 18, 1900, the defendant mortgaged its property and franchise for \$1,000,000 to secure the

(118 Me. 285, 98 Atl. 754.)

payment of bonds, the proceeds of which, with that of the capital stock, gave it a working capital of \$2,700,000. In April, 1901, it issued its debenture bonds for \$1,000,000 from which it realized the sum of \$950,000, thereby increasing the working capital to \$3,650,000. Its net earnings to and including 1910 are alleged to have been about \$688,000. It is alleged that on December 31, 1910, the corporate assets amounted in value to \$4,131,039.76, and its liabilities outside of capital stock, and including "undivided profits," were \$2,431,039.76; that the excess of assets over liabilities is composed in part of the net earnings, which have been applied by the directors to the increase and enlargement of the company's plant, and otherwise to the increase of its assets, instead of being applied to the payment of dividends to preferred stockholders. The complainant alleges that he has duly demanded the sum which should have been due and payable to him, but that the demand has not been complied with.

It is alleged that by the issue of debenture bonds in April, 1901, it was intended wrongfully to create such a large additional indebtedness as would deprive the preferred stockholders of the dividends to which they were entitled; that the refusal to declare dividends was for the purpose of increasing the value of the plant, and of making the claim that the debenture bonds could not be paid at maturity, if dividends on preferred stock were paid; that no provision was made for the payment of the debenture bonds, and that, three days before they became due, the company announced that it was not in position to pay them.

Afterwards, another corporation was organized, called the Rockland & Rockport Lime Company. And on July 1, 1911, the defendant sold all its assets, subject to the first mortgage bonds, for \$1,081,000, to one Kalloch, the purchaser assuming all the debts, liabilities, and obligations

of the company, and on the same day Kalloch sold the assets to the Rockland & Rockport Lime Company. And in this connection it is alleged that among the liabilities assumed by Kalloch were undivided profits amounting to \$212,256.32.

The foregoing statement embodies the allegations in the bill. And the question is whether upon such a statement, assuming the allegations to be proved, there would be any justification for equitable interference at the suit of a preferred stockholder to compel a distribution of dividends.

As a general rule, the officers of a corporation are the sole judges as to the propriety of declaring dividends, and the courts will not interfere with the proper exercise of that discretion. Yet when the right to a dividend is clear, and there are funds from which it can properly be made, a court of equity will interfere to compel the company to declare it. Directors are not allowed to use their power illegally, wantonly, or oppressively. *Belfast & M. L. R. Co. v. Belfast*, 77 Me. 445, 1 Atl. 362. The rights of a preferred stockholder are enforceable in equity against the company, in accordance with the terms of his contract. *Hazeltine v. Belfast & M. L. R. Co.* 79 Me. 411, 1 Am. St. Rep. 330, 10 Atl. 328. And all unfair discrimination between preferred stockholders and common stockholders will be prevented. 1 *Morawetz, Priv. Corp.* § 280.

Corporation—
power to compel
declaration of
dividends.

—enforcement
of rights of
stockholders.

But even as to a preferred stockholder, unless his contract otherwise provides or requires, the profits or net earnings may be allowed to accumulate, and remain invested in the business. The officers of a corporation are invested with a discretionary power with regard to the time and manner of distributing its profits. They may use the profits for the development of the company's business, so long as

—right to
accumulated
profits.

they do not abuse their discretionary power, or violate the charter or the contracts made as to profits with particular classes of stockholders. 1 Morawetz, Priv. Corp. §§ 276, 447.

The preferential rights of a preferred stockholder arise from his contract, which in this case is found in his stock certificate. His contractual rights the court may enforce against the corporation and other classes of stockholders. But aside from his special contract he stands on no better footing than any other stockholder. He can require the payment of dividends, when others cannot, only in case and to the extent that dividends were

—right of
preferred
stockholders.

promised or guaranteed in his contract. Such dividends he may require whenever the company has acquired funds which may rightfully be used for the payment of dividends. 1 Morawetz, Priv. Corp. § 459.

Moreover, a preferred stockholder is not a creditor. He is a stockholder, although his peculiar rights arise from contract. He is a stockholder as to creditors in general, and his rights are subordinate to theirs. He cannot claim dividends out of funds

—funds needed
to pay debts.

that are needed for, or that properly should be applied to, the payment of debts. *Belfast & M. L. R. Co. v. Belfast*, supra. He is entitled to a dividend out of net earnings only.

The plaintiff's contract is that he shall be entitled out of the net earnings of the company, to a semiannual, preferential, cumulative dividend, to be paid or provided for before any dividend is set apart or paid on the common stock. And that is why it is called preferential. By being cumulative, if net earnings at any dividend period are insufficient to pay the contract dividend, it is to be made up out of subsequent net earnings. And in any event, upon liquidation or dissolution of the corporation, the contract goes on to say, the preferred stockholders are to be paid in full for their stock

at par, with all accrued and unpaid dividends, before common stockholders receive anything. One feature of the contract remains to be noticed. The contract was that the preferred stockholder was entitled, out of the net earnings, to "semiannual . . . dividends." The defendant contends that under this contract the plaintiff was not entitled, even if there were net earnings, to have dividends paid for any half year, year, or series of years; that the directors might use the net earnings for the development of the business; and that there was but a single limitation, namely, that the plaintiff must be paid all accrued and unpaid dividends before anything is paid to common stockholders. In other words, it is claimed that the defendant made no promise or guaranty to the plaintiff of any dividends to be paid out of net earnings, at any particular time, and that it will have fully kept and performed the obligation of its contract, if at any time, past or future, it has paid, or will pay, the preferred dividends before common ones are paid. That is, it may indefinitely postpone payment. We are unable to concur in this view. This contract, like all others, must be interpreted in accordance with the expressed intention of the parties, reading the contract in the light of its purposes and existing conditions and surrounding circumstances. And reading the contract in that way, we think it obvious that, when the parties agreed that the plaintiff was to be entitled out of the net earnings to a semiannual dividend, they intended that he should be entitled to have a dividend paid semiannually if there were net earnings.

Such we think would be the ordinary acceptance of the words used. And if there is meaning, the contract should be construed more strictly against the company. The phraseology was its own,

—provision for
semiannual
dividends.

Contracts—
preferred stock—
construction
against
corporation.

and it should be held to the significance which the words would ordinarily imply to an investor.

It follows, therefore, that the plaintiff is now entitled to cumulative dividends, if there are net earnings, and if now there is any available fund out of which dividends may properly be paid. Here lies the difficulty in the plaintiff's case. It is alleged that the net earnings to December 31, 1910, were \$688,000. It is also alleged that these net earnings were applied by the directors to the increase and enlargement of the plant, and "also to the increase of the assets" of the corporation, whereas they should have been applied to the payment of the dividends. The plaintiff claims also that the company has \$212,256.32 of "undivided profits," which should be applied to dividends. This claim relates to the allegation respecting assets and liabilities on December 31, 1910. It is alleged specifically that the value of the plant of the corporation was \$3,567,477.14, and that there were other assets to the amount of \$563,562.62, the whole amounting to \$4,131,039.76. The liabilities are alleged to be, first mortgage bonds, \$988,500; debenture bonds, \$1,000,000; interest accrued and unpaid, \$33,094.13; accounts payable, \$113,689.31; mortgage note account, \$80,000; contingent reserve, \$3,500. These items amount to \$2,218,783.44. If to this be added the capital stock liability of \$1,700,000, the total liabilities amounted to \$3,918,783.44. And this amount deducted from the total assets leaves a balance of \$212,256.32, which is properly called "undivided profits," and which the plaintiff claims is a basis for dividends. But it will be noticed that it is a bookkeeping item, entered to make a complete balance sheet. It indicates, indeed, the excess of all assets over all liabilities, and that is profit.

Corporation—
profit on
balance sheet—
fund available
for dividends.

But it does not indicate that there is any fund immediately available for dividends. And as the net earnings had been \$688,000,

and as no dividends had ever been declared, it shows that the net earnings applied to the increase of the plant and other assets, in excess of \$212,256.32, had disappeared in a shrinkage of the value of the plant and other assets.

But it is also alleged that six months later, July 1, 1911, the corporation sold "its entire property of every kind and nature, including its accounts due and cash on hand, through an intermediary, to another corporation, for \$1,081,000. This sale was subject to the first mortgage for \$1,000,000. And the purchaser assumed all the debts, liabilities, and obligations of the old corporation, and agreed to pay the purchase price in debenture bonds. The phraseology of the allegation leaves it uncertain whether the assumption of debts and so forth was a consideration additional to the \$1,081,000, or whether the debts were to be paid out of the \$1,081,000. Counsel on both sides have treated the question as if the latter alternative were the true one. And we assume it to be so.

Plaintiff's counsel in argument criticizes this sale, but the plaintiff's bill does not suggest any illegality in it. It rather criticizes the directors for not having before that time made provision for the extinguishment of the debenture bonds, by payment, renewal, or otherwise. It is not alleged that there was any fraud, or want of good faith, in the sale, nor that the purchaser was not a bona fide purchaser. It is not alleged that the property was sold for less than its real value. And even if there were fraud and collusion, and if the directors abused their discretion in making the sale, it is clear that the remedy for such acts does not lie within the scope of this bill, as framed. This bill seeks only a declaration of a dividend, and that presupposes a fund or other property out of which it can be paid.

Action—suit to
compel payment
of dividends—
attack on sale
of corporation.

The concrete fact is that all the defendants' property was sold to a

purchaser, who, under the allegations of the bill, must be regarded as a bona fide purchaser, for \$1,081,000. No explanation is afforded by the bill of the apparent shrinkage in the net assets of nearly \$1,000,000 from December 31, 1910, to July 1, 1911. For present purposes, on demurrer, we must take the statement as of December 31, 1910, to be true. It may be that upon a hearing it would appear that the assets were largely overstated. Or it may be that there was some other cause of shrinkage. Whatever may be the explanation, the fact remains that, after the sale, \$1,081,000 in new debenture bonds was all the property the corporation had. Whatever may have been the duty of the corporation previously to make provision for dividends, it had made no such provision. The plaintiff did not insist upon his dividends, and did not undertake to compel the company to pay them. And now at the end of the chapter there are only \$1,081,000 with which to pay debts and dividends. The net profits had disappeared. The capital stock was practically wiped out. The company owed \$1,000,000 of debenture bonds, then overdue. Six months before it had owed nearly \$147,000 for unpaid interest and accounts payable. There is no allegation, and there is no presumption, that this indebtedness had been reduced. The provision for the payment of the debenture bonds would absorb \$1,000,000 of the purchase price, leaving only \$81,000, even if there were no other indebtedness.

The plaintiff contends, however, that as a preferred stockholder he should have had priority over the debenture bonds liability. We do not think so. Stockholders, even preferred stockholders, can have no

**Corporation—
priority of
preferred stock
—debenture
bonds.**

priority over creditors. The debenture bonds were a lawful indebtedness of the corporation, and were entitled to payment, whether the corporation would be able to keep its contract with the

plaintiff for dividends, or not. But if it were otherwise, the length of time that has elapsed since the purchaser assumed the debts and agreed to pay in new debenture bonds, and the nature of the transaction itself, warrants the inference that the transaction is completed, and that \$1,000,000 of the purchase price has long since passed, in one form or another, to the holders of the old debenture bonds, and is not now held by the defendant. And if that is so, it is not available for dividends.

The plaintiff also contends that there was no necessity for providing for the payment of all the debenture bonds, when due, and relies upon *Hazeltine v. Belfast & M. L. R. Co.* 79 Me. 411, 1 Am. St. Rep. 330, 10 Atl. 328. But that case is not like this one. There the corporation, having a large current income, sought to set apart enough of it as a sinking fund to pay the entire bonded indebtedness which would become due many years later. The court held that it was not necessary, as a legal proposition, thus to provide for the payment of all the indebtedness at maturity, to the exclusion of dividends for preferred stockholders. But here we have a case where presumably the payment of the bonded indebtedness is an accomplished fact. It is too late, now, to recall the payment.

**—right to object
to payment
of bonds.**

It is now immaterial whether it was necessary to pay all of the old debenture bonds, if they are paid. Upon the allegations, we would not be justified in saying that the corporation now has any property in excess of \$81,000 available for dividends, and not that, if there is indebtedness to be paid out of it.

It is true that the plaintiff alleges that "there is property out of which a dividend can and should be paid," but that indefinite statement must be interpreted, of course, in connection with the definite statement of the results of the sale of the property. There is nothing in the bill

**Pleading—
allegation of
profits—effect
on demurrer.**

to indicate what the property is, but counsel argues that the \$212,-256.32 "undivided profits" shown in the trial balance are property. We have already discussed this question. Although there is a bookkeeping item of "undivided profits," they certainly are not tangible for dividend purposes.

If we assume that at the time of the sale there were no debts except the debenture bonds, and this is the most favorable assumption for the plaintiff that can be made upon the allegations, and if we assume that the corporation still holds \$81,000 of the purchase price, the bill does not show a situation calling for the declaration of a dividend. The corporation having sold all its property, it has apparently "ceased to do business." *Van Oss v. Premier Petroleum Co.* 113 Me. 180, 93 Atl. 72. And the stockholder's remedy is rather by compelling it to be wound

Corporation—
remedy upon
ceasing to do
business.

up, than by seeking dividends out of net earnings which no longer exist. Laws of 1905, chap. 85, as amended by Laws of 1907, chap. 137. When the entire assets have been reduced to less than 10 per cent, at most, of the preferred stock, and the entire corporate plant has been sold, the proper remedy is not dividends, but dissolution. And under the situation described in the bill dissolution is the only proper remedy, since in no other way can the interests of all parties, including creditors, if any, be safeguarded.

We hold, therefore, that upon proof of the facts alleged in the bill, without more, the court would not be justified in ordering the payment of a dividend to preferred stockholders, and for that reason the demurrer was correctly sustained.

There is another good ground of demurrer. The plaintiff has not alleged in his bill that any application has been made to the directors to declare the dividend sought for, nor is any reason alleged why such an application would be ineffectual, if there were any

—conditions of
resort to equity.

funds to divide. One or the other allegation is essential. *Ulmer v. Maine Real Estate Co.* 93 Me. 324, 45 Atl. 40. The plaintiff alleges that he had demanded payment of the amount due by contract, as he claims, on his own stock. His suit is brought for the benefit of all stockholders of his class, and his demand for payment falls far short of an application to have a dividend declared for the benefit of all.

Exceptions overruled.

Bill dismissed, with costs.

NOTE.

The position taken in the reported case (*SPEAR v. ROCKLAND-ROCKPORT LIME Co.* ante, 793), that any superior right of the holders of preferred stock in respect to compelling the declaration of dividends must rest upon the terms of the contract, is sustained by the weight of authority as is shown in subdivision II. of the annotation following *ENGLANDER v. OSBORNE*, post, 802, on the general subject of the right of holders of preferred stock in respect to dividends.

The principle declared in the reported case (*SPEAR v. ROCKLAND-ROCKPORT LIME Co.*) that preferred stockholders can have no priority over creditors is stated and exemplified in subdivision VII. a, of that note. The question of accumulated dividends is treated in subdivision XI.; the general question as to remedies of preferred stockholders, in subdivision XIV.

SAMUEL ENGLANDER, Exr., etc., of Matilda De Witt, Deceased,
v.

CHARLES OSBORNE et al.

JOHN G. HOFFMAN, Appt.

Pennsylvania Supreme Court—May 6, 1918.

(261 Pa. 366, 104 Atl. 614.)

Corporations — preferred stock — right to share in excess dividends.

1. Holders of preferred stock in a corporation, entitled to receive a fixed yearly cumulative dividend of 6 per cent before any dividend shall be set apart to common stock, share with the common stock in case, after several years of passed dividends, earnings are made in excess of what are necessary to pay the guaranteed cumulative dividends, any excess over a 6 per cent dividend to the common stock for that year, although the common stock is thereby deprived of a full 6 per cent dividend for the passed years.

[See note on this question beginning on page 802.]

— position of preferred stockholders.

2. Holders of preferred stock in a corporation occupy, beyond the provisions of their contract, no position towards the company different from that of holders of the common shares.

[See 7 R. C. L. 200.]

— method of distributing earnings.

3. When a dividend is declared by a corporation holders of preferred stock are entitled to claim first, to the extent of their preference for any current year, and if there remains a sum more than sufficient to pay a similar dividend on the common stock, both classes of stockholders are entitled to share equally in the excess.

[See 7 R. C. L. 285-287.]

— right of holders of common stock.

4. Holders of common stock in a corporation are not entitled, in case an extra dividend is earned in any year, to be reimbursed for unearned dividends in past years before the holders of preferred stock will share in the excess over the dividend provided for that year.

— passing dividend — effect on common stock.

5. The passing of a dividend on the common stock of a corporation for a year deprives such stock of all right to a share of profits for that year, unless the contract expressly provides for the cumulation of dividends on such stock.

APPEAL by defendant Hoffman from a decree of the Court of Common Pleas, No. 1, for Philadelphia County, overruling a demurrer to a bill filed to restrain payment of a dividend on the common stock of the defendant corporation. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. John G. Kaufman and V. Gilpin Robinson, for appellant:

The preferred stock is, of course, entitled to its preference of 6 per cent cumulative dividends; but any dividend declared after the preferred dividends are fully paid goes exclusively to the common stock until it has received the same percentage as the preferred stock has received by way of dividend.

Sternbergh v. Brock, 225 Pa. 279, 24 L.R.A.(N.S.) 1078, 133 Am. St. Rep. 877, 74 Atl. 166; Fidelity Trust Co. v. Lehigh Valley R. Co. 215 Pa. 610, 64 Atl. 829, 7 Ann. Cas. 613.

Mr. Joseph B. Englander, for appellee:

A corporation may not declare dividends in favor of common stock for years passed in which there was no dividend.

10 Cyc. 573; West Chester & P. R. Co. v. Jackson, 77 Pa. 321; Fidelity Trust Co. v. Lehigh Valley R. Co. 215 Pa. 610, 64 Atl. 829, 7 Ann. Cas. 613.

Holders of preferred stock have to divide equally with the holders of common stock in any dividend declared in any one year.

Fidelity Trust Co. v. Lehigh Valley

R. Co. supra; Sternbergh v. Brock, 225 Pa. 279, 24 L.R.A. (N.S.) 1078, 133 Am. St. Rep. 877, 74 Atl. 166.

Frazer, J., delivered the opinion of the court:

Plaintiff's decedent owned certain shares of the 6 per cent cumulative preferred stock of the Hoffman, De Witt & McDonough Company, one of the defendants. No dividends were paid on either the company's preferred or common stock until 1917, a period of nine years, when a dividend of 54 per cent, covering the current year and all arrearages, was declared and paid on the preferred stock, and at the same time a dividend of equal amount was declared on its common stock. Plaintiff began these proceedings to restrain the payment of the latter dividend, contending the holders of common stock were not entitled to a dividend of more than 6 per cent without sharing the excess equally with the preferred stockholders. Defendants demurred, and claimed the holders of common stock were entitled to receive dividends to an amount sufficient to make up arrearages in passed years and equalize the common and preferred stock, before holders of the latter were entitled to receive an excess above the amount of their fixed dividends and arrearages. The court below overruled the demurrer and restrained the payment of the dividend on the common stock. Defendant appealed.

The certificates of the preferred stock of the company provide: "The holders of the preferred stock shall be entitled to receive when and as declared, and the company shall be bound to pay, a fixed yearly cumulative dividend of 6 per cent (6%) payable quarterly, before any dividend shall be set apart on the common stock."

We find nothing limiting the right of the preferred stockholders to the 6 per cent dividend, regardless of the earnings of the company, and in absence of such limitation the general rule is that such stockholders are entitled to share with the hold-

ers of the common stock all profits distributed after the latter have received, in any year,

an amount equal to the dividend on the preferred stock. Fidelity Trust Co. v.

Corporations—
preferred stock
—right to share
in excess dividends.

Lehigh Valley R. Co. 215 Pa. 610, 64 Atl. 829, 7 Ann. Cas. 613; Sternbergh v. Brock, 225 Pa. 279, 24 L.R.A. (N.S.) 1078, 133 Am. St. Rep. 877, 74 Atl. 166; Sterling v. F. H. Watson Co. 241 Pa. 105, 88 Atl. 297. The priority of the preferred stockholders rests upon the contract, and beyond the provisions of such contract

—position of preferred stockholders.

they occupy no position toward the company different from that of the holders of common stock. When a dividend is declared, the former are entitled to first claim to the extent of their preference for the current year, and if there

—method of distributing earnings.

remains a sum more than sufficient to pay a similar dividend on the common stock, both classes of stockholders are entitled to share equally in the excess. In absence of agreement, express or implied, that dividends shall be cumulative, unpaid dividends in the past cannot be claimed. 10 Cyc. 573.

Likewise there is no logical reason for holding that common stockholders are entitled to go back of the current year,

—right of holders of common stock.

and claim to be reimbursed for unearned dividends in past years. To do so would render such dividends cumulative in effect without agreement. Accordingly, when during previous years no dividends were earned, this was conclusive as to the right of all stockholders, both preferred and common, except for the contractual right of the former to payment out of future profits to the extent of their preference, before the latter would be entitled to participate in the earnings. So far as the holders of the common stock were concerned their status was finally determined when, during any

current year, there were no profits to be divided. The profits so lost are lost forever, and each new year marks the beginning of a new dividend-paying period. *Dent v. London Tramways Co.* L. R. 16 Ch. Div. 344, 353, 50 L. J. Ch. N. S. 190, 44 L. T. N. S. 91; *Morawetz, Priv Corp.* 2d ed. § 459, cited in 10 Cyc. 573.

The foregoing principles were properly applied by the learned judge of the court below. No different rule was suggested by this court in *Sternbergh v. Brock*, supra, relied upon by appellant. The statement by this court that (225 Pa. 287) "it is to be assumed that, before the holders of preferred stock could claim more than the 5 per cent dividends that they received, the holders of the common stock were entitled to receive a dividend of the same percentage on the par value of their shares," cannot be construed as giving the holders of the common stock the right to reimbursement for dividends unpaid in passed years, before the preferred stockholders are entitled to participate in the excess profits of a

given year. The question there before the court was whether preferred stockholders were limited to dividends to the amount of their preference, or whether they were entitled to participate in excess profits in any year after the common stockholders had received a dividend equal to that paid on the preferred stock. There was no claim made by the holders of the common stock for reimbursement for dividends unpaid in the past, though it appears from the opinion of this court (225 Pa. 286, 287) that past dividends on common stock did not equal dividends on preferred stock. Notwithstanding this fact, the preferred stockholders were permitted to participate with the common stock in an excess of dividends earned in a particular year. Aside from the fact that the question now before us was apparently not raised or discussed, the case, instead of supporting appellant's view, is authority in support of the conclusion reached by the court below.

The assignments of error are overruled and the decree of the court below affirmed.

ANNOTATION.

Rights of holders of preferred stock in respect to dividends.

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 - a. In absence of contract, 803.
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I. Introductory.

This note is confined to the rights of a preferred stockholder as against

the corporation with respect to dividends. It does not include the right of preferred stockholders to hold of-

officers or directors personally liable for dividends, because of mismanagement of the corporate affairs, nor does it discuss rights arising under a guaranty of dividends made by a third person.

II. Right to dividends generally.

a. In absence of contract.

In the absence of a governing statute or of any violation of a special agreement for the payment of dividends, the holders of preferred stock in a corporation are bound to abide by the action of the directors thereof as regards the declaration of dividends, and the courts will not interfere with the directors in the exercise of their discretion unless it can be shown that they are acting in bad faith or are guilty of wilful mismanagement.

United States.—*St. John v. Erie R. Co.* (1874) 22 Wall. 136, 22 L. ed. 743; *New York, L. E. & W. R. Co. v. Nickals* (1886) 119 U. S. 296, 30 L. ed. 363, 7 Sup. Ct. Rep. 209; *Union P. R. Co. v. Frank* (1915) 141 C. C. A. 510, 226 Fed. 906.

Kansas.—*Inscho v. Mid-continent Development Co.* (1915) 94 Kan. 370, 146 Pac. 1014, Ann. Cas. 1917B, 546.

Kentucky.—*Smith v. Southern Foundry Co.* (1915) 166 Ky. 208, 179 S. W. 205.

Maine.—*SPEAR v. ROCKLAND-ROCKPORT LIME Co.* (reported herewith) ante, 793.

Massachusetts.—*Field v. Lamson & G. Mfg. Co.* (1894) 162 Mass. 388, 27 L.R.A. 136, 38 N. E. 1126.

Michigan.—*KNIGHT v. ALAMO MFG. Co.* (reported herewith) ante, 789.

Missouri.—*Kidd v. Puritana Cereal Food Co.* (1909) 145 Mo. App. 502, 122 S. W. 784.

Pennsylvania.—*McLean v. Pittsburgh Plate Glass Co.* (1893) 159 Pa. 112, 28 Atl. 211.

England.—*Bond v. Barrow Hæmatite Steel Co.* [1902] 1 Ch. 353, 86 L. T. N. S. 10, 71 L. J. Ch. N. S. 246, 9 Manson, 69, 50 Week. Rep. 295, 18 Times L. R. 249.

The court in *Smith v. Southern Foundry Co.* (Ky.) supra, stated the rule as follows: "Dividends are payable out of the profits and surplus

funds of the corporation as the directors may, in the exercise of a sound discretion, declare. Unless the directors are guilty of bad faith or a wilful abuse of discretion, the courts will not interfere."

In *New York, L. E. & W. R. Co. v. Nickals* (1886) 119 U. S. 296, 30 L. ed. 363, 7 Sup. Ct. Rep. 209, the reason of the rule was set forth as follows: "The directors of such corporations, having opportunities not ordinarily possessed by others of knowing the resources and condition of the property under their control, are in a better position than stockholders to determine whether, in view of the duties which the corporation owes to the public, and of all its liabilities, it will be prudent in any particular year to declare a dividend upon stock."

The directors are bound to have consideration for the interest of the public in the business of the corporation (*New York, L. E. & W. R. Co. v. Nickals* (U. S.) supra), and for the rights of its creditors (*Field v. Lamson & G. Mfg. Co.* (Mass.), and *Inscho v. Mid-continent Development Co.* (Kan.) supra). And even after having properly discharged these duties, it has been held that the matter of the declaration of a dividend still rests in the discretion of the directors, and that they may, in the absence of bad faith, devote the earnings of the company to improvements. *McLean v. Pittsburgh Plate Glass Co.* (Pa.) supra.

But in *Storrow v. Texas Consol. Compress & Mfg. Asso.* (1898) 31 C. C. A. 139, 59 U. S. App. 120, 87 Fed. 612 (writ of certiorari denied in (1899) 174 U. S. 800, 43 L. ed. 1187, 19 Sup. Ct. Rep. 887), wherein the plaintiff brought a bill to compel the declaration of a dividend on preferred stock, the court said: "While it was largely a matter of discretion with the board of directors as to what use they would put the profits to, whether to declare a dividend or use them in the business of the company, there is a limit to this discretion, and the courts will not allow the directors to use their powers oppressively by refusing to declare a dividend while the net profits and character of the

business clearly warrant it." And on subsequent appeal in (1899) 34 C. C. A. 182, 92 Fed. 5, the court, referring to the former decision, said: "But from what was said it is easy to see that there might result an accounting to ascertain if there had been net earnings to such an extent as to warrant the payment of dividends upon the preferred stock, and also that, if certain contemplated acts of mismanagement were insisted upon, an injunction might be issued."

In *Utica Trust & D. Co. v. Charles C. Kellogg & Sons Co.* (1908) 126 App. Div. 176, 110 N. Y. Supp. 1048, it was held that new preferred stock issued only three months prior to the payment of a semiannual dividend on all the preferred stock was entitled to interest at the same rate as the rest of the stock, but for the period of three months only.

In *New York, L. E. & W. R. Co. v. Nickals* (1886) 119 U. S. 296, 30 L. ed. 363, 7 Sup. Ct. Rep. 209, it appeared that preferred stock had been issued, entitling the holder to noncumulative dividends (of 6 per cent per annum) in preference to the payment of any dividend on the common stock, but dependent on the profits of each particular year as declared by the board of directors. For the year 1880 a balance was shown in the accounts which some of the preferred stockholders asserted should have been paid out as a dividend, but which had been used by the company in improvements. It was held that the stockholders were entitled to such dividends only as were declared, and that the declaration of dividends was a matter for the directors to decide, keeping in mind the necessities and condition of the property.

In *St. John v. Erie R. Co.* (1874) 22 Wall. (U. S.) 136, 22 L. ed. 743, it appeared that preferred stock was issued by a company with the agreement that "such preferred stock is to be entitled to preferred dividends out of the net earnings (if earned in the current year, but not otherwise) not to exceed 7 per cent in any one year, payable semiannually, after payment of mortgage interest and delayed

coupons in full." One of the sections of the act of incorporation of the company stated that the stock should be entitled to dividends out of the "net earnings." These dividends were paid for several years, but later the expenses incurred by the leasing of other roads and the borrowing of money for repairs made it impossible to pay any dividends. A preferred stockholder claimed that his right to a dividend was prior to leases and later debts. The court held that the dividends were to be paid out of "net earnings," and that by such was meant payment after the discharge of the debts incurred by the leases, etc., saying that the corporation might "conduct its operations in good faith as it saw fit."

In *Union P. R. Co. v. Frank* (1915) 141 C. C. A. 510, 226 Fed. 906, wherein it appeared to the court that the non-payment of dividends on the stock held by complainants was the moving cause of the litigation, it was held, following *New York, L. E. & W. R. Co. v. Nickals* (U. S.) supra, "that a mere statement and accumulation of net profits during a designated period did not amount to the ascertainment that dividends were due stockholders, or to the declaration of such dividends." The court quoted from the case cited as follows: "If preferred stockholders become entitled to dividends upon a mere ascertainment of profits for a particular year, the duty of the company to maintain its track and cars in such condition as to accommodate the public and provide for the safe transportation of passengers and freight would be subordinate to their right to payment out of the funds remaining on hand after meeting current expenses and fixed charges."

In *Inscho v. Midcontinent Development Co.* (1915) 94 Kan. 370, 146 Pac. 1014, Ann. Cas. 1917B, 546, wherein a preferred stockholder sought to recover one year's dividend on her stock, alleging that sufficient had been earned to pay one annual dividend, mismanagement by the directors was asserted. It was held that the facts did not justify the action of the lower court in taking the management of the company from the directors and plac-

ing it in the hands of a receiver, no bad faith or mismanagement having been shown as justification therefor.

In *Smith v. Southern Foundry Co.* (1915) 166 Ky. 208, 179 S. W. 205, a preferred stockholder claimed to have the rights of a creditor. It was held that as regards the dividends shown to be overdue the status of creditor might have been given to the stockholder if it had been shown that the directors had declared a dividend, or that it was their duty to declare a dividend from the profits named. The court said: "Dividends are payable out of the profits and surplus funds of the corporation, as the directors may in the exercise of a sound discretion declare. Unless the directors are guilty of bad faith or a wilful abuse of discretion, the courts will not interfere."

In *SPEAR v. ROCKLAND-ROCKPORT LIME Co.* (reported herewith) ante, 793, the action was by a preferred stockholder to obtain a dividend on stock which entitled him to "a semi-annual preferential cumulative dividend at the rate of 7 per cent per annum," out of the net earnings of the company. It was held that the declaration of dividends was a matter for the discretion of the directors, provided they did not violate the contract of the company with the stockholders. The contract called for semiannual preferential cumulative dividends, and it was claimed that the word "cumulative" implied that the dividends might be postponed indefinitely, but the court held that they were payable semiannually, if there were net earnings. The evidence showed that the entire assets had been sold for but little more than enough to pay the bonded indebtedness of the company, which consisted of a large mortgage loan and a debenture loan made after the issuance of the preferred stock. The preferred stockholder asked that he be granted priority to the debenture bonds for dividends, but the court held that even preferred stockholders can have no priority over creditors, saying that there was no property that could be devoted to the payment of dividends, and that the plaintiff did not state that any application for the dec-

laration of a dividend had been made by him to the directors.

In *Field v. Lamson & G. Mfg. Co.* (1894) 162 Mass. 388, 27 L.R.A. 136, 88 N. E. 1126, a preferred stockholder brought an action to recover guaranteed preferred dividends alleged to be due. It was held that the guaranty could not be taken to mean that any net profits must be distributed in dividends regardless of the financial condition of the company; that it did not affect the rule that the decision as to whether there shall be dividends or not is always a matter for the fair judgment of the company and its agents; and, again, that the directors are bound to have regard for the creditors as well as for the stockholders, and it is demanded of them only that they act in a judicious manner.

In *KNIGHT v. ALAMO MFG. Co.* reported herewith) ante, 789, wherein the plaintiff, the owner of 7 per cent cumulative preferred stock in the defendant corporation, obtained from a justice of the peace a judgment for dividends alleged by him to be due and unpaid, it was held that the question whether dividends are to be declared or not is for the directors of the corporation to decide, and not a matter for the jury.

In *Kidd v. Puritana Cereal Food Co.* (1909) 145 Mo. App. 502, 122 S. W. 784, an action at law by a preferred stockholder to recover three dividends alleged by him to be due, it was held that the plaintiff's "right to dividends depended on whether the earnings of the company justified the directors in paying them."

McLean v. Pittsburgh Plate Glass Co. (1893) 159 Pa. 112, 28 Atl. 211, was an action to compel the payment of dividends on preferred stock. The certificates of stock provided for a noncumulative dividend of 12 per cent per annum on the preferred stock, and it was contended that net earnings, which should have been distributed as dividends, were used for the payment of debts and improvements to the property of the company. It was held that the preferred stockholders were entitled to dividends "when declared by the board of directors" as provided

in their certificate. The court said: "As a matter of course the directors must determine not only the amount of all dividends to be declared, but the circumstances in which they will or may declare them. They are certainly not entitled to refuse them, either arbitrarily, or when, in view of all the considerations which should properly affect the question, they ought to grant them. Their action, or refusal to act, is undoubtedly subject to review by the courts, but within the regulated limits of their authority, as suggested, they have the exclusive control of the whole matter, and their action is binding upon the stockholders."

In *Bond v. Barrow Hæmatite Steel Co.* [1902] 1 Ch. (Eng.) 353, wherein preferred shareholders of two classes sought to compel the payment of arrears of dividends, it was said: "The courts have, no doubt, in many cases, overruled directors who proposed to pay dividends, but I am not aware of any case in which the court has compelled them to pay when they have expressed their opinion that the state of the accounts did not admit of any such payment."

In *Utica Trust & D. Co. v. Charles C. Kellogg & Sons Co.* (1908) 126 App. Div. 176, 110 N. Y. Supp. 1048, it appeared that the defendant had issued new preferred stock with the same provision as to interest as the old preferred stock, which bore 6 per cent interest, payable semiannually, cumulative. The plaintiff purchased some of the new preferred stock about October 1, and the following January a dividend of 3 per cent was declared on the old preferred stock, and 1½ per cent on the new issue. The plaintiff claimed a dividend equal in amount to that declared on the old stock, but the court held with the defendant that the agreement calling for interest at the rate of 6 per cent per annum had been observed, that the dividends, when declared, were to be of interest earned, and that the new stock had received a rate of interest equal to that of the old stock.

b. Under contract.

Where the right of a preferred stockholder to dividends is fixed by con-

tract, the directors are bound thereby, and may not divert to other purposes funds which should be distributed as dividends on the preferred stock. *Burk v. Ottawa Gas & E. Co.* (1912) 87 Kan. 6, 123 Pac. 857, Ann. Cas. 1913D, 772; *Belfast & M. L. R. Co. v. Belfast* (1885) 77 Me. 445, 1 Atl. 362; *Hazeltine v. Belfast & M. L. R. Co.* (1887) 79 Me. 411, 1 Am. St. Rep. 380, 10 Atl. 328; *Boardman v. Lake Shore & M. S. R. Co.* (1881) 84 N. Y. 157.

And the courts will not allow common stockholders to act so as to prejudice the rights of the preferred stockholders. *Hazeltine v. Belfast & M. L. R. Co.* (1887) 79 Me. 411, 1 Am. St. Rep. 380, 10 Atl. 328.

In *Burk v. Ottawa Gas Co.* (1912) 87 Kan. 6, 123 Pac. 857, Ann. Cas. 1913D, 772, the plaintiffs, as holders of 6 per cent noncumulative preferred stock of the said company, contended that the directors thereof were bound to declare a dividend; the directors claimed that the funds of the company had been expended in "necessary" improvements. By-laws stated that the dividend was to be paid "out of the net profits, and a pro tanto dividend if such dividend fall short of 6 per cent." It was held that if the duty of the corporation to the public required the expenditure for necessary improvements, it was justified, but if it was done merely as a matter of business policy, it was a breach of the contract whereby the stockholders were to be paid out of the profits, whenever any were earned. Since the dividends were noncumulative, the stockholders were entitled to them annually, as earned. While not ordinarily regarded as creditors, since equity considered that as done which ought to be done, the preferred stockholders should be regarded as creditors if a dividend or dividends ought to have been declared in any year to such stockholders.

In *Belfast & M. L. R. Co. v. Belfast* (1885) 77 Me. 445, 1 Atl. 362, wherein it was contended that the preferred stockholders should have a dividend of 6 per cent from the net earnings of the road, the court said: "As a general rule, the officers of a corporation

are the sole judges as to the propriety of declaring dividends, and the courts will not interfere with a proper exercise of their discretion. The company usually establishes its financial policy for itself. Yet when the right to a dividend is clear, and there are funds from which it can properly be made, a court of equity will interfere to compel the company to declare it. Directors are not allowed to use their power illegally, wantonly, or oppressively."

In *Hazeltine v. Belfast & M. L. R. Co. (Me.) supra*, involving the right of the court to interfere to aid preferred stockholders to a dividend, it was pointed out that the court could and would provide a remedy in cases where the directors refused to perform their duty and carry out the terms of their contract, or where one class of stockholders was infringing on the privileges of another class. In that case it appeared that the common stockholders were in the majority, and had elected directors hostile to the interests of the preferred stockholders.

In *Boardman v. Lake Shore & M. S. R. Co. (1881) 84 N. Y. 157*, wherein preferred stockholders sought to compel the payment of dividends on their stock, the court said: "While, as a general rule, courts of equity will not exercise visitatorial powers over corporations, and their officers are the sole judges as to the propriety of declaring dividends, and in this respect the court will not interfere with a proper exercise of their discretion, yet where the right to the dividend is clear and fixed by the contract, and requires the directors to take action before it can be asserted by a suit at law, and a restraint by injunction is essential to maintain the right of the stockholder, the interposition of a court of equity is a proper exercise of its power and should be upheld."

III. Rights of assignee of stock.

The right to undeclared dividends and arrears thereon is an incident of preferred stock, and passes with the transfer of the stock to an assignee. *Manning v. Quicksilver Min. Co. (1881) 24 Hun (N. Y.) 860*; *Boardman v. Lake Shore & M. S. R. Co. (1881) 84 N. Y.*

157; *Jermain v. Lake Shore & M. S. R. Co. (1883) 91 N. Y. 483*.

In *Manning v. Quicksilver Min. Co. (N. Y.) supra*, it appeared that a holder of preferred stock sold his shares to one man, and his right and title to the unpaid dividends or interest thereon to another, the plaintiff, who demanded payment of said interest. The court said: "The interest which had accrued at the time when the shares were assigned was simply an incident or accessory of the shares themselves. The right to it depended wholly upon the title to the shares, and as no moneys had been appropriated in any form for its payment, the authority to demand it was wholly dependent upon that title."

In *Boardman v. Lake Shore & M. S. R. Co. (1881) 84 N. Y. 157*, an action by a preferred stockholder to compel the payment of certain dividends on said stock, the plaintiff, who acquired the stock in 1862, sought to recover dividends due and unpaid on said stock from 1857 to 1863. It was held that an assignment of stock carried with it all undeclared dividends which are part of the stocks' proportionate share of the company's assets.

In *Jermain v. Lake Shore & M. S. R. Co. (1883) 91 N. Y. 483*, wherein the facts were almost the same as in *Boardman v. Lake Shore & M. S. R. Co. (N. Y.) supra*, it was held that the assignment of the preferred stock carried with it the right to the unpaid dividends thereon, though the transfer was made in 1870, at which time the dividends were due and enforceable. In the *Boardman Case* the transfer was made in 1862, before there was a dividend due and enforceable on the stock, but the court held this to be no material distinction, since "in such case the dividend was payable by virtue of the guaranty."

IV. Rights of one exchanging stock.

Where a holder of preferred stock has surrendered the stock for the purpose of receiving preferred stock in a new corporation, he is entitled to any dividends declared on the new stock, although he has not procured a certificate therefor. *Ellsworth v. New York, L. E. & W. R. Co. (1884)*

19 N. Y. Week. Dig. 211. In that case, it appeared that the defendant company had purchased a railroad and had agreed that holders of preferred stock therein, on the payment of \$3, might receive a similar number of shares of preferred stock in the defendant company. The plaintiff paid the required amount on his preferred stock, but did not surrender his certificate at the time. Several years later a dividend was declared on the stock, to be payable to those registered on the books of the company on December 31, 1881. The plaintiff procured a certificate for the stock to which he was entitled on January 17, 1882, and demanded the dividend thereon. It was held that the plaintiff had become the owner of the stock upon paying the stipulated sum, and that it was merely held in trust for him until he should surrender the old certificate, and since the stock existed when the dividend was declared he was entitled thereto.

V. Preference over common stock.

The preference which preferred stock has over common stock as to dividends is entirely a matter of contract, which is generally set forth in the by-laws of the corporation, on the certificate of its stock, or elsewhere, and the cases involving that preference are based wholly on the interpretation by the courts of the contract so made. See the following cases: *Bailey v. Hannibal & St. J. R. Co.* (1872) 1 Dill. 174, Fed. Cas. No. 736, affirmed in (1873) 17 Wall. (U. S.) 96, 21 L. ed. 611; *Belfast & M. L. R. Co. v. Belfast* (1885) 77 Me. 445, 1 Atl. 362; *Elkins v. Camden & A. R. Co.* (1882) 36 N. J. Eq. 233; *Howell v. Chicago & N. W. R. Co.* (1868) 51 Barb. (N. Y.) 378; *West Chester & P. R. Co. v. Jackson* (1875) 77 Pa. 321; *Ashbury v. Watson* (1885) L. R. 30 Ch. Div. (Eng.) 376, 54 L. J. Ch. N. S. 985, 54 L. T. N. S. 27, 33 Week. Rep. 882.

In *Elkins v. Camden & A. R. Co.* (1882) 36 N. J. Eq. 233, the court said: "Calling stock preferred stock does not, per se, define the rights of such stock, but, in order to determine in what respect the holder of such

stock is to be preferred to the holder of ordinary stock, resort must be had to the statute or contract under which it is issued."

In *ENGLANDER v. OSBORNE* (reported herewith) ante, 800, the court remarked: "The priority of the preferred stockholders rests upon the contract, and beyond the provisions of such contract they occupy no position toward the company different from that of the holders of common stock."

And in *Kain v. Angle* (1910) 111 Va. 415, 69 S. E. 355, the court said that preferred stock entitles the holders "to receive dividends from the earnings of the company before the common stock can receive a dividend from such earnings," and that a preferred dividend is nothing more than that which is paid to one class of shareholders in priority to that to be paid to another class. The same general rule of priority as to dividends was also stated in *Rider v. John G. Delker & Sons Co.* (1911) 145 Ky. 634, 39 L.R.A.(N.S.) 1007, 140 S. W. 1011.

In *Bailey v. Hannibal & St. J. R. Co.* (1873) 17 Wall. (U. S.) 96, 21 L. ed. 611, it appeared that a railroad company had issued certain "preferred stock, to be 7 per cent and noncumulative, but to share with the common stock any surplus which may be carried over and above 7 per cent upon both in any one year." The stock certificate contained, in substance, the foregoing statement, but an indenture signed by the stockholders gave them "an equal dividend with said other shares, . . . beyond said 7 per cent." A holder of the preferred stock claimed the right to share equally with the common stock on all earnings above 7 per cent on the preferred stock. The court held that a proper construction of the contract entitled the preferred stockholder to 7 per cent, then a dividend of 7 per cent to be paid to the common stock, and further profits to be shared equally by both classes of stock.

In *Belfast & M. L. R. Co. v. Belfast* (1885) 77 Me. 445, 1 Atl. 362, it appeared that when the corporation was created it was intended to operate without a corporate debt. Later, the

necessity for funds arising, both preferred and common stockholders favored a loan, but it was consequently contended that the preferred stockholders had lost the preference thereby, since they were to be favored only in case there were no debts. It was held that their status was not altered by the creation of the debt.

In *Elkins v. Camden & A. R. Co.* (1882) 36 N. J. Eq. 233, a preferred stockholder sought to restrain the defendant company "from paying a dividend on the ordinary stock until the full amount of the dividend on the preferred had been paid." A statute stated that on the preferred stock a holder was entitled to dividends "not to exceed 7 per cent per annum, before any dividend shall be set apart or paid on the other and ordinary stock of said company." The directors had declared a dividend of 4 per cent on the preferred and 3 per cent on the common. It was held that the common stock was entitled to nothing until the preferred had received its full share of 7 per cent. The court said: "I do not think that the preferred stock can, by any just use of equitable rules, be held to be precluded or estopped from asserting its right of preference given by the statute, simply because the persons who held it at the time those dividends were declared allowed them to be declared and paid without objection or question."

In *Howell v. Chicago & N. W. R. Co.* (1888) 51 Barb. (N. Y.) 378, there was a motion to continue an injunction restraining the payment of a dividend. The preferred stock was entitled to a dividend of 7 per cent, then the common stock was to have 7 per cent, the preferred to have the next 3 per cent, and the balance to be divided between the two classes of stock. Ten per cent of the capital was made payable to each class of stock, the dividend to consist of stock, the preferred to get preferred stock, the common to receive common stock. At the market value of the stock, the preferred received \$8, and the common \$7, per share. It was held that, whether the market or par value of the stock was considered, the contract with the preferred stock-

holders as to dividends was observed, and that the common stockholder, having received his share, had no ground of complaint.

In *West Chester & P. R. Co. v. Jackson* (1875) 77 Pa. 321, it appeared that the plaintiff was the holder of a few shares of preferred stock, which stock was entitled to a dividend of 8 per cent per annum before any dividend should be paid to the holders of the unpreferred stock. The remainder of the preferred and common stock had been exchanged for consolidated preferred stock, on which a dividend was declared in 1873. No dividends had been paid on the preferred stock from the time of its issuance in 1859. It was held that the preferred stock was, by agreement, entitled to dividends at 8 per cent per annum "from the time of payment therefor," and that all unpaid dividends must be paid in full before the other stock should be entitled to a dividend.

In *Ashbury v. Watson* (1885) L. R. 30 Ch. Div. (Eng.) 376, 54 L. J. Ch. N. S. 985, 54 L. T. N. S. 27, 33 Week. Rep. 882, it appeared that a company had issued certain preferred shares, entitled to specified priorities over the ordinary stock; these priorities were later changed by resolutions, and redemption provisions more favorable to the preferred shareholders substituted, which were finally withdrawn and the original priorities restored. It was held that the condition in regard to the priorities contained in the memorandum of association could not be altered, as it was forbidden by statute, and that there was no evidence to show that the resolutions had been ratified by all the stockholders, "with full knowledge of what had been done."

VI. Guaranty of dividends.

a. Current dividends.

Preferred stock is sometimes issued with dividends at a stipulated rate guaranteed. This, however, in the absence of a statute authorizing an absolute guaranty, does not mean that dividends at that rate are to be paid at all events, but is an undertaking that they shall be paid only when there

are net earnings available for the purpose.

Massachusetts.—*Williston v. Michigan S. & N. I. R. Co.* (1866) 13 Allen, 400; *Field v. Lamson & G. Mfg. Co.* (1894) 162 Mass. 388, 27 L.R.A. 136, 38 N. E. 1126.

Michigan.—*Lockhart v. Van Alstyne* (1875) 31 Mich. 76, 18 Am. Rep. 156.

Missouri.—*Feld v. Roanoke Invest. Co.* (1894) 123 Mo. 603, 27 S. W. 635.

New York.—*Prouty v. Michigan S. & N. I. R. Co.* (1874) 4 Thomp. & C. 230, 1 Hun, 655; *Boardman v. Lake Shore & M. S. R. Co.* (1881) 84 N. Y. 157.

Ohio.—*Miller v. Ratterman* (1890) 47 Ohio St. 141, 24 N. E. 496, reversing (1889) 22 Ohio L. J. 99.

Rhode Island.—*Taft v. Hartford, P. & F. R. Co.* (1866) 8 R. I. 310, 5 Am. Rep. 575.

Vermont.—*Chaffee v. Rutland R. Co.* (1882) 55 Vt. 110.

England.—*Henry v. Great Northern R. Co.* (1857) 3 Jur. N. S. 1133, 1 De G. & J. 606, 44 Eng. Reprint, 858, 27 L. J. Ch. N. S. 1, 6 Week. Rep. 87; *Matthews v. Great Northern R. Co.* (1859) 5 Jur. N. S. 284, 28 N. J. Ch. N. S. 375, 7 Week. Rep. 233.

In *Taft v. Hartford, P. & F. R. Co.* (1866) 8 R. I. 310, 5 Am. Rep. 575, the court considered a guaranty of a dividend "to mean nothing more than a pledge of the funds legally applicable to the purposes of a dividend; that, in short, it is a dividend, and not a debt, which is thus preferred and guaranteed."

In *Williston v. Michigan S. & N. I. R. Co.* (1866) 13 Allen (Mass.) 400, it was said: "The guaranty expressed in the certificate relates to the disposition to be made of net earnings among different classes of shareholders, and cannot be construed as a contract for the payment of interest. The net earnings are the fund upon which the stipulated dividends are made chargeable, and the guaranty is an engagement for the application of that fund to a particular class, in preference to or priority over the common and less favored stockholders."

In *McGregor v. Home Ins. Co.* (1880) 33 N. J. Eq. 181, it was said

that a preferred dividend was payable out of profits only, even when "issued under an agreement or guaranty that a dividend of a fixed sum shall be paid on it annually."

In *Chaffee v. Rutland R. Co.* (Vt.) supra, it was said: "It is now well established that dividends on preferred stock are payable only out of net earnings which are applicable to the payment of dividends."

In *Williston v. Michigan S. & N. I. R. Co.* (Mass.) supra, a stockholder brought an action to recover dividends alleged to be due, his certificate stating that he was entitled to dividends in preference to the other stock, and that the payment of the dividend was guaranteed. The dividends were payable out of net earnings. It was said by the court: "The guaranty expressed in the certificate relates to the disposition to be made of net earnings among different classes of shareholders, and cannot be construed as a contract for the payment of interest. The net earnings are the fund upon which the stipulated dividends are made chargeable, and the guaranty is an engagement for the application of that fund to a particular class, in preference to or priority over the common and less favored stockholders."

Field v. Lamson & G. Mfg. Co. (1894) 162 Mass. 388, 27 L.R.A. 136, 38 N. E. 1126, was an action on a contract, brought by a preferred stockholder to recover dividends alleged to be due. An act provided for the creation of preferred stock, and made provision, *inter alia*, that dividends might be paid thereon out of net profits at a rate to be determined, and not more than 7 per cent in preference to any other stock of the corporation; that the preferred stock should be entitled to share pro rata with the other stock, "in any excess divided in any year above a dividend on the whole stock at said rate per cent," the preferred dividends to be cumulative from the time of issue, and, if desired, might be guaranteed by the corporation. The stock was issued in accordance with the act, the rate of dividend fixed at 6 per cent, and the dividend guaranteed. It was held that the guaranty

did not make the company liable for the dividend at all events, whether there were any net profits or not, but only undertook that the net profits should be devoted to the preferred dividends, in priority to any on the common stock. Nor could the guaranty be considered as implying that net profits should be devoted to preferred dividends, regardless of the welfare of the company. The decision as to the declaration of dividends must remain with the company, the preferred stockholders being entitled to dividends and accumulations thereof, in preference to the common stockholders, when in the fair judgment of the company there are net profits available for such dividends.

In *Lockhart v. Van Alstyne* (1875) 31 Mich. 76, 18 Am. Rep. 156, the plaintiff was the holder of preferred stock on which it was provided that a semiannual dividend of 5 per cent "shall be guaranteed by the company." Two dividends were paid thereon, and none thereafter, because there had been no profits from the time the stock was issued. It was contended by the plaintiff that, since the dividends were guaranteed, they were to be payable from some other source if the profits would not suffice. The court, citing a number of anomalous situations which would result if such were the interpretation given, held that the plaintiff's claim was contrary to public policy, and that he was entitled to semiannual dividends of 5 per cent only when there were profits from which to pay them.

In *Feld v. Roanoke Invest. Co.* (1894) 123 Mo. 603, 27 S. W. 685, the plaintiff claimed a breach of contract in that the defendant had failed to pay the 7 per cent interest payable on its preferred stock, which he held. It was held, however, that "the failure to pay the interest semiannually, in the absence of funds by the corporation with which to pay, was no substantial breach of the contract." There was no obligation to pay "dividends" or "interest," regardless of the name, so long as there were no net profits for the purpose, for there could be no such payment from capital.

In *Boardman v. Lake Shore & M. S. R. Co.* (1881) 84 N. Y. 157, the action was to compel the defendant company to pay certain dividends on the preferred stock. The plaintiff was the holder of preferred stock, which was entitled to guaranteed dividends of 10 per cent per annum, and to share equally with other stock of the company in earnings in excess of 10 per cent. The court said: "The doctrine that preference shareholders are entitled to be first paid the amount of dividends guaranteed, and of all arrears of dividends or interest, before the other shareholders are entitled to receive anything, and, although they can receive no profits where none are earned, yet as soon as there are any profits to divide they are entitled to the same, is fully supported by authority."

In *Prouty v. Michigan S. & N. I. R. Co.* (1874) 4 Thomp. & C. (N. Y.) 230, 1 Hun, 655, the complainant sought to compel provision for the payment of dividend arrears on the preferred stock, from future net earnings. The certificates of stock provided that the stock should be entitled to dividends of 10 per cent per annum, and to share pro rata with the other stock of the company on all earnings above said 10 per cent, said dividends to be guaranteed. It was held that by the guaranty the company undertook that the preferred shareholders should have 10 per cent dividends from the net earnings each year, and if, because of lack of earnings, it was unable to pay it one year, it was bound to be made up later, for there was a positive stipulation for 10 per cent per annum. The court said: "The holders were given an interest in the clear profits of the company, equal to the 10 per cent which it was agreed they should receive from that source. The dividends mentioned are payable, generally, out of the net earnings of the company."

In *Miller v. Ratterman* (1890) 47 Ohio St. 141, 24 N. E. 496, reversing (1889) 22 Ohio L. J. 99, it appeared that a railroad company issued preferred stock, and that a mortgage had been placed on the property of the company to secure the payment of

dividends on the stock, which had been guaranteed by the company issuing it and another company. It was held that the provision guaranteeing the payment of dividends did not undertake that the dividends should be paid under any circumstances, but was a stipulation to pay out of surplus profits.

In *Taft v. Hartford, P. & F. R. Co.* (1866) 8 R. I. 310, 5 Am. Rep. 575, the plaintiff brought an action of assumpsit as the holder of preferred stock of the defendant company, on which he was entitled to "preferred and guaranteed dividends at the rate of 10 per cent per annum, before any dividend shall be paid on any other stock in said company." Dividends were claimed, though none were earned. It was held that by the word "guaranteed" was meant not an undertaking that the dividends should be payable at all events, but a pledge that they should be paid out of the funds available for the purpose, out of the net profits, if there were any.

In *Henry v. Great Northern R. Co.* (1857) 1 De G. & J. 606, 44 Eng. Reprint, 858, wherein it appeared that certain statutes empowered the company to guarantee dividends on certain preference shares, the court said: "I have come to the conclusion that what these statutes, in fact, guarantee to the favored shareholders, is a charge on all accruing profits at the stipulated rate, before anything is divided among the ordinary shareholders. This is, substantially, interest, chargeable exclusively on profits."

In *Matthews v. Great Northern R. Co.* (1859) 5 Jur. N. S. (Eng.) 284, it appeared that certain shares had been divided into half shares, and it was provided that "in respect of each whole share so divided, the whole of the interest and dividends which would in each year have accrued shall be applied in or towards payment, in the first place, of interest or dividend, after the rate of 6 per cent per annum, on the amount paid upon the half share so denominated 'guaranteed,' and the remainder, if any, shall alone be payable to the half share so denominated 'deferred.'"

The court said: "It cannot be contended that the guaranty is an absolute guaranty; it must be a limited guaranty; it must be a guaranty at least limited to the whole of the profits made by the railway; it is neither a personal guaranty from an individual shareholder, nor is it a guaranty from the general funds of the company." It was held that the guaranteed shareholders were entitled to a total of 6 per cent per annum.

In some instances corporations have been empowered by statute to guarantee absolutely the dividends on preferred stock, and dividends on stock issued in accordance with such a statute must be paid, regardless of whether earnings are available therefor. *Williams v. Parker* (1884) 136 Mass. 204; *Burt v. Rattle* (1876) 31 Ohio St. 116; *Gordon v. Richmond, F. & P. R. Co.* (1884) 78 Va. 501.

In *Williams v. Parker* (Mass.) *supra*, the question was "whether the guaranty that each share of the preferred stock 'shall receive semiannual dividends of \$4 on each share' is an absolute guaranty, or is conditional upon the earning of sufficient profits by the corporation." It was held to be entirely dependent on the construction of the statute authorizing the issue of said preferred stock; and if the guaranty were to mean nothing more than that the preferred stock was to have priority of dividends over the common stock, it would have been so expressed, said the court, which consequently decided that, no conditions having been set forth in the statute, the guaranty could only be taken to mean that the dividends were to be paid, whether the net earnings were sufficient to pay them or not, in which latter case the corporation would be bound to make up the difference from any of its other property.

In *Burt v. Rattle* (1876) 31 Ohio St. 116, wherein it appeared that a corporation guaranteed the payment of the principal and dividends of preferred stock, issued by virtue of a statute which authorized such guaranty, payment of principal and dividends was secured by a bond and mortgage on the property of the corpora-

tion. It was held that the preferred stockholders were, in reality, secured creditors of the corporation.

In *Gordon v. Richmond, F. & P. R. Co.* (1884) 78 Va. 501, wherein it appeared that a company specially empowered by statute issued stock guaranteed as to principal and dividends, and secured by a deed of trust, it was held that the dividends were payable out of gross earnings, and that in a division of assets these stockholders are entitled to dividends, as well as principal, before the common stock. The court said: "It is also insisted that guaranteed dividends are only payable out of net profits. But in this the appellee is clearly mistaken, for it has been repeatedly held that payment of interest upon shares of capital stock out of gross earnings is legal, where, as in this case, it is authorized by statute."

b. Dividends in arrears.

A guaranty of dividends at a certain rate on preferred stock has been held in some cases to bestow on the stock the right to payment from future profits, of dividends in arrears thereon. *Boardman v. Lake Shore & M. S. R. Co.* (1881) 84 N. Y. 157; *Prouty v. Michigan S. & N. I. R. Co.* (1874) 4 Thomp. & C. (N. Y.) 230, 1 Hun, 655; *Stevens v. South Devon R. Co.* (1851) 9 Hare, 313, 68 Eng. Reprint, 524, 21 L. J. Ch. N. S. 816; *Henry v. Great Northern R. Co.* (1857) 3 Jur. N. S. 1133, 1 De G. & J. 606, 44 Eng. Reprint, 858, 27 L. J. Ch. N. S. 1, 6 Week. Rep. 87; *Corry v. Londonderry & E. R. Co.* (1860) 7 Jur. N. S. 508, 29 Beav. 263, 54 Eng. Reprint, 628, 30 L. J. Ch. N. S. 290, 9 Week. Rep. 301, 4 L. T. N. S. 131; *Matthews v. Great Northern R. Co.* (1859) 5 Jur. N. S. (Eng.) 284, 28 L. J. Ch. N. S. 375, 7 Week. Rep. 233; *Mills v. Northern R. of Buenos Ayres Co.* (1870) L. R. 5 Ch. (Eng.) 621, 23 L. T. N. S. 719, 19 Week. Rep. 171.

In *Prouty v. Michigan S. & N. I. R. Co.* (1874) 1 Hun (N. Y.) 655, 4 Thomp. & C. 230, the court said of a guaranty of 10 per cent dividends on the preferred stock: "Its apparent object was to render the ultimate payment uncontingent, whenever the net earnings proved sufficient to enable

the company to make it. That, though not in the express terms of the certificate, is its import and spirit."

In *Boardman v. Lake Shore & M. S. R. Co.* (N. Y.) supra, it was held that "the reasonable and fair interpretation of the contract is that the dividends were not only to be preferred, but, being guaranteed, were cumulative, and a specific charge upon the accruing profits, to be paid as arrears before any other dividends were divided upon the common stock."

In *Stevens v. South Devon R. Co.* (1851) 9 Hare, 313, 68 Eng. Reprint, 524, wherein it appeared that shares were issued with a guaranty of a certain rate of interest per annum, it was held that the holders thereof were "well entitled to the 6 per cent guaranteed, out of any funds of the company which could be lawfully applied to the payment of it, and therefore out of future profits, before any dividend could be payable upon the whole shares."

In *Corry v. Londonderry & E. R. Co.* (1860) 29 Beav. 263, 54 Eng. Reprint, 628, 30 L. J. Ch. N. S. 290, 9 Week. Rep. 301, 4 L. T. N. S. 131, 7 Jur. N. S. 508, wherein it appeared that the company had issued guaranteed preference shares, the court held that the shareholders were "entitled to receive not only the 5 per cent for the future, but all the arrears, out of the profits, until the arrears are paid (not, of course, including any interest)."

In *Mills v. Northern R. of Buenos Ayres Co.* (1870) L. R. 5 Ch. (Eng.) 621, 23 L. T. N. S. 719, 19 Week. Rep. 171, wherein it appeared that a company had issued a number of guaranteed preference shares, it was said: "Those guaranteed shareholders had a right to carry on their surplus debt, beyond what they were paid de anno in annum, to following years."

VII. Dividend as debt.

a. In absence of special statute.

In the absence of a statutory provision, the holder of preferred stock has none of the prerogatives of a creditor as regards his right to a dividend, which is not to be considered a debt until it has been declared.

United States.—*Sullivan v. Portland & K. R. Co.* (1874) 4 Cliff. 212, Fed. Cas. No. 13,596; *Warren v. King* (1883) 108 U. S. 389, 27 L. ed. 769, 2 Sup. Ct. Rep. 789; *Texas Consol. Compress & Mfg. Assn. v. Storrow* (1899) 34 C. C. A. 182, 92 Fed. 5.

Georgia.—*Coggeshall v. Georgia Land & Invest. Co.* (1914) 14 Ga. App. 637, 82 S. E. 156; *Jefferson Bkg. Co. v. Martin Institute* (1917) 146 Ga. 383, 91 S. E. 463.

Illinois.—*Hamblock v. Clipper Lawn Mower Co.* (1909) 148 Ill. App. 618.

Kansas.—*Burk v. Ottawa Gas & E. Co.* (1912) 87 Kan. 6, 123 Pac. 857, Ann. Cas. 1913D, 772; *Inscho v. Mid-continent Development Co.* (1915) 94 Kan. 370, 146 Pac. 1014, Ann. Cas. 1917B, 546.

Kentucky.—*Rider v. John G. Delker & Sons Co.* (1911) 145 Ky. 634, 39 L.R.A.(N.S.) 1007, 140 S. W. 1011; *Smith v. Southern Foundry Co.* (1915) 166 Ky. 208, 179 S. W. 205.

Maine.—*SPEAR v. ROCKLAND-ROCKPORT LIME Co.* (reported herewith) ante, 798.

Massachusetts.—*Williston v. Michigan S. & N. I. R. Co.* (1866) 18 Allen, 400.

Minnesota.—*Booth v. Union Fibre Co.* (1917) 137 Minn. 7, 162 N. W. 677.

Missouri.—*Kidd v. Puritana Cereal Food Co.* (1909) 145 Mo. App. 502, 122 S. W. 784.

Ohio.—*Miller v. Ratterman* (1890) 47 Ohio St. 141, 24 N. E. 496, reversing (1889) 22 Ohio L. J. 99.

Rhode Island.—*Taft v. Hartford, P. & F. R. Co.* (1866) 8 R. I. 310, 5 Am. Rep. 575.

Texas.—*Reagan Bale Co. v. Heuermann* (1912) — Tex. Civ. App. —, 149 S. W. 228.

Vermont.—*Chaffee v. Rutland R. Co.* (1882) 55 Vt. 110.

But in a Kansas case, *Burk v. Ottawa Gas & E. Co.* (Kan.) supra, which involved a peculiar contract, the court said: "The holder of the preferred stock, however, is not generally a creditor until a dividend is declared, but, as equity regards as done that which ought to be done, if, under the facts of this case, a dividend or dividends ought to have been declared in a cer-

tain year or years to such stockholders, they should be regarded as creditors to such extent, from such time or times, in this equitable action."

However, in a later Kansas case, *Inscho v. Mid-continent Development Co.* (Kan.) supra, it was held that until the payment of debts there were no net earnings from which dividends might be paid, the court seeming to lay stress on the fact that the dividends were cumulative as one reason for its decision.

In *Belfast & M. L. R. Co. v. Belfast* (1885) 77 Me. 445, 1 Atl. 362, concerning the request of preferred stockholders for a dividend, the court said: "No such claim could have been made upon the ground that he is a creditor of the company; he is not such. Preferred stockholders, ordinarily, are not creditors."

In *Lockhart v. Van Alstyne* (1875) 31 Mich. 76, 18 Am. Rep. 156, the court said: "A right to a dividend from the profits of a corporation is no debt until the dividend is declared."

In some cases, a pledge on the profits or mortgage on the property of the company has been given to preferred stockholders, to secure the payment of dividends on their stock, but such measures have been held to be void as against public policy (*Jefferson Bkg. Co. v. Martin Institute* (1917) 146 Ga. 383, 91 S. E. 463), and incapable of changing the contract of a stockholder into that of a creditor (see *Miller v. Ratterman* (1890) 47 Ohio St. 141, 24 N. E. 496; *Coggeshall v. Georgia Land & Invest. Co.* (1914) 14 Ga. App. 637, 82 S. E. 156). See also the following dictum in *Rowan v. Texas Orchard Development Co.* (1916) — Tex. Civ. App. —, 181 S. W. 871: "The rule that a corporation cannot make a valid contract by which it agrees to pay dividends upon its preferred stock, regardless of whether there is any property out of which to make such payment, and redeem said stock at par and accrued interest out of the capital of the corporation in event of default in the payment of dividends, has been generally recognized and enforced by the courts."

In *Sullivan v. Portland & K. R. Co.*

(1874) 4 Cliff. 212, Fed. Cas. No. 13,596, it appeared that certain holders of preferred stock in a railway corporation exchanged their old stock for new 6 per cent preferred stock, in consideration of an agreement of the holders of 10 per cent certificates to remit 4 per cent thereof to provide for the 6 per cent rate on the preferred stock. Later, a second mortgage was placed on the road, which was, some time thereafter, foreclosed. The holders of the preferred stock claimed that they were entitled to their share of the 4 per cent interest remitted, as heretofore mentioned. It was held that "the contract was merely executory, and did not, without more, amount to a lien, even if the contract was legal, as the interest remitted was never set apart to be applied to the described object."

In *Warren v. King* (1883) 108 U. S. 389, 27 L. ed. 769, 2 Sup. Ct. Rep. 789. there was a petition by preferred stockholders which, *inter alia*, requested a decree that they were entitled to receive 7 per cent interest on their shares out of the net earnings of the company remaining, after the payment of interest to the holders of the first mortgage bonds. Their certificates stated that they were entitled to receive their dividends from the net earnings. It was held that by net earnings was meant what was left after the payment of all current expenses, interest, and indebtedness, and that the position of the preferred stockholders was inferior to all creditors. Their dividends are to come from the same fund as those of the common stock, *viz.*, the net earnings, and there is nothing to give them the "attributes of a creditor."

In *Texas Consol. Compress & Mfg. Asso. v. Storrow* (1899) 34 C. C. A. 182, 92 Fed. 5, it appeared that certain preferred stockholders of a corporation asked that a receiver be appointed to wind up the corporation on the ground, *inter alia*, that the directors had refused to appropriate any of the earnings to the payment of dividends on said stock, and had used money that should have been paid out as dividends for purposes of expan-

sion. The court pointed out that as the claims of these stockholders had not been liquidated by decree or judgment, and were denied as existing debts, there was no basis for the request of a receiver. It was suggested that they be granted an accounting and protection against fraudulent acts, until they could show adjudicated demands.

In *Coggeshall v. Georgia Land & Invest. Co.* (1914) 14 Ga. App. 637, 82 S. E. 156, an action brought to recover the principal and interest on a certificate of preferred stock, it appeared that the preferred stock certificate stated that the holder was entitled to a cumulative dividend of 8 per cent per annum, the profits to be pledged to the payment thereof. The court pointed out that the holder of the certificate here had the right to vote,—an "earmark" of stock; and that, while it was provided that the stock might be retired, there was no obligation to do so which might indicate the contract as one of indebtedness. And since the certificate was held to be one for preferred stock, the stockholder was not to be considered a creditor in preference to outside creditors.

In *Jefferson Bkg. Co. v. Martin Institute* (1917) 146 Ga. 383, 91 S. E. 463, certain "preferred stockholders" claimed to have a lien on the property of their corporation, superior to the general creditors thereof. Their certificates recited that the preferred stock should have a dividend of 6 per cent per annum out of the earnings, and that to secure its prompt payment and that of the principal the corporation thereby pledged all its property. The court quoted Cook on Corporations, as follows: "The law is now clearly settled that a preferred stockholder is not a corporate creditor. . . . A contract that dividends shall be paid on the preferred stock, whether any profits are made or not, would be contrary to public policy and void. An agreement to pay dividends absolutely and at all events, from the profits when there are any, and from the capital when there are not, is an undertaking which is contrary to law, and is void."

In *Hamblock v. Clipper Lawn Mower Co.* (1909) 148 Ill. App. 618, it appeared that a holder of 6 per cent preferred stock obtained a justice's court judgment for a year's dividend. It was shown that a dividend of 6 per cent had been paid to some of the stockholders who had paid cash for their stock, the holder in this instance having received his for tools and machinery. It was held that a dividend could "be declared only from the profits, except where no rights of creditors intervened and all the stockholders assent." The court said: "The payment of dividends out of capital is reducing the capital to the detriment of the creditors, and it is illegal for a company to pay dividends to shareholders out of the capital before an income is earned. . . . Dividends upon preferred stock are not a debt that is guaranteed. The right to a dividend is not a debt. There is no debt until the dividend is declared, and the right to declare it does not exist until there is a fund from which it can properly be made. Therefore, preferred shareholders are not creditors of the company, by virtue of their stock certificates." Since no dividend had been declared, the judgment could not be sustained.

In *Burk v. Ottawa Gas & E. Co.* (1912) 87 Kan. 6, 123 Pac. 857, Ann. Cas. 1913D, 772, it was provided as follows: "The preferred stock shall carry a 6 per cent per annum preferred noncumulative dividend, payable semi-annually on the 1st days of July and January of each year after January 1st, 1906, out of the net profits of the preceding fiscal year, and a pro tanto dividend, if such dividend fall short of 6 per cent." It was held that "the holder of the preferred stock, however, is not generally a creditor until a dividend is declared; but, as equity regards as done that which ought to be done, if, under the facts of this case, a dividend or dividends ought to have been declared in a certain year or years to such stockholders, they should be regarded as creditors to such extent, from such time or times, in this equitable action."

In *Inscho v. Mid-continent Develop-*

ment Co. (1915) 94 Kan. 370, 146 Pac. 1014, Ann. Cas. 1917B, 546, wherein the plaintiff, a preferred stockholder, sued the company to recover one year's dividend at 7 per cent, on her shares of preferred stock, alleging that sufficient had been earned to pay one annual dividend, mismanagement by the directors was asserted. A receiver was appointed to take charge of the property. It was held that the stockholder was entitled to a payment only from net earnings, and was not a creditor, but was dependent on the fortunes of the company. The duty to pay the debts of the company is superior to that of paying dividends to the stockholders, and until such are paid there are no net earnings from which to pay dividends. The cumulative feature of the dividends, by virtue of which they are not lost to the stockholders if not paid annually, also affects the duty of the corporation to stockholders.

In *Rider v. John G. Delker & Sons Co.* (1911) 145 Ky. 634, 39 L.R.A. (N.S.) 1007, 140 S. W. 1011, a holder of preferred stock, which was, together with accumulated dividends thereon, subject to redemption by any holder after five years, sought prematurely to have his stock and dividends redeemed, claiming to be a creditor. It was held that the plaintiff was a stockholder and not a creditor.

In *SPEAR v. ROCKLAND-ROCKPORT LIME Co.* (reported herewith) ante, 793, a bill in equity brought by a preferred stockholder "for the purpose of requiring the declaration of a dividend" on the preferred stock of said company, the court said: "Moreover, a preferred stockholder is not a creditor. He is a stockholder, although his peculiar rights arise from contract. He is a stockholder as to creditors in general, and his rights are subordinate to theirs. He cannot claim dividends out of funds that are needed for, or that properly should be applied to, the payment of debts. He is entitled to a dividend out of net earnings only."

In *Williston v. Michigan S. & N. I. R. Co.* (1866) 13 Allen (Mass.) 400, wherein the plaintiff brought an action on the contract to recover dividends

alleged to be due him as a stockholder, the payment of the dividends being guaranteed, it was held that he was not a creditor of the corporation so as to maintain an action at law to recover the payment of dividends.

In *Booth v. Union Fibre Co.* (1917) 137 Minn. 7, 162 N. W. 677, a holder of 6 per cent cumulative preferred stock brought an action to compel the payment of accumulated dividends thereon. It was said: "The dividends come out of earnings, and not out of capital. Unless there are net earnings there is no right to dividends. The stockholder is still a stockholder and not a creditor. He makes a contribution to capital, and not a loan."

Kidd v. Puritana Cereal Food Co. (1909) 145 Mo. App. 502, 122 S. W. 784, was an action brought to recover three dividends alleged to have been due on preferred stock. It was held that a statute under which the company issued its preferred stock could not be construed as meaning that the semiannual instalments payable on the preferred shares were to be considered interest and a debt. Such an interpretation would require a "clear legislative grant."

In *Miller v. Ratterman* (1890) 47 Ohio St. 141, 24 N. E. 496, reversing (1889) 22 Ohio L. J. 99, wherein it appeared that a company had issued preferred stock, with dividends thereon guaranteed and secured by a mortgage on its property, it was held that dividends were payable on the said stock only from net earnings, and that the said mortgage could not give the preferred stockholders "priority over creditors, either then existing, or those who became such afterwards."

In *Taft v. Hartford, P. & F. R. Co.* (1866) 8 R. I. 310, 5 Am. Rep. 575, the holder of preferred and guaranteed stock, on which dividends of 10 per cent per annum were guaranteed before any dividend should be paid on any other stock of the said company, claimed dividends, though none had been earned. It was held that the company guaranteed a dividend, and not a debt.

In *Reagan Bale Co. v. Heuermann* (1912) — Tex. Civ. App. —, 149 S. W. 6 A.L.R.—52.

228, it appeared that the plaintiff was the holder of preferred stock of the company, which provided for cumulative dividends of 8 per cent, the right to share with common stockholders in any surplus over 8 per cent on said common stock, and the option to mature the shares if dividends at said rate of 8 per cent were omitted for two years. No dividends were ever paid on the stock, and it was sought to recover the par value of the stock as provided. The court said: "Whatever may be the superior rights of preferred stockholders over the holders of common stock, the statute has granted no authority to any corporation to make the claims on any of its stockholders superior to the creditors of the corporation." The plaintiff was a stockholder, and no failure to pay dividends could transform a stockholder into a preferred creditor.

In *Chaffee v. Rutland R. Co.* (1882) 55 Vt. 110, wherein the plaintiff brought an action of assumpsit on certain scrip issued by the company in payment of dividends on its preferred guaranteed stock, of which he was the holder, the stock having been issued to the second mortgage bondholders, it was held that the stockholders were none the less participants in the fortunes of the company, entitled to a share of the capital stock, and not in any sense creditor of the company.

b. Under special statute.

By virtue of a statute applicable to a particular corporation or class of corporations, it has been held that a corporation may issue preferred stock with dividends thereon assured in such a manner as to give the holder thereof the rights of a creditor. *Cotting v. New York & N. E. R. Co.* (1886) 54 Conn. 156, 5 Atl. 851; *Heller v. National Marine Bank* (1899) 89 Md. 602, 45 L.R.A. 438, 73 Am. St. Rep. 212, 43 Atl. 800; *Williams v. Parker* (1884) 136 Mass. 204; *Burt v. Rattle* (1876) 31 Ohio St. 116.

In *Cotting v. New York & N. E. R. Co.* (1886) 54 Conn. 156, 5 Atl. 851, it appeared that preferred stock provided for by an act of legislature was to have dividends of 7 per cent per annum, payable from net earnings,

which were held to be payable despite an impaired capital existing at the time of the issue. The dividend unpaid became a lien on the net earnings, and to that extent the preferred stockholder was a creditor.

In *Heller v. National Marine Bank* (1899) 89 Md. 602, 45 L.R.A. 438, 78 Am. St. Rep. 212, 43 Atl. 800, it appeared that a company issued preferred stock under a statute which provided for a class of preferred stock, said stock, when acknowledged and recorded in the manner provided, to constitute "a lien on the franchises and property of such corporation, and have priority over any subsequently created mortgage or other encumbrance." The court held that by the statute, which was not against public policy, there was created a preferred stock which constituted a lien on the property and franchises of the company. The court, by refusing to limit this lien to the guaranteed dividend, inferentially included the dividend. Such a lien, it was held, having priority to any mortgage or encumbrance, must have priority to claims over which a subsequently created mortgage would have taken precedence.

In *Williams v. Parker* (1884) 186 Mass. 204, the court was called on to construe a statute authorizing the issue of preferred stock by a corporation, whereby it was guaranteed that the stock should have semiannual dividends of \$4. It was held that by virtue of this statute, and another passed shortly after in the same year, "holders of special stock shall be regarded as creditors of the corporation for the dividends guaranteed, which have become payable."

In *Burt v. Rattle* (1876) 31 Ohio St. 116, it appeared that a corporation issued preferred stock under the provisions of a statute whereby such stock was conditionally authorized, with dividends guaranteed, etc. The stock had been secured by a bond and mortgage to insure the payment of dividends and principal. Later, having incurred considerable indebtedness, the company failed. It was held that the preferred stockholders, so-called, were in fact secured creditors of the

corporation, and not members thereof. All the conditions of the statute under which the stock was issued, the court said, were to that effect, and the words used, such as "dividends" and "stockholders," would not suffice to alter the substance of the statute. The preferred stockholders were secured creditors as regards the principal and unpaid dividends on their stock.

VIII. Effect of impairment of capital or existence of debts.

Dividends may not be claimed on the preferred stock of a corporation while its debts are unpaid or its capital impaired, unless by virtue of special legislative grant. *Belfast & M. L. R. Co. v. Belfast* (1885) 77 Me. 445, 1 Atl. 362; *Hazeltine v. Belfast & M. L. R. Co.* (1887) 79 Me. 411, 1 Am. St. Rep. 330, 10 Atl. 328; *Field v. Lamson & G. Mfg. Co.* (1894) 162 Mass. 388, 27 L.R.A. 136, 38 N. E. 1126; *Kidd v. Puritana Cereal Food Co.* (1909) 145 Mo. App. 502, 122 S. W. 784; *Goodnow v. American Writing Paper Co.* (1907) 72 N. J. Eq. 645, 66 Atl. 607; *Chaffee v. Rutland R. Co.* (1882) 55 Vt. 110; *Stevens v. South Devon R. Co.* (1851) 9 Hare, 313, 68 Eng. Reprint, 524, 21 L. J. Ch. N. S. 816; *Dent v. London Tramways Co.* (1879) L. R. 16 Ch. Div. (Eng.) 353, 50 L. J. Ch. N. S. 190, 44 L. T. N. S. 91; *Davison v. Gillies* (1879) L. R. 16 Ch. Div. (Eng.) 347, note, 50 L. J. Ch. N. S. 192, note, 44 L. T. N. S. 92, note; *Bond v. Barrow Hæmetite Steel Co.* [1902] 1 Ch. (Eng.) 353, 71 L. J. Ch. N. S. 246, 86 L. T. N. S. 10, 9 Manson, 69, 50 Week. Rep. 295, 18 Times L. R. 249; *Lambert v. Neuchatel Asphalte Co.* (1882) 51 L. J. Ch. N. S. (Eng.) 882, 47 L. T. N. S. 73, 30 Week. Rep. 913.

In *Kidd v. Puritana Cereal Food Co.* (1909) 145 Mo. App. 502, 122 S. W. 784, the court stated the principle as follows: "Without authority from the legislature, an incorporated company cannot confer on holders of preferred shares a right to be paid dividends, if the capital of the company will thereby be impaired, or the demands of its creditors postponed."

And see *Inscho v. Mid-continent Development Co.* (1915) 94 Kan. 370, 146 Pac. 1014, Ann. Cas. 1917B, 546, where-

in the court said that the duty to pay the debts of the company was superior to the duty to pay dividends on the preferred stock.

The rule, however, is subject to limitation as to unpaid debts, and to varying interpretations as to what constitutes impairment of capital.

Dividends on preferred stock are payable from net earnings, and the net earnings may be ascertained only after the payment of the debts of the company. It is generally held, however, that it is not necessary that all the debts of a corporation should be paid before any dividends may be declared. *Hazeltine v. Belfast & M. L. R. Co.* (1887) 79 Me. 411, 1 Am. St. Rep. 330, 10 Atl. 328.

In *Belfast & M. L. R. Co. v. Belfast* (1885) 77 Me. 445, 1 Atl. 362, it was held that a floating debt should be paid before dividends were declared on the preferred stock, but in *Stevens v. South Devon R. Co.* (1851) 9 Hare, 313, 68 Eng. Reprint, 524, 21 L. J. Ch. N. S. 816, on similar facts, the court refused to interfere with the internal management of the company, and restrain the declaration of a dividend on the preferred stock while there was a floating debt unpaid. It must be noted, however, that in the latter instance the court was asked to restrain, and not to enforce, the declaration of a dividend. So in *Lambert v. Neuchatel Asphalte Co.* (1882) 51 L. J. Ch. N. S. (Eng.) 882, 47 L. T. N. S. 73, 30 Week. Rep. 913, the court refused to deal with affairs that should be decided by a general meeting of the company.

Where payment of a dividend has been made to most of the preferred stockholders, it is no defense to the demand of the remaining few that the dividend was wrongfully paid. *Chaffee v. Rutland R. Co.* (1882) 55 Vt. 110.

Nor are the preference shares of a company to be prejudiced by the wrongful payment of dividends to the ordinary shares. *Dent v. London Tramways Co.* (1879) L. R. 16 Ch. Div. (Eng.) 344, 50 L. J. Ch. N. S. 190, 44 L. T. N. S. 91.

It is not impairment of capital within the meaning of the rule, where

"watered" stock has been issued, and dividends may be paid on the preferred stock of a corporation whose assets are not equal to the face value of its stock. *Goodnow v. American Writing Paper Co.* (1907) 72 N. J. Eq. 645, 66 Atl. 607, affirmed in (1907) 73 N. J. Eq. 692, 69 Atl. 1014.

In *Bond v. Barrow Hæmetite Steel Co.* [1902] 1 Ch. (Eng.) 353, the court said: "Perhaps the shortest way of expressing the distinction which I am endeavoring to explain is to say that fixed capital may be sunk and lost, and yet that the excess of current receipts over current payments may be divided; but that floating or circulating capital must be kept up."

In *Belfast & M. L. R. Co. v. Belfast* (1885) 77 Me. 445, 1 Atl. 362, there were involved various questions concerning the rights of holders of the preferred stock of a railroad. By-laws provided for a semiannual dividend thereon at a rate not to exceed 6 per cent per annum, and payable from net earnings, the nonpreferred stock to have a similar rate, and then the two classes were to share any surplus equally. Although it had been planned and agreed to build the road with no indebtedness, it was found necessary, in order to complete the work, to place a mortgage thereon, and to incur indebtedness on a note. The road was then leased at an annual rental. In a certain year, after payment of interest, it had on hand \$10,863, from which the preferred stockholders claimed a dividend. In deciding what should be considered as "net earnings" from which dividends might be payable, it was pointed out that not all indebtedness need be paid before there might be such net earnings; the floating debt or note should be provided for, both as to principal and interest, and a sinking fund created for the satisfaction of the bonded debt, and the surplus might be paid in dividends. It was remarked that, "as a general rule, the officers of a corporation are the sole judges as to the propriety of declaring dividends, and the courts will not interfere with a proper exercise of their discretion."

The company usually establishes its financial policy for itself."

In *Hazeltine v. Belfast & M. L. R. Co.* (1887) 79 Me. 411, 1 Am. St. Rep. 330, 10 Atl. 328, it appeared that a company had a funded debt of \$150,000 on a property which cost \$1,050,000, and no other indebtedness. Preferred stockholders asserted a right to a dividend, payable out of cash in the treasury to the amount of \$22,412. A by-law provided as follows: "Dividends on the preferred stock shall first be made semiannually from the net earnings of the road, not exceeding 6 per centum per annum, after which dividend, if there shall remain a surplus, a dividend shall be made on the nonpreferred stock up to a like per cent per annum; and should a surplus then remain of net earnings, after both of said dividends, in any one year, the same shall be divided pro rata on all the stock." It was contended that provision must be made for the payment of the funded debt before any dividends might be paid, but the court held that all dividends should not be withheld from stockholders until all debts were paid.

In *Field v. Lamson & G. Mfg. Co.* (1894) 162 Mass. 388, 27 L.R.A. 136, 38 N. E. 1126, the action was by a preferred stockholder for the recovery of dividends alleged by him to be due. No dividends had been declared, and it appeared that the capital was impaired to a considerable degree, and a debt in a large sum was payable on demand, or in short time. It was held that there was nothing to show that the directors had not acted in an honest and judicious manner in the exercise of their discretion, when, because of the debts and impairment of capital, they refused to declare any dividends on the preferred stock. They were bound to consider creditors as well as stockholders.

In *Kidd v. Puritana Cereal Food Co.* (1909) 145 Mo. App. 502, 122 S. W. 784, an action brought by a preferred stockholder to recover three dividends alleged by him to be due on property stock, the court said: "Without authority from the legislature an incorporated company cannot confer on

holders of preferred shares a right to be paid dividends, if the capital of the company will thereby be impaired or the demands of its creditors postponed."

In *Goodnow v. American Writing Paper Co.* (1907) 72 N. J. Eq. 645, 66 Atl. 607, affirmed in (1907) 73 N. J. Eq. 692, 69 Atl. 1014, it was sought to enjoin the payment of a dividend on the preferred stock on the ground that the stock of the company represented an overvaluation thereof, and that to pay a dividend before the overvaluation had been eliminated by the appropriation of earnings would be to impair the capital of the company. The court said: "After a careful consideration of the questions involved, I am of opinion that as between these stockholders, no actual fraud being charged, the agreement to issue the stock as full paid for property purchased, the agreement having been carried out, is binding upon the company and its shareholders, and that the stock so issued is not subject to further call, either directly or indirectly, by suppression of dividends declarable from annual net profits, and that if all of the assets for which the stock was issued still remain in the possession of the company, or such of them as may have been exhausted replaced, either in kind or with money, to the extent of their real value, a dividend ascertained by reserving for capital the actual cost of the assets for which the stock was issued, they being still in possession, is not a dividing of the capital of the corporation, forbidden by our act."

In *Chaffee v. Rutland R. Co.* (1882) 55 Vt. 110, it appeared that the plaintiff was the holder of preferred guaranteed stock, and that he had received in settlement of dividends thereon, certain scrip, entitling him to dividends when earned, or transferable into bonds. The company refused either to issue said bonds in exchange therefor or to pay the dividends. It was held that although the company was acting wrongfully in declaring dividends when there were no earnings, and in issuing scrip therefor transferable into mortgage bonds, nev-

ertheless, since the scrip of all the other holders had been accordingly transferred, it could not refuse a transfer for the holder of the last of these obligations, nor was he chargeable as a stockholder with notice that the financial condition of the company did not warrant a dividend.

In *Stevens v. South Devon R. Co.* (1851) 9 Hare, 313, 68 Eng. Reprint, 524, 21 L. J. Ch. N. S. 816, wherein an ordinary shareholder sought to restrain the payment of any dividend on the preference shares as long as a floating debt remained unpaid, it was held that the question was "one of internal management, with which the court could not interfere."

In *Davidson v. Gillies* (1879) L. R. 16 Ch. Div. (Eng.) 347, note, 50 L. J. Ch. N. S. 192, note, 44 L. T. N. S. 92, note, wherein it appeared that the articles of association of a company provided that "no dividend shall be declared except out of the profits of the company," and also that, before recommending a dividend, reserve and contingent funds should be set aside, it was held that maintenance of the company's property must be provided for before there could be any profits available for dividends.

In *Dent v. London Tramways Co.* (1879) L. R. 16 Ch. Div. (Eng.) 344, 50 L. J. Ch. N. S. 190, 44 L. T. N. S. 91, wherein it appeared that the property of the company had been allowed to deteriorate in order to pay dividends to the ordinary shareholders, it was held that the preference shareholders, entitled to a preferential dividend of 6 per cent, "dependent upon the profits of the particular year only," were not to be forbidden a dividend when warranted by the profits of a particular year, in order to make up the deficiency caused by the prior wrongful payment of dividends to the ordinary shares.

In *Bond v. Barrow Haemetite Steel Co.* [1902] 1 Ch. (Eng.) 353, 86 L. T. N. S. 10, 71 L. J. Ch. N. S. 246, 9 Manson, 69, 50 Week. Rep. 295, 18 Times L. R. 249, wherein preference shareholders of two classes claimed dividends on their shares, it was held that, because of large financial losses of cir-

culating capital, the dividends requested were not justified, and to have paid them would have been contrary to the rule that circulating capital must be kept up.

In *Lambert v. Neuchatel Asphalte Co.* (1882) 51 L. J. Ch. N. S. (Eng.) 882, 47 L. T. N. S. 73, 30 Week. Rep. 918, wherein the plaintiff, to protect a dwindling capital, attempted to have a reserve fund set aside before the declaration of any dividends on the preference or ordinary shares, it was held that by the articles of the company the decision of such matters was given to a general meeting.

But in *Cotting v. New York & N. E. R. Co.* (1886) 54 Conn. 156, 5 Atl. 851, it appeared that a railroad company in need of funds issued preferred stock, on which dividends were to be paid at 7 per cent per annum, commencing October 1, 1885. A statute prohibited the payment of dividends by a company whose capital was impaired. The court held that, although preferred stockholders were ordinarily entitled only to dividends from net profits, the legislature in creating this stock issue had provided for preferred stock, with extra privileges, with a pledge of payment of dividends and arrearages thereof out of net earnings. The deficiency of capital existed at the time of the stock issue, and it was the object of the legislature to put the road on a working basis.

IX. *Payment from capital.*

a. *Corporation going concern.*

Dividends on the preferred stock of going concerns may not be paid from capital funds, except where it is especially permitted by statute. *Lockhart v. Van Alstyne* (1875) 31 Mich. 76, 18 Am. Rep. 156; *Roberts v. Roberts-Weeks Co.* (1906) 184 N. Y. 257, 3 L.R.A.(N.S.) 1034, 112 Am. St. Rep. 607, 77 N. E. 13, 6 Ann. Cas. 213.

In *Hamblock v. Clipper Lawn Mower Co.* (1909) 148 Ill. App. 618, the court said: "The payment of dividends out of capital is reducing the capital to the detriment of the creditors, and it is illegal for a company to pay dividends to shareholders out of the capital, before an income is earned."

And in *Re Alexandra Palace Co.* (1882) L. R. 21 Ch. Div. (Eng.) 149, 51 L. J. Ch. N. S. 655, 46 L. T. N. S. 730, 30 Week. Rep. 771, wherein it appeared that a corporation had borrowed money to pay dividends on its 6 per cent preference shares, it was held that the dividends were wrongfully paid, since they had not been made from profits.

But in *Williams v. Parker* (1884) 136 Mass. 204, under a statute authorizing a corporation to issue special preferred stock, it was held that dividends thereon were payable from net earnings, and, in the absence thereof, from any other property of the corporation.

In *Lockhart v. Van Alstyne* (1875) 31 Mich. 76, 18 Am. Rep. 156, the plaintiff, a holder of preferred stock with 5 per cent semiannual dividend guaranteed, claimed a right to have dividends paid whether there were profits for that purpose or not. It was said that a payment of a dividend from the capital would be considered dishonest and fraudulent, since it would give a deceptive appearance as to the financial condition of the corporation, and for this and other reasons the court refused to give such a construction to the guaranty.

In *Roberts v. Roberts-Wicks Co.* (1906) 184 N. Y. 257, 3 L.R.A.(N.S.) 1034, 112 Am. St. Rep. 607, 77 N. E. 13, 6 Ann. Cas. 213, it appeared that a corporation had reduced its capital stock in order to meet an impairment of capital, and that as a result of said reduction there was a balance, or surplus, which the directors shortly afterward devoted to the payment of dividends and arrears thereof, on preferred stock of the company. It was held that such money could not be devoted to the payment of dividends and arrears on the preferred stock, as proposed by the directors. Dividends, the court said, are payable out of net profits, and this fund does not consist of profits, but of capital, which belongs to all the stockholders in proportion to their holdings.

b. Corporation in liquidation.

The right of holders of preferred stock in a corporation which is in

liquidation, to be paid dividends or arrears thereof, is dependent entirely on the contract in each particular case. *Drewry-Hughes Co. v. Throckmorton* (1917) 120 Va. 859, 92 S. E. 818; *Bishop v. Smyrna & C. R. Co.* [1895] 2 Ch. (Eng.) 265, 64 L. J. Ch. N. S. 617, 72 L. T. N. S. 773, 2 Manson, 429, 43 Week. Rep. 647, 13 Reports, 561; *Re Crichton's Oil Co.* [1902] 2 Ch. (Eng.) 86, 71 L. J. Ch. N. S. 531, 86 L. T. N. S. 787, 18 Times L. R. 556; *Re W. J. Hall & Co.* [1909] 1 Ch. (Eng.) 521, 100 L. T. N. S. 692, 78 L. J. Ch. N. S. 382, 16 Manson, 152; *Re Accrington Corp. Steam Tramways Co.* [1909] 2 Ch. (Eng.) 40, 78 L. J. Ch. N. S. 485, 101 L. T. N. S. 99, 16 Manson, 178.

In *Bishop v. Smyrna & C. R. Co.* [1895] 2 Ch. (Eng.) 265, 64 L. J. Ch. N. S. 617, 72 L. T. N. S. 773, 2 Manson, 429, 43 Week. Rep. 647, 13 Reports, 561, and *Re W. J. Hall & Co.* [1909] 1 Ch. (Eng.) 521, 100 L. T. N. S. 692, 78 L. J. Ch. N. S. 382, 16 Manson, 152, it was held that, although the commencement of proceedings to wind up a concern terminated the right of directors of a corporation to declare a dividend, the rights of the preference shareholders remained, and were enforceable, because declared by the contract between the different classes of shareholders.

But in *Re Accrington Corp. Steam Tramways Co.* (Eng.) supra, the preference shareholders were held to have no right to any profits not declared as dividends before the company instituted liquidation proceedings.

In *Drewry-Hughes Co. v. Throckmorton* (Va.) supra, it appeared that a company had issued preferred stock entitled to 6 per cent cumulative dividends, to constitute a preferred charge over the common stock until the same was discharged. In case of liquidation the preferred stock was to have a prior claim to the amount of its face value and arrears of dividends, with interest thereon. It was held that the charter and the certificate clearly set forth the terms of the agreement with the preferred stockholders, and that on dissolution they were entitled to be paid from the assets of the company

the face value of the stock and all dividends remaining unpaid at the time the company started to wind up its business, no dividends being permissible after a corporation goes into liquidation, interest on the accumulations not to be payable after the commencement of the dissolution.

In *Bishop v. Smyrna & C. R. Co.* (Eng.) supra, it appeared that just prior to liquidation large profits were shown by the revenue account of a company, while the capital account showed a deficit. It was held that arrears of dividends due on certain preference shares should be paid from the profits, according to the contract, before any part thereof might be used to pay the capital claims of the ordinary shareholders.

In the case of *Re Crichton's Oil Co.* [1902] 2 Ch. (Eng.) 86, 71 L. J. Ch. N. S. 531, 86 L. T. N. S. 787, 18 Times L. R. 556, it appeared that the assets were insufficient to repay the paid-up capital of a company in liquidation. There was on hand a fund consisting of profits which was claimed by the cumulative preference shareholders in payment of arrears of dividend thereon. It was held that these shares were entitled only to a claim on the profits "available for dividends," and that the fund consisting of profits here could not be so considered according to the terms of the contract.

In the case of *Re W. J. Hall & Co.* [1909] 1 Ch. (Eng.) 521, 100 L. T. N. S. 692, 78 L. J. Ch. N. S. 382, 16 Manson, 152, it appeared that the company had issued preference shares entitled to dividends only out of profits, and which, on liquidation, were to be entitled to the surplus assets to the extent of the capital paid up thereon, and any arrears on the 5 per cent preferential dividends. It was held that, regardless of declaration of dividends, the preference shareholders were entitled to arrears of dividends to the commencement of the winding up, in so far as there were profits for that purpose.

In the case of *Re Accrington Corp. Steam Tramways Co.* (Eng.) supra, it appeared that a company had issued 6 per cent cumulative preferred stock,

and had made a later issue of 6 per cent preferred stock. There was also a large amount of ordinary shares. On liquidation it was found that the assets were not sufficient to cancel the stock, and the old preference shareholders claimed an accumulation of dividends, both classes of preference stock asserting a claim to dividends for one year. It was held that although the arrears of dividends had been declared and a sum set aside for the payment thereof, such action had been taken when the company was being wound up, when it could no longer be done, and so neither class of preference stock was entitled to anything in respect to dividends.

X. Payment from special fund.

Where, by reason of the diversion of profits to capital uses, the preferred stock has failed to receive its proper dividend, the shortage or arrears thereof so caused may be made up from money borrowed for the purpose, or by the issue of bonds or stock, but dividends may not be paid from a surplus fund which has been created by a reduction of capital. *Wood v. Lary* (1888) 47 Hun (N. Y.) 550; *Roberts v. Roberts-Wicks Co.* (1906) 184 N. Y. 257, 3 L.R.A.(N.S.) 1034, 112 Am. St. Rep. 607, 77 N. E. 13, 6 Ann. Cas. 213; *Bassett v. United States Cast Iron Pipe & Foundry Co.* (1909) 74 N. J. Eq. 668, 70 Atl. 929, affirmed in (1909) 75 N. J. Eq. 539, 73 Atl. 514; *Mills v. Northern R. of Buenos Ayres Co.* (1870) L. R. 5 Ch. (Eng.) 621, 23 L. T. N. S. 719, 19 Week. Rep. 171.

This rule is not affected by the fact that the diversion of profits was from noncumulative preferred stock. *Wood v. Lary* (N. Y.) supra; *Bassett v. United States Cast Iron Pipe & Foundry Co.* (1909) 74 N. J. Eq. 668, 70 Atl. 929, affirmed in (1909) 75 N. J. Eq. 539, 73 Atl. 514.

In *Mills v. Northern R. of Buenos Ayres Co.* (Eng.) supra, it was held not to be ultra vires for a company to borrow money for the purpose of returning to the revenue account funds taken therefrom for the use of capital. But see *Hoole v. Great Western R. Co.* (1867) L. R. 3 Ch. (Eng.) 262, 16 Week. Rep. 260, 17 L. T. N. S. 153, seemingly

contrary to the general rule, wherein a procedure quite similar was held to be *ultra vires*.

In *Wood v. Lary* (N. Y.) *supra*, it appeared that a corporation had issued 6 per cent noncumulative preferred stock, that for several years no dividends were paid thereon, but the earnings applicable thereto were expended in construction work and betterments, and that thereupon the directors declared a dividend on the stock for the four years past, payable in mortgage bonds. It was held that a corporation may create a loan to the extent of its dividends, and as an evidence of the debt may issue a bond secured by a mortgage. The court pointed out that the preferred stockholders "were entitled to dividends whenever in any year the net earnings, after payment of all interest charges, were sufficient for the payment thereof." This was considered to determine the rights of the stockholders and to place them beyond the discretion of the directors, thereby overcoming the argument based on the fact that the dividends were noncumulative.

In *Roberts v. Roberts-Wicks Co.* (1906) 184 N. Y. 257, 3 L.R.A. (N.S.) 1034, 112 Am. St. Rep. 607, 77 N. E. 13, 6 Ann. Cas. 213, it appeared that the capital stock of a corporation had been reduced, and as a result a surplus fund had been created from which the directors now proposed to pay dividends and arrears on cumulative preferred stock. The court held that such a fund did not consist of profits from which dividends might be paid, but, if distributed, must be paid to both classes of stockholders in proportion to their holdings.

Bassett v. United States Cast Iron Pipe & Foundry Co. (N. J.) *supra*, involved the right of preferred stockholders to a dividend from a surplus fund which had been chiefly created by a reduction of the noncumulative preferred dividends for four years. It was contended by the common stockholders that the dividends on the preferred stock were to be paid from the earnings of a particular year, but the court held that in so far as the fund had been built up by a reduction of

the preferred dividend in former years, it was available for the payment of the dividend in question.

In *Mills v. Northern R. of Buenos Ayres Co.* (Eng.) *supra*, it appeared that a company had issued guaranteed preferred shares on which arrears of cumulative dividends were due, and the company planned to borrow, as it had power to do, in order to pay off the dividends, earnings equal in amount thereto having been applied to purposes of capital instead of having been devoted to dividends. It was held not to be *ultra vires* for the company to return to revenue the money borrowed therefrom for the purpose of capital, and to use that revenue in paying arrears of dividends.

In *Hoole v. Great Western R. Co.* (Eng.) *supra*, it appeared that revenue which might have been distributed in dividends on the preference and ordinary shares had been used for purposes of capital, and that the company had declared a dividend payable in preference stock in lieu of one in cash. It was held that paying a dividend on shares by shares was *ultra vires*, being contrary to statute, nor was it capable of being construed in any other way.

XI. Accumulations and arrears.

a. Corporation going concern.

The right of preferred stockholders to cumulative dividends is generally stipulated in the agreement or inferred from a guaranty of the dividends, and will not be defeated except by an expressed or implied intention to the contrary, while the corporation is a going concern.

Maine.—*Belfast & M. L. R. Co. v. Belfast* (1885) 77 Me. 445, 1 Atl. 362; *Hazeltine v. Belfast & M. L. R. Co.* (1887) 79 Me. 411, 1 Am. St. Rep. 330, 10 Atl. 328; *SPEAR v. ROCKLAND-ROCKPORT LIME CO.* (reported herewith) ante, 793.

Massachusetts.—*Gardner Sav. Bank v. Taber-Prang Art Co.* (1905) 189 Mass. 363, 75 N. E. 705.

Michigan.—*Lockhart v. Van Alstyne* (1875) 81 Mich. 76, 18 Am. Rep. 156.

New Jersey.—*Elkins v. Camden & A. R. Co.* (1882) 36 N. J. Eq. 233.

New York.—*Prouty v. Michigan S.*

& N. I. R. Co. (1874) 4 Thomp. & C. 230, 1 Hun, 655; Boardman v. Lake Shore & M. S. R. Co. (1881) 84 N. Y. 157; Roberts v. Roberts-Wicks Co. (1906) 184 N. Y. 257, 3 L.R.A. (N.S.) 1034, 112 Am. St. Rep. 607, 77 N. E. 13, 6 Ann. Cas. 213.

Pennsylvania.—West Chester & P. R. Co. v. Jackson (1875) 77 Pa. 321; Fidelity Trust Co. v. Lehigh Valley R. Co. (1906) 215 Pa. 610, 64 Atl. 829, 7 Ann. Cas. 613; Sterling v. H. F. Watson Co. (1913) 241 Pa. 105, 88 Atl. 297.

Rhode Island.—Taft v. Hartford (1866) 8 R. I. 310, 5 Am. Rep. 575.

England.—Stevens v. South Devon R. Co. (1851) 9 Hare, 313, 68 Eng. Reprint, 524, 21 L. J. Ch. N. S. 816; Sturge v. Eastern Union R. Co. (1855) 7 De G. M. & G. 158, 44 Eng. Reprint, 62, 1 Jur. N. S. 713, 31 Eng. L. & Eq. Rep. 406; Henry v. Great Northern R. Co. (1857) 1 De G. & J. 606, 44 Eng. Reprint, 858, 3 Jur. N. S. 1133, 27 L. J. Ch. N. S. 1, 6 Week. Rep. 87, affirming (1857) 4 Kay & J. 1, 70 Eng. Reprint, 1, 3 Jur. N. S. 1117; Crawford v. North-Eastern R. Co. (1857) 3 Kay & J. 723, 69 Eng. Reprint, 1301, 3 Jur. N. S. 1093; Matthews v. Great Northern R. Co. (1859) 5 Jur. N. S. 284, 28 L. J. Ch. N. S. 375, 7 Week. Rep. 233; Corry v. Londonderry & E. R. Co. (1861) 29 Beav. 263, 54 Eng. Reprint, 628, 7 Jur. N. S. 503, 30 L. J. Ch. N. S. 290, 9 Week. Rep. 301, 4 L. T. N. S. 131; Webb v. Earle (1875) L. R. 20 Eq. 560, 44 L. J. Ch. N. S. 608, 24 Week. Rep. 46; Staples v. Eastman Photographic Materials Co. [1896] 2 Ch. 303, 65 L. J. Ch. N. S. 682, 74 L. T. N. S. 479; Bond v. Barrow Haematite Steel Co. [1902] 1 Ch. 353, 86 L. T. N. S. 10, 71 L. J. Ch. N. S. 246, 9 Manson, 69, 50 Week. Rep. 295, 18 Times L. R. 249.

Many of the English and American cases, in holding that guaranteed dividends on preferred stock should be cumulative, base their decisions on *Henry v. Great Northern R. Co.* (1857) 1 De G. & J. 606, 44 Eng. Reprint, 858, 27 L. J. Ch. N. S. 1, 6 Week. Rep. 87, 3 Jur. N. S. 1133, wherein the court, in considering the rights of such shares, said "that if, on the declaration of a dividend, the fund to be di-

vided should be insufficient to satisfy the claim of the shareholders entitled to preference, those shareholders will be entitled to be paid in full out of all subsequent dividends before the ordinary shareholders can receive anything."

The fact that dividends are "cumulative" does not permit a corporation to postpone payments thereon at will, regardless of the fact that there were funds available for payment thereof. *SPEAR v. ROCKLAND-ROCKPORT LIME CO.* (reported herewith) ante, 793.

And the fact that preferred shares have at some time received extra dividends, in common with the other stock, does not affect their right to any arrears of dividend of later accumulation, nor is the amount of such extra dividend to be deducted in payment of the accumulations. *Fidelity Trust Co. v. Lehigh Valley R. Co.* (1906) 215 Pa. 610, 64 Atl. 829, 7 Ann. Cas. 213; *Sterling v. H. F. Watson Co.* (Pa.) supra.

But where the dividends on preference shares are to be subject to the creation of a reserve fund, the arrears on those dividends are likewise affected. *Bond v. Barrow Haematite Steel Co.* (Eng.) supra.

However, the court will be keen to note any implied intention to limit the preferred shares to dividends from the earnings of a particular period. *Belfast & M. L. R. Co. v. Belfast* (1885) 77 Me. 445, 1 Atl. 362.

In *Belfast & M. L. R. Co. v. Belfast* (Me.) supra, it appeared that the by-laws of a company provided as follows: "Dividends on the preferred stock shall first be made semiannually from the net earnings of said road, not exceeding 6 per centum per annum, after which dividend, if there shall remain a surplus, a dividend shall be made upon the nonpreferred stock up to a like per cent per annum; and should a surplus then remain of net earnings, after both of said dividends, in any one year, the same shall be divided pro rata on all the stock." It was said: "It was not intended in the present instance to guarantee a dividend. If a dividend is prevented in any one year by a deficit of earnings,

it cannot be made up from the earnings of succeeding years. A 6 per centum dividend is not assured by the contract of subscription. It may be less. The implication of the by-laws is clear that there is to be no surplus of profits to be carried from one year to another. The net earnings are to be wholly distributed each year."

In *Hazeltine v. Belfast & M. L. R. Co.* (1887) 79 Me. 411, 1 Am. St. Rep. 380, 10 Atl. 328, wherein the facts were the same as those in *Belfast & M. L. R. Co. v. Belfast (Me.)* supra, the court said: "The construction which we gave to this contract in the previous case was certainly very liberal towards the holders of the common stock, and all the doubts were weighed in their behalf, in the decision that the preferred stock was noncumulative. Had the by-law merely provided that the preferred stock should be entitled to a dividend of 6 per cent annually when earned, the arrearages of one year would have been payable out of the earnings of subsequent years, and there would have been no occasion for the present controversy between the two classes of stockholders;" but "inasmuch as the by-law implies that the entire net earnings of each year should be paid out in dividends, a deficiency of preferred dividend in any one year could not be made up in subsequent years."

In *SPEAR v. ROCKLAND-ROCKPORT LIME Co.* (reported herewith) ante, 793, it appears that preferred stock was to have out of the net earnings a "semiannual preferential cumulative dividend." The defendant company claimed that it was sufficient "if at any time in the past or future it has paid or will pay the preferred dividends before common ones are paid." It was held, however, that such was not the meaning of the term "cumulative," and that "semiannually" meant dividends payable semiannually.

In *Gardner Sav. Bank v. Taber Prang Art Co.* (1905) 189 Mass. 363, 75 N. E. 705, it appeared that a corporation had issued 7 per cent cumulative preferred stock and common stock. Certain of the preferred stock, known as "Springfield" stock, was to be en-

titled to annual dividends in preference to the remaining preferred stock, for a period of three years from the original issue thereof. Dividends might annually be declared on the remaining preferred stock during that period, after the Springfield stock had received its annual 7 per cent on the accumulations thereof, if the full amount was not paid in any one year, etc. The plaintiff contended "that the Springfield stock was entitled to preference only for the period of three years from the original issue thereof, and that, this period having passed, the other preferred stock is entitled to share equally with the Springfield stock." The court said: "We are of opinion, however, that the judge of the superior court was right in dismissing the bill; and that the Springfield stock was entitled by the by-law to three dividends of 7 per cent each, in preference to the remaining preferred stock. If the corporation could not pay the full 7 per cent in any one year, the unpaid amount was to accumulate and to be paid before payments were made on the other preferred stock."

In *Lockhart v. Van Alstyne* (1875) 31 Mich. 76, 18 Am. Rep. 156, wherein it appeared that a company had issued preferred stock with a dividend of 5 per cent per annum to be guaranteed by the company, the court said: "We think the guaranty here in question will bear the construction that the preference stockholders shall be entitled to 5 per cent semiannual dividends when there are profits to pay them, and not otherwise. Probably if profits were not realized to the necessary amount in any one year, they would be entitled, when they were realized, to have all arrears made up."

In *Elkins v. Camden & A. R. Co.* (1882) 86 N. J. Eq. 233, a holder of preferred stock, which was entitled to dividends "not to exceed 7 per cent per annum before any dividend shall be set apart or paid on the other and ordinary stock of said company," sought to restrain the payment of a dividend on the ordinary stock until the full amount had been paid on the preferred stock. He contended that he

was entitled to a 7 per cent dividend for every year during which dividends were unpaid, since the issue of the stock. It was held that the preferred stock was entitled to 7 per cent per annum, or such smaller sum as was warranted by the profits, but that no deficiencies or arrears could be carried beyond the current year.

In *Prouty v. Michigan S. & N. I. R. Co.* (1874) 1 Hun (N. Y.) 655, 4 Thomp. & C. 230, it appeared that the plaintiff, a holder of preferred stock, sought to compel the payment of dividend arrears on his stock from future net earnings. The stock provided for dividends at the rate of 10 per cent, and also a share pro rata with other stock in earnings over and above 10 per cent, the dividends being guaranteed. It was held that the preferred stockholders were entitled to their dividends from net earnings, and that the failure of the company to pay them when due because of lack of funds did not relieve the company from the obligation to pay them as soon as there were profits which might be devoted to that purpose.

In *Boardman v. Lake Shore & M. S. R. Co.* (1881) 84 N. Y. 157, on facts similar to those of *Prouty v. Michigan S. & N. I. R. Co.* (N. Y.) *supra*, the court likewise held that the guaranty was an engagement that the dividend should be "cumulative and a specific charge upon the accruing profits, to be paid as arrears before any other dividends were divided upon the common stock."

In *Roberts v. Roberts-Wicks Co.* (1906) 184 N. Y. 257, 3 L.R.A.(N.S.) 1034, 112 Am. St. Rep. 607, 77 N. E. 18, 6 Ann. Cas. 213, it appeared that a corporation had reduced its stock, whereby the plaintiff, who had held 250 shares of the preferred stock, was possessed of 167 shares only. This stock provided for a cumulative dividend of 6 per cent, and, in case of nonpayment, it was to bear interest at the rate of 6 per cent from the date when it was due. For three years prior to the reduction in capital no dividends had been paid on the preferred stock, but shortly thereafter a dividend was declared, paying all arrears to holders of

the preferred stock. The plaintiff claimed to be paid arrears on 250 shares of stock. The court said "that, in making the distribution of the surplus profits arising from the conduct of the business, the directors were obliged to apply them, in first order, towards the satisfaction of all claims which the preferred stockholders at any time held against the company, based upon arrears of unpaid dividends and the stipulated interest accrued thereon. Such was the express obligation of the corporation, which, so far as the record shows, has never been discharged or released."

In *West Chester & P. R. Co. v. Jackson* (1875) 77 Pa. 321, it was held that a holder of preferred stock which provided for dividends from the time of payment thereof, at the rate of 8 per cent per annum, and before any dividends were payable to the common stock, was entitled to all arrears of dividends on the stock before a dividend was paid to the common stock.

In *Fidelity Trust Co. v. Lehigh Valley R. Co.* (1906) 215 Pa. 610, 64 Atl. 629, 7 Ann. Cas. 613, it appeared that preferred stock had been issued which was entitled to 10 per cent dividends in preference to all other stock, in every future dividend. During several years both preferred and common stocks enjoyed extra dividends above the stipulated rate of 10 per cent, and later, for eleven years, no dividend was paid on either class of stock. A dividend of 10 per cent was then declared on the preferred stock, and a dividend of 1 per cent on the common. It was held that the arrears of dividends on the preferred stock must be paid before any dividend on the common stock.

In *Sterling v. H. F. Watson Co.* (1913) 241 Pa. 105, 88 Atl. 297, it appeared that the plaintiff was a holder of the preferred stock of the defendant company, which was entitled to cumulative semiannual dividends of 4 per cent, and might be retired on payment by the company of the par value and arrears of dividends. One cash dividend was paid on the stock, and a stock dividend of 25 per cent was paid to both preferred and common stock

equally. Some fifteen years later the company sought to redeem the stock. It was held that by the contract the preferred stock was entitled, on retirement, to payment of all arrears of dividends, and that by this was meant payment in cash, wherefore the 25 per cent stock dividend already paid could not be deducted from the amount due as arrears.

In *Taft v. Hartford* (1866) 8 R. L. 310, 5 Am. Rep. 575, wherein it appeared that a corporation had guaranteed a preferred dividend, the court followed the construction placed on a "guaranty" by the English case, *Henry v. Great Northern R. Co.* (1857) 1 De G. & J. 606, 44 Eng. Reprint, 858, 27 L. J. Ch. N. S. 1, 6 Week. Rep. 87, 3 Jur. 1133, that such dividends were a pledge on the funds legally applicable for the purpose, and that any deficiency thereof should be made up from subsequent earnings.

In *Stevens v. South Devon R. Co.* (1851) 9 Hare, 313, 68 Eng. Reprint, 524, 21 L. J. Ch. N. S. 816, it appeared that concerning certain half shares it was provided "that 6 per cent per annum be guaranteed until the 15th of March, 1857, upon all calls duly paid, and upon all sums received in contemplation of calls by authority of the board of directors in respect of such half shares; and that the said guaranty shall not exclude the shareholders from participation in any higher rate of dividend for the time being payable on the whole shares." It was held that such half shares were "well entitled to the 6 per cent guaranteed out of any funds of the company, which could be lawfully applied to the payment of it, and therefore out of future profits, before any dividend could be payable upon the whole shares."

In *Sturge v. Eastern Union R. Co.* (1885) 7 De G. M. & G. 158, 44 Eng. Reprint, 62, 1 Jur. N. S. 713, 31 Eng. L. & Eq. Rep. 406, it appeared that a company had issued preference shares with 6 per cent interest per annum. Later, an act specified that the income of the company should be applied, thirdly, in payment of the interest or dividends upon the guaranteed or preference shares of the company before

the passing of the act, and the arrears, if any, from time to time, of such interest or dividends. This specific reference to the "arrears of interest or dividends" was held by the court to be conclusive that the preference shares were entitled to be paid accumulations of interest.

In *Henry v. Great Northern R. Co.* (Eng.) supra, it appeared that a company had issued a number of preference shares of various sorts. In order to replace a loss caused by the fraud of one of the officers, the company was authorized by statute to devote thereto the profits on land, the balance to be paid in dividends. It was held that this did not confine the rights of the shares to that balance. The court said that by the word "dividend" a rate of interest is really meant, and that the favored shareholders were guaranteed "a charge on all accruing profits at the stipulated rate, before anything is divided among the ordinary shareholders. This is, substantially, interest chargeable exclusively on profits."

In *Crawford v. North-Eastern R. Co.* (1857) 3 Kay & J. 723, 69 Eng. Reprint, 1301, 3 Jur. N. S. 1093, it appeared that a company had issued preference shares, "entitled to a dividend at the rate of 7 per cent per annum for the period of three years, and of 6 per cent per annum in perpetuity thereafter." The court said: "I conceive that these parties have charge on the profits for all time of the particular sums payable to them during these respective years, of so much per cent for a certain period of time, and after that to a certain other rate per cent."

In *Matthews v. Great Northern R. Co.* (1859) 5 Jur. N. S. (Eng.) 234, it appeared that certain shares of the company had been paid up and denominated guaranteed. It was provided as follows: "In respect of each whole share so divided, the whole of the interest and dividends which would in each year have accrued shall be applied in or towards payment, in the first place, of interest or dividend, after the rate of 6 per cent per annum, on the amount paid upon the half share so denominated 'guaranteed;' and the remainder, if any, shall alone be pay-

able to the half share so denominated 'deferred.'" It was held that the holders of the guaranteed half shares were entitled to all the dividends of the original share until they had received a total of 6 per cent, the stipulated rate, per annum.

In *Corry v. Londonderry & E. R. Co.* (1860) 29 Beav. 263, 54 Eng. Reprint, 628, 30 L. J. Ch. N. S. 290, 9 Week. Rep. 301, 4 L. T. N. S. 181, 7 Jur. N. S. 508, wherein it appeared that a company had issued guaranteed preference shares entitled to 5 per cent, to be paid out of part of the profits, etc., it was held, following *Henry v. Great Northern R. Co.* (Eng.) *supra*, that these shares should receive "all the arrears out of the profits until the arrears are paid (not, of course, including any interest)."

In *Webb v. Earle* (1875) L. R. 20 Eq. (Eng.) 560, 44 L. J. Ch. N. S. 608, 24 Week. Rep. 46, wherein it appeared that a company had issued preference shares, "carrying dividends at 10 per cent per annum, payable half yearly, and entitled to a pro rata participation in surplus dividends after 110 per cent has been paid on the ordinary share capital of £650,000," it was held that the shares were to have their dividends only when and in so far as there was a profit from which they might be paid, but that any arrears should be made up from the earnings of a subsequent period.

In *Staples v. Eastman Photographic Materials Co.* [1896] 2 Ch. (Eng.) 803, 74 L. T. N. S. 479, 65 L. J. Ch. N. S. 682, wherein it appeared that preference shares were issued, the holders to "be entitled out of the net profits of each year to a preference dividend at the rate of 10 per cent per annum, it was held that the words "per annum" referred to the rate of the dividend, and to nothing else, and that the dividend was not cumulative.

In *Bond v. Barrow Hæmatite Steel Co.* [1902] 1 Ch. (Eng.) 353, 86 L. T. N. S. 10, 71 L. J. Ch. N. S. 246, 9 Manson, 69, 50 Week. Rep. 295, 18 Times L. R. 249, it appeared that the holders of two classes of preference stock sought to have paid the dividends claimed to be due thereon for three

or more years. It was held, however, that, where a dividend was to be subject to the right of the directors to appropriate profits to a reserve fund, the arrears of dividend were likewise subject thereto.

b. Corporation in liquidation.

For a discussion of the payment of arrears of dividends on preferred stock of a corporation in liquidation, see *supra*, subdivision IX. b.

XII. Right to dividends in excess of those stipulated.

In the absence of a limitation imposed by contract or by statute, the preferred stock in a corporation is entitled to share equally with the common stock in any distribution of profits after the common stock has received, in the same period, an amount equal in rate to that stipulated for the preferred stock.

United States.—*Bailey v. Hannibal & St. J. R. Co.* (1872) 1 Dill. 174, Fed. Cas. No. 736, affirmed in (1873) 17 Wall. 96, 21 L. ed. 611; *Niles v. Ludlow Valve Mfg. Co.* (1918) 120 C. C. A. 319, 202 Fed. 141, affirming (1912; D. C.) 196 Fed. 994, writ of certiorari denied in (1913) 231 U. S. 743, 58 L. ed. 465, 34 Sup. Ct. Rep. 320.

Maryland.—*Scott v. Baltimore & O. R. Co.* (1901) 93 Md. 475, 49 Atl. 327.

New York.—*Russell v. American Gas & E. Co.* (1912) 152 App. Div. 136, 136 N. Y. Supp. 602; *Equitable Life Assur. Soc. v. Union P. R. Co.* (1914) 212 N. Y. 360, L.R.A.1915D, 1052, 106 N. E. 92, affirming (1914) 162 App. Div. 81, 147 N. Y. Supp. 382.

Pennsylvania.—*Fidelity Trust Co. v. Lehigh Valley R. Co.* (1906) 215 Pa. 610, 64 Atl. 829, 7 Ann. Cas. 613; *Sternbergh v. Brock* (1909) 225 Pa. 279, 24 L.R.A.(N.S.) 1073, 138 Am. St. Rep. 877, 74 Atl. 166; *Sterling v. H. F. Watson Co.* (1913) 241 Pa. 105, 88 Atl. 297.

And see *ENGLANDER v. OSBORNE* (reported herewith) ante, 800.

Virginia.—*Gordon v. Richmond F. & P. R. Co.* (1884) 78 Va. 501.

England.—*Allen v. Londonderry & E. R. Co.* (1876) 25 Week. Rep. 524; *Will v. United Lankat Plantations Co.* [1914] A. C. 11, 83 L. J. Ch. N. S. 195,

109 L. T. N. S. 754, 21 Manson, 24, 30 Times L. R. 37, 58 Sol. Jo. 291.

In *Sternbergh v. Brock* (1909) 225 Pa. 279, 24 L.R.A.(N.S.) 1078, 133 Am. St. Rep. 877, 74 Atl. 166, the principle was stated as follows: "Where there is no stipulation in the contract to the contrary, the weight of authority clearly favors the right of preferred stockholders to share with the common stockholders in all profits distributed, after the latter have received an amount equal to the stipulated dividend on the preferred stock."

In *Bailey v. Hannibal & St. J. R. Co.* (Fed.) supra, it appeared that it was provided by contract that the preferred stock was "to be 7 per cent noncumulative, but to share with the common stock any surplus which may be earned over and above 7 per cent upon both in any one year." It was held that the preferred stock was not entitled to share equally with the common stock in all earnings above 7 per cent on the preferred stock, but only those earnings which remained after a dividend of 7 per cent had been paid on both the preferred and the common stock.

In *Niles v. Ludlow Valve Mfg. Co.* (1913) 120 C. C. A. 319, 202 Fed. 141, a holder of preferred stock claimed a right to a share of an accumulated surplus about to be distributed as a stock dividend to the common stockholders. The New Jersey statute provided an 8 per cent dividend for preferred stockholders, which was prior to dividends on the common stock. It was held that the preferred stockholders were entitled to 8 per cent only, and that all profits over and above this amount belonged to the common stockholders, who might either disburse them annually, or accumulate them, as they chose.

In *Scott v. Baltimore & O. R. Co.* (Md.) supra, the question presented was the right of preferred stockholders to share in the profits of the company over and above their stipulated rate of 4 per cent per annum. The stock was stated to be 4 per cent noncumulative preferred stock, and, being provided for in an agreement of great detail of description, the court said that if it had been the intention to

grant the preferred stock the right to share equally with the common stock after it had received its 4 per cent dividend, expression would surely have been given to that intent. The words of the certificate that the preferred stock was to receive "such yearly dividend, noncumulative, as the board may declare, up to but not exceeding 4 per cent, before any dividends shall be set apart or paid upon the common stock," were held to be in accord with this decision, and it was said that the words "not exceeding" must be given their proper significance, which was to limit the rate of the dividend on the preferred stock.

In *Russell v. American Gas & E. Co.* (N. Y.) supra, it appeared that the plaintiff was the holder of preferred stock, which was entitled to cumulative dividends at 6 per cent, to preference in distribution of assets, and "to no further dividend or distribution." The par value of both classes of stock was \$50, and the market value of the common \$80 per share. The corporation proposed to allow the common stockholders to subscribe at par to a large amount of the unissued common stock, to which the plaintiff, as a preferred stockholder, objected. It was held that "the value the stock had above par represented surplus, and was available for distribution among the holders of its common stock," and that this might be done either by selling the stock and distributing the surplus, or by allowing the stockholders to subscribe thereto. The preferred stockholder had no ground for objection as long as his dividends were paid and the capital was unimpaired.

In *Equitable Life Assur. Soc. v. Union P. R. Co.* (1914) 212 N. Y. 360, L.R.A.1915D, 1052, 106 N. E. 92, affirming (1914) 162 App. Div. 81, 147 N. Y. Supp. 382, the plaintiff, as a holder of preferred stock of a company, attempted to restrain the distribution by the latter of a large dividend to its common stockholders. The preferred stock was to be entitled to dividends in preference to the common stock, at a rate not exceeding 4 per cent per annum, dividends to be noncumulative, and the preferred stock to be entitled

to no other or further share of the profits. It was contended that the money sought to be distributed was an accretion to capital in which the preferred stock was entitled to share. It was the result of profit from the sale of securities and from the conversion of its bonds into common stock. It was held by the court that "the gains or profits realized by a corporation, at least from its active transactions, such as those under consideration here, constitute profits and surplus which are available for dividends," and that, therefore, the preferred stock was not entitled to any share therein.

In *Fidelity Trust Co. v. Lehigh Valley R. Co.* (1906) 215 Pa. 610, 64 Atl. 629, 7 Ann. Cas. 613, wherein it was held that accumulations were due on the dividends of the preferred stock, the question arose whether dividends paid thereon in past years in excess of the stipulated rate of 10 per cent might be charged against the arrears due at the time of suit. It was held that the extra dividends paid were properly distributed to both classes of stock, and that they were not to be deducted from the arrears now due on the preferred stock.

In *Sternbergh v. Brock* (1909) 225 Pa. 279, 24 L.R.A. (N.S.) 1078, 133 Am. St. Rep. 877, 74 Atl. 166, it was held that the holders of preferred stock, which was to receive a cumulative yearly dividend of 5 per cent per annum before any dividends should be set apart or paid on the common stock, were entitled to share with the common stockholders in all profits distributed, after the latter should have received an amount equal to the stipulated dividend on the preferred stock.

In *Sterling v. H. F. Watson Co.* (1913) 241 Pa. 105, 88 Atl. 297, it appeared that the plaintiff was the holder of preferred stock which was entitled to cumulative semiannual dividends of 4 per cent, and which might be retired on payment of the par value and all arrears of dividends. In a plan for the retirement of the preferred stock the company sought to deduct from the arrears of dividends a stock dividend of 25 per cent, which had been paid on both preferred and

common stocks. The court said: "These dividends are preferences, and not limitations. When the preferred dividends are paid, and dividends out of the net earnings from year to year of an equal amount have been declared and paid on the common stock, then all of the stock, common and preferred, has the right to participate in the distribution of surplus earnings upon an equal basis."

In *Gordon v. Richmond, F. & P. R. Co.* (1884) 78 Va. 501, it appeared that a company, being empowered by statute, issued stock guaranteed as to principal and dividend, and later issued scrip as a dividend to the holders of the common stock, in remuneration of money appropriated to capital and properly payable in dividends. It was held that, according to the terms of the contract, the guaranteed stock was entitled to share with the common stock in a surplus of dividend, which right was violated by the scrip dividend.

In *Allen v. Londonderry & E. R. Co.* (1876) 25 Week. Rep. (Eng.) 554, it appeared that it was provided that 5 per cent preference shares should participate in any surplus, "whenever the profits admitted of a dividend of the same amount (5 per cent) on the whole amount of paid-up capital." It was held that the ordinary shareholders should receive their arrears of interest before the surplus was divided, at an equal rate between the two classes of shares.

In *Will v. United Lankat Plantations Co.* [1914] A. C. (Eng.) 11, 83 L. J. Ch. N. S. 195, 109 L. T. N. S. 754, 21 Manson, 24, 30 Times L. R. 37, 58 Sol. Jo. 291, it appeared that the plaintiff, a holder of 10 per cent cumulative preference stock, sought to share equally with the common stock in the net profits, after both classes of stock had received a dividend of 10 per cent per annum. It was held that the contract of the preferred stockholder called for a cumulative preferential dividend at the rate of 10 per cent, and priority to the other shares as regards both capital and dividend, and that he was entitled to that dividend, and no more.

XIII. Alteration of rate or nature of dividend.

In the absence of any reservation, the obligation to pay dividends on the preferred stock at the rate contracted may not be altered without the assent of the preferred stockholders. *Pronik v. Spirits Distributing Co.* (1899) 58 N. J. Eq. 97, 42 Atl. 586; *Willcox v. Trenton Potteries Co.* (1902) 64 N. J. Eq. 173, 53 Atl. 474; *Re Neath & B. R. Co.* [1892] 1 Ch. (Eng.) 349, 66 L. T. N. S. 40, 40 Week. Rep. 289.

Pronick v. Spirits Distributing Co. (N. J.) *supra*, was a proceeding in equity whereby the plaintiff, a preferred stockholder, sought to "enjoin the alteration of the organization certificate." It was held that there was a contract between the stockholders under that certificate, and also a contract between the stockholders and the company, and that the rate of dividend stipulated in the contracts could not be altered without the consent of the stockholder, unless the power to do so was expressly reserved. It was also held that general statutory power to amend the original certificate did not permit the impairment of the obligation of the contract by an alteration of the rate of dividend.

In *Willcox v. Trenton Potteries Co.* (1902) 64 N. J. Eq. 173, 53 Atl. 474, a preferred stockholder sued to prohibit the defendant company from effecting a plan "for funding arrears of dividends on preferred stock and for exchange of stock certificates." It was proposed to substitute noncumulative for the cumulative shares of preferred stock of those who ratified the agreement, and to give to all who thus ratified, a certificate for all dividends in arrears, the certificate to bear interest payable from the net profits and prior to any dividend on the capital stock. It was held that in so far as the non-assenting stockholders were not affected by any reduction of dividend, their contract was unchanged, and the amendment consequently lawful. Concerning the new noncumulative shares of preferred stock to be issued to all who ratified the agreement, and not to those who refused to consent thereto, it was held to be the duty of the

directors, when setting aside a sum to pay the interest on the funding certificates, to set aside a similar per cent for a dividend on the preferred shares of the nonassenting stockholders.

In the case of *Re Neath & B. R. Co.* (Eng.) *supra*, it appeared that in reorganizing finances of a company it was planned to exchange preference shares for new preference shares, with the result that the dividend rate thereon would be lowered. It was held that, while the plan as a whole might be beneficial to the shareholders, it was nevertheless in a sense prejudicial to their rights and interests, and that it would require their assent before it might be adopted.

XIV. Remedies of preferred stockholder.

a. At law.

A preferred stockholder may not maintain an action at law for a dividend which has not been declared. *American Steel Foundries v. Lazear* (1913) 124 C. C. A. 231, 204 Fed. 204; *Williston v. Michigan S. & N. I. R. Co.* (1866) 13 Allen (Mass.) 400; *Field v. Lamson & G. Mfg. Co.* (1894) 162 Mass. 388, 27 L.R.A. 136, 38 N. E. 1126; *KNIGHT v. ALAMO MFG. Co.* (reported herewith) ante, 789; *Kidd v. Puritana Cereal Food Co.* (1909) 145 Mo. App. 502, 122 S. W. 784; *Hogue v. American Steel Foundries* (1912) 42 Pa. Co. Ct. 215; *West Chester & P. R. Co. v. Jackson* (1875) 77 Pa. 321; *Chaffee v. Rutland R. Co.* (1882) 55 Vt. 110.

In *Kidd v. Puritana Cereal Food Co.* (1909) 145 Mo. App. 502, 122 S. W. 784, the court stated the rule positively as follows: "Certainly a dividend cannot be recovered in a legal action until it has been declared."

The stockholder does not occupy the position of a creditor, and so cannot maintain an action at law for the recovery of dividends. *Williston v. Michigan S. & N. I. R. Co.* (1866) 13 Allen (Mass.) 400.

However, where a dividend has been declared, an action in *assumpsit* is proper. *West Chester & P. R. Co. v. Jackson* (1875) 77 Pa. 321.

And the same form of action will lie where scrip has been issued in pay-

ment of the dividend. *Chaffee v. Rutland R. Co.* (1882) 55 Vt. 110.

Bates v. Androscoggin & K. R. Co. (1860) 49 Me. 491, seems to be contrary to the general rule, although the court in that case insisted that the action of debt there maintained was not for dividends, but for payments of money due the stockholders on a contract.

In *American Steel Foundries v. Lazear* (1913) 124 C. C. A. 231, 204 Fed. 204, preferred stockholders brought an action of assumpsit for accumulated dividends of 6 per cent, by reason of the fact that the company, by its directors, set apart funds as profits. The certificate of stock stated that holders thereof should receive, "when and as declared from the surplus or net profits of the company, yearly dividends at the rate of 6 per cent per annum, and no more, cumulative and payable before any dividend on the common stock." It was held that, since a dividend had not been declared, the only relief was in equity, to compel the directors to perform their corporate duty.

In *Hogue v. American Steel Foundries* (1912) 42 Pa. Co. Ct. 215, wherein the facts were the same as those in *American Steel Foundries v. Lazear* (Fed.) *supra*, it was similarly held that on no theory would an action of assumpsit lie against a corporation for dividends which were averred to have been declared. The court said: "If the plaintiffs have been injured by the reorganization of the defendant company, or if the company has misappropriated its earnings by the payment of dividends to a class of stock which should have been devoted to the stock upon which suit is brought in this case, their remedy is evidently by suit in equity in the courts of New Jersey, which have full authority to investigate and adjudicate upon the several matters embraced in this proceeding."

Williston v. Michigan S. & N. I. R. Co. (Mass.) *supra*, was an action on a contract against a foreign corporation to recover dividends alleged to be due on guaranteed stock. The plaintiff was the owner of stock which stipulated that the holder was entitled to

dividends of 10 per cent per annum out of the net earnings, and was also entitled to share pro rata with the other stock of the company in any excess of earnings over 10 per cent per annum, and the payment of said dividends was guaranteed. It was held that the plaintiff was not, by virtue of his stock certificate, such a creditor as might maintain an action at law to recover dividends. He had a voice in the management of the company, but no right to sue on a contract for the payment of dividends. Nor, it was held, was there any remedy in equity in this case, since the court had no equitable jurisdiction over the defendant, the service in the present case having been made by attaching funds in the hands of defendant debtor.

In *Field v. Lamson & G. Mfg. Co.* (1894) 162 Mass. 388, 27 L.R.A. 186, 88 N. E. 1126, wherein a preferred stockholder brought an action on the contract to recover dividends alleged to be due, it was held that, "no dividend having been declared, the action, which was a suit at law, could not be maintained."

KNIGHT v. ALAMO MFG. CO. (reported herewith) ante, 789, was an action by a holder of 7 per cent cumulative preferred stock in the defendant corporation to recover dividends alleged by him to be due thereon. It was said: "If directors wrongfully refuse to declare a dividend when one ought to be declared, the stockholder may have his remedy in equity; but he cannot maintain an action at law until it has been declared." It was said further that this rule was not affected by the fact that several dividends had been paid by the secretary of the company without any formal authorization by the directors to do so.

In *Kidd v. Puritana Cereal Food Co.* (1909) 145 Mo. App. 502, 122 S. W. 784, an action at law brought by a preferred stockholder to recover three dividends alleged by him to be due on his stock, the court said: "Where it is clear a dividend ought to have been declared on preferred shares, a court of equity in a proper suit may compel this to be done or treat it as having been done. *Boardman v. Lake Shore &*

M. S. R. Co. (1881) 84 N. Y. 180. But the present action is one at law, and certainly a dividend cannot be recovered in a legal action until it has been declared."

Bates v. Androscoggin & K. R. Co. (1860) 49 Me. 491, was an action of debt to recover ten dividends on preferred stock, which entitled the holder, "from the net earnings of the road, to the payment of \$6 per share, semi-annually, until the net earnings of the road shall be sufficient to pay an interest of 6 per cent per annum on all the stock issued, and all the bonds issued for the first and second loans." The court said: "The action, as we have already seen, is not upon the stock per se, nor technically for dividends declared upon the stock of the company, but upon a contract by which the defendants obligated themselves to pay certain specified sums, at certain times, in consideration that the plaintiff had taken stock of the company."

b. In equity.

The remedy of a preferred stockholder to recover or to protect a dividend is in equity. *SPEAR v. ROCKLAND-ROCKPORT LIME Co.* (reported herewith) ante, 793; *Howell v. Chicago & N. W. R. Co.* (1868) 51 Barb. (N. Y.) 378; *Thompson v. Erie R. Co.* (1871) 45 N. Y. 468; *Thompson v. Erie R. Co.* (1871) 42 How. Pr. (N. Y.) 68, 11 Abb. Pr. N. S. 188; *Prouty v. Michigan S. & N. I. R. Co.* (1874) 4 Thomp. & C. 230, 1 Hun (N. Y.) 655; *Chase v. Vanderbilt* (1875) 62 N. Y. 307; *Boardman v. Lake Shore & M. S. R. Co.* (1881) 84 N. Y. 157; *Marshall v. American Caramel Co.* (1890) 9 Pa. Dist. R. 152; *Boston & P. R. Corp. v. New York & N. E. R. Co.* (1881) 13 R. I. 260; *Emerson v. New York & N. E. R. Co.* (1884) 14 R. I. 555; *Gordon v. Richmond, F. & P. R. Co.* (1886) 81 Va. 621; *Sturge v. Eastern Union R. Co.* (1855) 7 De G. M. & G. 158, 44 Eng. Reprint, 62, 31 Eng. L. & Eq. Rep. 406, 1 Jur. N. S. 713.

In *Boardman v. Lake Shore & M. S. R. Co.* (1881) 84 N. Y. 157, it was held that a decree for specific performance was proper, where it was sought not only to recover dividends due on preferred stock, but also to restrain the

payment of any dividends on the common stock before those due on said preferred stock were paid.

And in *Marshall v. American Caramel Co.* (1890) 9 Pa. Dist. R. 152, the court said: "The preferred stockholders may, by a bill in equity, restrain the corporation from any illegal acts that might injuriously affect the security of their investment, or result in a default in the payment of the dividends payable to them by the terms of the contract."

Where no right of the preferred stockholder is impaired, there is, of course, no remedy to be had. *Thompson v. Erie R. Co.* (1871) 42 How. Pr. (N. Y.) 68, 11 Abb. Pr. N. S. 188.

In *Boardman v. Lake Shore & M. S. R. Co.* (N. Y.) supra, it was held that the delay of the plaintiff to bring suit had no such bearing on the conduct of the defendant as to cause an estoppel; but in *Boston & P. R. Corp. v. New York & N. E. R. Co.* (1881) 13 R. I. 260, and *Emerson v. New York & N. E. R. Co.* (1884) 14 R. I. 555, where intervening equities had arisen, the plaintiff was held to be barred by laches.

In *Williston v. Michigan S. & N. I. R. Co.* (1866) 13 Allen (Mass.) 400, it was held that a Massachusetts court had no equitable jurisdiction over a foreign corporation so as to enforce the payment of dividends on the preferred stock thereof. A New York case, *Howell v. Chicago & N. W. R. Co.* (1868) 51 Barb. (N. Y.) 378, maintained the same principle, but a later case, *Prouty v. Michigan S. & N. I. R. Co.* (1874) 1 Hun (N. Y.) 655, 4 Thomp. & C. 230, held, to the contrary, that by virtue of statute a suit might be brought against any foreign corporation for any cause of action.

Thompson v. Erie R. Co. (N. Y.) supra, was an action by preferred stockholders to restrain the railway company from issuing bonds secured by mortgage. It was held that the company could not be restrained from issuing the bond and mortgage on the ground that the dividends on the preferred stock might be impaired thereby, that no injury to the preferred stockholders was apparent, and that, if their right was to be paid their div-

idend prior to any subsequent mortgage, the managers of the company were bound to see that such right was protected.

In *Marshall v. American Caramel Co.* (1890) 9 Pa. Dist. R. 152, it was held that the owners of preferred stock in a company, the by-laws of which guaranteed 8 per cent dividends out of the net earnings on the stock, who had no right to vote unless there should be default in the payment of dividends, in which case the holders thereof were to exercise the rights of the holders of common stock, might, by a bill in equity, restrain the corporation from any illegal acts that might injuriously affect the security of their investment, or result in a default in the payment of the dividends payable to them by the terms of the contract.

In *Sturge v. Eastern Union R. Co.* (1855) 7 De G. M. & G. 158, 44 Eng. Reprint, 62, 81 Eng. L. & Eq. Rep. 406,

1 Jur. N. S. 718, a holder of the guaranteed preferential shares was held to be entitled to have a decree directing the payment of arrears of dividends on his shares before any dividends should be paid on the ordinary shares.

In *Gordon v. Richmond, F. & P. R. Co.* (1886) 81 Va. 621, the court said: "The company was sued, as the common debtor of all the class of guaranteed stockholders, for the payment of a dividend in scrip and money, in which they had not been allowed to participate, and the common stockholders had; and this court held this injustice and inequality should be redressed in favor or relief of the whole class of guaranteed stockholders, and its order was mandatory upon the circuit court to allow the opportunity for all the guaranteed stockholders to come before it, in these causes, by proper proceedings."

R. S.

SPOKANE MERCHANTS ASSOCIATION, Appt.,

v.

R. M. ACORD, Respt.

Washington Supreme Court (Dept. No. 1) — January 30, 1918.

(99 Wash. 674, 170 Pac. 329.)

Writ — summons — omission in — effect.

1. The omission from the statutory form of summons which the statute requires to be substantially complied with, of the words "exclusive of the day of service," when designating the time for answer, does not render the summons void where the statute itself expressly excludes the first day in the computation of time.

[See note on this question beginning on page 841.]

Judgment — default — vacation.

2. A default judgment upon a valid summons can be vacated only upon the showing of some valid excuse for fail-

ure to appear and prima facie evidence of a valid defense upon the merits.

[See 15 R. C. L. 707 et seq., 718.]

APPEAL by plaintiff from an order of the Superior Court for Okanogan County (Neal, J.) quashing the summons and vacating the judgment in an action brought to recover the amount alleged to be due on a promissory note. *Reversed.*

The facts are stated in the opinion of the court.

Mr. Peter McPherson, for appellant:

The summons was in substantial compliance with the statute.

Wagnitz v. Ritter, 31 Wash. 348, 71 Pac. 1085; *Stubbs v. Continental Timber Co.* 49 Wash. 431, 95 Pac. 1011;

Old Republic Min. Co. v. Ferry County, 69 Wash. 600, 125 Pac. 1018.

No consideration will be given to a fraction of a day.

Goetzinger v. Rosenfeld, 16 Wash. 392, 38 L.R.A. 257, 47 Pac. 882; Perkins v. Jennings, 27 Wash. 145, 67 Pac. 590; Kelly v. Independent Pub. Co. 45 Mont. 127, 38 L.R.A. (N.S.) 1160, 122 Pac. 735, Ann. Cas. 1913D, 1068; Allen v. Morris, 87 Wash. 272, 151 Pac. 827; Ball v. Mander, 19 How. Pr. 468; Morgan v. Woods, 33 Ind. 26; Merrill v. Barnard, 61 N. C. (Phill. L.) 570; Yonge v. Broxson, 23 Ala. 689; Butcher v. Brand, 6 Iowa, 236; Worster v. Oliver, 4 Iowa, 347; Young v. Krueger, 92 Wis. 361, 66 N. W. 355; People ex rel. Chaddock v. Barry, 93 Mich. 542, 18 L.R.A. 337, 53 N. W. 786.

Mr. J. Henry Smith, for respondent:

The time to appear is a matter of vital substance.

20 Enc. Pl. & Pr. 1161; 52 Cyc. 521; Stubbs v. Continental Timber Co. 49 Wash. 433, 95 Pac. 1011; Old Republic Min. Co. v. Ferry County, 69 Wash. 600, 125 Pac. 1018.

Ellis, Ch. J., delivered the opinion of the court:

The sole question presented by this appeal is whether or not the omission of the words, "exclusive of the day of service," from the statutory form of summons prescribed in Rem. Code, § 223, renders such summons void. The action was upon a promissory note, payable on demand. Plaintiff commenced his action by service of summons and a copy of the complaint on July 24, 1916, upon the defendant personally in Okanogan county. Forty-three days after that service having elapsed, and defendant not having appeared nor given any notice of intention to appear, plaintiff moved the court for an order of default. The motion was granted, and the order entered September 5, 1916. Thereafter, on the same day, and upon sufficient findings and conclusions of law, judgment was entered against the defendant. On November 21, 1916, defendant filed his motion to quash the summons and vacate the judgment. On February 3, 1917, the court granted the motion and made an order quashing the

summons and vacating the judgment. Plaintiff appeals.

The sections of the statute governing the issuance, contents, and form of the summons are §§ 2, 3, and 4 of chap. 127, Laws 1893, p. 407, prescribing the manner of commencing civil actions in the superior courts. These sections are embodied without change in Rem. Code, §§ 221, 222, and 223. Omitting venue, title, and signature, the form prescribed by § 223 is as follows: "The state of Washington, ———, to the said ———, defendant: You are hereby summoned to appear within twenty days after service of this summons, exclusive of the day of service, and defend the above entitled action in the court aforesaid; and in case of your failure so to do, judgment will be rendered against you, according to the demand of the complaint, which will be filed with the clerk of said court, or a copy of which is herewith served upon you."

It will be noted, without the necessity of particularizing, that this form, prescribed as "substantially" to be followed, does not embody everything found in the two prior sections relating to the issuance and contents of the summons. Wagnitz v. Ritter, 31 Wash. 343, 71 Pac. 1035. It only undertakes to perform the dominant purpose of any summons, namely, to give notice with certainty of the definite time prescribed by law, within which, after service, the defendant must appear and defend, and to advise him of the consequences of his failure to do so. Any summons, therefore, which definitely and certainly gives notice of these things, must be held a substantial, hence a sufficient, compliance with that form. Such is the purport of the decisions of this court touching the prescribed form of service by publication contained in Rem. Code, § 233. Old Republic Min. Co. v. Ferry County, 69 Wash. 600, 125 Pac. 1018; Stubbs v. Continental Timber Co. 49 Wash. 431, 95 Pac. 1011. As said by this court in Wagnitz v. Ritter, *supra*, "the summons is in no sense a process of

the court; it is a notice merely." See also *Porter v. Vandercook*, 11 Wis. 70. It ought to be held sufficient, therefore, when it performs the office of notice of the things required in the statute so certainly as not to deceive or mislead. *Worster v. Oliver*, 4 Iowa, 345. It is self-demonstrative that, if the words used in the summons before us mean precisely the same thing as the words used in the statutory form, it is a substantial compliance with that form. Things equal to the same thing are equal to each other. Section 26 of the same Act of 1893 (Laws 1893, p. 415), embodied in Rem. Code as § 252, is as follows: "The time within which an act is to be done shall be computed by excluding the first day and including the last. If the last day falls on a Sunday it shall be excluded."

It is plain, therefore, that, by the very terms of this, another section of the same statute, the words "within twenty days after service," even without the words, "exclusive of the day of service," mean precisely what they mean when expressly so qualified. We are thus forced to the conclusion that the summons before us substantially complies with the statutory form, unless we hold that the statutory form is mandatory, regardless of the fact that the statute itself makes a substantial compliance sufficient.

If the language of the statutory form were so exact and certain as to meet every contingency without reference to the rule for computation of time laid down in § 252, there would be more force in the argument that the legislature had intended the inclusion of the words, "exclusive of the day of service," as mandatory and essential to the validity of the summons. But the statutory form is not so certain as to meet every contingency. It makes no provision for the contingency that the last day of the twenty may fall on a Sunday. So that, in any event, when that con-

tingency arises, as it very often may, resort must be had to the later section (§ 252) governing computation of time. Since resort must be had to that section for the meaning of the words, "within twenty days after service," in the one contingency, why, then, may we not resort to it in the other contingency which that section just as fully meets? To put the matter another way: If the words used in the summons, "within twenty days after service," are so certain and definite, merely by a reference to § 252, that, without more, they meet the contingency that the last day of the twenty may fall on a Sunday, then why in reason are they not sufficient, by reference to the same law, to meet the case when the last day of the twenty falls on any other day of the week, since § 252 gives just as definite and certain a meaning to the term, "within twenty days after service," in the one case as in the other? The failure of the legislature to provide for both contingencies in the statutory form of summons strongly argues that the inclusion of the words, "exclusive of the day of service," was not regarded as vital, in view of the fact that the statute governing computation of time in all cases had long existed prior to the passage of the Act of 1893, and was re-enacted therein. Code of 1881, § 743; 2 Hill's Code, § 794; Rem. Code, § 150. Indeed, if the words of the form, "exclusive of the day of service," were held mandatory and controlling in all cases, they would preclude a resort to the provisions of § 252 in any case, and would prevent the application of that section as defining the twenty days, even when the last day of the twenty fell on a Sunday.

It may be stated as a general rule that a defect such as that here presented, even in writs or other technical process of the court, would not render such process void. *Yonge v. Broxson*, 23 Ala. 684; *Merrill v. Barnard*, 61 N. C. (Phill. L.) 569; *Butcher v. Brand*, 6 Iowa, 235; *Morgan v. Woods*, 33 Ind. 23. In

Writ—summons—
omission in—
effect.

each of the following cases a summons much more defective than that here involved was sustained. *Guion v. Melvin*, 69 N. C. 242; *Porter v. Vandercook*, *supra*. In *Guion v. Melvin*, the court said: "We do not say that this deviation from the statute form is such an irregularity as will make the summons void, although it is always best and safest to follow the form prescribed by the Code. But clearly the defendant cannot be abridged of any right by such an irregularity; he is not obliged to appear until the twentieth day after service, exclusive of the day of service, and any proceeding had before that day is null and void. We think the probate judge was not bound to dismiss the proceeding for the irregularity, but that he should have allowed the defendant the time allowed by the Code for an appearance."

We hold that the summons in the case before us presents a substantial compliance with the statute, and that its filing in court with proof of service gave the court jurisdiction to render the personal judgment at any time after twenty days from the date of the service, computed as prescribed in § 252. The summons was not void, hence the judgment was not void. The judgment was not prematurely entered.

Respondent offers no excuse for not appearing and initiating his defense, if defense he had, within the twenty days, however computed. The judgment not being void, respondent could rightfully procure its vacation only by showing some excuse valid in law for his failure to appear, and, at the same time, alleging and proving, *prima facie*, that he had a valid defense upon the merits. *Paltro v. Gavenas*, 97 Wash. 327, 166 Pac. 1156; *Chehalis Coal Co. v. Laisure*, 97 Wash. 422, 166 Pac. 1158; *Ball v. Mander*, 19 How. Pr. 468; *Black*, *Judgm.* 2d ed. § 346a.

Judgment—
default—
vacation.

The order appealed from is reversed, with direction to the trial court to reinstate the judgment as originally entered.

Main, Parker, Fullerton, and Webster, JJ., concur.

NOTE.

Effect of defects or informalities as to appearance or return day in summons or notice of commencement of an action is treated in the annotation following *FLANERY v. KUSHA*, *post*, 841. See specifically as to omissions, subdivision I. i, of that annotation.

T. B. FLANERY, Resp.,

v.

ROSA KUSHA, Appt.

Minnesota Supreme Court — July 18, 1919.

(— Minn. —, 173 N. W. 652.)

Writ — defect — service — effect.

1. In an action commenced in the district court, the summons and complaint were served on defendant personally. The summons required her to serve her answer to the complaint "within twenty or . . . after service of this summons upon you." She failed to answer and a default judgment was entered against her. Held that, notwithstanding the defect in the summons, the court acquired jurisdiction to enter the judgment.

[See note on this question beginning on page 841.]

Headnotes by LEES, C.

— character of summons.

2. A summons is not process, but merely a notice to defendant that an action against him has been commenced and that judgment will be taken against him if he fails to answer. It is sufficient if it clearly in-

forms him that it is intended for him and requires him to answer the complaint. The statute prescribing its requisites is to be liberally construed, there being no general rule as to what defects are jurisdictional.

[See 21 R. C. L. 1263, 1267.]

APPEAL by defendant from an order of the District Court for Hennepin County (Rockwood, J.) denying an application for vacation of a default judgment entered against defendant in an action brought to recover a balance due on a sum of money loaned to her. *Affirmed.*

The facts are stated in the Commissioner's opinion.

Mr. C. C. Joslyn for appellant.

Mr. John A. Larimore, for respondent:

The amount mentioned by defendant, for which the property sold on the execution sale, is not in any way material.

Coolbaugh v. Roemer, 32 Minn. 445, 21 N. W. 472.

A summons is not a process, but merely a notice to defendant that an action has been commenced.

Hanna v. Russell, 12 Minn. 80, Gil. 43; Lowry v. Harris, 12 Minn. 255, Gil. 166; First Nat. Bank v. Estenson, 68 Minn. 28, 70 N. W. 775; Lockway v. Modern Woodmen, 116 Minn. 115, 133 N. W. 398, Ann. Cas. 1913A, 555; Morrison County Lumber Co. v. Duclos, 181 Minn. 173, 154 N. W. 952; Plano Mfg. Co. v. Kaufert, 86 Minn. 18, 89 N. W. 1124.

The notices complied sufficiently with the statute to give the court jurisdiction.

Lockway v. Modern Woodmen, 116 Minn. 115, 133 N. W. 398, Ann. Cas. 1913A, 555; Porter v. Vendercook, 11 Wis. 70; Mezchen v. More, 54 Wis. 215, 11 N. W. 534; Lenham Mercantile Co. v. Herke, 55 Misc. 310, 105 N. Y. Supp. 472; Griffin v. Jackson, 36 N. Y. S. R. 110, 13 N. Y. Supp. 321; Ambler v. Leach, 15 W. Va. 677; Gould v. Castel, 47 Mich. 604, 11 N. W. 403; Woods v. Brzezinski, 57 Conn. 471, 18 Atl. 252; Ley v. Pilger, 59 Neb. 561, 81 N. W. 507; Barker v. Central West Ins. Co. 75 Neb. 43, 105 N. W. 985; Gould v. Johnston, 24 Minn. 188; Millette v. Mehmke, 26 Minn. 306, 3 N. W. 700.

Lees, C., filed the following opinion:

Appeal from an order denying defendant's application for the vacation of a default judgment entered against her. The application was

made on the ground that the court had not acquired jurisdiction over defendant.

On December 29, 1915, a summons was issued in the usual form, except in one particular. It notified defendant that she must serve a copy of her answer to the complaint which was attached to the summons within "twenty or . . . after service of this summons upon you." The name and address of plaintiff's attorney upon whom the answer was to be served were given, and defendant was notified that if she failed "to answer the said complaint within the time aforesaid the plaintiff in this action will take judgment against you for the sum of \$106," with interest and costs. Personal service of the summons and complaint was made on March 16, 1916, as defendant was about to leave this state to go to Chicago, where she has since resided. She made no answer, and proof of service of the summons and complaint being filed, together with proof of her default, judgment was entered against her on May 8, 1916. An execution was issued on September 6, 1916, and a levy on land in which she had an interest was made, followed on November 13, 1916, by an execution sale thereof to plaintiff. On September 22, 1917, plaintiff assigned the sheriff's certificate of sale to third parties, who now claim title to the land, there having been no redemption from the sale.

Section 7729, Gen. Stat. 1913, prescribes the requisites of a summons. In part, the section reads as follows: "The summons shall . . .

require him [defendant] to serve his answer to the complaint . . . within twenty days after the service on him of such summons, exclusive of the day of service."

The defect in this summons consists in the omission of the word "days" after the word "twenty."

The sole question before us is whether the court failed to acquire jurisdiction because of this defect. We answer the question in the negative, and will briefly state our reasons for so answering it.

A summons is not process, but merely a notice to defendant that an action against him has been commenced and that judgment will be taken against him if he fails to answer. Hanna v. Russell, 12 Minn. 80, Gil. 43; First Nat. Bank v. Estenson, 68 Minn. 28, 70 N. W. 775; Morrison County Lumber Co. v. Duclos, 131 Minn. 173, 154 N. W. 952. The statute does not prescribe the form of a summons. It is sufficient in this regard if it clearly informs the defendant that it is intended for him and requires him to answer the complaint. Plano Mfg. Co. v. Kaufert, 86 Minn. 13, 89 N. W. 1124. The statute prescribing its requisites is to be liberally construed, there being no general rule as to what defects are jurisdictional. Lockway v. Modern Woodmen, 116 Minn. 115, 133 N. W. 398, Ann. Cas. 1913A, 555. The effect of an omission in a summons such as we have here has not heretofore been considered by this court. Lockway v. Modern Woodmen, supra, comes nearest to being in point. The summons in that case required defendant to answer within twenty days instead of thirty, to which it was entitled by the statute applicable to the class to which defendant belonged. The statute further provided that the service of the summons requiring an answer to be filed within less than thirty days after such service should not be valid or binding. Nevertheless it was held that the summons

might be amended to conform to the statute, and that defendant's motion to vacate the service was properly denied. It was said in passing that, if the summons had required defendant to answer within a less number of days than twenty, the mistake would be a mere irregularity and subject to amendment. It is but a short step from this holding to the one in the case at bar. If a summons requiring defendant to answer in less than twenty days after its service gives the court jurisdiction over him, one which required him to answer without stating when must likewise give jurisdiction.

Read in connection with the complaint served with it, the summons in this case notified defendant that she had been sued by plaintiff in the district court of Hennepin county; that if she did not answer the complaint by serving a copy of her answer on plaintiff's attorney at his office in Minneapolis, judgment would be taken against her for \$106, with interest and costs; and that her answer must be served "within twenty or . . . after service of this summons." Counsel for defendant forcibly contends that "twenty" may refer to any known division of time, such as hours, days, weeks, or months, and that there is nothing to advise defendant—an illiterate woman of foreign birth—that twenty days was intended. On the other hand, counsel for plaintiff refer to the rule that everyone is presumed to know the law, and that the statute allows a defendant twenty days after service of a district court summons upon him within which to appear and answer. We do not deem either contention to be of controlling importance, basing our decision upon the holding that the omission of the word "days" did not destroy the validity of the summons, and that such an omission was an irregularity only, so that the court obtained jurisdiction over the defendant and its judgment against her was not void.

We have not overlooked the cases

cited by counsel for defendant. All of them are from other states. Some of them sustain the contention that this summons was fatally defective. *Gundry v. Whittlesey*, 19 Wis. 212, is perhaps the strongest case in defendant's favor. The Wisconsin statute required the summons to specify the amount for which judgment would be taken in case of failure to answer. The summons notified defendant that, if he failed to answer, plaintiff would take judgment against him for "two hundred and fifty . . . with 10 per cent interest." Omission of the word "dollars" was held to be fatal

to the validity of the summons. The complaint was not served and of course defendant could only surmise that plaintiff was asking for a judgment of \$250. There is a material difference in the nature of the omission in the summons in that case and the omission involved in this case. We find nothing in the other cases cited tending to weaken the force of the decisions heretofore rendered by this court to which we have called attention, and which in our judgment necessarily lead to the conclusion we have reached here.

Order affirmed.

Petition for rehearing denied.

ANNOTATION.

Effect of defects or informalities as to appearance or return day in summons or notice of commencement of action.

I. In courts of record:

- a. Generally, 841
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I. In courts of record.

a. Generally.

No general rule can be laid down as to the effect of defects or informalities, as to the appearance or return day, in a summons or notice of the commencement of an action in a court of record, because some defects are held to render the summons absolutely void and to invalidate all subsequent proceedings in the action, while other defects are held to be simply irregular and subject to amendment, and because the same defect is held in some jurisdictions to be fatal and in others curable. The question may also, of course be affected by the fact whether the attack based upon the defects in the summons or notice is direct or col-

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lateral; and although many of the cases do not expressly allude to the point, an effort has been made to indicate, by parenthetical memoranda or otherwise, the nature of the attack or the stage at which it was made. For example, the word "appeal" in parenthesis indicates that the attack was made on appeal or error in the original action.

b. Unauthorized return day.

A summons made returnable at a time other than that fixed by law is irregular, and may be abated or quashed, and will not support a default judgment. *Jones v. Austin* (1855) 16 Ark. 386; *Thompson v. Patterson* (1857) 2 Miles (Pa.) 146; *Tobler v. Stubblefield* (1869) 32 Tex. 188.

A citation made returnable at the time specified in a new Constitution not yet in effect, different from the time required by the existing statute, should be quashed. *Watson v. Miller* (1881) 55 Tex. 289.

c. Mistake in designating return day.

The insertion of an erroneous return day in a summons renders the process irregular, but not void. *Ley v. Pilger* (1900) 59 Neb. 561, 81 N. W. 507.

So a writ issued on August 1, and made returnable on the first Monday of August "next," was held not to be absolutely void, since it might be construed to be the August in which the writ was issued; hence, though a judgment by default taken thereunder might have been set aside on motion in the court rendering it, or reversed on appeal, it was not open to collateral attack. *Point Pleasant v. Greenlee* (1907) 63 W. Va. 207, 129 Am. St. Rep. 971, 60 S. E. 601.

But a default judgment based on a summons dated in a certain month, requiring the defendant to appear in the same month "next," will be reversed on appeal or error. *Austin v. Nichols* (1790) 1 Root (Conn.) 199; *Way v. Clark* (1792) 1 Root (Conn.) 439; *Cook v. Mix* (1834) 10 Conn. 565; *Hochlander v. Hochlander* (1874) 73 Ill. 618; *Griesser v. Taylor* (1916) 200 Ill. App. 549.

But in *Condon v. Barr* (1885) 47 N. J. L. 113, 54 Am. Rep. 121, a summons dated the 8th of October, and returnable the 16th of October "next," was held not ground for reversal of the judgment, where the defendant was not misled, and appeared at the proper time.

In *Hamilton v. Ingraham* (1877) 121 Mass. 562, a summons dated August 18, and returnable on the 30th of August "next," was allowed to be amended, after a plea to the jurisdiction, by substituting the word "current" for the word "next."

A summons bearing date the fourth Monday in November, 1840, issued on the 11th of May, 1841, and made returnable to the fourth Monday in May instant, is amendable so as to make "instant" read "next," but, the writ

having performed its office, it was held on appeal not necessary to amend the defect. *Harrison v. Agricultural Bank* (1844) 2 Smedes & M. (Miss.) 307.

A published summons requiring the defendant to appear within sixty days after the service of the summons, where the statute requires a summons to be made returnable sixty days after the date of the first publication, is ineffectual to give the court jurisdiction. *Thompson v. Robbins* (1903) 32 Wash. 149, 72 Pac. 1043 (motion to open default); *Smith v. White* (1903) 32 Wash. 414, 73 Pac. 480 (motion to vacate judgment); *Dolan v. Jones* (1905) 37 Wash. 176, 79 Pac. 640 (action to cancel decree); *Hays v. Peavey* (1909) 54 Wash. 78, 102 Pac. 889 (motion to vacate).

Conversely, published summons requiring the defendant to appear within sixty days from the date of the first publication, instead of from the service of the summons, as specified by the statute, confers no jurisdiction, and the judgment is void. *Woodham v. Anderson* (1903) 32 Wash. 500, 73 Pac. 536 (motion to vacate); *Bailey v. Hood* (1905) 38 Wash. 700, 80 Pac. 559 (motion to vacate).

But it was held in *Ontario Land Co. v. Wilfong* (1912) 223 U. S. 543, 56 L. ed. 544, 32 Sup. Ct. Rep. 328 (a suit to quiet title as against a claim based on the judgment), that a judgment in proceedings under the Washington statute, to foreclose the lien of a county for delinquent taxes, was not rendered invalid by the fact that the summons required answer within sixty days after the first publication, instead of within sixty days after the "date of" the first publication.

The report of *Rattoon v. Webb* (1809) 3 N. J. L. 608, reversing a judgment because the summons was issued the 11th of June, and made returnable the 11th of July, does not disclose the requirement of the statute.

Where the goods of the defendant are attached, the writ of attachment will be abated if the return day of the summons left with the defendant is different from that in the writ of attachment. *Nelson v. Swett* (1826) 4

N. H. 256; Baker v. Brown (1847) 18 N. H. 551.

Requiring the defendant to answer "by" a certain date, instead of "at" such date as the statute provides, is a mere irregularity. *Hurford v. Baker* (1885) 17 Neb. 443, 23 N. W. 339.

Making a summons returnable upon a day certain, instead of within twenty days after service as required by statute, is not such an irregularity as will make the summons void, but the court may allow the defendant the required time for appearance. *Guion v. Melvin* (1873) 69 N. C. 242.

Requiring the defendant by a published notice to answer in the forenoon of the return day is at most error without prejudice, where the defendant sustains no injury thereby. *Armstrong v. Middlestadt* (1888) 22 Neb. 711, 36 N. W. 151.

A summons issued November 9, designating the answer day to be December 9, but, by a clerical error apparent by the record, directing the sheriff to return it on December 19, instead of on November 19, is not void, but may be corrected at any time, since it could not have misled the defendant. *Alford v. Hoag* (1898) 8 Kan. App. 141, 54 Pac. 1105.

A defect as to the return day of a summons may be amended by motion, after the time to take advantage of such defect by plea in abatement is passed. *Lawrence v. Chase* (1866) 54 Me. 196.

d. Want of certainty.

A summons requiring the defendant to appear within ten days after the return by the marshal is too vague and indefinite, and will be set aside. *Winters v. Hughes* (1861) 3 Utah, 443, 24 Pac. 759.

Citations purporting to be issued as to one defendant on the 4th of December, 1858, and issued as to the other on the 4th of January, 1858, and both made returnable on the sixteenth Monday after the fourth Monday in September, 1858, will not support, because of want of certainty as to time, a judgment by default rendered on the 25th of January, 1858, and the judgment will be reversed. *Wright v. Wilmot* (1858) 22 Tex. 398.

Under a statute requiring the notice to specify the time at which the defendant shall appear, a notice to appear before a court of conciliation on Tuesday, May 18th, when the 19th is Tuesday and the date on which court is held, is fatally defective. *Steinmetz v. Signer* (1864) 23 Ind. 386 (reversing judgment for costs).

But the fact that the copy of the complaint served is so badly written that the defendant cannot tell whether the return day is the 2d or 3d of the month is not ground for enjoining the levy of an execution, where the 3d is on Sunday, and a perusal of other parts of the complaint would have shown that the 2d was the return day. *Woods v. Brzezinski* (1889) 57 Conn. 471, 18 Atl. 252.

And in *Buford v. Real Estate Bank* (1842) 4 Ark. 520, a default judgment was upheld on a writ of error, as against the objection that the summons was void for uncertainty, where it required the defendant to appear "on the third Monday of the next March term, to be holden on the 15th day of March next," and it appeared that that day was the third Monday of March, and the first day of the March term, at which, by law, the court was to sit only one week, and that a summons was required to be made returnable on the first day of the term.

e. Returnable too soon.

A summons issued during the term of court and returnable instantan is a nullity, and not amendable, but it can be vacated by the defendant, and is subject to collateral attack by anybody. *Joiner v. Delta Bank* (1898) 71 Miss. 382, 14 So. 464.

A default judgment entered upon a summons requiring the defendant to appear and answer forthwith, instead of on the first day of the next term, is void. *Hunsaker v. Coffin* (1864) 2 Or. 107 (motion for the issuance of execution on the judgment).

A summons improperly made returnable on the day it is issued will be quashed. *Dyott v. Pennock* (1838) 2 Miles (Pa.) 213.

A published notice requiring the defendant to answer on the second, instead of the third, Monday after the

completion of the service of publication, is irregular, and a judgment entered thereon will be quashed on motion. *Calkins v. Miller* (1898) 55 Neb. 601, 75 N. W. 1108; *Wilkins v. Wilkins* (1889) 26 Neb. 235, 41 N. W. 1101.

Where the statute provides that the citation must express the number of days given to the defendant to answer according to the distance from his residence to the courthouse, and that he shall be given ten days if residing within 10 miles, and an additional day for every additional 10 miles, a citation directing the answer to be filed in ten days, and according to law, is defective, where the defendant resides more than 10 miles from the courthouse; and the suit will be dismissed. *Kendrick v. Kendrick* (1841) 19 La. 36.

A summons which does not give the defendant the additional time in which to appear required by law because of his distance from the place for appearance is an absolute nullity, whether or not he is prejudiced thereby. *Larue v. Poulin* (1908) Rap. Jud. Quebec 17 B. R. 188.

So it has been held that a summons will be quashed, when there is less than the number of days required by statute between the date and the return day thereof.

Arkansas. — *Ferguson v. Ross* (1842) 5 Ark. 517; *Robinson v. State Bank* (1850) 11 Ark. 301.

Delaware. — *Warrington v. Tull* (1848) 5 Harr. 107.

Nebraska. — *Crowell v. Galloway* (1874) 3 Neb. 215.

New York. — *Bell v. Good* (1892) 22 N. Y. Civ. Proc. Rep. 356, 19 N. Y. Supp. 693.

Oklahoma. — *State ex rel. Collins v. Parks* (1912) 34 Okla. 385, 126 Pac. 242; *Aggers v. Bridges* (1912) 31 Okla. 617, 122 Pac. 170.

Pennsylvania. — *Hatfield v. Swiler* (1857) 28 Pa. 522; *Misho v. McCleland* (1897) 20 Pa. Co. Ct. 302; *Snyder v. Finn* (1897) 6 Pa. Dist. R. 191; *Steen v. Carlson* (1907) 19 Pa. Dist. R. 966.

South Carolina. — *Adkins v. Moore* (1895) 43 S. C. 173, 20 S. E. 985 (motion for the issuance of execution on the judgment).

Under a statute providing that the day for the defendant's appearance shall not be less than five days after the day of the date of the summons, a summons dated on the 11th and returnable on the 16th is fatally defective. *Warrington v. Tull* (1848) 5 Harr. (Del.) 107.

Making a summons returnable on the twentieth day after service, where the statute requires the service to be not less than twenty days before the return day, is a jurisdictional defect. *Adkins v. Moore* (1895) 43 S. C. 173, 20 S. E. 985.

A summons returnable on the first Monday after its date, instead of on the second Monday as directed by statute, confers no jurisdiction on the district court. *Crowell v. Galloway* (1874) 3 Neb. 215.

A summons requiring the defendant to answer on the tenth day after the return day, where the statute gives the defendant twenty days after the return day, will be quashed. *State ex rel. Collins v. Parks* (1912) 34 Okla. 385, 126 Pac. 242.

In *Matthews v. Hoff* (1885) 113 Ill. 90, an action of ejectment, a summons in a proceeding to sell a decedent's real estate was declared to be void because less than the required number of days intervened between the date of the writ and the return day. In this case, however, the decree directing sale was sustained upon the presumption that the court had acquired jurisdiction in some other manner.

But it has been held that a summons returnable in less than the required time is merely irregular and amendable, in *Lockway v. Modern Woodmen* (1911) 116 Minn. 115, 133 N. W. 398, Ann. Cas. 1913A, 555 (motion to set aside); *Barker Co. v. Central West Invest. Co.* (1905) 75 Neb. 43, 105 N. W. 985 (motion to amend, following defendant's objection to jurisdiction); *Gribbon v. Freel* (1883) 93 N. Y. 93 (motion to vacate attachment); *Deimel v. Scheveland* (1890) 16 Daly, 34, 9 N. Y. Supp. 482, 955 (amendment before publication completed); *Spruhn v. Brown* (1909) 63 Misc. 46, 116 N. Y. Supp. 568 (motion to set aside); *Bowman v. Cassell* (1906) 32 Pa. Co. Ct.

316 (motion to dismiss bill); Porter v. Vandercook (1860) 11 Wis. 70 (motion to set aside).

A summons whose return day and answer day are one week earlier than the proper time is not void, but merely irregular, and may be amended, even though a motion to quash for such defects is pending, and the amendment will relate back to the time of the issuance of the summons so as to prevent the bar of the Statute of Limitations from falling. Barker Co. v. Central West Invest. Co. (1905) 75 Neb. 43, 105 N. W. 985.

A notice properly requiring the defendant to appear in fifteen days, but improperly requiring him to answer in the same time, when by the rules of the court he has thirty days in which to answer, is defective, but the bill will not be dismissed for such defect, where the defendant is not harmed thereby. Bowman v. Cassell (1906) 32 Pa. Co. Ct. 316.

f. Returnable in too long a time.

A summons returnable more than twenty days after its date, contrary to statute, confers no jurisdiction upon the court. Simmons v. Cochran (1888) 29 S. C. 31, 6 S. E. 859 (plea to the jurisdiction).

Making a citation returnable on the seventh Monday, instead of the sixth Monday, as charged by statute, is ground for the reversal of a default judgment. Neill v. Brown (1858) 11 Tex. 17.

But a summons returnable on the fourth Monday, instead of the second Monday, after its date, as required by statute, was held merely irregular, and where the defendant was actually served and given sufficient time to answer, and did not take advantage of such irregularity by proper motion, the judgment was held valid on collateral attack. Jones v. Danforth (1904) 71 Neb. 722, 99 N. W. 495.

And a summons made returnable on the fourth instead of the first Tuesday of the month is amendable, where the time of holding court is fixed by law, and the defendant is not misled, but appears, and there is a continuance without any saving of exceptions. Barker v. Norton (1840) 17 Me. 416.

And a summons requiring the defendant to answer in twenty-two instead of twenty days after the return day will not be quashed, as the defendant is not deprived of any substantial right. Armstrong v. May (1916) 55 Okla. 539, 155 Pac. 238.

g. Impossible return day.

A citation requiring the defendant to appear at a past date will not support a judgment by default.

Gaar, S. & Co. v. Taylor (1905) 128 Iowa, 636, 105 N. W. 125 (action to set aside judgment); Cummings v. Landes (1908) 140 Iowa, 80, 117 N. W. 22 (collateral attack); Violand v. Saxel (1868) 31 Tex. 238 (appeal); Binyard v. McCombs (1877) 1 Tex. App. Civ. Cas. (White & W.) 259 (appeal); James v. Proper (1880) 1 Tex. App. Civ. Cas. (White & W.) 85 (appeal); Scott v. Watts (1881) 1 Tex. App. Civ. Cas. (White & W.) 38 (appeal); McNeil v. Ballinger (1883) 1 Tex. App. Civ. Cas. (White & W.) 482 (appeal); Spence v. Morris (1894) — Tex. Civ. App. —, 28 S. W. 405 (appeal); Paris & G. N. R. Co. v. Beckley (1911) — Tex. Civ. App. —, 142 S. W. 47 (appeal); Smith v. Buckholts State Bank (1917) — Tex. Civ. App. —, 198 S. W. 730 (appeal).

A notice requiring appearance at a date antedating its service confers no jurisdiction. Cummings v. Landes (1908) 140 Iowa, 80, 117 N. W. 22, supra; Gaar, S. & Co. v. Taylor (1905) 128 Iowa, 636, 105 N. W. 125, supra.

In Gaar, S. & Co. v. Taylor (Iowa) supra, service by publication was not completed until after the return day.

A citation to appear on the second Monday in September, 1891, in answer to a petition filed December 30, 1891, is fatally defective. Spence v. Morris (1894) — Tex. Civ. App. —, 28 S. W. 405, supra.

But making a summons, through clerical error, returnable to a date long past, was held a mere irregularity and amendable, and not to render a default judgment based thereon subject to collateral attack. Kelly v. Harrison (1892) 69 Miss. 856, 12 So. 261.

A summons dated July 16, and returnable on the first Tuesday of October next, but not served until the fol-

lowing May, is not a nullity because it commands the defendant to appear on a past date, but it may be amended so as to show a proper return day. *Speare v. Stone* (1912) 113 C. C. A. 301, 193 Fed. 375.

An obvious mistake in the year, making the return day a long past date, may be corrected by amendment. *Guptill v. Horne* (1874) 63 Me. 405.

The fact that a subpoena in the Federal court is, on its face, returnable prior to the time it was served, does not render a default judgment subject to collateral attack, where the defendant could have appeared and answered long before the judgment was taken. *Batjer v. Roberts* (1912) — Tex. Civ. App. —, 148 S. W. 841.

A published notice requiring the defendant to answer on a date prior to the filing of the petition, instead of on the third Monday after completed service, is not invalidated by such defect to such an extent as to prevent the court from acquiring jurisdiction, or to render the proceedings absolutely void, but such defect is a mere irregularity, not available in a collateral attack upon the decree, but constituting sufficient ground for its reversal in a direct proceeding. *Scarborough v. Myrick* (1896) 47 Neb. 794, 66 N. W. 867.

A summons by clerical error made returnable to the second instead of the first Monday of a month will not be held void upon the ground that it is made returnable to an impossible term of court. *Lamb v. Tucker* (1916) 146 Ga. 216, 91 S. E. 66 (motion to dismiss petition).

A citation requiring the defendant to appear on the second Monday after the tenth Monday of a month is fatally defective, and will not support a default judgment, against an attack on error. *Covington v. Burleson* (1866) 28 Tex. 868.

A citation requiring the defendant to appear on the second Monday in Monday, 1874, does not give the court jurisdiction. *Davidson v. Heidenheimer Bros.* (1884) 2 Posey Unrep. Cas. (Tex.) 490.

h. Returnable on holiday.

A summons returnable on a legal

holiday is not void, but the return day will be the first day thereafter in which the court may legally transact business. *Strowbridge v. Miller* (1903) 4 Neb. (Unof.) 449, 94 N. W. 825.

A summons returnable on Sunday may be amended so as to make the return day the Monday following. *Lawrence Harbor Colony v. American Surety Co.* (1904) 70 N. J. L. 589, 57 Atl. 390.

In *Swann v. Broome* (1764) 3 Burr. 1595, 97 Eng. Reprint, 999, reversing a judgment because the vouchee died on the return day of the summons, which was on a Sunday, it was stated that the old English courts sat on Sundays, and that, after the discontinuance of this practice, a summons was still properly made returnable on Sunday, but was known by the defendant to require appearance on Monday.

i. Mistakes as to return term.

1. Wrong term.

A summons returnable to the wrong term is a nullity, and will not authorize a judgment by default upon direct attack.

Arkansas. — *Murphy v. Williams* (1839) 1 Ark. 376 (appeal); *Ferguson v. Ross* (1844) 5 Ark. 517 (motion to quash); *Robinson v. State Bank* (1850) 11 Ark. 301 (certiorari).

Connecticut. — *Nichols v. Shaw* (1791) 1 Root, 315 (appeal).

Georgia. — *Bank of St. Marys v. Mumford* (1849) 6 Ga. 44 (motion for new trial).

Illinois. — *Calhoun v. Webster* (1840) 3 Ill. 221 (appeal); *Hildreth v. Hough* (1858) 20 Ill. 331 (appeal); *Elee v. Wait* (1862) 28 Ill. 70 (appeal); *Hochlander v. Hochlander* (1874) 73 Ill. 618 (appeal); *Culver v. Phelps* (1889) 130 Ill. 217, 22 N. E. 809 (appeal).

Indiana. — *Carey v. Butler* (1858) 11 Ind. 391 (appeal); *Briggs v. Sneghan* (1873) 45 Ind. 14 (appeal).

Maine. — *McAlpine v. Smith* (1878) 68 Me. 423 (motion to dismiss case); *Blake v. Wing* (1885) 77 Me. 170 (motion to dismiss action); *Densmore v. Hall* (1912) 109 Me. 438, 84 Atl. 983 (motion to dismiss action); *Kehail v.*

Tarbox (1914) 112 Me. 827, 92 Atl. 182 (motion to dismiss action).

New York.—Bunn v. Thomas (1807) 2 Johns. 190 (motion to vacate).

North Carolina. — Scott v. Jarrell (1914) 167 N. C. 364, 83 S. E. 563 (motion to dismiss action); McDowell v. Justice (1914) 167 N. C. 493, 83 S. E. 803 (motion to vacate judgment).

Pennsylvania.—Hotchkiss v. Liverpool & L. & G. Ins. Co. (1908) 18 Pa. Dist. R. 289 (motion to vacate).

A summons required by statute to be made returnable at the next term is void, where more than one term intervenes between its issuance and return day. Nichols v. Shaw (1791) 1 Root (Conn.) 815 (appeal); Calhoun v. Webster (1840) 3 Ill. 221 (appeal); Hildreth v. Hough (1858) 20 Ill. 331 (appeal); Elee v. Wait (1862) 28 Ill. 70 (appeal); Hochlander v. Hochlander (1874) 73 Ill. 618 (appeal); Culver v. Phelps (1889) 130 Ill. 217, 22 N. E. 809 (appeal); Carey v. Butler (1858) 11 Ind. 391 (appeal); Briggs v. Sneghan (1873) 45 Ind. 14 (appeal); Blake v. Wing (1885) 77 Me. 170 (motion to dismiss case).

And therefore a summons issued in a certain month, returnable at the next term to be held in the same month "next," is a nullity, and not amendable. Calhoun v. Webster (1840) 3 Ill. 221 (appeal); Hildreth v. Hough (1858) 20 Ill. 331 (appeal); Elee v. Wait (1862) 28 Ill. 70 (appeal); Culver v. Phelps (1889) 130 Ill. 217, 22 N. E. 809 (appeal); Bunn v. Thomas (1807) 2 Johns. (N. Y.) 190 (motion to vacate).

But it was held in McNatt v. Citizens & S. Bank (1917) 20 Ga. App. 755, 93 S. E. 271, upon an appeal after the overruling of a motion to dismiss the petition, that a summons dated May 3, and requiring the defendant to appear at the next term, on the fourth Monday, being the 24th of May "next," was valid, the court stating that the defendant was bound to know when the next term would be held, and that specifying the time as in the next year did not render the process invalid.

A summons dated in September, returnable to the next September term, is bad, and will not support a de-

fault judgment. Murphy v. Williams (1837) 1 Ark. 376, supra.

A summons properly returnable to the first day of the next term will be set aside if made returnable at a subsequent return day. Hotchkiss v. Liverpool & L. & G. Ins. Co. (1908) 18 Pa. Dist. R. 289, supra.

A summons returnable after an intervening term, contrary to law, is not defective in a mere matter of form, and therefore, upon the dismissal of the action for such defect after the running of the Statute of Limitations, the action cannot be recommenced under a statute permitting a barred action to be brought if it was defeated for any matter of form before being barred. Densmore v. Hall (1912) 109 Me. 438, 84 Atl. 983, supra.

The defect in a summons made returnable after an intervening term, at which it should have been made returnable, need not be pleaded in abatement, but may be taken advantage of by motion seasonably filed. McAlpine v. Smith (1878) 68 Me. 423, supra; Kehail v. Tarbox (1914) 112 Me. 327 92 Atl. 182, supra.

Where the statute provides that a summons sued out twenty days before the next term shall be returnable to such term, and, if otherwise returned, is void, a summons dated more than twenty days before the term, whose return day, because of failure of timely service, is changed to the second term without changing the date of the summons, is void. Bank of St. Marys v. Mumford (1849) 6 Ga. 44, supra.

A summons made returnable to the next term, instead of the second term after its date, as provided by statute, is irregular, and such irregularity is ground for the quashing of the summons, the dismissal of the action, or the vacation of the judgment. Ley v. Pilger (1900) 59 Neb. 561, 81 N. W. 507 (appeal); Scott v. Jarrell (1914) 167 N. C. 364, 83 S. E. 563, supra; McDowell v. Justice (1914) 167 N. C. 493, 83 S. E. 803, supra.

But in Ley v. Pilger (Neb.) supra, it was held that such a summons was not absolutely void.

Where, by statute, a summons issued less than fifteen days before the

first day of the next term shall be made returnable to the second term of the court after its date, a judgment by default upon such a summons, returnable at the first term, is erroneous. *Robinson v. State Bank* (1850) 11 Ark. 301, *supra*; *Ferguson v. Ross* (1842) 5 Ark. 517, *supra*.

A summons whose proper return day is at the second term after its issuance will be quashed if made returnable at an intervening return day. *Price v. Scott* (1898) 21 Pa. Co. Ct. 608.

A summons made returnable to the next spring term, instead of more correctly the next March term, will uphold a default judgment upon appeal, where the defendant cannot be misled by such incorrect designation of the term. *Anderson v. Pearce* (1880) 36 Ark. 293, 38 Am. Rep. 39.

Where the declaration prays for process requiring the defendant to appear at the August term, which commences on the first Monday of August, but by a clerical mistake the defendant is cited to appear the first Monday of July, the summons is not void, but may be amended, upon the plaintiff's motion in the action. *Richmond & D. R. Co. v. Benson & Co.* (1890) 86 Ga. 203, 22 Am. St. Rep. 446, 12 S. E. 357.

The complaint will be dismissed where the summons is made returnable at a general term, instead of at a special term as required by statute. *Ryan v. McCannell* (1848) 1 Sandf. (N. Y.) 709.

A summons returnable before the clerk of the court not in term time, when by statute it should be made returnable to the court in term time, is an irregularity, and ground for dismissal of the action. *Jones v. McClair* (1870) 64 N. C. 125; *Woodley v. Gilliam* (1870) 64 N. C. 649.

But in *Thomas v. Womack* (1870) 64 N. C. 657, it was held that such irregularity was amendable, upon motion in the action, where the defendant had notice of the true return day, and was not prejudiced by such irregularity.

In *Walker v. Joyner* (1876) 52 Miss. 789, the court intimated that making the summons returnable on the first day of the regular term instead of on

the next rule day in vacation was reversible error.

But the fact that a summons was made returnable in vacation of the court, instead of at a regular term, was held not ground for setting it aside, where the statute provided that no summons shall be set aside, or be adjudged insufficient, where there is sufficient substance about it to inform the party on whom it may be served that there is an action instituted against him in court. *Ross v. Glass* (1880) 70 Ind. 391.

The fact that the return day of a citation is not in a regular term is immaterial, if there is sufficient time between its date and the return day. *Patout v. Rawle* (1849) 4 La. Ann. 485 (appeal).

A summons commanding appearance at a time not authorized by law is nevertheless a good summons for the next term, and such defect is no ground for quashing it, but a reason for continuance only. *Knox v. Golding* (1910) 46 Ind. App. 634, 91 N. E. 857, 92 N. E. 986.

2. *Wrong day of term.*

A summons returnable to the fourth day of the term, instead of the first day as required by statute, is void, and not merely voidable, and will be quashed on motion. *Rattan v. Stone* (1842) 4 Ill. 540.

But the naming of a wrong return day in the right term, as, for example, the second day when the law requires writs to be returnable on the first day, was held a mere clerical error which works no prejudice, as the defendant is presumed to know the legal day. *Rigsbee v. Bowler* (1861) 17 Ind. 167; *Denny v. Graeter* (1861) 17 Ind. 197.

A summons returnable to the second, instead of the first, Monday of a term, is merely irregular, and amendable, and a judgment based thereon is not subject to collateral attack. *Sweatman v. Dean* (1905) 86 Miss. 641, 38 So. 231.

A published notice requiring the defendant to appear at the next term, on the first Monday, is a mere irregularity and does not subject the judgment to collateral attack, where the law fixes the time of the next term after

the publication. *Jasper County v. Wadlow* (1884) 82 Mo. 172; *Jasper County v. Mickey* (1887) Mo. —, 4 S. W. 424.

A citation commanding the defendant to appear at the next regular term to be held on the second Monday of September, the same being the 2d day of September, is fatally defective upon appeal. *Taylor v. Taylor* (1913) — Tex. Civ. App. —, 157 S. W. 1184.

A notice requiring defendant to appear on the second day of the term, to begin on the 12th day of the month, when the term in fact begins on the 18th, does not authorize the entry of a default judgment. *Boals v. Shules* (1870) 29 Iowa, 507 (motion to set aside judgment).

A notice requiring defendant to appear at the next term, to begin on the 30th day of the month, when in fact it begins on the 31st, does not arrest the operation of the Statute of Limitations, and if the statute has run before a second notice is delivered to the sheriff, the action is barred. *Fernekes v. Case* (1888) 75 Iowa, 152, 39 N. W. 238.

But a summons properly commanding the defendant to answer on the first day of the next spring term, but erroneously adding that such date will be March 25, was held amendable, on motion in the action, by striking out such erroneous statement. *Lowenstein v. Gaines* (1897) 64 Ark. 499, 43 S. W. 762.

The defect in a summons made returnable on the first Monday of a month, when the term in fact begins on the second Monday, is cured by a statute providing that all process returnable at a day fixed by law shall be deemed and taken to be returnable at such day, although a different day may be named in such process. *White Water Valley Canal Co. v. Henderson* (1851) 3 Ind. 3 (motion to quash).

A notice requiring the defendant to appear on the 29th day of September, being the second day of the next term, where the 29th is the fourth day of the term, is not such a defect as to require the vacation of a default judgment entered on the 29th. A dissenting opinion, however, held the defect

jurisdictional. *Burr v. Wilcox* (1865) 19 Iowa, 81.

A writ made returnable on the 8th of October, which was Sunday, where the term of court began on Monday the 9th, was held voidable and amendable upon motion in the action. *Norton v. Dover* (1882) 14 Fed. 106.

The fact that a notice requires defendant to plead on or before the second day of the term, while a rule of the court requires the notice to be returnable on the first day, is not such a defect or irregularity as authorizes the court to set aside the notice, since the defendant is presumed to know by what day the law requires him to answer, and cannot urge as a fatal defect the giving to him of an additional day. *Worster v. Oliver* (1856) 4 Iowa, 345.

A citation not made returnable in specific language on the first day of the next term, but made returnable on a specified date, which is the first day of the next term, will support a default judgment on appeal. *De Walt v. Zeigler* (1894) 9 Tex. Civ. App. 82, 29 S. W. 60.

j. Omissions.

The omission of the return day from a summons does not vitiate it, but it may be amended, where the Code or a general law fixes the return day, which is therefore known to the defendant. *Davis v. McCary* (1892) 100 Ala. 545, 13 So. 665 (appeal); *Ames v. Weston* (1839) 16 Me. 266 (motion to amend).

A summons requiring the defendant to answer within twenty, omitted the word "days" after the word "twenty," was held, upon appeal from an order denying a motion to vacate a default judgment, to give the court jurisdiction in *FLANERY v. KUSHA* (reported herewith) ante, 838.

A default judgment, entered upon a summons defective in that it fails to state the hour of the day the district court is to be holden, cannot be vacated upon the motion of the plaintiff, as he is concluded by it until it is reversed. *Wood v. Payea* (1884) 188 Mass. 61.

A published summons requiring the defendant to appear the requisite

number of days after service, but failing to state the day upon which service would be complete, is void, although it states the date of the first publication; and a default judgment taken thereupon is void, and subject to collateral attack. *Bauer v. Widholm* (1908) 49 Wash. 310, 95 Pac. 277.

A published summons which fails to state the year when the defendant is required to appear is too indefinite and uncertain to base a judgment of default upon. *McLean v. Lester* (1908) 48 Wash. 213, 93 Pac. 203 (appeal).

A summons commanding the defendant to appear on the first day of the next term, without specifying the particular time, is not void, or even voidable, as, the time of holding court being fixed by law, everyone is presumed to know when that time is. *Rogers v. Miller* (1843) 5 Ill. 333 (motion to quash).

But a notice which did not state the time when the defendant was to appear was held not to confer jurisdiction, and a default judgment based thereon was held to be subject to collateral attack. *Kitsmiller v. Kitchen* (1867) 24 Iowa, 163.

A summons issued on July 2, 1883, served on the 15th of October, and made returnable on the third Monday after the — Monday of November, is not irregular where the defendant cannot be misled by it, and the action will not be dismissed for such defect. *Roberts v. Allman* (1890) 106 N. C. 391, 11 S. E. 424.

But a citation requiring the defendant to appear on the — Monday of a month was held bad, and the judgment thereon reversed. *Violand v. Saxel* (1868) 31 Tex. 283.

The failure of a summons issued in November and returnable in January, to have the word "next" after "January," is immaterial, as it could not have misled the defendant. *Arminius Chemical Co. v. White* (1911) 112 Va. 250, 71 S. E. 637 (motion to quash).

The omission of the words, "exclusive of the day of service," from the statutory form of summons, does not render a summons void, where a general law requires the day of service

to be excluded in computing the return day. *SPOKANE MERCHANTS ASSO. v. ACORD* (reported herewith) ante, 835 (motion to quash summons and vacate judgment).

The omission from a published summons of the words, "within sixty days after the date of the first publication," in the statutory form, where the summons requires the defendant to appear within sixty days of a specified date which is the date of the first publication, does not render the summons and judgment thereon void. *Stubbs v. Continental Timber Co.* (1908) 49 Wash. 431, 95 Pac. 1011 (action to quiet title as against default judgment).

A notice to appear at the next term, when by statute it is necessary to name the term, is defective, and it is irregular for the court to render judgment by default thereon, but such defect can be corrected by proper motion in the trial court. *Decatur County v. Clements* (1865) 18 Iowa, 536 (appeal); *De Tar v. Boone County* (1872) 34 Iowa, 488.

And in *De Tar v. Boone County* (Iowa) supra, it was held that equity would not enjoin the collection of a judgment by default entered upon such a notice.

The failure of a notice to name the return term as required by statute is not a fatal defect, where the notice required the defendant to appear on a specified date, which is the one designated by the statute. *Knapp, S. & Co. v. Haight* (1867) 23 Iowa, 75 (motion to set aside default).

And such failure to name the return term is not ground for quashing the notice, but only entitles the defendant to a continuance. *Des Moines Branch Bank v. Van* (1861) 12 Iowa, 523.

But in *Kirk v. Hampton* (1835) 2 Tex. App. Civ. Cas. (Willson) 630, it was held, upon appeal, that a citation which failed to require the defendant to appear at the next regular term, although it stated the time for the holding of the court before which he was summoned to appear, was fatally defective.

*II. In justice's court.**a. Generally.*

While, as previously stated, no general rule can be formulated upon this question as to writs emanating from courts of record, the same is not true as to justices' courts, since their jurisdiction is purely a creature of statute, and limited thereby, so that failure of a summons issued by a justice of the peace to strictly comply with statutory requirements as to appearance or return day prevents the justice from acquiring jurisdiction, and renders void all subsequent proceedings in the action. Accordingly, in nearly all the cases cited in this subdivision the defect or irregularity was held fatal; whether the attack was direct or collateral.

b. Mistake in designating return day.

A justice's summons requiring the defendant to appear on the seventh day after its service, instead of at a specified time, does not give the court jurisdiction. *Miner v. Francis* (1894) 3 N. D. 549, 58 N. W. 343 (motion to set aside summons).

A summons issued on August 3d and returnable on May 10, the next, does not confer jurisdiction, and will not support a default judgment. *Hunter v. Weidner* (1861) 1 Woodw. Dec. (Pa.) 6 (certiorari).

But the fact that the return day of a justice's summons is in figures is not cause for reversal. *Maires v. Smith* (1838) 16 N. J. L. 360.

c. Returnable too soon.

A justice's court acquires no jurisdiction where the summons is made returnable in less than the time fixed by statute.

Georgia.—*Thurston v. Wilkerson* (1880) 65 Ga. 557 (affidavit of illegality to execution); *Sellars v. Cheney* (1883) 70 Ga. 790 (ejectment against purchaser on execution sale).

Indiana.—*Davis v. D. M. Osborn & Co.* 156 Ind. 86, 59 N. E. 279 (action to enjoin enforcement of judgment).

Michigan.—*Everts v. Fisk* (1880) 44 Mich. 515, 7 N. W. 81 (appeal); *Simonson v. Durfee* (1883) 50 Mich. 80, 14 N. W. 706 (certiorari to review judgment).

Missouri.—*Sanders v. Rains* (1847) 10 Mo. 770 (ejectment against purchaser on execution sale); *Williams v. Bower* (1858) 26 Mo. 601 (motion to set aside default).

New York.—*King v. Dowdall* (1848) 2 Sandf. 181 (motion to quash).

Pennsylvania.—*Pinchin v. Fry* (1789) 1 Dall. 405, 1 L. ed. 197 (certiorari).

Texas.—*Whitney v. Krapf* (1894) 8 Tex. Civ. App. 304, 27 S. W. 843 (action to recover land from purchaser at execution sale).

West Virginia.—*Lehow v. Macomber & W. Rope Co.* (1917) 81 W. Va. 21, 93 S. E. 939 (appeal).

A summons returnable on the second day after its issuance, where the statute requires it to be made returnable not less than two days from its date, is fatally defective, and a judgment based thereon will be reversed. *Everts v. Fisk* (Mich.) supra.

A citation from a justice's court returnable on the first, instead of the fourth, Monday of the proper month, does not confer jurisdiction, and a default judgment rendered thereon is subject to collateral attack. *Whitney v. Krapf* (Tex.) supra.

A justice's summons issued on Friday and returnable on Monday confers no jurisdiction, under a statute providing that a summons shall be returnable not less than two days from its issue, since Sunday is not counted. *Simonson v. Durfee* (Mich.) supra.

Making a summons returnable on the day succeeding its date, where the statute requires an allowance of from five to eight days, is reversible error. *Pinchin v. Fry* (Pa.) supra.

No title is acquired under a sale on an execution upon a default judgment based on a summons returnable in less than the statutory time. *Sanders v. Rains* (Mo.) supra.

d. Returnable in too long a time.

A justice of the peace acquires no jurisdiction by a summons returnable in a greater number of days after its date than specified by statute. *Deidesheimer v. Brown* (1857) 8 Cal. 340 (motion to dismiss case); *Ohio & M. R. Co. v. Hanna* (1861) 16 Ind. 391 (motion to dismiss case) *Fuller v. In-*

dianapolis & C. R. Co. (1862) 18 Ind. 91 (action to restrain collection of and to vacate judgment, and to set aside execution); Willins v. Wheeler (1859) 28 Barb. (N. Y.) 669 (appeal); Pantall v. Dickey (1888) 123 Pa. 431 (certiorari); Hess v. Lee (1896) 5 Pa. Dist. R. 563 (certiorari).

A municipal court acquires no jurisdiction under a summons returnable ten days after its date, where the statute provides that the summons must be returnable in not more than four days. Newcombe v. Cohn (1901) 33 Misc. 602, 67 N. Y. Supp. 930 (appeal).

A summons made returnable more than the statutory number of days after its issuance is no notice to the defendant, and does not affect the commencement of a suit. Ohio & M. R. Co. v. Hanna (1861) 16 Ind. 391, supra; Fuller v. Indianapolis & C. R. Co. (1862) 18 Ind. 91, supra.

Making a summons in a justice's court returnable more than ten days from its date, in violation of the statute, is ground for the dismissal of the case. Deidesheimer v. Brown (Cal.) supra.

e. Impossible return day.

Under a statute requiring a summons issued by a justice of the peace to specify the day and hour for appearance by the defendant, a summons returnable upon a day antedating its issuance confers no jurisdiction, and a judgment based thereon is void. Rice v. American Nat. Bank (1893) 3 Colo. App. 81, 31 Pac. 1024 (suit to enjoin proceedings).

A summons issued on December 28, and by error made returnable on January 7 of the same year, confers no jurisdiction, and a judgment based thereon will be reversed. Epstein v. Prosser (1909) 133 App. Div. 859, 117 N. Y. Supp. 1115.

But erroneously stating the previous year for appearance by defendant, in a summons issued by a justice of the peace, does not make the summons entirely void, but it is amendable, under a statute authorizing amendment of any process, in form or substance, to further justice, where the defendant is not misled and appears at the

proper time, without objecting to the defect. Bradbury v. Van Nostrand (1865) 45 Barb. (N. Y.) 194.

f. Hour of appearance.

A notice of an action in a justice's court is fatally defective if, under a Code requiring it to designate the hour of appearance, it states the hour as "11 o'clock, M." Hodges v. Brett (1854) 4 G. Greene (Iowa) 345 (motion to dismiss case).

A summons returnable at 12 o'clock in the afternoon is void. Ross v. Ward (1837) 16 N. J. L. 23 (certiorari).

A summons returnable between the hours of 9 A. M. and 8 A. M. is erroneous, and the judgment will be reversed on certiorari. Bend v. Komperdor (1909) 18 Pa. Dist. R. 976.

g. Returnable on holiday.

A justice of the peace acquires no jurisdiction under a summons returnable on a general election day, and a default judgment rendered thereupon is void, and will be reversed. People ex rel. Monday v. Schwartz (1867) 3 Abb. Pr. N. S. (N. Y.) 396; Leonosio v. Bartilino (1895) 7 S. D. 93, 63 N. W. 543.

h. Omissions.

A summons issued by a justice of the peace with the return day blank is a nullity, and gives him no jurisdiction. Craighead v. Martin (1878) 25 Minn. 41 (appeal).

The delivery of a notice with the appearance day left blank, by a justice of the peace to a constable for service, the blank being later filled in by the latter, does not affect the commencement of an action so as to prevent its being barred by the running of the Statute of Limitations before the issuance of a second notice. Phinney v. Donahue (1885) 67 Iowa, 192, 25 N. W. 126 (appeal).

Failure of the summons to state the hour for the defendant's appearance is fatal. Wiggin v. Massey 4 Boyce (Del.) 42, 90 Atl. 40 (certiorari).

It is stated in Burgess v. Tweedy (1843) 16 Conn. 39, upon appeal, that although a judgment in a justice's court might be good, if no hour of the

return day was fixed in the summons for appearance by the defendant, as required by statute, such an omission would be fatal upon a plea in abatement.

A summons requiring the defendant to appear before a justice of the peace

at 10 o'clock in the — noon is void. *Seurer v. Horst* (1884) 31 Minn. 479, 18 N. W. 283 (motion to dismiss case). As is also one requiring the defendant to appear at 2 o'clock — noon. *Camman v. Perrine* (1827) 9 N. J. L. 253 (certiorari). G. V. I.

HUBERT ROBERTSON, Appt.,

v.

STATE OF TEXAS.

Texas Court of Criminal Appeals — May 23, 1917.

(81 Tex. Crim. Rep. 378, 195 S. W. 602.)

Witness — defendant in criminal case — evidence of veracity.

1. An accused who offers himself as a witness may give evidence of his reputation for veracity, where confessions and statements which contradict his testimony are offered in evidence against him.

[See note on this question beginning on page 862.]

Trial — jury — question of voluntary confession.

2. The question whether or not a confession was voluntary cannot be submitted to the jury if there is no evidence tending to show that it was so.

[See 1 R. C. L. 577.]

Criminal law — confession — when voluntary.

3. A confession is not voluntary if it was forced or extorted in any manner, even by over-persuasion or promise or threats.

[See 1 R. C. L. 553.]

APPEAL by defendant from a judgment of the District Court for Bell County (Spann, J.) convicting him of burglary. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Will Glover and N. P. Woodward, for appellant:

In order to render a confession admissible, it must be freely made, and without compulsion or persuasion, not induced by promises creating hope of benefit, or influences applied leading the defendant to believe that he is in danger of serious bodily injury if he does not make the confession.

Carter v. State, 37 Tex. 362; *Nolen v. State*, 8 Tex. App. 585; *Paris v. State*, 35 Tex. Crim. Rep. 82, 31 S. W. 855; *Parker v. State*, 46 Tex. Crim. Rep. 461, 108 Am. St. Rep. 1021, 80 S. W. 1008, 3 Ann. Cas. 893; *Gallagher v. State*, — Tex. Crim. Rep. —, 24 S. W. 288; *Ammons v. State*, 80 Miss. 592, 18 L.R.A. (N.S.) 769, 92 Am. St. Rep. 607, 32 So. 9, 12 Am. Crim. Rep. 82; *Bram v. United States*, 168 U. S. 532, 42 L. ed. 568, 18 Sup. Ct. Rep. 183, 10 Am. Crim. Rep. 547; *Cain v. State*, 18 Tex.

387; *Warren v. State*, 29 Tex. 369; *United States v. Stone*, 8 Fed. 232; *West v. United States*, 20 App. D. C. 347, 12 Am. Crim. Rep. 89; *Johnson v. State*, 48 Tex. Crim. Rep. 428, 88 S. W. 223; *Barnes v. State*, 36 Tex. 356; *Lauderdale v. State*, 31 Tex. Crim. Rep. 46, 37 Am. St. Rep. 788, 19 S. W. 679; 1 R. C. L. p. 577.

It is not proper to permit the state to show the acts and declarations of third parties, in the absence of a defendant, and a defendant is not bound by the acts and declarations of third parties in his absence.

Chunley v. State, 20 Tex. App. 547; *Whicker v. State*, — Tex. Crim. Rep. —, 55 S. W. 47; *Zimmer v. State*, 64 Tex. Crim. Rep. 114, 141 S. W. 781; *Millner v. State*, 75 Tex. Crim. Rep. 22, 169 S. W. 899; *Morgan v. State*, 62 Tex. Crim. Rep. 120, 136 S. W. 1065; *Melton v. State*, 58 Tex. Crim. Rep. 86,

124 S. W. 910; *Clements v. State*, 61 Tex. Crim. Rep. 161, 134 S. W. 728; *Seymour v. State*, 71 Tex. Crim. Rep. 76, 158 S. W. 304.

Where there is an attack upon a defendant, and the assertion of crime against him, and where the nature of the case involves an attack upon the integrity and truthfulness of his substantial defense, testimony as to his reputation for truth and veracity should be admitted.

Butler v. State, 52 Tex. Crim. Rep. 528, 107 S. W. 840; *House v. State*, 42 Tex. Crim. Rep. 125, 57 S. W. 825; *Farmer v. State*, 35 Tex. Crim. Rep. 270, 33 S. W. 232; *Wilkerson v. State*, 60 Tex. Crim. Rep. 388, 131 S. W. 1108, Ann. Cas. 1912C, 126; *Luttrell v. State*, 40 Tex. Crim. Rep. 651, 51 S. W. 930, 11 Am. Crim. Rep. 226; *Matthews v. State*, 80 Tex. Crim. Rep. 177, 189 S. W. 491.

Mr. E. B. Hendricks, Assistant Attorney General, for the State.

Davidson, P. J., delivered the opinion of the court:

Appellant was convicted of burglary, his punishment being assessed at two years' confinement in the penitentiary.

There are two questions which require a reversal of the judgment. Appellant offered testimony of his reputation for veracity, which was rejected by the court. That may be disposed of by stating it was admissible on account of the contradictions with reference to appellant's statements and accounts of the burglary, used against him, and his connection with it as shown by what is termed confessions. Whenever a witness is contradicted by showing he made contradictory statements out of court from those made in court, we have always understood the rule to be that his

Witness—
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reputation for truth and veracity can be sustained. A bill of exceptions was reserved to the admission of a purported confession made by appellant to the then district attorney. The bill is very full, with questions and answers, and the confession, and testimony bearing upon it. The proposition involved in it is

that it was not a voluntary confession. In order that there may be no question as to the exact attitude of the matter as shown by the bill of exceptions, verified by the court, the whole bill will be copied in full;

"Be it remembered that on the trial of the above-numbered and entitled cause, the following proceedings, among others, were had:

"That after the witness DeWitt Bowmer was placed upon the stand by the state, who identified a written statement or confession made by the defendant as having been made to the witness while he (the witness) was district attorney of Bell county, Texas, the state then offered in evidence said written statement or confession of the defendant, to which the defendant objected because he was under arrest in charge of an officer and in confinement at the time said statement or confession was made, and because the same was not freely made, and was not the voluntary statement and confession of the defendant, but was a written statement and confession of the defendant procured by the witness DeWitt Bowmer, the then district attorney, by force, threats, and abuse, and through fear of serious bodily injury, and after severe cross-examination by the witness DeWitt Bowmer, who was at the time said statement and confession was made district attorney of said Bell county, and after said witness DeWitt Bowmer had threatened to prosecute defendant for the offense of perjury if he did not make the confession, and send him, the defendant, to the penitentiary for a longer period of time than he could or would for burglary; after which objection the jury was withdrawn, and the following testimony of the witness DeWitt Bowmer was introduced before the court:

"Direct examination by Mr. White, for the state: Q. Mr. Bowmer, was that statement made to you? A. Yes, sir. Q. That warning printed in the statement was given the defendant? A. The whole statement, including the warning,

was read to the defendant. Q. Before signing? A. Yes, sir. Q. And the defendant signed it in the presence of the two gentlemen who appear as witnesses? A. Yes, sir. Q. These two gentlemen were not officers? A. I do not think they were, but my best judgment is that they were not. Cross-examination by Mr. Woodward, for defendant: Q. Mr. Bowmer, under what conditions did the defendant make that statement; I mean by that, wasn't he pretty roughly handled before the statement was taken? A. I do not know what you would call roughly handled; I can tell you the circumstance. Q. Well? A. We began to investigate this meat stealing one day over there, and we got on this witness, Robert Swanson and Sam Lane, and his wife, and the whole bunch of witnesses, and got a plenty of evidence to know who the guilty parties were, and Hubert Robertson was arrested before that time and brought over to Belton. Well, Pat White, his codefendant, was arrested that day, so after I had all these other statements up there, why, I got Pat White up in the justice court and got a confession from him, and I sent back over to Belton by officers coming over here as I remember and got Hubert Robertson out of jail and brought him back. When he first came over he claimed that he knew nothing about it, and told some kind of a story about it, I forget just what he said now, but anyway I did not think he was telling the truth, and I started in to make him tell it if I could, and so he told about three different stories, and he finally made this statement. Q. You told him you were going to whip him, and some of the boys did hit him? A. I cannot say that anybody hit him; I did not hit him. I started to once or twice, and ought to have, I guess, because he was an impudent negro, but I did not hit him. If any of the boys hit him I do not remember it. If they did it was unjust, because I was the one going after the negro. I had the confession of Pat White,

and I thought this negro was guilty, and I used such means as I thought was calculated to make him tell the truth. Q. You threatened you were going to hit him? A. I do not know whether I did or not; I have so many times told them that that I do not remember. Q. You expect you did? A. As I remember it, the negro kept telling what I did not think was the truth, and I finally said, 'I am going to let you go, I had rather you tell a lie than the truth anyway, because then I will indict you for perjury and send you to the penitentiary for a longer term than I could for burglary.' I cannot remember what I said to the negro because I had so many. Q. But you did intimate that what he did tell you was a lie, and you were going to send him to the pen for that? A. I told him I did not think he was telling a lie. Q. This is not a voluntary statement? A. I do not know, Mr. Woodward. Q. The negro was under arrest? A. It was my understanding they came to Belton and got him out of jail. Q. And you asked him questions and he answered them, and from that you made up the statement? A. Yes. Q. And everything in there was in response to questions asked? A. Yes. Q. After he had made, I believe you said, three different stories? A. Two or three; I had him up there, I reckon, an hour. Re-direct examination by Mr. White: Q. After all the preliminary statements were made and this statement was written down, was it read over to the defendant? A. Yes, sir. Q. Did he make any objection to signing it? A. No, sir. Q. And was written down as he finally made it? A. Yes, sir. Q. And that was his statement? A. Yes, sir. Q. You did not compel him to sign that statement by threats or any other matter? A. No, I am sure that I did not on signing the statement. I do not remember. I expect I talked to the negro pretty roughly to make him tell what I thought was the truth, because I thought he was a little bit too defiant about the mat-

ter, but that was not about signing the statement; that was about the statement he was giving; there was no objection about signing the statement as given, and there was no coercion or abuse to cause him to sign. All that was said was said before this statement was written. The Court: What did you say to him? A. I do not remember all I said to the negro; I think I said to him—maybe I cursed him a little. The Court: You did curse him? A. Maybe I threatened to strike him. The Court: Was there a 'third degree' proceeding? A. I do not know what you call the third degree; I felt like the negro was not telling the truth, and I thought I could get the truth out of him; I knew he was guilty, felt that way about it, and I felt like I was justified in using such means; I told him he was a liar and all such things as that. Q. Anybody else talk to him besides you at that time? A. Mr. Cooper was in there and out; I do not know whether he was in there at the time or not. This investigation lasted two days; we had every negro out of the bottom up there, and Mr. Cooper was in there a part of the time, and Mr. Gray was there a part of the time. Recross-examination by Mr. Woodward: Q. Didn't Mr. Gray threaten to run him in for living with a negro woman if he did not tell it? A. I do not remember that; it could have happened. Q. You did abuse him and call him a liar? A. Yes, I called him a liar. Q. Possibly might have called him a son of a bitch? A. I do not know whether I did or not, Mr. Woodward; I ought not to have if I did, but I might have. And that after said foregoing questions were propounded to said witness by the state and by the defendant, in the absence of the jury, the jury was then recalled and the same evidence as before set out was then offered before the jury, whereupon the court overruled defendant's objection to the introduction of said statement, and the state then offered in evidence and read before the jury the

before-mentioned statement, which statement is as follows, to wit:

"The State of Texas,

"County of Bell.

"November 4, 1916.

"My name is Hubert Robertson. I am under arrest in the custody of Jerry Gray, constable of Pre. No. 5 of Bell county, Texas, and have been duly warned by DeWitt Bowmer, of Bell county, Texas, the person to whom I am making the following statement, that I do not have to make any statement at all; that any statement made by me may be used in evidence against me on trial for the offense concerning which this confession and statement is made do now make the following statement:

"Sometime in Jan'y, 1916, Pat White and I got Louis Newsom's horse and buggy in Temple and drove out to Mr. W. H. Hutchinson's place on Big Elm about seven or eight miles from Temple and stole some meat and lard out of Mr. Hutchinson's smokehouse at nighttime. Pat and I first discussed going out to Hutchinson's on Saturday afternoon before we went that night. Louis Newsom hitched the horse up for Pat White and I. Pat and I got out to Mr. Hutchinson's house about 10 o'clock P. M. There was a light in Mr. Hutchinson's house and someone came out on the porch and went back in the house, and Pat says everything is all right now. Pat and I then went up to the smokehouse and went inside. I began feeling around in the smokehouse; it was dark inside, and felt a lard can. I took the lid off to see what the can contained; it was full of lard. Pat was on the other side of the smokehouse and called me over to him; he had found some fresh meat salted down and in box, and I held a sack which we had brought with us, while Pat filled it full of meat; it was so heavy Pat couldn't carry it, so I carried the meat and Pat got a can of lard. We took them a little ways from the house, set the lard and meat down, and both of us went back to the smokehouse and got another can of

lard; we then loaded the two cans of lard and the sack of meat in the buggy and came back to Temple; we stopped our buggy in front of Louis Newsom's in Temple when we got back; we went in Newsom's house, told him what we had, and Newsom gave me a drink of whisky; then Pat, Newsom, and I went out to the buggy, and then carried the meat and one can of lard in Newsom's house, and gave him some meat, and Newsom set a big dish pan on the table and we filled it very full of lard. Robert Swanson came by the buggy after I had come back out of the house, and I showed him the remaining lard and meat. Pat took his part of the meat and I took my part over to Sam Lane's and left it in Sam's smokehouse that night, and Sam told me the next day to take it away and I took it away Sunday night, being the next night following the stealing of the same, and sold it to John McNeese for \$3; we did not have Mr. Hutchinson's permission to get the meat and lard.

"The door of the smokehouse that night was closed, but not locked.

"[Signed] Hubert Robertson.

"Witnesses:

"C. S. Alexander,

"J. K. Wood.

"And after which said statement before set out was read in evidence before the jury, the state then placed upon the stand C. S. Alexander, who, after being sworn, testified in substance as follows:

"My name is C. S. Alexander. This signature as a witness to this statement is my signature. I was present at the time that instrument was signed by the defendant, Hubert Robertson. I do not remember just the date it was signed, but I went down town that night and was standing on the corner by the popcorn wagon and J. K. Wood came up and said, 'Would you have any objection to going to Cooper's office and witnessing some testimony?' and said, 'We have to have someone else besides an officer,' and when I got in the court room Mr. Bowmer had taken his testimony and had it written out when I got up there, and

he read it over to him, called his attention to it, and said, 'I will read this testimony over, and be careful, and if there is any mistake correct me,' and he read it slowly and carefully, and when he got through he said, 'Is that correct?' and he said it was, and said, 'Will you sign it?' and he said, 'Yes,' and he turned to me and said, 'Mr. Alexander, will you witness this?' and I said, 'Yes,' and he signed it and I signed it. There was no threats made toward the defendant while I was there to induce him to sign any instrument. It was read over to him two times.

"I do not know what was said or done to the negro before I went up there.

"And the state then called R. L. Cooper and placed him upon the stand, who testified in substance, on behalf of the state, as follows:

"My name is R. L. Cooper. I do not hold any official position now. Up to the 20th of November I was justice of the peace at Temple, and held that position on November 4, 1916. I remember of the circumstance of the examination of some witnesses in regard to the theft of some meat from Mr. Hutchinson. There was two statements taken from Hubert Robertson; I was present all the time during the first and the second; I do not recall whether I was there all the time or not, I was probably in and out. I do not recall whether I was there all the time this statement was made that is witnessed by Mr. Alexander and Mr. Wood; I was there when Mr. Alexander came in and signed this as a witness. I remember that, and I think I saw the signature of Jack Wood. Hubert Robertson was warned as such cases are always done, that he did not have to make a statement, and Mr. Bowmer went ahead and took his statement. I was in and out probably at times; I would be in and hear part of it. I do not recall that I was in all the time, I do not believe that I was because I was attending to my affairs all the time, and usually when the attorneys are there to take the state-

ments I pay very little attention to it.

"Mr. Bowmer was there all the time and took the last statement; I think A. D. Dyess took his first statement. The first statement was taken before he was brought to jail. I remember some parts of that statement; in that first statement he did not admit going to old man Hutchinson's and getting that meat. He told how he got the meat he did sell in the first statement, and it did not incriminate him in the way of a burglary from Mr. Hutchinson. The time the warning was made was not at the time it was read over to him, it was given to him before it was ever written; that is the customary rule, and I think it was done in that case; I usually do those things myself. I cannot say that I warned him at the time Mr. Bowmer came back to get another statement. Mr. Bowmer might have. It is not very likely that if any warning was given him that Mr. Bowmer gave it, it is very likely I did myself; but I cannot testify that I did or did not, and my testimony on that is based on my custom.

"And the defendant then and there in open court, at the time said written statement or confession was offered, objected for the reasons before given; and the court, over the objection of the defendant, as aforesaid, admitted said written statement or confession and permitted same to be read to the jury, to which actions and rulings of the court the defendant then and there in open court excepted for the reasons before given, and here now tenders this his bill of exceptions and asks that same be signed and filed as a part of the record herein, which is accordingly done, but with the following explanation and modification, to wit:

"It appearing to the court that there being a conflicting issue as to the facts surrounding the confession as to whether or not same was voluntary, the witness DeWitt Bowmer, the then district attorney, who took the confession, and the witnesses Alexander and Cooper stat-

ing that same was made in accordance with the requirements of the statute, and the defendant denying that same was so made, it was a question of fact for the jury to determine, and they were so instructed.

"F. M. Spann, District Judge, Presiding.

"Will Glover, N. P. Woodward, Attorneys for Defendant."

The remaining bills are largely upon the same line. Appellant's contention was that he was not present at the burglary and had nothing to do with it. This confession, which was introduced against him and relied on by the state, shows he was present and participated in the burglary. He had made a previous confession or statement denying that he had anything to do with the burglary, but it was not incriminating as to the burglary and quite unsatisfactory to the state. It connected him with receiving some of the property taken out of the house some hours after it was taken, and with knowledge that it was stolen, but did not make him a principal in the burglary. He might be prosecuted, if those facts are true, for receiving fruits of the crime. He also proved an alibi by a woman who kept house where he was boarding and sleeping. Without discussing this confession and the manner of obtaining it and what occurred in securing it, it is evident from an inspection of what occurred that it could not be and was not a voluntary confession. The court admitted it on the ground that he would leave it to the jury to decide whether it was voluntary or not, which he proceeded to do in his charge. We suppose the jury must have found that it was voluntary, or they would not have convicted. Wherever there may be an issue as to whether the confession is voluntary or not, it may be submitted to the jury for their determination, but in this case there seems to be no evidence that it was voluntary; the officer who took it excludes the idea that it was voluntary. The facts he states and

the manner in which he obtained the confession exclude the idea of its being voluntary.

**Trial-jury—
question of
voluntary
confession.** There is nothing in the case to indicate that the fruits of

the crime were discovered by reason of the confession. They had already been discovered. The record is full of testimony with reference to that matter, and this was either the second or third statement that was obtained from appellant, not as to where the property was or anything of that sort, but as to his connection with the original act. A voluntary confession is just what it says, and ought to be voluntarily given, and not forced or extorted in any manner, even by

over-persuasion or promise or threats.

The judgment is reversed and the cause is remanded.

NOTE.

The question considered in the reported case (ROBERTSON v. STATE, ante, 858), whether testimony tending to show that a party or witness has made contradictory statements furnishes a foundation for supporting evidence as to his truth and veracity, is the subject of the annotation following COLVIN v. WILSON, post, 862. See specifically subd. I. b, 1, of that annotation for the application in criminal prosecutions of the view admitting supporting evidence in that regard.

NETA COLVIN

v.

ED WILSON, Appt.

Kansas Supreme Court — April 7, 1917.

(100 Kan. 247, 164 Pac. 284.)

Witness — proving character — contradictory statements.

1. Where, in the trial of an action to recover damages for alleged assaults by defendant upon plaintiff, the defendant introduced the testimony of several witnesses to contradict statements made by the plaintiff on cross-examination concerning matters collateral to the issues, the court may, in the exercise of its sound discretion, permit the plaintiff in rebuttal to prove her good reputation for truth and veracity in the community where she resides. On the facts stated in the opinion there was no abuse of judicial discretion in the admission of such rebuttal testimony.

[See note on this question beginning on page 862.]

Evidence — character of defendant.

2. In a civil action the character of a party is not admissible as evidence

to disprove the act with which he is charged.

[See 10 R. C. L. 947.]

Headnotes by PORTER, J.

APPEAL by defendant from a judgment of the District Court for Bourbon County (Hulett, J.) in plaintiff's favor in an action brought to recover damages for two assaults upon her person by defendant. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. F. J. Oyler and J. G. Sheppard for appellant.

Messrs. Hubert Lardner, B. Hudson, and Douglas Hudson, for appellee:

Evidence of plaintiff's good reputation for truth and veracity or for chastity or for any other virtue was not admissible and was not offered because she was a party to the suit. Evidence of her good reputation for truth and veracity was admissible in rebuttal because in her capacity as a material witness for the plaintiff an attempt was made by the defendant to impeach her.

Wright v. McKee, 37 Vt. 163; Stow v. Converse, 3 Conn. 345, 8 Am. Dec. 189; Simpson v. Westenberger, 28 Kan. 757, 42 Am. Rep. 195; 1 Wigmore, Ev. p. 134, § 64; Gough v. St. John, 16 Wend. 646; Pratt v. Andrews, 4 N. Y. 493; Fowler v. Aetna F. Ins. Co. 6 Cow. 673, 16 Am. Dec. 460; Curtis v. Hoadley, 29 Kan. 569; Hammett v. State, 42 Okla. 384, 141 Pac. 421, Ann. Cas. 1916D, 1148; Chicago City R. Co. v. Matthieson, 212 Ill. 292, 72 N. E. 443; First Nat. Bank v. Blakeman, 19 Okla. 106, 12 L.R.A. (N.S.) 364, 91 Pac. 868; Underhill, Ev. § 352; Clem v. State, 33 Ind. 427.

When a witness is accused of recent fabrication of testimony, or his testimony is contradicted by other witnesses, who claim that he had made opposite statements to them, testimony of consistent statements made anterior to the date of the alleged fabrication, or made immediately after the occurrence of which he has testified took place, and before he has had any reason or ground for fabricating an untrue or false statement, is admissible.

State v. Petty, 21 Kan. 54; State v. McKinney, 31 Kan. 570, 3 Pac. 356, 5 Am. Crim. Rep. 538; State v. Hendricks, 32 Kan. 559, 4 Pac. 1050; Cloud County v. Vickers, 62 Kan. 25, 61 Pac. 891; Stirn v. Nelson, 65 Kan. 419, 70 Pac. 355; National Cereal Co. v. Alexander, 75 Kan. 542, 89 Pac. 923; State v. Parish, 79 N. C. 610; McCord v. State, 83 Ga. 521, 10 S. E. 487, 8 Am. Crim. Rep. 636.

Porter, J., delivered the opinion of the court:

Neta Colvin, the plaintiff, resides with her husband and children on a farm near Bronson, in Bourbon county. Ed Wilson, the defendant, is a married man living near the plaintiff's home. The two families

were neighbors and visited back and forth. Mrs. Colvin brought this action against Wilson to recover damages for two alleged assaults upon her person. The defendant answered with a general denial. The jury returned a verdict in plaintiff's favor for \$500, upon which the court rendered judgment. Defendant appeals.

The plaintiff testified that on two occasions defendant came to her home during the absence of her husband and forcibly grabbed her in his arms, pulling her close to him; that she screamed and tried to get loose and struggled with him for two or three minutes until he desisted. She testified that on the second occasion he tried to induce her to give him a kiss, and that he subjected her to other indignities.

1. The principal contention of appellant is that incompetent testimony was admitted over his objections. On rebuttal, plaintiff produced three witnesses who testified that her general reputation for truth and veracity in the community where she resided was good. The objection to this was based on the claim that no one had attacked her reputation as to truth and veracity, and therefore it was error to admit proof of such general reputation in rebuttal. The determination of the question depends upon what constitutes an attack upon the credibility of a witness. The evidence was not offered because the plaintiff was a party, but because she was a witness.

On cross-examination counsel for defendant asked her a number of questions upon collateral matters, illustrated by the following:

Q. And you never fainted before this?

A. No, sir.

Q. In your life?

A. No, sir; I never did.

Q. You didn't tell Mrs. Howard that you was out in the cow lot and a cow got after you and frightened you before this occurred? Did you tell her that?

A. No, sir.

Similar questions asked here as to statements made to Mrs. Leek were answered by the plaintiff in the negative. The defense subsequently called as witnesses Mrs. Howard and Mrs. Leek, who flatly contradicted plaintiff's statements on these matters. Again, on cross-examination, plaintiff was asked if she had ever flirted with defendant at his home, and if she had ever winked at him, to both of which questions she answered "No." The defense subsequently called Mrs. Wilson and her husband, who testified that plaintiff had flirted with him at his home and had winked at him. The defendant likewise called other witnesses who contradicted plaintiff on other wholly collateral matters. In each instance counsel asked the contradicting witnesses questions for which he claimed he had laid the proper foundation by the previous examination of plaintiff. The manifest and only purpose of the cross-examination as to these matters and the introduction of the testimony contradicting plaintiff's statements in respect thereto was to impeach her veracity as a witness; and we can conceive no sufficient reason why testimony showing the plaintiff's general reputation as to truthfulness and veracity was not competent on rebuttal. It is insisted, however, that her reputation for truth and veracity was presumed to be good until attacked. This is, of course, fundamental. But it is also insisted that no attack upon her reputation had been made. If defendant is correct in the latter contention, he cannot claim that he suffered any prejudice by the admission of testimony tending to establish something presumed and conceded to be true. The defendant, however, did make an indirect attack upon the credibility and veracity of the witness. In *Clem v. State*, 33 Ind. 418, 427, it was said: "The sole object in asking a witness whether he had made statements elsewhere not in accordance with his testimony, and, upon his denial, calling other witnesses to

show that he did make such statements, is to create the belief that he is not a credible witness. Impeachment of a witness by proof of his bad character is intended to accomplish exactly and only the same thing. The statements and the bad character are alike immaterial, except for the single purpose of affecting the credit of the witness, and it is not easy to say that the two methods are not about equally efficient in accomplishing the end. In either case the credibility of the witness is impaired. . . . If it is just in the one case that a party should be permitted to establish the credit of his witness by showing his good character, it is alike just in the other case."

The same conclusion was reached by the court in the case of *First Nat. Bank v. Blakeman*, 19 Okla. 106, 12 L.R.A.(N.S.) 364, 91 Pac. 868. In the opinion in that case the Oklahoma court concedes that there is an irreconcilable conflict in the authorities, and adopts the rule favoring the admission of such testimony in rebuttal as one founded upon the better reason.

However, we do not wish to be understood as favoring the adoption of the hard and fast rule that, wherever proof has been admitted showing contradictory statements of a witness who is a party concerning matters foreign to the issues, the party whose veracity as a witness in the particular instance has been assailed has then the absolute right to offer rebuttal testimony to show his general reputation for truth and veracity. The better rule, we think, is to leave the question of the admissibility of such rebuttal testimony to the sound discretion of the trial court.

Witness—proving character—contradictory statements.

In view of the course pursued by the defendant in the case at bar, there was certainly no abuse of the trial court's discretion. The main issue was whether the alleged assaults were committed. There was a flat contradiction in the testimony of the two parties as to

what occurred. Aside from his denial of the assaults, the testimony offered by defendant consisted for the most part of attempts to show that the plaintiff had testified falsely as to wholly collateral matters inquired of in cross-examination.

2. The defendant offered to prove that his general reputation in the community as a moral, chaste, and law-abiding citizen was good, to which the court sustained an objection. It is urged by plaintiff that defendant failed to produce this testimony in support of the motion for a new trial. His own affidavit was filed stating that the three witnesses whose testimony was rejected would, if permitted, have testified that his general reputation in these

respects was good. Under § 307 of the Civil Code (Gen. Stat. 1909, § 5901) he should have produced the evidence "by affidavit, deposition or oral testimony of the witnesses." However, no error was committed. In a civil action the character of a party is not admissible as evidence tending to disprove the act with which he is charged. In *Curtis v. Hoadley*, 29 Kan. 566, where defendant was charged with fraud, the judgment was reversed for error in admitting evidence of defendant's reputation for honesty and fair dealing. To the same effect is *Simpson v. Westenberger*, 28 Kan. 756, 42 Am. Rep. 195.

Evidence—
character of
defendant.

The judgment is affirmed.

ANNOTATION.

Testimony tending to show that party or witness has made contradictory statements as ground for evidence as to his truth and veracity.

I. View that testimony is admissible:

a. Rule stated, 862.

b. Application of rule:

1. In criminal prosecution, 864.
2. In civil action, 871.

I. View that testimony is admissible.

a. Rule stated.

In a number of jurisdictions the rule is that where a witness has testified, and the opposite party has either on cross-examination of the witness or by the introduction of independent testimony impeached the witness by proof that he has made contradictory and inconsistent statements out of court, it is competent to corroborate him by evidence of his general reputation for truth and veracity.

Alabama.—*Hadjo v. Gooden* (1848) 13 Ala. 718; *Lewis v. State* (1860) 35 Ala. 380; *Haley v. State* (1879) 63 Ala. 83; *Holley v. State* (1894) 105 Ala. 100, 17 So. 102; *Towns v. State* (1895) 111 Ala. 1, 20 So. 598; *McClellan v. State* (1897) 117 Ala. 140, 23 So. 653; *Lusk v. State* (1900) 129 Ala. 1, 30 So. 33; *Brown v. State* (1904) 142 Ala. 287, 38 So. 268; *Graham v. State*

II. View that testimony is inadmissible:

a. Rule stated, 878.

b. Application of rule:

1. In criminal prosecution, 878.
2. In civil action, 882.

III. Rule in Kansas, 887.

(1908) 153 Ala. 38, 45 So. 580; *Robbins, v. State* (1915) 13 Ala. App. 167, 69 So. 297.

Florida.—*Mercer v. State* (1898) 40 Fla. 216, 74 Am. St. Rep. 135, 24 So. 154.

Georgia.—*McEwen v. Springfield* (1879) 64 Ga. 159; *Price v. State* (1884) 72 Ga. 441; *Clark v. State* (1903) 117 Ga. 254, 43 S. E. 853; *Bell Bros. v. Aiken* (1907) 1 Ga. App. 36, 57 S. E. 1001.

Indiana.—*Paxton v. Dye* (1866) 26 Ind. 393; *Clark v. Bond* (1868) 29 Ind. 555; *Harris v. State* (1868) 30 Ind. 131; *Clem v. State* (1870) 33 Ind. 418; *Stratton v. State* (1874) 45 Ind. 468; *Louisville, N. A. & C. R. Co. v. Frawley* (1886) 110 Ind. 18, 9 N. E. 594; *Carroll County v. O'Connor* (1893) 187 Ind. 622, 35 N. E. 1006, 37 N. E. 16; *Garr, S. & Co. v. Shaffer* (1894) 139 Ind. 191, 38 N. E. 811.

Louisiana.—*State v. Boyd* (1886) 38 La. Ann. 374.

Maryland.—*Davis v. State* (1878) 38 Md. 15.

Missouri.—*State v. Cooper* (1880) 71 Mo. 436; *Miller v. St. Louis R. Co.* (1878) 5 Mo. App. 471, 9 Am. Neg. Cas. 504; *Fulkerson v. Murdock* (1893) 53 Mo. App. 151, affirmed in (1894) 123 Mo. 292, 27 S. W. 555; *Walker v. Phoenix Ins. Co.* (1895) 62 Mo. App. 209; *Berryman v. Cox* (1898) 73 Mo. App. 67; *Alkire Grocer Co. v. Tagart* (1899) 78 Mo. App. 166; *Browning v. Chicago, R. I. & P. R. Co.* (1906) 118 Mo. App. 449, 94 S. W. 315; *State v. Christopher* (1908) 134 Mo. App. 6, 114 S. W. 549.

North Carolina.—*Isler v. Dewey* (1874) 71 N. C. 14; *Armfield v. Raleigh & S. R. Co.* (1913) 162 N. C. 24, 77 S. E. 963.

Oklahoma.—*First Nat. Bank v. Blakeman* (1907) 19 Okla. 106, 12 L.R.A.(N.S.) 364, 91 Pac. 868.

Texas.—*Burrill v. State* (1857) 18 Tex. 713; *Johnson v. Brown* (1879) 51 Tex. 65; *Dixon v. State* (1883) 15 Tex. App. 271; *Thomas v. State* (1885) 18 Tex. App. 213; *Phillips v. State* (1885) 19 Tex. App. 158; *Crook v. State* (1889) 27 Tex. App. 198, 11 S. W. 444; *Tipton v. State* (1891) 30 Tex. App. 530, 17 S. W. 1097; *Ledbetter v. State* (1895) — Tex. Crim. Rep. —, 29 S. W. 479; *Morrison v. State* (1897) 37 Tex. Crim. Rep. 601, 40 S. W. 591; *Payne v. State* (1899) 40 Tex. Crim. Rep. 290, 50 S. W. 863; *Fox v. Robbins* (1902) — Tex. Civ. App. —, 70 S. W. 597; *Sheppard v. Love* (1902) — Tex. Civ. App. —, 71 S. W. 67; *Runnels v. State* (1903) 45 Tex. Crim. Rep. 446, 77 S. W. 458; *Swain v. State* (1905) 48 Tex. Crim. Rep. 98, 86 S. W. 335; *Harris v. State* (1906) 49 Tex. Crim. Rep. 338, 94 S. W. 227; *Dunlap v. State* (1906) 50 Tex. Crim. Rep. 504, 98 S. W. 845; *Myers v. State* (1907) — Tex. Crim. Rep. —, 101 S. W. 1000; *Brown v. State* (1907) 52 Tex. Crim. Rep. 267, 106 S. W. 368; *Alderson v. State* (1908) 53 Tex. Crim. Rep. 525, 111 S. W. 738; *Graham v. State* (1909) 57 Tex. Crim. Rep. 104, 123 S. W. 691; *Contreras v. San Antonio Traction Co.* (1904) — Tex. Civ. App. —, 83 S. W. 870; *Mis-*

souri, K. & T. R. Co. v. Adams (1906) 42 Tex. Civ. App. 274, 93 S. W. 498; *Kansas City Southern R. Co. v. Williams* (1908) — Tex. Civ. App. —, 111 S. W. 196; *Missouri, K. & T. R. Co. v. Adams* (1906) 42 Tex. Civ. App. 274, 114 S. W. 493; *Houston Electric Co. v. Faroux* (1910) 59 Tex. Civ. App. 232, 125 S. W. 922; *Dickson v. State* (1912) 66 Tex. Crim. Rep. 270, 146 S. W. 914; *Becker v. State* (1916) 80 Tex. Crim. Rep. 186, 190 S. W. 185; *ROBERTSON v. STATE* (reported herewith) ante, 858.

Vermont.—*State v. Roe* (1840) 12 Vt. 93; *Paine v. Tilden* (1848) 20 Vt. 554; *Sweet v. Sherman* (1848) 21 Vt. 23; *Stevenson v. Gunning* (1892) 64 Vt. 601, 25 Atl. 697.

Virginia.—*George v. Pilcher* (1877) 28 Gratt. 299, 26 Am. Rep. 350; *Reynolds v. Richmond & M. R. Co.* (1895) 92 Va. 400, 23 S. E. 770.

West Virginia.—*State v. Staley* (1899) 45 W. Va. 792, 32 S. E. 198.

The rule was laid down in *Armfield v. Raleigh & S. R. Co.* (1913) 162 N. C. 24, 77 S. E. 963, as follows: "Whenever the credit of a witness is impeached, whether by proof of general bad character or by contradictory statements by himself, or by cross-examination tending to impeach his veracity or memory . . . it may be restored or strengthened by any proper evidence tending to restore confidence in his veracity and in the truthfulness of his testimony, whether such evidence appears in a verbal or written statement, verified or not, or whether the previous statements were made ante litem motam or pending the controversy."

In *Dickson v. State* (1912) 66 Tex. Crim. Rep. 270, 146 S. W. 914, the rule is thus laid down: "Either side is entitled to prove general reputation for truth and veracity of witness who has been impeached or sought to be impeached by proof of contradictory statements."

Similarly, in *State v. Boyd* (1886) 38 La. Ann. 374, the court said: "The exception to the ruling of the court in admitting testimony as to the character for truth and veracity of two of the state's witnesses is not good under the circumstances of this

case, where the judge states that on cross-examination of other witnesses, the counsel for defendant had attempted to impeach or invalidate their evidence. We think this brings the case within the rule laid down by Greenleaf and supported by the weight of authority: "Where evidence of contradictory statement by a witness or of other particular facts is offered by way of impeaching his veracity, his general character for truth being thus in some sort put in issue, it has been deemed reasonable to admit general evidence that he is a man of strict integrity and scrupulous regard for truth."

It has been held that testimony which tends to show that a witness has made contradictory statements impairs, if not directly assails, his veracity, and "under such circumstances, it was certainly allowable to sustain the credibility of the witness by proof of his general character, and that he would be believed on oath." *Hadjo v. Gooden* (1848) 18 Ala. 718.

"When a witness in a preliminary cross-examination is questioned as to previous contradictory statements made by him, and positively denies having made them, and testimony is thereafter introduced to show, and which tends to show, that he did make such statements contradictory of his present testimony, his testimony is thereby directly impeached, and his reputation for truth and veracity fairly put in issue. In such cases the rule is that witnesses may be introduced in rebuttal to show that the general reputation of the assailed witness for truth and veracity is good." *Contreras v. San Antonio Traction Co.* (1904) — Tex. Civ. App. —, 83 S. W. 870.

b. Application of rule.

1. In criminal prosecution.

Where a witness on cross-examination denies that he had threatened another with personal violence unless his testimony should be to a certain effect, and evidence is offered to prove that he did so, this constitutes an attempt to discredit the witness,

and it is competent to introduce evidence to sustain his credit as a truthful witness. *Lewis v. State* (1860) 35 Ala. 380.

In *Haley v. State* (1879) 63 Ala. 83, a witness for the state was asked on cross-examination if he had not, at a given time and place, made a statement to another touching the matter of his evidence, which was variant from the testimony he had given. He answered that he had not. Evidence was then heard as to the contradictory statements, and it was held permissible to sustain his credibility by proof of his general good character.

In *Holley v. State* (1894) 105 Ala. 100, 17 So. 102, a witness for the prosecution, after identifying one of the defendants, admitted on cross-examination that he had stated at various times and to different persons that he did not recognize any of the robbers on the night of the crime, and did not know who they were. The state was then allowed to introduce evidence of the good character of the witness for truth and veracity. In affirming this ruling, it was said: "The credit of a witness may be impeached by proof that he made statements out of court contrary to what he has testified at the trial, . . . and where evidence has been introduced by the defendant, by way of impeaching him, tending to show that one of the state's witnesses had made such contradictory statements, the witness's general character for truth having been thus, in a measure, assailed, it was competent for the state to introduce evidence to sustain his general character, and to show that it was good for truth and veracity."

So, in *Towns v. State* (1895) 111 Ala. 1, 20 So. 598, evidence was admitted as to the character of a witness for truth and veracity, after testimony had been given showing that her statements at the trial were in conflict with others she had previously made. The appellate court said: "Testimony having been introduced to discredit the witness . . . it was competent to introduce

evidence to support her general credit as a witness."

In *McClellan v. State* (1897) 117 Ala. 140, 23 So. 653, a witness for the state testified that the defendant had sold him whisky, and denied having made an alleged statement to the contrary, which was testified to by two witnesses. It was held that evidence as to his character was admissible, the court saying: "The defendant having introduced evidence tending to discredit the witness . . . it is not to be doubted that it was competent for the state to support him by calling witnesses to show that his general character was good."

In *Lusk v. State* (1900) 129 Ala. 1, 30 So. 38, a bastardy proceeding, the prosecutrix on cross-examination admitted that during the period inquired about she had been visited by and associated with men other than the defendant, and further, that she had told the justice of the peace at a preliminary hearing that she had never "kept company" with any other young man but the defendant. It was held proper to admit testimony as to her veracity, the court saying: "On behalf of the defense there was adduced the testimony of several other witnesses going to show that the prosecutrix had 'kept company' with other young men than the defendant. All this testimony was received without objection, so that no question of its materiality arises; and having been treated and doubtless made to do the offices of material testimony on the trial, the principle that a witness cannot be impeached by evidence of contradictory statements as to immaterial matters can have no application in the premises, even if these were absolutely immaterial matters, which we do not decide. That this evidence of what the prosecutrix testified on the preliminary hearing and of facts going to show that what she then deposed was untrue was in the nature of impeachment of her credibility as a witness on the final trial, there can, we think, be no question. Being such, it was clearly competent for the state in rebuttal to support her credibility by

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evidence of her general good character and of her general good character for truth and veracity.

While the assaulted party, in a trial for assault with intent to kill, was testifying, a predicate was laid for proving a contradictory statement, which he denied, but which the defendant proved was made, and it was held that an "objection to the proof of good character of the witness . . . was properly overruled, as he had testified as a witness and had been impeached by the defendant as to contradictory statements, and it was permissible to sustain his credibility by proof of good character." *Brown v. State* (1904) 142 Ala. 287, 38 So. 268.

In *Graham v. State* (1908) 153 Ala. 38, 45 So. 580, the defendant had examined witnesses as to contradictory statements made by a witness for the purpose of impeaching him, and it was held that "this opened the door for the state to sustain said witness by proof as to his general character."

In *Robbins v. State* (1915) 18 Ala. App. 167, 69 So. 297, writ of certiorari denied in (1915) 195 Ala. 696, 70 So. 1014, contradictory statements were shown to have been made by a witness touching the whereabouts of certain clothing alleged to have been worn by the defendant at the time of the commission of the offense, and it was held that the court did not err in allowing the state to prove good character of the witness for truth and veracity.

In *Mercer v. State* (1898) 40 Fla. 216, 74 Am. St. Rep. 135, 24 So. 154, wherein witnesses were introduced in rebuttal for the purpose of sustaining the general reputation and character for truth and veracity of several other state witnesses, it was held that the evidence was properly received against the objection of the defendant on the ground that their reputation for truth and veracity had not been attacked and was not in issue. The court said: "The general characters of the state's witnesses, whose reputation for truth and veracity in the communities in which they

lived was sought to be established and sustained by the challenged evidence, had not been attempted to be impeached by any direct general assault thereon, it is true, but the defendants, as to each of said witnesses, had not only on cross-examination and by their own witnesses undertaken to cast discredit upon them for truth and veracity, but introduced various witnesses who testified to contradictory statements alleged to have been made by them on other occasions respecting the subject-matter of their testimony, conflicting with the evidence at the trial."

In that case, in addition to the proof to sustain the general character of the witness for truth and veracity, the state attorney was allowed, over the objection of the defendants, to go further in its sustaining proof and to interrogate the supporting witnesses by independent questions as to the character for honesty of the sustained witnesses, and this was held to be reversible error, the court saying: "The general well-settled rule of law is, that when the character of a witness is gone into, the only proper object of inquiry is as to his reputation for truth and veracity. 1 Taylor, Ev. pp. 257 et seq. and cases cited. Neither his general character, nor particular phases or traits of character, can be gone into, but the inquiry must be confined to his reputation or character for truth and veracity."

In Georgia the rule is established by statute that a witness impeached by proof of contradictory statements may be sustained by proof of general good character, the effect of the evidence to be determined by the jury. Price v. State (1884) 72 Ga. 444. In that case one of the grounds of exception was that the court allowed the prosecution in a trial for homicide to prove by a witness that the general character of another witness was good, and that he would believe him on oath, the objection being that there was no impeachment of the witness by proof of bad character. It appeared, however, from a note by the lower court, that counsel for the de-

fendant had proved contradictory statements made by the witness, and it was held that "the Code, as well as repeated rulings of this court, affirms that attacks on the character of a witness by contradictory statements may be rebutted by proof of general good character for truth and standing in society."

And in Clark v. State (1903) 117 Ga. 254, 48 S. E. 853, the provision of the Georgia Code was applied in the official syllabus of the court as follows: "A witness sought to be impeached by previous contradictory statements may be sustained by proof of general good character, the effect of the evidence to be determined by the jury." Compare Bell v. State (1896) 100 Ga. 78, 27 S. E. 669, wherein the defendant sought to impeach the principal witness for the state by proof of general bad character and by proof of contradictory statements, and it was held erroneous to charge generally that "when it sought to impeach a witness by either of these modes, the credibility of the witness may be restored by proof of general good character," as the effect of such a charge would be to allow proof of good character to restore the witness to credibility, even though the truth of his testimony has been actually disproved.

Evidence of the general good character of a witness for the state was allowed in Clem v. State (1870) 33 Ind. 418, after the defense had impeached the witness by proof of statements made by him contradictory of the facts to which he had testified. A part of the opinion upon the general subject is quoted in (COLVIN v. WILSON, reported herewith) ante, 859.

In Harris v. State (1868) 30 Ind. 181, a trial for assault with attempt to rape, the prosecuting witness was asked if she had not made a certain statement. On her replying in the negative, an attempt to contradict her was made by a witness for the defendant. No evidence was offered in rebuttal, but the general rule was recognized by the court in the following words: "The character of the prosecuting witness, having been attacked,

was open to the state as well as to the defendant. Such character was not a matter peculiarly within the knowledge of either party. The failure to sustain on the one side, or to attack on the other, gave no legal ground for presumptions."

In *Stratton v. State* (1874) 45 Ind. 468, no objection was raised to the introduction in evidence of testimony sustaining the general moral character of a witness who had been impeached on the ground that he had made statements out of court conflicting with his evidence, but the question turned on the fact that the sustaining testimony related to a time two years prior to the alleged offense, and it was held that it was properly admitted.

In *Davis v. State* (1878) 38 Md. 15, it was held proper not only to admit evidence of the good character for truth and veracity of the witness who had been impeached by proof of contradictory statements, but also like evidence as to the character of the impeaching witness. The court said: "The credit of the two witnesses . . . was fairly put in issue, and it was equally competent for the state, under such circumstances, to support the general character of . . . for veracity. To permit the credit of the two witnesses to be put in issue, and then to deny to either side the right of sustaining its witness by proof of general character for veracity, would be to deprive the jury of evidence necessary to the determination of the issue thus submitted to them. And where such evidence has been admitted in support of the witness on the one side, it would be manifestly unjust to deny the same right to the other."

In *State v. Christopher* (1908) 134 Mo. App. 6, 114 S. W. 549, a prosecution for the illegal sale of liquor in violation of a local-option law, a detective employed and paid by the prosecuting witness testified to the fact that an illegal sale was made by defendant, as charged in the information. His testimony was contradicted in all essential matters by that of defendant and his witnesses, some of whom testified that the detective had

made statements out of court which contradicted his testimony in important particulars. The state then offered witnesses to prove that the general reputation of the detective for veracity was good, and it was held that the objection of the defendant was properly overruled.

In *State v. Cooper* (1880) 71 Mo. 436, the rule was recognized, but it was held that the evidence as to the character of the defendant for truth and veracity was properly excluded because prematurely offered, the court saying: "It was after his denial that he had made certain statements, and before the state introduced any evidence to contradict him, that the evidence was offered, and the offer was not repeated after the state's contradictory evidence was introduced."

In *Dixon v. State* (1883) 15 Tex. App. 271, on cross-examination of a witness, the proper basis was laid to prove that he had made prior inconsistent statements in relation to the alleged assault, directly contradicting the matters testified to by him. These contradictory statements were fully proved by evidence introduced for that purpose by the state. To counteract the effect of this impeaching testimony, and to support and give credit to the witness, the defendant offered several witnesses to prove that they were well acquainted with the general reputation of the witness, in the community in which he lived, for truth and veracity, and that it was good. To this testimony the district attorney objected, the objection was sustained by the court, and the defendant excepted. It was held, however, that the evidence should have been admitted, the court saying: "We have thus presented to us the question: Can a witness's testimony, which has been impeached merely by proof of prior conflicting statements made by him, be sustained by calling witnesses to show that his reputation for truth and veracity is good? Upon this subject Mr. Greenleaf says: 'Where evidence of contradictory statements by a witness, or of other particular facts, as, for example, that he had been committed to the house of correction, is offered by

way of impeaching his veracity, his general character for truth being thus in some sort put in issue, it has been deemed reasonable to admit general evidence that he is a man of strict integrity, and scrupulous regard for truth.' 1 Greenl. Ev. § 469. It has been denied by respectable authority that the text of Mr. Greenleaf, above quoted, is sound law. . . . But the weight of authority, we think, is in support of the text, and in favor of the admissibility of such evidence.

. . . In our own state the text of Mr. Greenleaf, above quoted, was cited and adopted as the correct rule by our supreme court in the case of *Burrell v. State* (1857) 18 Tex. 713. In that case the court say: 'When the credit of the witness had been impeached by proof that he had made a statement contrary to what he had testified on the trial, it was competent to admit evidence of his general good character for truth and veracity.' If the evidence is competent and material, it is admissible, and it would be error to reject it when offered in a proper case. We think the *Burrell Case* is conclusive of the question in this state, and that the rule there announced is not only supported by the weight of authority, but is in accordance with reason and justice. In the case before us, the credit of the defendant's principal witness was directly attacked in a manner calculated to seriously damage it, and thereby prejudice the defendant's case. It would certainly be most unjust to deny the defendant the privilege of removing, if he could, from the minds of the jury the unfavorable opinion as to the credibility of his witness, likely to be produced by the impeaching evidence of the state. To prove that the general reputation of the witness for truth and veracity was good in the community in which he resided might fully establish in the minds of the jury the credibility of the witness, or, at least, might so far accomplish that effect as to create in the minds of the jury a reasonable doubt as to the guilt of the defendant. Upon the credibility of this witness mainly rested the fate of the defendant. His testimony was to be weighed in the

balances against that of the state. By the attack made by the state upon his testimony, its weight was undoubtedly lessened. He had the right to cast into his side of the balances the good character of his witness for truth, that the jury might weigh it in connection with all the other evidence undergoing their consideration. We think the court erred in rejecting the evidence offered by the defendant in support of the credibility of the witness."

In *Thomas v. State* (1885) 18 Tex. App. 213, an indictment for forgery, a witness was impeached by proving contradictory statements made by him out of court, and the offer to prove his general good character and his reputation for truth and veracity was refused. This was held to be error. The court held that the party calling a witness may sustain him by showing that his reputation for truth and veracity is good, saying: "This has always been the rule in Texas, in both civil and criminal cases."

Where a witness in the trial of an indictment for murder testifies, implicating the defendant, who introduces evidence showing that prior to the trial the witness had made statements in which he said the defendant had nothing to do with the murder, it is not error to permit the state to prove that the general reputation of the witness for truth and veracity was good. *Crook v. State* (1889) 27 Tex. App. 198, 11 S. W. 444.

In *Tipton v. State* (1891) 30 Tex. App. 530, 17 S. W. 1097, a trial for incest, the prosecuting witness was contradicted as to several of her statements by witnesses who testified to statements made by her with regard to the paternity of her child, in conflict with her testimony as given on the witness stand. It was held not to be error to permit the prosecution to introduce several witnesses who testified to the general good reputation of the witness in the neighborhood in which she lived, for truth and veracity.

In *Ledbetter v. State* (1895) — Tex. Crim. Rep. —, 29 S. W. 479, the defendant sought to impeach a witness for the prosecution by showing that he

had made statements to others in conflict with his testimony. To support this witness, the state proved that his general reputation for truth and veracity was good, and it was held that this evidence was admissible, notwithstanding the contention of the defendant that such proof can only be made when a witness is sought to be impeached by evidence that his general reputation for truth and veracity was bad.

In *Runnels v. State* (1903) 45 Tex. Crim. Rep. 446, 77 S. W. 458, the appellant reserved a number of exceptions to the evidence offered and introduced by the state to prove the good character of two witnesses for truth and veracity in the community in which they lived. These bills, as explained by the court, showed that the testimony was introduced after the witnesses had been attacked by the appellant by showing they had testified to material facts at the examining trial different from their testimony on this trial before the jury. It was held the evidence was admissible.

Where in a trial for murder, for the purpose of impeaching and contradicting the defendant, who, while on the witness stand, stated that he had testified upon his habeas corpus hearing substantially the same as he did upon his final trial, his former evidence was read and showed some discrepancies and contradictions; it was held to be reversible error to refuse the offer of testimony of witnesses to prove that his general reputation for truth and veracity was good. The court said: "We deem it hardly necessary to cite authorities." *Swain v. State* (1905) 48 Tex. Crim. Rep. 98, 86 S. W. 335.

In *Dunlap v. State* (1906) 50 Tex. Crim. Rep. 504, 98 S. W. 945, a prosecution for arson, the defendant made a statement, when the cause of the fire was being inquired into before a justice of the peace, and the following day was called upon to make another statement, and this was used by the prosecution to contradict or impeach the defendant, who testified in his own behalf. It was held error to reject the testimony of witnesses to prove that his reputation for truth and veracity

was good, the court saying: "Whenever contradictory or apparently contradictory statements of the witness are used, it is always admissible to prove his reputation to be good in regard to truth and veracity."

In *Myers v. State* (1907) — Tex. Crim. Rep. —, 101 S. W. 1000, the defendant was charged with selling a bottle of whisky in violation of the local-option law. A witness for the state was cross-examined in reference to certain inconsistent statements, and having denied making them, he was contradicted by a witness for the defense. It was held that evidence as to the reputation of the witness for truth and veracity was properly admitted, the court saying: "Authorities are not necessary to be cited in support of this ruling of the court, for it is well settled."

So in *Graham v. State* (1909) 57 Tex. Crim. Rep. 104, 123 S. W. 691, in a prosecution for murder, where it was shown that a witness for the state had given different versions of the matters about which he testified, and he was contradicted after laying the predicate, it was held that the testimony of witnesses as to his good reputation for truth and veracity was admissible, the court saying: "The authorities are all in accord on this question."

In a prosecution for rape, where the defense sought to impeach the prosecutrix by showing contradictory statements and, among other things, introduced her testimony taken on the examining trial, it was held to be proper to admit evidence of her good reputation for veracity. *Brown v. State* (1907) 52 Tex. Crim. Rep. 267, 106 S. W. 368.

In *Alderson v. State* (1908) 53 Tex. Crim. Rep. 525, 111 S. W. 738, objection was made to the introduction of testimony as to the general reputation of the prosecuting witness for truth and veracity, on the ground that there had been no attack on his reputation. It appeared that an effort, partly successful, had been made to show contradictory statements made by the witness out of court, which would, if believed, seriously impair the weight

and credibility of his evidence, and it was held that the supporting testimony was properly admitted.

Where the defendant, in a prosecution for burglary, offered testimony of his reputation for veracity, it was held that its exclusion was error on account of contradictions of the defendant's account of the burglary by what was termed a confession. *ROBERTSON v. STATE* (reported herewith) ante, 853. The court, in reversing the judgment below, said: "Wherever a witness is contradicted by showing he made contradictory statements out of court from those made in court, we have always understood the rule to be that his reputation for truth and veracity can be sustained."

In *Becker v. State* (1916) 80 Tex. Crim. Rep. 186, 190 S. W. 185, where in the accused, in a trial for murder, was asked as to certain statements made prior to the killing, and was contradicted in his answer by a witness for the prosecution, it was held error to refuse to permit the defendant to prove his reputation for truth and veracity, notwithstanding that the court withdrew from the consideration of the jury the testimony of the impeaching witness. It was said: "Could and was the harmful and hurtful effect of this testimony removed by its withdrawal? We do not think so. It had been deliberately introduced for the purpose of impeaching appellant and breaking down his defense. It was on one of the vital issues in the case. It is a general rule, when it is thus sought to impeach and break down the testimony of the state or appellant, proof of general reputation for truth and veracity becomes admissible."

In *Morrison v. State* (1897) 37 Tex. Crim. Rep. 601, 40 S. W. 591, a prosecution for aggravated assault and battery, it was held to be proper for the court to permit evidence to prove the general reputation of a witness for truth and veracity after an attempt had been made to impeach him by showing that he had made statements contradictory to, and inconsistent with, his testimony, given on the trial of the cause, though his reputation for truth

in the neighborhood in which he lived was admitted.

But it has also been held that where the state admits that the general reputation of a witness for truth and veracity is good, supporting evidence will not be admitted, notwithstanding contradictory statements have been proved. *Mayhew v. State* (1913) 69 Tex. Crim. Rep. 187, 155 S. W. 191.

In *Renfro v. State* (1901) 42 Tex. Crim. Rep. 393, 56 S. W. 1013, a witness was asked if he had made a former statement different from his present testimony, and was shown his written evidence at the inquest, to which he answered that if it was there, it was true, and it was held that this was not contradicting the witness, but simply refreshing his memory, and hence did not authorize the introduction of evidence as to his reputation for truth and veracity.

That a witness whose reputation for veracity has been impeached by showing that he has made contradictory statements to his evidence on the trial may be sustained by proof of his general good character for truth and veracity was recognized in *Phillips v. State* (1885) 19 Tex. App. 158, as being the well-settled law of Texas. The facts of the case, however, showed that the doctrine was not applicable.

The general rule governing this class of testimony was accepted and discussed in *Payne v. State* (1899) 40 Tex. Crim. Rep. 290, 50 S. W. 363. The facts of that case, however, did not, in the opinion of the court, call for its application.

In *Harris v. State* (1906) 49 Tex. Crim. Rep. 338, 94 S. W. 227, the rule was laid down as well settled and repeatedly indorsed by an unbroken line of authorities. It was not applied in that case, however, as the facts showed that the attacking witnesses were offered after a rigid cross-examination, and that they attacked the reputation of the witness generally, and not on account of contradictory statements.

In *State v. Roe* (1840) 12 Vt. 93, a witness admitted on cross-examination that he had testified before a preliminary court and omitted certain testi-

mony, his reason being that he had been threatened and was afraid of bodily injury and violence. The prosecutor, to sustain the testimony of this witness, offered several witnesses to prove that his general character for truth and veracity was good, and it was held that the testimony was properly admitted, the court resting its decision on *Fuller v. Sanford* (Vt.) decided in 1836, but not reported.

In *State v. Staley* (1899) 45 W. Va. 792, 32 S. E. 198, a prosecution for murder, the defendant was contradicted as to certain threats alleged to have been made against the deceased, and it was held to be error to refuse the offer of the defense to prove by witnesses well acquainted with the defendant, and with his general reputation for truth and veracity in the community in which he lived, that he sustained a good and unimpeachable reputation for truth and veracity, it was said by the court: "The credibility of a witness who has been impeached by proof of a former declaration at variance with his testimony may be supported by evidence of his good character for truth and veracity." In the same case a witness for the prosecution was similarly impeached as to a contradictory statement, and the admission by the court of evidence as to his reputation for truth and veracity was held to be proper on the same ground.

2. In civil action.

In *McEwen v. Springfield* (1879) 64 Ga. 159, a civil suit for damages for the murder of the plaintiff's husband, statements made by a witness at the time of the killing were shown to be in conflict with his answers to interrogatories read at the trial, and it was held to be proper to admit evidence as to the general good character of the witness. However, it was held to be error to charge as follows: "If a witness be impeached by both methods, that is, by disproving the facts testified by him, and by proof of contradictory statements, and he be supported by other witnesses, who testify to his general good character and that he is worthy to be believed, then the jury should understand such evidence as

supporting him to be judged of by the jury, in respect to the contradictory statements, but that it is inapplicable as far as relates to the evidence by which a fact or facts he may testify to is disproved, if any. Or, in other words, a witness impeached by proof of contradictory statements made by him should be treated as having his credit restored by satisfactory proof of general good character. But if a fact or facts testified to by a witness be disproved to the satisfaction of the jury, then evidence of general good character should not be treated as re-establishing such disproved facts." In reversing the judgment of the lower court it was said: "This charge of the court, in view of the evidence in the record, was to nullify what it had previously charged as to the restoration of the credibility of the witness by proof of his general good character. The question made by the evidence in the record was whether Horn had been impeached by having made contradictory statements in view of the testimony as to his general good character, and the effect of the charge was to tell the jury that proof of his general good character should not be treated as re-establishing his credibility."

Prior to the adoption of the statutory provision in Georgia a contrary ruling was made in *Stamper v. Griffin* (1853) 12 Ga. 450, and the subject was summed up by the court as follows: "After a witness has been examined in chief, his credit may be impeached in various modes besides that of exhibiting the impracticability of his story by a cross-examination. 1. By disproving the facts stated by him, by the testimony of other witnesses. 2. By general evidence affecting his credit for veracity. 3. By proof that he has made statements out of court contrary to what he has testified to at the trial. Here the question is, whether when a witness has been discredited, by proving that he made contradictory statements, it is competent to support his testimony by proof of his general good character for truth and veracity. Mr. Phillipps asserts that it is reasonable to admit general evidence, but cites no authority. Mr. Greenleaf

states the proposition in the very language of Phillipps, and, in support of the proposition, refers to the case of *Rex v. Clarke* (1817) 2 Starkie (Eng.) 241. See 1 Greenl. Ev. § 469. Upon reference to this book, it will be found not to support the principle for which it is quoted. In the case stated by Starkie the witness was asked whether she had not been twice committed to Bridewell, and answered that she had. This went to affect her general reputation; and the party who called her was properly allowed to prove that since those commitments her character had been fair and good. Mr. Starkie must be understood, therefore, as meaning only, that where the questions put in the cross-examination and answers did impeach the general character of the witness, the other party might rebut, by proving a general good character. But it never was decided that if a witness was contradicted as to any fact of his testimony, either by his own declarations at other times or by other witnesses, evidence might be admitted to prove his general good character. Suppose a witness contradicted himself on the stand, does this give a right to introduce evidence of general character? It was never so pretended. Why, any more, should it be allowed when he has contradicted himself by making different statements as to the facts? In *Russell v. Coffin* (1829) 8 Pick. (Mass.) 143, this point was considered, and the practice, as stated in the text-books to which I have referred, repudiated. Parker, Ch. J., says: 'If it were to obtain, great delay and confusion would arise, and as almost all cases are tried upon controverted testimony, each witness must bring his compurgators to support him when he is contradicted; and indeed it would be a trial of the witnesses, and not of the action.'

In *Clark v. Bond* (1868) 29 Ind. 555, the question on which the case turned was whether there had been a partnership between the parties in certain transactions. Several of the defendant's witnesses were impeached by evidence that they had stated at other times matters not consistent with material testimony which they gave un-

der oath. The defendant then offered to show, by a number of persons, that the general character for truth of the impeached witnesses was good, and it was held that the court's refusal to permit this was erroneous, as opposed to "sound reason and the great weight of authority."

In *Louisville, N. A. & C. R. Co. v. Frawley* (1886) 110 Ind. 18, 9 N. E. 594, prior to the trial the defendant had examined the plaintiff under oath, and later, during his cross-examination as a witness, he was asked whether he had at the prior examination made certain statements in which he had given an account materially different from that stated at the trial. Part of the prior examination was then introduced by the defendant, with a view to contradicting the testimony given by the plaintiff at the trial, and subsequently the plaintiff was permitted to introduce testimony to the effect that his general reputation for truth and veracity in the neighborhood in which he lived was good. It was held that "this was in accordance with the rule that where a witness has been impeached by showing that he has made statements out of court contradictory of those made at the trial, evidence of his general good character, and of his good repute for truth and veracity, may be introduced."

In *Carroll County v. O'Connor* (1893) 137 Ind. 622, 35 N. E. 1006, wherein a witness was impeached by the proof of statements made out of court in conflict with his testimony, and it was permitted to prove his general reputation for truth and veracity, it was said by the court: "Appellants concede that this permission was authorized by the rulings of this court, but it is urged that the courts of other states hold to the contrary, and that our cases should be overruled. We are unable to concur in this demand, as the rule is not only reasonable, in our judgment, but it has prevailed in this state for more than twenty-five years."

In *Miller v. St. Louis R. Co.* (1878) 5 Mo. App. 471, 9 Am. Neg. Cas. 504, the facts do not appear, but the rule was laid down in the opinion of the court as follows: "As the case must

go back for a retrial, we may say that there is nothing in the objection of appellant to the testimony in support of plaintiff's character. His character for truth was attacked by defendant, not by direct evidence, but by the character of the cross-examination, and by evidence of statements by him, out of court, different from those sworn to by him on the stand. It is now well settled that where this is the case, it is competent for the party calling the witness to give evidence of his general good character."

In *Walker v. Phoenix Ins. Co.* (1895) 62 Mo. App. 209, it was held that the court below erred in refusing to allow the defendant to introduce proof of the good reputation for truth and veracity of a witness whose character in this respect was attacked, not by direct evidence, but by cross-examination and by evidence of statements and reports made by him out of court, different from those sworn to on the witness stand.

In *Berryman v. Cox* (1898) 73 Mo. App. 67, a civil action for damages for assault and battery, the defendant called an eyewitness to the affray who had testified as to the blows struck. He was cross-examined as to prior contradictory statements and evidence introduced to impeach him on this ground. The court then refused an offer of evidence as to his character for truth and veracity, and this was held reversible error, the appellate court saying: "As the plaintiff attacked the character of the witness . . . for truth by showing that he had given contradictory statements of the matter out of court different from that he had testified to in court, it was competent for the defendant, who had called him, to give general evidence in support of his good character, and therefore the action of the court in rejecting the defendant's offer was error."

In *Alkire Grocer Co. v. Tagart* (1899) 78 Mo. App. 166, the rule was applied to a witness who was a party to the suit. On this phase of the question it was said by the court: "Defendant occupied the capacity of witness in the cause and therefore the

question must be considered from that standpoint. It is a rule so well understood it need only be stated, that if a party calls witnesses to impeach the character of a witness for his opponent for truth and veracity, the latter may in turn call witnesses to sustain his character in that respect. This rule necessarily applies though the witness attacked is one of the parties to the cause. And a direct attack on a witness for truth and veracity is not the only means resorted to to impeach him. It is frequently done in cross-examination by showing that he has given different accounts or made contradictory statements. In such case the party calling him may prove his good character for truth and veracity. . . . So we hold the same rule would apply to a party in his character as a witness in the cause."

In *Browning v. Chicago, R. I. & P. R. Co.* (1906) 118 Mo. App. 449, 94 S. W. 315, the defendant introduced evidence to impeach the veracity of the plaintiff by showing that he had made contradictory statements in reference to material facts in the case, and the court permitted the latter to introduce evidence as to his good character and reputation for truth. In answer to the contention of the defendant that "the mere contradiction of the testimony of the plaintiff, where he is a witness, will not justify the introduction of proof by him of his general reputation for veracity or honesty, when the matter shown in contradiction is in the nature of independent, and not impeaching, evidence, as where it is in the nature of an admission by the plaintiff against his interest," it was said by the court: "The evidence introduced did not consist of proof of independent facts tending to contradict plaintiff, but of evidence showing that he had made statements and admissions in conflict with the evidence he had given on the trial. In other words, impeaching evidence in contradistinction to the evidence merely contradictory."

In *Isler v. Dewey* (1874) 71 N. C. 14, a witness for the plaintiff was cross-examined as to statements made

at different times contradicting his testimony, and evidence of the former statements was testified to by other witnesses for the defendants, the latter objecting to the admission of evidence as to character for truth and veracity, on the ground that that was not in issue, and was in fact conceded, the impeaching evidence only questioning his recollection. But it was said by the court: "The very nature of his evidence, and the peculiar situation of the witness when he testifies that his own deed was fraudulent, puts him under a cloud, which grows darker when it is shown that his statements have been inconsistent and contradictory. The bare statement in the record puts an imputation upon the character of the witness which cannot be removed by the gracious admission of counsel that they only impeach his memory, and not his character. Who can tell what impression was made upon the jury by these circumstances, so damaging to the testimony of the witness? His character was necessarily impeached, and he therefore had the right to prove a good character if he could do so."

In *Johnson v. Brown* (1879) 51 Tex. 65, a witness to the execution of a will was impeached on the ground that he had made a statement to the effect that there was no will of the decedent in existence, and it was held proper to admit evidence as to his general character for truth and veracity. This case goes further in holding that where another witness to the will was asked as to contradictory statements alleged to have been made by him, his reply being that he did not remember having made them, evidence was admitted of his general good reputation.

In *Fox v. Robbins* (1902) — Tex. Civ. App. 70 S. W. 597, a witness for the defendants was asked if he had made statements out of court contradictory of his testimony given on the trial. He denied having done so, and the plaintiffs proved by two witnesses that he had made such statements. It was held that his credibility as a witness having, in effect, been attacked, evidence as to his general reputation for truth and veracity was admissible.

In *Sheppard v. Love* (1902) — Tex. Civ. App. —, 71 S. W. 67, the appellants complained of the court's excluding testimony offered to prove the reputation for truth and veracity of one of their witnesses whose reputation had been attacked by showing that he had made contradictory statements. This was held to be error, the court saying: "Appellees introduced testimony which constituted an attack upon the character of the witness for truth and honesty, and testimony supporting his character was competent."

In *Contreras v. San Antonio Traction Co.* (1904) — Tex. Civ. App. —, 88 S. W. 870, the rule was applied in an action for injuries due to the alleged negligence of the defendant. The defendant showed by two witnesses that the plaintiff had made statements out of court contradictory to his testimony as a witness in the case, and it was held that this went directly to his credibility as a witness, making testimony as to his reputation for truth and veracity admissible. The court distinguished the case of *Gulf, C. & S. F. R. Co. v. Ramey* (1894) 86 Tex. 455, 25 S. W. 406, relied on by the defendant to sustain his proposition that when the subject-matter of the contrary statement is material to issues in the case, the character of the witness for truthfulness is not attacked, and testimony of his character or reputation is not admissible, saying: "That case, as we understand it, does not lay down any such rule. It declares the well-established principle that a mere contradiction of a witness's testimony by that of other witnesses testifying in reference to an issue in the case does not authorize the introduction of testimony to sustain the former by proof of his general reputation for truth and veracity. It holds that testimony directed to the special purpose of attacking his character for truth and honesty makes such evidence proper, and the court there applied this rule to a case in which a party sought to make an attack through the medium of an irrelevant issue."

In *Missouri, K. & T. R. Co. v. Dumas* (1906) 42 Tex. Civ. App. 274, 93 S. W.

493, an action for negligence, the defendant introduced evidence for the purpose of showing that the plaintiff had on other occasions made statements at variance with his statements on the trial, and tending to show that the plaintiff had simulated the injury. It was held that "the fact that his reputation for truth and veracity was good . . . was admissible in corroboration of his testimony that in fact he was injured."

In *Kansas City Southern R. Co. v. Williams* (1908) — *Tex. Civ. App.* —, 111 S. W. 196, an action for injuries by a railroad employee due to the alleged negligence of the railroad, it was held that where the plaintiff had impeached the testimony of a witness for the defendant by showing that he had made statements out of court inconsistent with those he made while testifying upon the trial, the defendant should be permitted to introduce in evidence the depositions of a number of witnesses as to the good reputation for truth and veracity of the impeached witness.

In *Houston Electric Co. v. Faroux* (1910) 59 *Tex. Civ. App.* 232, 125 S. W. 922, an action by a passenger for injuries received in a railroad accident, wherein the defendant pleaded that the plaintiff did not receive any injuries therein, but that such injuries existed anterior to the date of the accident, and offered the testimony of several witnesses to show that the plaintiff had made contradictory statements, it was said by the court: "This was tantamount to charging, both by pleading and proof, that the plaintiff was attempting to recover for injuries which he knew were not the result of the derailment and for which he knew the defendant was not liable, and was, in effect, a charge that plaintiff was fraudulently attempting to mulct the defendant in damages which it should not pay. This was, in effect, an attack upon his credibility as a witness and an impeachment of his character for truth, and he had the right to strengthen his testimony to the effect that he was injured in the derailment, as he claimed to be, by proof

of his general reputation for truth and veracity."

In *Paine v. Tilden* (1848) 20 *Vt.* 554, the plaintiff's witness was contradicted in material parts of his testimony and was also proved, with a view to impeach his credit, to have given different and contradictory accounts respecting the subject-matter of his testimony from those sworn to by him in court. It was held that the plaintiff could introduce evidence to support his general character for truth and veracity, the court saying: "It is now well settled that whenever the character of a witness for truth is attacked in anyway, it is competent for the party calling him to give general evidence in support of the good character of the witness. And we do not think it important whether the character of the witness is attacked by showing that he has given contradictory accounts of the matter out of court, and different from that sworn to or by cross-examination or by general evidence of want of character for truth."

In *George v. Pilcher* (1877) 28 *Gratt. (Va.)* 299, 26 *Am. Rep.* 350, it was said: "When a witness is thus impeached, the party calling him has the right to sustain him, and for that purpose it would seem but just and reasonable that he should be allowed to introduce evidence of the general reputation of the witness for truth. All the authorities concur that such corroborating evidence is admissible where the character of the witness is attacked by direct evidence; but there is much conflict among them as to its admissibility where the attack is made in any other mode. . . . In answer to the evidence of contradictory statements, and for the purpose of corroborating the testimony of the witness whose veracity has been thus impeached, it seems reasonable to be allowed to show that he is a man of the strictest integrity and of scrupulous regard to truth. 1 *Phillips, Ev.* 306, 307. See 1 *Greenl. Ev.* *Redfield's* ed. § 469 and notes. Many of the decisions in the American states hold that the evidence is admissible only when the general character of the witness, or his character for truth, is as-

sailed by direct evidence as to such character, or by proof on cross-examination of extrinsic facts going to general character; and that it cannot be received to sustain a witness on account of inconsistencies in his own statements on cross-examination, or on account of statements proved to have been made by him out of court contradictory of statements made by him in court, or on account of proof by other witnesses of material facts irreconcilable with the facts proved by the witness, although such proof may impute fraud or falsehood to the witness. . . . Other state authorities, however, lay down a much more liberal rule. . . . We are not aware that the precise question passed upon by these decisions has ever come before this court for determination until now, and in the conflict of authorities in other states, we are called upon to declare the true rule in Virginia; and we are of opinion that whenever the character of a witness for truth is attacked, either by direct evidence of want of truth, or by cross-examination, or by proof of contradictory statements in regard to the material facts, or by disproving by other witnesses material facts stated by him in his examination, or, in general, whenever his character for truth is impeached in anyway known to the law, the party calling him may sustain him by evidence of his general reputation for truth. The rule, as we declare it, has, we believe, been generally regarded as the true rule by the bench and the bar in this state, and has been generally followed in the practice." This ruling was approved and the doctrine so laid down adopted in *Reynolds v. Richmond & M. R. Co.* (1895) 92 Va. 400, 23 S. E. 770, although the facts on that case precluded the application of the rule.

In *First Nat. Bank v. Blakeman* (1907) 19 Okla. 106, 12 L.R.A. (N.S.) 364, 91 Pac. 868, the rule was recognized and fully discussed, but the facts of the case forbade its application. The evidence offered was to the truth and veracity of the defendant, when there had been no evidence offered for the purpose of impeaching his testimony, nor any attempt made

to show that he had made contradictory statements, and it was held to be error to admit evidence as to his reputation for truth and veracity.

So, in *Fulkerson v. Murdock* (1892) 53 Mo. App. 151, affirmed in (1894) 123 Mo. 292, 27 S. W. 555, the rule was recognized, though the facts of the case rendered it inapplicable. It was said: "Before this class of testimony can be admitted, the veracity of the witness must have been directly impeached in some manner. The utmost limit to which cases have extended the rule is to admit evidence of general reputation supporting the character and veracity of a witness, where it is shown that he had on other occasions made statements contrary to his evidence. 1 Greenl. Ev. § 469. The soundness of extending the rule even to that extent has been seriously questioned by high authority."

In *Paxton v. Dye* (1866) 26 Ind. 393, the rule was recognized, but it was held in that case that the reply of the witness on cross-examination was not contradicted by the impeaching witnesses, and that their answers were not inconsistent with him, hence it was proper to exclude evidence as to the character of the witness sought to be impeached.

In *Garr, S. & Co. v. Shaffer* (1894) 139 Ind. 191, 38 N. E. 811, an action to foreclose a chattel mortgage, the plaintiff introduced evidence to show that the defendant, at the time of the service of the writ, admitted the ownership of the property. On being afterwards called as a witness for the defense, the plaintiff denied these admissions, and also denied that the conversation in which it was claimed the admissions were made ever took place. On the theory that the witness was thus impeached by evidence as to statements made by her out of court, contradictory to those made by her as a witness on the trial, other witnesses were called, who testified as to her general character and her good repute for truth and veracity. It was held that "proof of her admissions that the property was not her own was original testimony against her, and not impeaching simply. Consequently,

it was error to allow her to introduce character evidence in her favor." The court, however, said further: "But, on that hearing, it was also held that the evidence as to statements of the witness Sarah A. Shaffer was applicable to all the actions, which were tried together, the evidence being heard but once. If that were true, then, as to those actions to which she was not a party, such evidence as to statements by her out of court, in contradiction to her statements as a witness in court, would be impeaching; and, consequently, witnesses might be called to sustain her character as to those cases. For the court, hearing the evidence once for all, the cases might apply it in its proper order; and if her evidence as to ownership of the property were applied by the court before applying the evidence as to contradictory statements made by her out of court, then, certainly, this last evidence would be impeaching, and witnesses as to her character for truth and veracity might be introduced."

See also *Tedens v. Schumers* (1884) 14 Ill. App. 607, wherein it was said: "Counsel for the plaintiff attempted to justify the admission of this evidence upon the ground that the proof made by the defendants of the plaintiff's statements on former occasions, at variance with his testimony on the trial, had a direct tendency to impeach his veracity, and thus rendered evidence of his general character in that respect admissible. In this we think they are in error. The usual mode of impeaching a witness, by proving his statements out of court variant from his testimony at the trial, is by asking him on cross-examination as to such former statements, and if he fails to admit them, to then make proof of such statements by other competent evidence. Here the plaintiff's admissions were not proved by way of showing statements out of court variant from his testimony at the trial, but as admissions of a party to the suit and as evidence in chief in support of the issues on the part of the defendants. The contradiction was made to appear after the statements out of court had been proved, and then not from ques-

tions put to the witness on cross-examination, but from such as were put to him by his own counsel, when recalled in rebuttal. An attempt to impeach a witness is a submission to the jury by the party attempting the impeachment of a collateral issue as to the veracity of the witness, and such issue cannot be raised or submitted by the party who puts the witness on the stand. By calling the witness he assumes, or vouches, for his general good character for veracity, and he is thereby precluded from raising that question. It is for the other side, and for him alone, to determine whether that character shall be assailed, and the issue cannot be forced upon him by any questions put to the witness by the party producing him. All that can be said in this case, so far as this mode of impeachment is concerned, is, that there is a contradiction between the plaintiff and the witnesses for the defendants as to a fact material to the issues. A mere contradiction in the testimony of two witnesses does not necessarily involve the moral character of either, and will not alone authorize the admission of evidence as to their general good character for truth."

A distinction is observed between an attack on the character of a witness as such for credibility and the character of the testimony given for belief. It is only when the character of the witness for credibility is directly attacked by general evidence regarding his standing and character for truth and veracity, or by showing that he has made contradictory or inconsistent statements, either out of court or in court, or has done some act affecting his credibility, that sustaining evidence can be used. But when the character of the testimony given by a witness is attacked only by showing its improbability, or by other testimony conflicting therewith, sustaining testimony of his reputation cannot be admitted. The reason for the distinction is that when there is only a conflict in the testimony of opposing witnesses, the opposing witnesses on both sides could be supported by sustaining testimony in regard to their standing

and character, and the trial would be prolonged indefinitely. Besides the improbability of the testimony given by a witness does not directly attack the character of the witness for credibility. *Stevenson v. Gunning* (1892) 64 Vt. 601, 25 Atl. 697. In that case a witness had been cross-examined at great length, and it was claimed by the defendant that her story was improbable and unworthy of belief, that it was false and perjured. The defendant did not claim that she had made statements out of court different from her statements in court, nor was any foundation attempted to be laid by the cross-examination for such contradiction, and it was held that it was not error to exclude testimony offered in rebuttal to show that she sustained a good reputation and character for truth and veracity.

The distinction between an attack on the character of a witness and the character of his testimony is recognized also in *Sweet v. Sherman* (1848) 21 Vt. 23, wherein the plaintiff's character for credibility was attacked and sustaining evidence was held properly admitted. It appeared that the defendant had given in evidence the declarations of the complainant inconsistent with her testimony on the stand, and the court said: "It can make no difference whether it appear from the cross-examination or from the examination of other witnesses, that the witness on the stand has given a different relation from the one given on the trial."

II. View that testimony is inadmissible.

a. Rule stated.

In some jurisdictions the courts have held that testimony as to the truth and veracity of a witness is not admissible unless his reputation in this respect has been assailed, and that questioning his credibility by showing that he has made inconsistent statements is only a contradiction of his testimony, and not an impeachment of his truthfulness. Under such circumstances, therefore, sustaining testimony is excluded.

California.—*People v. Bush* (1884) 65 Cal. 129, 3 Pac. 590, 5 Am. Crim. Rep. 459.

Iowa.—*State v. Archer* (1887) 73 Iowa, 320, 35 N. W. 241; *State v. Owens* (1899) 109 Iowa, 1, 79 N. W. 462; *State v. Hoffman* (1907) 134 Iowa, 587, 112 N. W. 103.

Kentucky.—*Vance v. Vance* (1859) 2 Met. 581; *Shields v. Conway* (1909) 133 Ky. 35, 117 S. W. 340.

Massachusetts.—*Russell v. Coffin* (1829) 8 Pick. 143; *Brown v. Mooers* (1856) 6 Gray, 451.

New York.—*People v. Rector* (1838) 19 Wend. 583; *People v. Hulse* (1842) 3 Hill, 313; *Starks v. People* (1847) 5 Denio, 106; *Frost v. McCargar* (1859) 29 Barb. 617.

Ohio.—*Webb v. State* (1876) 29 Ohio St. 351.

Oregon.—*Sheppard v. Yocum* (1881) 10 Or. 402; *First Nat. Bank v. Commercial Assur. Co.* (1898) 33 Or. 43, 52 Pac. 1050.

Pennsylvania.—*Wertz v. May* (1858) 21 Pa. 274.

South Carolina.—*Farr v. Thompson* (1839) 15 S. C. Eq. (Cheves) 37; *Chapman v. Cooley* (1860) 46 S. C. L. (12 Rich.) 654; *State v. Rice* (1897) 49 S. C. 418, 61 Am. St. Rep. 816, 27 S. E. 452.

"When witnesses contradict each other, the character of the one is as much impeached as that of the other; and there would be as good ground for admitting evidence of the good character of the one as of the other. And where a witness is impeached by evidence of his having previously made statements inconsistent with his testimony, it amounts to nothing beyond contradictory evidence. He must be asked if he made such statements, and if he answers that he did not, evidence that he did is admissible; if he answers that he did, that is the end of the matter." *People v. Bush* (Cal.) *supra*.

b. Application of rule.

1. In criminal prosecution.

In *State v. Archer* (1877) 73 Iowa, 320, 35 N. W. 241, a prosecution for murder, the state, after laying the proper foundation, introduced evi-

dence tending to prove that the defendant and his wife had made previous statements of fact contradictory to those detailed by them as witnesses. It was held that the offer to prove that their general good moral character, and their general reputation for truth, were good in the neighborhood in which they lived, was properly excluded, the court saying: "We believe the practice in this state has been to limit such testimony to cases where the general character or reputation of the witness has been attacked by the party against whom he testifies. Whether such evidence is allowable where it is claimed the witness has made contradictory statements has never been directly determined by this court. There appears to be a conflict of authority upon the question."

Following the decision in *State v. Archer* (Iowa) supra, the rule was accepted, but not applied, in *State v. Owens* (1899) 109 Iowa, 1, 79 N. W. 462, wherein the defendant was indicted and tried for the larceny of certain cattle. It was said by the court: "In this state, to show that a witness has made statements in contradiction of his testimony does not afford a foundation for introducing evidence to sustain his reputation."

In *State v. Hoffman* (1907) 134 Iowa, 587, 112 N. W. 103, a prosecution for embezzlement, on the cross-examination of the defendant as a witness his attention was called to conflicting statements which he had made in his testimony before the grand jury, for the purpose of affecting his credibility. In surrebuttal a witness was called for the defendant and asked as to his general reputation for truth and veracity. Affirming the exclusion of this testimony, the court said: "Assuming that the witness would have testified that defendant's reputation as to truth and veracity was good, we are asked to hold that where a witness is impeached by showing inconsistent statements, his testimony may be re-enforced by proof of general good character as to truth and veracity. On this question the authorities are in direct conflict. See 2 Wigmore, Ev. § 1108, where the view is

expressed that general good reputation for truth and veracity is too remote to be admissible in support of the testimony of a witness impeached by proof of conflicting statements. The authorities in this state support that view. *State v. Archer* and *State v. Owens* (Iowa) supra. We see no occasion for changing the rule which has been adopted by this court on the subject. Evidence of good character is usually admissible only where character has been assailed; for, in the absence of some attack, the character of the witness is presumed to be good. Contradictory statements are shown, not for the purpose of proving his general character as to truth and veracity to be bad, but to show that his testimony as to the particular matter with reference to which he is contradicted by proof of conflicting statements is not entitled to credit."

In *People v. Rector* (1838) 19 Wend. (N. Y.) 583, in a trial for murder, it was shown by the cross-examination that a witness was a man of grossly immoral habits and conduct. It was held that evidence was admissible, in reply, to show that the general character of the witness for truth was good. It was not denied that he had been guilty of deliberate falsehood, either in his statements previous to or at the trial, but the decision was rendered because of the general impeachment of his character. In speaking of the extension of this class of testimony, the court, said: "Where shall we stop if we depart from this rule? The credit of a witness may not only be shaken, but utterly overthrown, by disproving the facts to which he testifies. If evidence of general character is not admissible where the witness has only been contradicted by others, may it be given where he contradicts himself by conflicting statements, either in or out of court? Or if the rule to be established is, that the witness may be supported whenever his moral character is assailed, how shall it be determined what amounts to an impeachment; and so, too, of contradictory statements, whether made in or out of court. Both the credit and character of a witness

may be affected by a doubtful, hesitating, or apparently disingenuous manner in giving his evidence. The jury may draw unfavorable conclusions against the credit of a witness upon appearances, which can never be communicated to those who are not present at the time. Shall a party, whenever he thinks the credit of his witness impaired, be allowed to give evidence of his general character for truth? It is apparent that such a course will multiply collateral issues to an indefinite extent, and however plausible may be the argument that such a course is calculated to advance the ends of justice, I cannot doubt that it will have the contrary effect. The only plain and practical rule is that which allows a party to give evidence in support of the character of his witness, in answer to evidence of general character coming from the other side, and in that case only. This is, I think, the rule of the common law, and could a better one be devised, I should not feel myself at liberty to follow it." And by the Chief Justice it was said: "I lay out of view the contradiction of the facts testified to by Gillespie, by other witnesses in behalf of the people; this lays no foundation for general evidence in reply; it does not necessarily implicate character; it may turn upon a question of memory, and exist where all the witnesses are equally honest. I will also omit the contradictory relation of the transaction given by this witness out of court, when compared with that under oath,—though that may well have tended to impeachment,—and come to that part of the cross-examination where evidence is drawn from him directly touching his moral character."

Where, in a prosecution for rape, the defendant attempted to discredit the prosecutrix by showing that the account which she had given of the matter out of court did not in all respects correspond with her statements as a witness, it was held that the public prosecutor was not at liberty to call witnesses to the general good character of the complainant. *People v. Hulse* (1842) 3 Hill (N. Y.) 313, wherein it was said: "The general

rule is, that a party can only give evidence of the good character of his witness where impeaching witnesses have been first called on the other side. By impeaching witnesses I mean such as have spoken to general character, or character for truth, and not such as have merely given a different account of the facts, or proved that the witness has made declarations out of court inconsistent with his testimony on the trial. The question of character must be made by the opposite party, and not by the one who calls the witness. There is one case, and I believe only one, in the English courts which departs from the general rule that such evidence is only admissible in answer to impeaching witnesses on the other side. In *Rex v. Clarke* (1817) 2 Starkie (Eng.) 241, the prosecutrix admitted on her cross-examination that she had some years before been twice sent to the house of correction on charges of having stolen money from her master; and Holroyd, J., admitted evidence to show that her subsequent conduct had been good. He thought the evidence admissible where the character of the witness was attacked upon the cross-examination, as well as where the impeachment arose aliunde. This decision seems not to have been regarded as sound law in *Doe ex dem. Reed v. Harris* (1836) 7 Car. & P. (Eng.) 330, which was tried nearly twenty years afterwards. The defendant called the solicitor who drew the will to prove its execution, and 'in the cross-examination of the witness it was sought to impeach his character; and it was proposed by the defendant's counsel to call witnesses to prove his good character.' But Coleridge, J., said, 'This may be done when the attorney who prepared the will is dead, but I have never known such evidence received when he is alive;' and it was rejected. By taking the case of *Rex v. Clarke* for good law, it only proves that where there has been an attack, in the cross-examination, upon the moral character of the witness, as by showing him formerly guilty of a crime, evidence of subsequent good conduct may be received, although impeaching witnesses

have not been called. Mr. Phillipps, in the 7th edition of his valuable book upon Evidence, says: 'In answer to evidence of contradictory statements, and for the purpose of corroborating the testimony of the witness whose veracity has been thus impeached, it seems reasonable to be allowed to show that he is a man of the strictest integrity and of scrupulous regard to truth.' Vol. 1, pp. 306, 307. But he cites no authority in support of the position. This saying of Phillipps has been since mentioned by Mr. Greenleaf, but not in such a way as to signify his approval of the doctrine. Greenl. Ev. 521. I want the authority of an adjudged case for such an innovation upon the rules of evidence.

. . . The rule with us, then, seems to be this: Where a party attacks the general character of a witness on the other side, either by calling impeaching witnesses, or by drawing out extrinsic facts going to general character on the cross-examination, sustaining evidence may be given in reply. That rule does not warrant the course which was pursued on this trial. There had been no attack in any form upon the general character of the witness."

In *Starks v. People* (1847) 5 Denio (N. Y.) 106, the defendant was indicted for arson in burning a barn. On the trial of the case a witness for the prosecution was impeached by showing statements made inconsistent with his testimony. The district attorney then offered to prove that this witness's reputation for morality and truth was good, and the court admitted the testimony. In reversing the judgment, it was said: "The court also erred in allowing the district attorney to give evidence that his witness . . . was of good general character for morality and truth, for the reputation of the witness had not been attacked by the defendant. The only ground on which this evidence can be supposed to have been received is, that the defendant gave some evidence that the witness, on former occasions, had made certain statements which he now denied to have made, and that his testimony was in some respects contra-

dicted by other evidence before the jury. Granting all this to have been shown by the defendant, so that the truth of the evidence given by the witness was thus drawn in question, it furnished no ground for allowing the prosecutor to give evidence of the general good character of his own witness."

In *Webb v. State* (1876) 29 Ohio St. 351, a trial for forgery, the defendant gave evidence tending to show that a witness for the prosecution had made "certain material statements and admissions about said case at divers times off the witness stand, which he now denied having made, and sworn differently on a former trial from what he did on this trial." The state was then allowed to call witnesses to prove that the reputation of the witness for truth was good. On the ground that the impeaching evidence charged the witness with felony it was held that the sustaining testimony was properly admitted, but on the question of contradictory statements it was said: "Whether the impeachment of the credit of a witness, by showing that he has made statements at other times contradictory of his testimony given on the trial, lays a sufficient foundation for sustaining him by proof of his general reputation for truth, is a question which has given rise to great contrariety of decision. . . . Where the only impeachment of the witness consists of conduct or of statements made at other times inconsistent with his testimony, the better rule, in our opinion, is not to allow proof of his general character or reputation for truth for the purpose of sustaining his credit. If the impeaching evidence should appear from the conduct of the witness, or his contradictory statements made during his examination on the trial, it would not be claimed that the effect of such evidence ought to be allowed to be overcome by proof of the general reputation of the witness for truth. Yet the effect of the impeaching evidence in the two cases would be substantially the same. Besides, to be exactly just, if the impeached witness is to be sustained by evidence of char-

acter, similar evidence ought to be allowed to sustain the impeaching witnesses. The evil that would result from multiplying collateral issues and in protracting the trial, by allowing such evidence, would, in our opinion, more than counterbalance the good that would be derived from it."

In *People v. Ah Fat* (1874) 48 Cal. 61, where a witness for the prosecution was attacked by evidence tending to show perjury and general unworthiness of belief, it was held proper to admit evidence of his character for truth and veracity. However, the court said: "If this testimony had been directed to mere proof of contradictory statements of Gilman upon matters relevant to the issues being tried, the propriety of evidence of character to sustain Gilman's testimony would have been, to say the least, questionable, although authorities may be found in support of its admissibility."

2. In civil action.

An unqualified assertion of the rule as excluding sustaining testimony is found in *Brown v. Mooers* (1856) 6 Gray (Mass.) 451, an action for conversion. The defendant's counsel, in opening his case to the jury, stated that he expected to prove that one Shaw, a witness for the plaintiff, had made various contradictory statements. To rebut this evidence, the plaintiff offered to prove that the general reputation of Shaw for truth and veracity was good, but the court refused to admit the evidence. It was said: "The evidence as to the general character of Shaw for truth was not competent. His general character had not been impeached. The case of *Russell v. Coffin* (1829) 8 Pick. (Mass.) 143, cited by the plaintiff, is directly against him on the precise point at issue. See pp. 146, 154. The statement in 1 Greenl. Ev. § 469, is not sustained by the case the author cites of *Rex v. Clarke* (1817) 2 Starkie (Eng.) 241, and is not law."

In *Russell v. Coffin* (Mass.) *supra*, one of the witnesses to a deed was contradicted by a previous deposition by him, and it was held that testimony as to his good character for truth was inadmissible. In discussing the rule

as laid down in 3 Starkie on Evidence, p. 1757, the court said: "The position, as laid down by Starkie, cannot be carried to the extent contended for. He probably meant only that where the questions put in the cross-examination and the answers did impeach his general character, the other party might rebut by proving a good general character. And so far we do not object to the principle. As in the case stated by Starkie, the witness was asked whether she had not been twice committed to Bridewell, and answered that she had. This went to affect her general reputation; and the party who called her was allowed to prove that since those commitments her character had been fair and good. But it never was decided that if a witness was contradicted as to any fact of his testimony, either by his own declarations at other times, or by other witnesses, evidence might be admitted to prove his general good character. If this were the practice, great delay and confusion would arise, and as almost all cases are tried upon controverted testimony, each witness must bring his compurgators to support him when he is contradicted; and indeed it would be a trial of the witnesses and not of the action."

The matter of admission of testimony as to reputation is regulated in Kentucky by statute.

In *Vance v. Vance* (1859) 2 Met. (Ky.) 581, an action for the recovery of a slave, in affirming the decision of the trial court rejecting evidence as to good character for truthfulness, it was said: "As it regards the admissibility of the evidence which was offered of the good character of the witness, Mrs. Thompson, the Code of Practice is also explicit. Evidence of the good character of a witness is inadmissible until his general reputation has been impeached. § 663. A witness may be impeached by contradictory evidence, by showing that he has made statements different from his present testimony, or by evidence that his general reputation for truth or immorality renders him unworthy of belief. § 661. When he is impeached in the manner last mentioned,

evidence of good character is admissible; but it is not admissible where he is only impeached by proof of his having made a different statement on another occasion, or by proof of facts which contradict those stated by him in his testimony. As, then, no evidence had been introduced impeaching the witness on the ground that her general reputation rendered her unworthy of belief, evidence of her general good character, which had not been impeached, was inadmissible, and the court below did not err in rejecting it."

In *Shields v. Conway* (1909) 133 Ky. 35, 117 S. W. 340, the decision turned on the admission of character testimony where a witness had been shown to have been previously convicted of a felony. The general subject, however, was discussed by the court, as follows: Counsel say that, if it is allowable to offer evidence of good character to rebut the presumption of unworthiness arising from a conviction for a felony, it would logically result in allowing a witness who had made contradictory statements or declarations in conflict with his present testimony, or who was shown to have an interest in the case, to introduce evidence in support of his good character. There is, however, no reason for carrying the rule we have announced to this extent. A witness may be related to the party in whose behalf he is testifying, or he may be interested in the result of the controversy, or he may have made contradictory statements, or declarations in conflict with his present testimony, but evidence of these facts, or any or all of them, would not be an impeachment of the general reputation of the witness for morality and truth. A witness of the highest character may be related to a party to the litigation, or interested in the result of the trial, or have made statements contradictory of his evidence, but these circumstances do not involve his general reputation for truthfulness, nor are they regarded as impeaching his character."

In *Frost v. McCarger* (1859) 29 Barb. (N. Y.) 617, the defendant as agent for the plaintiff was sued for

misappropriation of funds. At the trial his general character was attacked, and it was also proved that he had made inconsistent statements regarding material facts. The court said: "We think the settled rule in this state now is, that where the veracity of a witness is attacked, and he is sought to be impeached only by proof of contradictory statements made by him on other occasions, in respect to the same matter, or by proof of particular facts stated by such witness against himself on his examination, evidence of general good character, or of good character for truth and veracity in support of the witness, is incompetent. . . . Besides, how does proof of good character tend to reconcile the contradictory statements of the witness, or to relieve him from the damaging effect of the facts stated by him in regard to himself. The fact that the public had never before found out the true character of the witness could legitimately afford no support to his credibility under such circumstances. The rule, as now established, rests upon sound reason, as well as authority."

In Oregon the law on the subject appears to be fixed by the case of *Sheppard v. Yocum* (1881) 10 Or. 402, overruling *Glaze v. Whitley* (1871) 5 Or. 164. *Glaze v. Whitley* was an action for malicious prosecution, and the plaintiff, having been called as a witness in his own behalf, undertook to give a full account of a homicide out of which the present case arose. Having denied certain contradictory statements, he was impeached by witnesses for the defense, and was then allowed to produce witnesses as to his character for truth and veracity. In affirming this ruling, the court said: "It is insisted that plaintiff, being a witness as well as a party, and other witnesses having sworn to statements made by him at other times, inconsistent with his testimony in court, it was in some sort an impeachment of his general character for truth and veracity. In the latter view we concur. It is the proper one to be adopted under these circumstances. 1 Greenl. Ev. § 469. Section 830 of the Civil Code provides

that 'a witness may be impeached by the party against whom he was called, by contradictory evidence, or by evidence that his character for general truth is bad,' etc. Section 831 provides that 'a witness may also be impeached by evidence that he had made at other times statements inconsistent with his present testimony.' Section 832 provides that 'evidence of the good character of a witness is not admissible in every action, suit or proceeding, until the character of such witness has been impeached.' From this we infer that evidence of good character is admissible whenever the character of a witness has been impeached in any of the ways provided for in the sections just above cited." But in *Sheppard v. Yocum* (Or.) *supra*, this case was overruled, and the rule settled that testimony as to reputation for truth and veracity is not admissible where a witness has been impeached because of contradictory statements. In the progress of the trial two witnesses were called by the plaintiff and testified to certain matters material to the issue. The proper foundation having been laid by cross-examination, the defendant showed that at other times and places they had made statements inconsistent with their present testimony, and the plaintiff was allowed in rebuttal to introduce evidence to prove that the general character of his witnesses for truth and veracity was good. In disapproving this ruling, the appellate court reviewed the authorities on both sides of the question, and said in conclusion: "These authorities are sufficient to show that some contrariety of decision prevails upon the admission of such evidence, and that the rule laid down in *Glaze v. Whitley* (Or.) *supra*, ought not to be disturbed without due consideration. But we are convinced, after a careful examination of the reasons, pro and con, the better rule is to exclude such evidence,—that it facilitates trials by avoiding a multiplicity of collateral issues, and the confusion ordinarily incident thereto; that it tends to secure the proper determination of the legal rights of parties by confining the evidence and the attention of the tri-

ers to the real issues sought to be litigated, and it is sustained by the weight of judicial authority. Besides, the reasons upon which the opposite rule is founded, which allows the impeached witness to be sustained by such evidence, applies with equal force to the impeaching witness, and, carried to its logical result, would and ought to include similar evidence to sustain him. In our judgment, it is a better practice to confine the trial to the issues of the action, and exclude such collateral matter, and thereby avoid the delay and tendency to mislead the jury from the more important questions of the case. It is proper, however, to say that this assignment of error would not have prevailed, if the record had not disclosed other matter which must reverse the case."

The rule as laid down in *Sheppard v. Yocum* (Or.) *supra*, was followed in *First Nat. Bank v. Commercial Assur. Co.* (1898) 38 Or. 48, 52 Pac. 1050, an action to recover on an insurance policy. A witness for the defendant was impeached in cross-examination by showing contradictory statements made by him, and evidence then offered for the purpose of establishing his good reputation for integrity, truth, and veracity in the community in which he lived was rejected. The court said: "Two methods of impeachment are involved in the cross-examination. One was an apparent effort to show that the witness had made statements out of court not in harmony with his testimony, and the other an attempt to connect him with a scheme to barter his testimony to the insurance company, which, it is claimed, if true, involves him in a crime which would render him unworthy of belief. The questions put touching his supposed conversations with Mitchell, Wilkins, and O'Neil, wherein he omitted to make mention of having seen a man come out of the store and run across the street, are of the first. If the case had gone further, and these persons had been called and testified to the supposed contradictory statements, then the case would have been identical with *Sheppard v. Yocum* (Or.) *supra*, wherein it was held

that the proper foundation had not been laid for sustaining the witness by proof of his reputation for truth and veracity. That cause was well considered, and overruled the earlier case of *Glaze v. Whitley* (Or.) *supra*, so the question must now be regarded as settled, against the defendant's contention on this phase of the controversy.

. . . The effect of such testimony is to discredit the witness's evidence, and not, in the legal sense, to impeach his general character, so as to let in testimony of his good reputation for truth and fair dealing. There was no attempt, therefore, at impeachment by an attack upon the witness's general character, but the purpose of the cross-examination was to establish his bias towards the defendant in the action, and thereby to discredit his testimony with the jury; and the court committed no error in refusing to admit testimony of good reputation for truth and veracity. It was urged with strong emphasis that very much depended upon the establishment of the witness's good character for truth and veracity and fair dealing, as the case turned upon the proper credit which should have been given to his testimony in the case; that what the witness testified to touching his solicitude that the company should have knowledge of what he would swear to was susceptible of two constructions, —one in harmony with an honest purpose, and the other the very reverse; and, if his good reputation had been established, it would probably have preponderated the cause in defendant's favor. This may all have been true, but it does not afford the ground upon which the testimony offered is made admissible; and, unless the witness's general character is first assailed, there can be no proof admitted to establish it, as the law gives him one by presumption."

In *Wertz v. May* (1853) 21 Pa. 274, an action of ejectment, two witnesses for the plaintiff were shown to have made inconsistent statements, and the trial court refused to admit evidence to prove that they were men of integrity and veracity. In sustaining that ruling, the court said: "Evidence

in support of the general character of witnesses is not competent until their general character has been assailed. Every witness puts his character in issue; but until evidence tending directly to impeach it is produced, the law presumes it to be good, and therefore testimony to prove it good is superfluous."

In *Farr v. Thompson* (1839) 15 S. C. Eq. (Cheves) 37, the proponent of a will showed by the examination of his own witness, without objection from the other side, that the witness had previously made statements inconsistent with his testimony. It was held that neither the witness nor the adverse party could introduce evidence of good character, but there was dictum indicating that sustaining evidence is ordinarily admissible. The court said: "Such proof of former inconsistent declarations is always offered to discredit what the witness swears on the trial, and is held to be one of the most legitimate modes of doing so, as it is in fact one of the most common. But although this is perfectly reasonable and proper in regard to an adverse witness, it becomes another question when presented in regard to a party's own witness. . . . If Dawkins had been the witness of the other party, and his testimony had been impeached as it was here, I think he should have been allowed to call witnesses to prove his good character. Such evidence, in its direct tendency, is calculated to show that the witness is not worthy of credit. It is an assertion of his having spoken or sworn falsely, and his good character is a legitimate defense against the presumption that is raised against him."

The dictum in *Farr v. Thompson* (S. C.) *supra*, however, was disapproved in *Chapman v. Cooley* (1860) 46 S. C. L. (12 Rich.) 654, wherein it appeared that the only witness for the plaintiffs had given inconsistent versions of the matter. Evidence to show that her reputation for truthfulness was good was rejected. In affirming this decision, it was said: "A judicious text-writer (Phillipps, Ev.) asserts, on his own unsupported authority, the reasonableness of such

general evidence, inasmuch as the adverse evidence puts the character of the witness in issue. Mr. Greenleaf, 1 Greenl. Ev. 469, repeats this assertion, citing in support of it the *nisi prius* decision of Judge Holroyd in *Rex v. Clarke* (1817) 2 Starkie (Eng.) 241. . . . It will be found, on examination of that case, that it does not support the proposition deduced from it. That was an indictment for an assault with intent to commit a rape, and the prosecutrix admitted in cross-examination that she had been twice committed for offenses to the House of Correction; and it was allowed in her behalf to offer evidence that her conduct was good while in this state of confinement and probation. The evidence admitted was not as to her general character, but as to her good conduct in a particular situation, in respect to the offenses implied from her confession. There is a wide difference between character and conduct for a time, and one equally wide between general character and proper credit on a special trial or occasion. *Nemo repente fuit turpissimus*. A great crime, perhaps with exception as to acts of violence, is not, according to common experience, the first instance of misconduct in any man. Moral principles are gradually sapped, and one may be fitted by imperceptible deterioration for any sort of the *crimen falsi* before any act has alarmed the community and affected his reputation. The greatest rogue, under circumstances supervised by his neighbors, may simulate the course of honesty. One of good principles and the fairest reputation may be utterly unworthy of credit in his statements of some transactions. Monomania is a state of mind universally recognized, and it may preclude one completely from the perception and narration of the truth. Intense ignorance or superstition, or some affection, may produce the same consequences. The great improbability of a narrative may produce disbelief, without impairing the confidence of the hearers in the probity of the narrator. A wise and good man may fail in his remembrance of any fact, and especially of its attend-

ant circumstances. Surely, then, character and credit are distinct things, and every assault on the credit of a witness does not involve the imputation of perjury to him, nor, indeed, any reflection on his reputation. If a witness should contradict himself in the course of his testimony, it would not be pretended that this would be a sufficient basis for evidence as to his good character; and yet there is no difference, in principle, between his contradiction of himself on the stand and outside of the courthouse. The consumption of the limited time which can be appropriated to the administration of justice and of the money of parties and witnesses, required by the trial of collateral issues as to character, is a great and growing mischief. In this very case, involving in pecuniary interest the value of a cotton screw and seven bags of cotton, the judge reports that three days of a former session were occupied, with no other fruit than mistrial by cessation of the term, and that at the trial which resulted in a verdict notwithstanding his ruling to exclude such evidence as to the principal witness of the plaintiff, fifty-six witnesses were examined as to character. Great delay, expense, and exasperation necessarily follow such a course. Instead of trying the issue in the action, the procedure, in many cases, is a trial of the witnesses, and every witness is expected to bring in his train a host of compurgators who will swear to their faith in him when he contradicts himself or is contradicted by others. These collateral issues as to character are practically and sometimes justly applied not only to the witnesses as to the facts in controversy, but also as to the witnesses as to character themselves, and really are unlimited and illimitable. In a large majority of cases these collateral investigations are altogether sterile, either because the testimony of the witness assailed is immaterial, or because the number is nearly equal of those attacking and those defending his character. It is frequently a mere contest as to the number of the compurgators and the vilifiers, and in the muster the vicinage is canvassed and

disquieted. In many cases, witnesses as to character have no character themselves, and in nine out of ten instances, they testify as to their impressions from the conduct of him in question coming under their actual observation, without any conception that character depends on the belief of the larger part of those competent to form an opinion concerning the principles and reputation of an individual founded on his conduct,—namely, the belief of the community, and not of the individual testifying. We disclaim, in right and fact, the decision of points of law from mere considerations of policy and convenience; but in a matter of practice not settled, we may weigh legitimately the interests of the people. In *Russell v. Coffin* (1829) 8 Pick. (Mass.) 154, *Stamper v. Griffin* (1852) 12 Ga. 456, and *Rogers v. Moore* (1838) 10 Conn. 16, the opinions of Phillipps and Greenleaf are expressly repudiated; and I have simply amplified the reason in these cases."

In *State v. Rice* (1897) 49 S. C. 418, 61 Am. St. Rep. 816, 27 S. E. 452, a prosecution for assault and battery with intent to kill, the prosecutor was permitted to prove the good character

of a witness whose general character had not been assailed in the testimony of the defense, though testimony had been offered to show that he had made contradictory statements. The court said: "Under the general rule, as laid down by the standard text-writers on evidence, such testimony would have been competent, but the rule in this state is otherwise. . . . Common experience shows that the distinction thus taken is well founded, for there are persons of unimpeachable character, whose testimony is not always entitled to much credit, arising from carelessness, imperfect memory, or other causes not involving any want of character."

III. Rule in Kansas.

In *COLVIN v. WILSON* (reported herewith) ante, 859, the decision is not in harmony with either of the views heretofore set forth. It is therein held that by showing contradictory statements the credibility of a witness is directly attacked and testimony as to his reputation for truth and veracity is admissible in the sound discretion of the trial court. The intention, however, of adopting a fixed rule on the subject is distinctly disavowed.

W. M. C.

COHN & ROTH ELECTRIC COMPANY, Appt.,

v.

BRICKLAYERS, MASONS, AND PLASTERERS LOCAL UNION NO. 1
et al.

Connecticut Supreme Court of Errors — August 2, 1917.

(92 Conn. 161, 101 Atl. 659.)

Conspiracy — unlawful compulsion on employer.

1. Refusal of union men to work with nonunion men does not impose unlawful compulsion upon employers that employ only nonunion labor, when more than one third of the labor in the community is nonunion.

[See note on this question beginning on page 909.]

Master and servant — right to quit work.

2. Individuals may work for whom they please and quit work when they please, provided they do not violate their contract of employment.

[See 16 R. C. L. 434; 18 R. C. L. 510.]

Conspiracy — of laborers to quit work — validity.

3. Combinations of individuals may quit work only to promote their own interests, and not for the primary purpose of injuring others.

[See 16 R. C. L. 435 et seq.]

Labor union — refusal to work with nonunion men — rights.

4. The members of a union, acting upon their agreement, may refuse to enter upon employment with nonunion labor, or refuse to continue their employment with such labor if their action is to promote their own interests.

[See 16 R. C. L. 440, 442.]

Injunction — against strike of union labor.

5. Injunction does not lie to prevent members of a labor union from striking to advance their own interests, although they thereby inflict injury upon the business of an employer of nonunion

labor, and they contemplate and intend that possible effect.

[See 16 R. C. L. 438.]

Labor union strike — to strengthen union.

6. Members of a labor union may strike against the employment of nonunion labor, for the purpose of strengthening their union.

[See 16 R. C. L. 440.]

Conspiracy — effect of intimidation statute.

7. Notice by members of labor unions to contractors that they will strike if nonunion men are employed on any of their jobs is not invalid within the intimidation statute.

[See 16 R. C. L. 436.]

APPEAL by plaintiff from a judgment of the Superior Court for Hartford County (Shumway, J.) in favor of defendants, in a suit for an injunction to restrain him from intimidating by strikes, boycotts, or otherwise, certain persons, for the purpose of inducing cancelation of contracts with plaintiff, or for the purpose of inducing them to refrain from employing or entering into contracts with plaintiff. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Perkins, Wells, & Scott, for appellant:

A strike is unlawful if for an unlawful purpose.

State v. Stockford, 77 Conn. 227, 107 Am. St. Rep. 28, 58 Atl. 769; *March v. Bricklayers & P. Union*, 79 Conn. 7, 4 L.R.A.(N.S.) 1198, 118 Am. St. Rep. 127, 63 Atl. 291, 6 Ann. Cas. 848; *Wye-man v. Deady*, 79 Conn. 414, 118 Am. St. Rep. 152, 65 Atl. 129, 8 Ann. Cas. 375; *Connors v. Connolly*, 86 Conn. 641, 45 L.R.A.(N.S.) 564, 86 Atl. 600; *State v. Rowley*, 12 Conn. 101; *State v. Gannon*, 75 Conn. 206, 52 Atl. 727; *State v. Glidden*, 55 Conn. 46, 3 Am. St. Rep. 23, 8 Atl. 890; *Pickett v. Walsh*, 192 Mass. 572, 6 L.R.A.(N.S.) 1067, 116 Am. St. Rep. 272, 78 N. E. 753, 7 Ann. Cas. 638; *Lohse Patent Door Co. v. Fuelle*, 215 Mo. 473, 22 L.R.A.(N.S.) 607, 128 Am. St. Rep. 492, 114 S. W. 997.

Intimidation does not require the use or threat of physical violence; causing a reasonable fear of business or property loss may constitute an intimidation.

State v. Stockford, 77 Conn. 227, 107 Am. St. Rep. 28, 58 Atl. 769; *Barr v. Essex Trades Council*, 53 N. J. Eq. 101, 30 Atl. 881.

If a rival business is established for the primary purpose of destroying that

already established, then it is unlawful and may be enjoined.

Dunshree v. Standard Oil Co. — Iowa, —, 126 N. W. 342; *Tuttle v. Buck*, 107 Minn. 145, 22 L.R.A.(N.S.) 599, 131 Am. St. Rep. 446, 119 N. W. 946, 16 Ann. Cas. 807; *West Virginia Transp. Co. v. Standard Oil Co.* 50 W. Va. 611, 56 L.R.A. 804, 88 Am. St. Rep. 895, 40 S. E. 591.

A strike for the purpose of procuring the discharge of a fellow employee is ordinarily unlawful.

Wyeman v. Deady, 79 Conn. 414, 118 Am. St. Rep. 152, 65 Atl. 129, 8 Ann. Cas. 375; *Ruddy v. United Asso. Journeymen Plumbers*, 79 N. J. L. 467, 75 Atl. 742; *Erdman v. Mitchell*, 207 Pa. 79, 63 L.R.A. 534, 99 Am. St. Rep. 783, 56 Atl. 327.

To this rule, however, there are two apparent exceptions which illustrate the distinction between acts which are intimidating because the primary intent is to injure, and acts which are not intimidating because the primary intent is to benefit.

Pickett v. Walsh, 192 Mass. 572, 6 L.R.A.(N.S.) 1067, 116 Am. St. Rep. 272, 78 N. E. 753, 7 Ann. Cas. 638; *Erdman v. Mitchell*, supra; *De Minico v. Craig*, 207 Mass. 599, 42 L.R.A.(N.S.) 1048, 94 N. E. 317.

Secondary strikes, instituted by

reason of the employment of nonunion labor, are unlawful.

Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co. 19 L.R.A. 387, 5 Inters. Com. Rep. 522, 54 Fed. 730; Iron Molders' Union v. Allis-Chalmers Co. 20 L.R.A. (N.S.) 315, 91 C. C. A. 631, 166 Fed. 45; Pickett v. Walsh, *supra*; New England Cement Gun Co. v. McGivern, 218 Mass. 198, L.R.A.1916C, 986, 105 N. E. 885; Gray v. Building Trades Council, 91 Minn. 171, 63 L.R.A. 753, 103 Am. St. Rep. 477, 97 N. W. 663, 1118, 1 Ann. Cas. 172; Clarkson v. Laiblan, 178 Mo. App. 708, 161 S. W. 660; Erdman v. Mitchell, *supra*; Quinn v. Leathem [1901] A. C. 495, 1 B. R. C. 197, 70 L. J. P. C. N. S. 76, 65 J. P. 708, 50 Week. Rep. 139, 85 L. T. N. S. 289, 17 Times L. R. 749, 27 Eng. Rul. Cas. 66; Bossert v. Dhuy, 166 App. Div. 251, 151 N. Y. Supp. 877.

The strikes were unlawful because they constituted, or were in the nature of, a secondary boycott.

State v. Glidden, 55 Conn. 46, 3 Am. St. Rep. 23, 8 Atl. 890; Gompers v. Buck's Stove & Range Co. 221 U. S. 418, 55 L. ed. 797, 34 L.R.A. (N.S.) 874, 31 Sup. Ct. Rep. 492; Loewe v. California State Federation of Labor, 139 Fed. 71; Iron Molders' Union v. Allis-Chalmers Co. 20 L.R.A. (N.S.) 315, 91 C. C. A. 631, 166 Fed. 45; Lawlor v. Loewe, 109 C. C. A. 288, 187 Fed. 522; Wilson v. Hey, 232 Ill. 389, 16 L.R.A. (N.S.) 85, 122 Am. St. Rep. 119, 83 N. E. 928, 13 Ann. Cas. 82; Jackson v. Stanfield, 137 Ind. 592, 23 L.R.A. 588, 36 N. E. 345, 37 N. E. 14; Funck v. Farmers Elevator Co. 142 Iowa, 621, 24 L.R.A. (N.S.) 108, 121 N. W. 53; My Maryland Lodge v. Adt, 100 Md. 238, 68 L.R.A. 752, 59 Atl. 721; Beck v. Railway Teamsters' Protective Union, 118 Mich. 497, 42 L.R.A. 407, 74 Am. St. Rep. 421, 77 N. W. 13; Baldwin v. Escanaba Liquor Dealers' Asso. 165 Mich. 98, 130 N. W. 214; Ertz v. Produce Exch. Co. 79 Minn. 140, 48 L.R.A. 90, 79 Am. St. Rep. 433, 81 N. W. 737; A. Fink & Son v. Butchers' Union, 84 N. J. Eq. 638, 95 Atl. 182.

Strikes instituted or threatened for the purpose of preventing the use of nonunion material are illegal.

Shine v. Fox Bros. Mfg. Co. 86 C. C. A. 311, 156 Fed. 357; Irving v. Joint Dist. Council, U. B. C. J. 180 Fed. 896; Purington v. Hinchliff, 219 Ill. 159, 2 L.R.A. (N.S.) 824, 109 Am. St. Rep. 322, 76 N. E. 47; Burnham v. Dowd, 217 Mass. 351, 51 L.R.A. (N.S.) 778, 104 N. E. 841; Lohse Patent Door Co. v.

Fuelle, 215 Mo. 421, 22 L.R.A. (N.S.) 607, 128 Am. St. Rep. 492, 114 S. W. 997; Alfred W. Booth & Bro. v. Burgess, 72 N. J. Eq. 181, 65 Atl. 226; Purvis v. Local No. 500, U. B. C. J. 214 Pa. 348, 12 L.R.A. (N.S.) 642, 112 Am. St. Rep. 757, 63 Atl. 585, 6 Ann. Cas. 275; Thomas v. Cincinnati, N. O. & T. P. R. Co. 4 Inters. Com. Rep. 788, 62 Fed. 803.

The strikes were also unlawful at common law because intended to inflict injury without adequate justification.

Connors v. Connolly, 86 Conn. 641, 45 L.R.A. (N.S.) 564, 86 Atl. 600; London Guarantee & Acci. Co. v. Horn, 206 Ill. 493, 99 Am. St. Rep. 185, 69 N. E. 526; Johnson v. Aetna L. Ins. Co. 158 Wis. 56, 147 N. W. 32, Ann. Cas. 1916E, 608; Iron Molders' Union v. Allis-Chalmers Co. 20 L.R.A. (N.S.) 315, 91 C. C. A. 631, 166 Fed. 51.

The acts of the defendants were such as should be prohibited or restrained by injunction.

United States v. Workingmen's Amalgamated Council, 26 L.R.A. 158, 4 Inters. Com. Rep. 831, 54 Fed. 994; Irving v. Joint Dist. Council, U. B. C. J. 180 Fed. 896; Irving v. Neal, 209 Fed. 471; Piano & O. Workers' International Union v. Piano & O. Supply Co. 124 Ill. App. 353; Wilson v. Hey, 232 Ill. 389, 16 L.R.A. (N.S.) 85, 122 Am. St. Rep. 119, 83 N. E. 928, 13 Ann. Cas. 82; My Maryland Lodge v. Adt, 100 Md. 238, 68 L.R.A. 752, 59 Atl. 721; Plant v. Woods, 176 Mass. 492, 51 L.R.A. 339, 79 Am. St. Rep. 330, 57 N. E. 1011; Folsom v. Lewis, 208 Mass. 336, 35 L.R.A. (N.S.) 787, 94 N. E. 316; Burnham v. Down, 217 Mass. 351, 51 L.R.A. (N.S.) 778, 104 N. E. 841; New England Cement Gun Co. v. McGivern, 218 Mass. 198, L.R.A.1916C, 986, 105 N. E. 885; Gray v. Building Trades Council, 91 Minn. 171, 63 L.R.A. 753, 103 Am. St. Rep. 477, 97 N. W. 663, 1118, 1 Ann. Cas. 172; Lohse Patent Door Co. v. Fuelle, 215 Mo. 421, 22 L.R.A. (N.S.) 607, 128 Am. St. Rep. 492, 114 S. W. 997; Clarkson v. Laiblan, 178 Mo. App. 708, 161 S. W. 660; George Jonas Glass Co. v. Glass Bottle Blowers' Asso. 77 N. J. Eq. 219, 41 L.R.A. (N.S.) 445, 79 Atl. 262; Albrow J. Newton Co. v. Erickson, 70 Misc. 291, 126 N. Y. Supp. 949, affirmed in 144 App. Div. 939, 129 N. Y. Supp. 1111; Bossert v. Dhuy (1914) 166 App. Div. 251, 151 N. Y. Supp. 877; Erdman v. Mitchell, 207 Pa. 79, 63 L.R.A. 534, 99 Am. St. Rep. 783, 56 Atl. 327; Purvis v. Local No. 500, U. B. C. J. 214 Pa. 348, 12

L.R.A.(N.S.) 642, 112 Am. St. Rep. 757, 63 Atl. 585, 6 Ann. Cas. 275; *Associated Hat Mfrs. v. Baird-Unteidt Co.* 88 Conn. 332, 91 Atl. 373.

Messrs. Hugh M. Alcorn, Thomas J. Spellacy, and William M. Maltbie, for appellees:

The members of a labor union may not seek to accomplish their end by attempting the ruin of the business of an employer who does not yield to their arguments.

State v. Stockford, 77 Conn. 227, 107 Am. St. Rep. 28, 58 Atl. 769.

It is the right of members of a union to refuse to work for any person, and to induce employers by fair means to employ them, and not others.

Wyeman v. Deady, 79 Conn. 414, 118 Am. St. Rep. 152, 65 Atl. 129, 8 Ann. Cas. 375; *State v. McGee*, 80 Conn. 614, 69 Atl. 1059; *Connors v. Connolly*, 86 Conn. 641, 45 L.R.A.(N.S.) 564, 86 Atl. 600.

An agreement between labor unions and employers, which takes in an entire industry of considerable proportions in a community, so that it operates generally in that community to prevent or seriously deter workmen from obtaining employment under favorable conditions without joining a union, is contrary to public policy.

Associated Hat Mfrs. Asso. v. Baird-Unteidt Co. 88 Conn. 332, 91 Atl. 373.

The refusal of members of a union to work for an employer who employs nonunion men is a reasonable means for them to adopt for the betterment of their condition.

State v. Glidden, 55 Conn. 46, 3 Am. St. Rep. 23, 8 Atl. 890; *State v. Stockford*, 77 Conn. 227, 107 Am. St. Rep. 28, 58 Atl. 769; *Coppage v. Kansas*, 236 U. S. 1, 59 L. ed. 441, L.R.A.1915C, 960, 35 Sup. Ct. Rep. 240; *Adair v. United States*, 208 U. S. 161, 52 L. ed. 436, 25 Sup. Ct. Rep. 277, 13 Ann. Cas. 764; *Gill Engraving Co. v. Doerr*, 214 Fed. 111; *National Fireproofing Co. v. Mason Builders' Asso.* 26 L.R.A.(N.S.) 148, 94 C. C. A. 535, 169 Fed. 259; *National Protective Asso. v. Cummings*, 170 N. Y. 315, 58 L.R.A. 135, 88 Am. St. Rep. 648, 63 N. E. 369; *Davis v. United Portable Hoisting Engineers*, 28 App. Div. 396, 51 N. Y. Supp. 180; *Mills v. United States Printing Co.* 99 App. Div. 605, 91 N. Y. Supp. 185; *Grassi Contracting Co. v. Bennett*, 174 App. Div. 244, 160 N. Y. Supp. 279; *Jacobs v. Cohen*, 183 N. Y. 207, 2 L.R.A.(N.S.) 292, 111 Am. St. Rep. 730, 76 N. E. 5, 5 Ann. Cas. 280; *Jersey*

City Printing Co. v. Cassidy, 63 N. J. Eq. 759, 53 Atl. 230; *Mayer v. Journeymen Stonecutters' Asso.* 47 N. J. Eq. 519, 20 Atl. 492; *Scott-Stafford Opera House Co. v. Minneapolis Musicians Asso.* 118 Minn. 410, 136 N. W. 1092; *Kemp v. Division No. 231*, 255 Ill. 213, 99 N. E. 389, Ann. Cas. 1913D, 347; *Meier v. Speer*, 96 Ark. 618, 32 L.R.A.(N.S.) 792, 132 S. W. 988; *Clemmitt v. Watson*, 14 Ind. App. 38, 42 N. E. 367; *Pickett v. Walsh*, 192 Mass. 572, 6 L.R.A.(N.S.) 1067, 116 Am. St. Rep. 272, 78 N. E. 753, 7 Ann. Cas. 638; *Allen v. Flood* [1898] A. C. 1, 62 J. P. 595, 67 L. J. Q. B. N. S. 119, 77 L. T. N. S. 717, 14 Times L. R. 125, 46 Week. Rep. 258, 17 Eng. Rul. Cas. 285.

The fact that the several individual unions have united in a central organization, and are acting conjointly, does not in any way interfere with this right to strike.

Thomas v. Cincinnati, N. O. & T. P. R. Co. 4 Inters. Com. Rep. 788, 62 Fed. 803; *Curran v. Treleaven* [1891] 2 Q. B. 560; *Gray v. Building Trades Council*, 91 Minn. 171, 63 L.R.A. 753, 103 Am. St. Rep. 477, 97 N. W. 663, 1118, 1 Ann. Cas. 172; *J. F. Parkinson Co. v. Building Trades Council*, 154 Cal. 581, 21 L.R.A.(N.S.) 550, 98 Pac. 1027, 16 Ann. Cas. 1165; *Alfred W. Booth & Bro. v. Burgess*, 72 N. J. Eq. 181, 65 Atl. 226.

The action of the strikers did not constitute a boycott.

Gray v. Building Trades Council, 91 Minn. 171, 63 L.R.A. 753, 103 Am. St. Rep. 477, 97 N. W. 663, 1118, 1 Ann. Cas. 172; *Gill Engraving Co. v. Doerr*, 214 Fed. 111; *Pierce v. Stablemen's Union*, 156 Cal. 70, 103 Pac. 324; *Crump v. Com.* 84 Va. 924, 10 Am. St. Rep. 895, 6 S. E. 620; *Hoban v. Dempsey*, 217 Mass. 166, L.R.A.1915A, 1217, 104 N. E. 717, Ann. Cas. 1915C, 810; *Kemp v. Division No. 241*, 255 Ill. 213, 99 N. E. 389, Ann. Cas. 1913D, 347; *Iron Molders' Union v. Allis-Chalmers Co.* 20 L.R.A.(N.S.) 315, 91 C. C. A. 631, 166 Fed. 45; *J. F. Parkinson Co. v. Building Trades Council*, 154 Cal. 581, 21 L.R.A.(N.S.) 550, 98 Pac. 1027, 16 Ann. Cas. 1165; *National Fireproofing Co. v. Mason Builders' Asso.* 26 L.R.A.(N.S.) 148, 94 C. C. A. 535, 169 Fed. 259; *Cote v. Murphy*, 159 Pa. 420, 23 L.R.A. 135, 39 Am. St. Rep. 686, 28 Atl. 190; *Macauley Bros. v. Tierney*, 19 R. I. 255, 37 L.R.A. 455, 61 Am. St. Rep. 770, 33 Atl. 1.

The notice by defendants to the general contractors of the probability of a

strike by them if plaintiff was employed on work in which they were engaged was not unlawful.

Allen v. Food, *supra*; Curran v. Treleven [1891] 2 Q. B. 560; Coppage v. Kansas, 236 U. S. 1, 59 L. ed. 441, L.R.A.1915C, 960, 35 Sup. Ct. Rep. 240; Adair v. United States, 208 U. S. 161, 52 L. ed. 436, 25 Sup. Ct. Rep. 277, 13 Ann. Cas. 764; National Fireproofing Co. v. Mason Builders Asso. 26 L.R.A. (N.S.) 148, 94 C. C. A. 535, 169 Fed. 259; Iron Molders' Union v. Allis-Chalmers Co. 20 L.R.A. (N.S.) 315, 91 C. C. A. 681, 166 Fed. 45; Vegelahn v. Guntner, 167 Mass. 92, 35 L.R.A. 722, 57 Am. St. Rep. 443, 44 N. E. 1077; Rhodes Bros. Co. v. Musicians' Protective Union, 37 R. I. 281, L.R.A.1915E, 1037, 92 Atl. 641; Bohn Mfg. Co. v. Hollis (Bohn Mfg. Co. v. Northwestern Lumbermen's Asso.) 54 Minn. 223, 21 L.R.A. 337, 40 Am. St. Rep. 319, 55 N. W. 1119; Meier v. Speer, 96 Ark. 618, 32 L.R.A. (N.S.) 792, 182 S. W. 988.

Wheeler, J., delivered the opinion of the court:

The plaintiff has waived its claim for damages and relies upon its claim for injunctive relief, alleging that the defendant labor unions and the members thereof have combined for the purpose of obtaining a monopoly of all the employment for the members of these local unions in the several building trades in which they are engaged, and for the purpose of excluding from such employment all who are not members.

In furtherance of this purpose and to establish this monopoly, the defendants are alleged to have agreed: (1) That no nonunion member shall be employed on any building in Hartford or its vicinity; (2) that no open-shop employer shall be permitted to supply any labor or materials for any such building; (3) that they will compel all owners, employers, and other persons to refuse to purchase supplies from open-shop employers; (4) that they will refuse to work for any owner or employer who shall purchase supplies from any open-shop employer; (5) that they will boycott all nonunion members and open-shop employers and all persons doing business with them. In further-

ance of said boycott the defendants are alleged to have agreed: (6) To cause all members of the defendant unions to refuse to work on every building owned by any person who owns any building on which any nonunion member is employed, or on which any open-shop employer is furnishing, or has contracted to furnish, labor or materials; and (7) to refuse to work on each and every job on which a general contractor may be engaged if any nonunion member is working for such general contractor, or if any open-shop contractor is furnishing, or has contracted to furnish, any labor or materials.

The complaint also alleges that in furtherance of these purposes and agreements the defendants have boycotted the plaintiff and all owners for whose buildings the plaintiff has furnished labor or materials, and all contractors or builders by whom the plaintiff has been employed, directly or indirectly, and have threatened to institute strikes of all of these members on all work on which any of the members were engaged for any owner or by any contractor for whom the plaintiff has furnished labor or materials; and the defendants have instituted strikes in accordance with these threats in all cases where their demands have not been promptly complied with.

Comparing the facts found with those alleged in the complaint, we find a marked dissimilarity. We can discover no finding of the illegal purpose of these defendants which the complaint reiterates, nor one of a conspiracy and agreement such as is alleged, save in one particular. That agreement is not specifically found, but it is found that the several defendant local unions have adopted the same or analogous by-laws obligatory upon all of their members. These by-laws prohibit members working with nonunion men under penalty for violation. They provide that "no member shall work for any employer who is employing nonunion . . . work-

ers," nor on any job contracted for by any nonunion contractor, nor on any job sublet to any contractor by any open-shop or nonunion contractor. The Hartford Structural Building Trade Alliance has adopted a by-law, of which Alliance all the defendant unions are members, and by which by-law all defendants are bound, that "no member of this Alliance shall work with any person . . . working at any trade in the Structural Building Trades Alliance who does not hold a working card" from the Alliance.

These by-laws create an agreement on the part of these several unions and all of their members, binding upon them, that their members will not work for any employer employing nonunion men on that job nor for any nonunion contractor, nor any job sublet to any contractor by any open-shop or nonunion contractor. Interpreted together, these several by-laws constitute an agreement, which membership imposed upon all members of the defendant unions, that they would not work on any job on which nonunion men or employers are at work.

All members of the defendant unions have ceased to work and refused to work on any building when the nonunion employees of the plaintiff have commenced work on such building. In one instance the members of the defendant unions withdrew from work on five buildings being erected by a single general contractor, because the plaintiff's nonunion employees were at work on one of these buildings. The defendants maintain their legal right to do these acts, and threaten and intend to continue in such course unless restrained by injunction.

The case set up in the complaint is not the agreement to cease work for a contractor if nonunion men are employed by him on any of his jobs, no matter where located, upon which the defendants are not at work and to which they have no relation; and if the complaint does

rely upon this cause of action the finding does not support it. It recites that, in one instance, the members of the defendant unions ceased work on five buildings in process of erection by one contractor, because plaintiff's nonunion employees were at work on one of these buildings. A single instance of one act done would hardly permit a holding that the trial judge had, in refusing an injunction, exercised his discretion improperly. It is noticeable that the finding does not state that these strikes were instituted for any of the unlawful purposes so frequently reiterated in the complaint.

The trial court could not find the existence of an illegal purpose without proof, and we cannot so hold without a finding to that effect. If the purpose of the strikes was illegal, they were clear deprivations of the right of the plaintiff to work. *State v. Glidden*, 55 Conn. 46, 3 Am. St. Rep. 23, 8 Atl. 890. If the purpose was to better the condition of the defendants, a situation is presented not heretofore considered by us; viz., a determination of whether an agreement to strike in a case in which the striking workmen are not concerned in a trade dispute, or in which their labor has not come in competition with nonunion labor, is lawful. Its decision is practically another phase of the question decided in *Pickett v. Walsh*, 192 Mass. 572, 582, 6 L.R.A. (N.S.) 1067, 116 Am. St. Rep. 272, 78 N. E. 753, 7 Ann. Cas. 638, in the last point treated in that case, and the first and second causes of action set forth in the complaint, pages 579 and 587 of the opinion. We express no opinion upon this point, leaving its decision open until it is fairly raised in the pleadings and in the record on appeal.

The agreement of the defendant unions and their members, that the members would refuse to work with nonunion men, followed by action by the members ceasing to work with the nonunion men of the plaintiff, is the only ground of complaint which the facts found support. In-

dividuals may work for whom they please, and quit work when they please, provided they do not violate

Master and servant—right to quit work.

their contract of employment. Com-

binations of individuals have similar rights, but the liability to injury from the concerted action of numbers has placed upon their freedom to quit work these additional qualifications: that their action must be taken for their own interest, and not for the primary purpose of injuring another or others, and neither in end sought, nor

Conspiracy of laborers to quit work—validity.

in means adopted to secure that end, must it be prohibited

by law, nor in contravention of public policy. *Connors v. Connolly*, 86 Conn. 641, 45 L.R.A. (N.S.) 564, 86 Atl. 600, is an example of an agreement which we held to be contrary to public policy.

The members of a union, acting upon their agreement, may refuse to enter upon employment with non-

Labor union—refusal to work with nonunion men—rights.

union labor, or refuse to continue their employment with nonunion labor,

provided their action does not fall within the qualifications of their freedom of action already stated. *Pickett v. Walsh*, 192 Mass. 572, 582, 6 L.R.A. (N.S.) 1067, 116 Am. St. Rep. 272, 78 N. E. 753, 7 Ann. Cas. 638; *Durnham v. Dowd*, 217 Mass. 351, 356, 51 L.R.A. (N.S.) 778, 104 N. E. 841; *Grassi Contracting Co. v. Bennett*, 174 App. Div. 244, 160 N. Y. Supp. 284; *Gray v. Building Trades Council*, 91 Minn. 171, 185, 63 L.R.A. 753, 103 Am. St. Rep. 477, 97 N. W. 663, 1118, 1 Ann. Cas. 172. In *State v. Stockford*, 77 Conn. 227, 237, 107 Am. St. Rep. 28, 58 Atl. 769, Hall, J., thus states our law: "Workmen may lawfully combine to accomplish their withdrawal in a body from the service of their employers, for the purpose of obtaining an advance in wages, a reduction of the hours of labor, or any other legitimate advantage, even though they may know that such action will necessarily cause

injury to the business of their employers, provided such abandonment of work is not in violation of any continuing contract, and is conducted in a lawful manner, and not under such circumstances as to wantonly or maliciously inflict injury to person or property."

The facts found show that the plaintiff has suffered damage in its business, and that the defendants contemplated this probable effect. A cause of action was

Injunction—against strike of union labor.

thus made out entitling the plaintiff to judgment, unless the defendants have made out, or the facts presented disclose, that the defendants were justified in what they did. *Connors v. Connolly*, supra. The finding is not express upon this point, but we are of the opinion that the necessary implication from the subordinate facts found is a justification for the defendants' course.

The end the defendants had in view by their by-laws was the strengthening of their unions. That was a legitimate end. There is no indication that the real purpose of the defendants was injury to the plaintiff

Labor union—strike—to strengthen union.

or the nonunion men it employed. Whatever injury was done the plaintiff was a consequence of trade competition, and an incident to a course of conduct by the defendants begun and prosecuted for their own legitimate interests. The means adopted were lawful. No unlawful compulsion in act or word was present. The plaintiff had its option to employ the defendants or not; trade conditions did not convert this legal option into practical compulsion, since over one third of the men working in all of these trades to which the defendants belong in this locality were nonunion men. The cessation of work was not intended to cause a breach of existing contracts, and the cancelation of some of its contracts by the plaintiff is, so far as we know, attributable to the plaintiff's act, rather than to the

defendants.' Certainly the finding is too bare of detail to permit the latter conclusion.

The notification by the defendants to the general contractors and owners, of the probability of a strike by them in case the plaintiff was employed on any job on which they were engaged, was no more than a notice that if nonunion labor was employed on jobs on which the defendant union men were employed the defendants would strike. If defendants had the right to contract that they would not work with nonunion labor, and if they might

**Conspiracy—
unlawful com-
pulsion on
employer.**

cease work if nonunion men were employed, as we hold in *State v. Stockford*, 77 Conn. 227, 107 Am. St. Rep. 28, 58 Atl. 769, we can see no unlawfulness in their notice to contractors and employers of what would happen if nonunion men were employed on jobs on which they were engaged. The notice was the course of fair dealing. It did not take away the free choice from the contractor or owner; it possessed him of the facts which might affect his decision.

**—effect of
intimidation
statute.**

We do not think the notice was an act fairly within the intimidation statute. Gen. Stat. § 1296. The facts surrounding the giving of such a notice might bring it within the statute; the facts detailed in this finding do not.

There is no error.

In this opinion the other judges concur.

NOTE.

The use of the boycott as a weapon in industrial disputes, including the right of members of a labor organization to refuse to work on a job on which a contractor employing nonunion labor is employed and to give notice to general contractors and owners of their intention to so refuse, is discussed in annotation on page 909, post.

As shown by such annotation, the majority of the decisions dealing with the point are in accord with the reported case in holding that such conduct is justifiable, provided the pressure thus brought to bear is for a legitimate purpose, and is not for the sole object of inflicting loss upon the recalcitrant contractor.

LOCAL UNION NO. 313, HOTEL AND RESTAURANT EMPLOYEES' INTERNATIONAL ALLIANCE, et al., Appts.,

v.

JOE. STATHAKIS.

Arkansas Supreme Court—July 1, 1918.

(135 Ark. 86, 205 S. W. 450.)

Injunction — against picketing.

1. Injunction lies against the maintenance by a labor union of pickets in front of a place of business, who use placards announcing the unfairness of its proprietor, the effect of which is to coerce intending patrons of the place to withhold their patronage.

[See note on this question beginning on page 909.]

Master and servant — liability for acts of pickets.

2. Officers of a labor union who employ persons to picket a place of busi-

ness are liable for unlawful acts which they commit, although in disobedience to instructions given them.

[See 16 R. C. L. 460.]

Trade union — right to organize.

3. Laborers have a right to organize into unions for the purpose of bargaining collectively for the betterment of their conditions, and, as an incident thereto, to strike collectively.

[See 16 R. C. L. 419.]

Master and servant — right to refuse service.

4. Laborers have a right to say for whom, and upon what terms, they will work, and may act through their unions in the decision of this question.

[See 16 R. C. L. 434.]

Strike — right to apprise public of facts.

5. Laborers who have gone on strike have a right to apprise the public of the fact, and solicit support in any legitimate attempt to prevail in their controversy.

[See 16 R. C. L. 457.]

Trade union — right to resort to force.

6. Labor unions have no right to resort to force, intimidation, or coercion.

[See 16 R. C. L. 444.]

Picketing — right to use placards.

7. Striking employees may use placards for the purpose of informing the public as to their grievances.

[See 16 R. C. L. 457.]

— coercion — legality.

8. Any conduct on the part of pickets of a labor union which amounts to coercion is unlawful, and will be enjoined.

[See 16 R. C. L. 453.]

Trade union — right to interfere with employment of labor.

9. A labor union has no right to interfere with the right of an employer to employ whom he pleases, and the public may bestow its favor and support where it chooses, free from any coercive molestation.

[See 16 R. C. L. 444, 445.]

Property — right to carry on business.

10. The right to carry on a lawful business without obstruction is a property right which will be protected by the courts.

[See 16 R. C. L. 461, 462.]

(Messrs. Hart and Humphreys, JJ., dissent.)

APPEAL by defendants from a decree of the Chancery Court for Pulaski County (Martineau, Ch.) in favor of plaintiff in an action brought to enjoin defendants from further picketing plaintiff's place of business. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Mehaffy, Reid, Donham, & Mehaffy for appellants.

Messrs. Moore, Smith, Moore, & Trieber for appellee.

Smith, J., delivered the opinion of the court:

Appellee operates two cafés in the city of Little Rock, one of which is located at 104 West Markham street and is known as Faust Café; the other is located at 106 South Main street and is known as Faust Coffeehouse. These cafés are located near the corner of Main and Markham streets, and are about one block apart. In the operation of this business appellee employed from seventy to eighty cooks, waiters, and helpers, and a disagreement arose between him and his help. It is unnecessary to consider the merits of this disagreement, but it eventuated in a demand on the part of his employees that appellee unionize his cafés. This de-

mand was refused, and the refusal was followed by a strike, which was participated in by most of the employees. This strike was conducted by the officers and employees of Local Union No. 313 of the Hotel and Restaurant Employees' International Union, which is a voluntary association of cooks and waiters and waitresses of the city of Little Rock. As an incident to the strike and in aid of it the local union ordered that appellee's places be "picketed." This consisted in having "pickets" patrol the sidewalks in front of the entrances to the cafés, exhibiting large placards, with the statements printed thereon in large red type that "This café is unfair to union labor," and "Look, Faust Café is unfair to union labor." One person, and occasionally two, walked continually in front of each of these cafés, carrying placards, and at

meal times this number was sometimes increased.

The picketing continued for about a month, when suit was brought against the officers of the local union and certain of the pickets to enjoin them from further picketing appellee's places of business. The officers of the union admitted that they employed the pickets, and paid them, and had supervision over them, and had representatives whose business it was to make regular inspections to see that the picketing was continuously carried on. Other restaurants and cafés in Little Rock which refused to unionize were being picketed at the same time. The demand that the restaurants should unionize meant that they should employ only persons who were members of the labor union. The officers of the union testified that they gave strict directions to the pickets to preserve order, to speak only when spoken to, and then only to answer respectfully questions asked them, and to keep walking the beats assigned them. These beats represented the fronts of the places of business which were being picketed. A number of the pickets testified that they obeyed these directions strictly, and in doing so endured insults, derision, and abuse in silence and without resentment. No picket admitted having violated the instructions of the union which employed them.

On the other hand, there was testimony tending to show that such was not the case. Without naming the witnesses, it may be said there was testimony to the following effect: A prospective customer was accosted by one of the pickets, who said, "Don't go in there, brother; it's a scab joint." He disregarded the warning and entered. While eating, a lady and two children undertook to enter. She opened the door, when the picket said, "Don't go in there, lady; it's a scab joint; it's unfair to union labor." She stopped, hesitated, appeared worried, and then turned and went away. Pickets accosted many per-

sons about to enter the cafés; a number of whom turned away and did not enter. A picket said to one of these, "I know his line of business and will remember it." A picket was heard to say, "I would like to get a chance to wait on some of those scabs eating in there." Frequently cooks and waiters who were on a strike at other restaurants joined the pickets, and occasionally crowds gathered about the cafés and interfered with the free passage of customers, and the assistance of the police became necessary to clear away the crowds. Persons about to enter were seized by the arm and asked not to enter. Strikers had in some instances threatened employees with personal violence who refused to join the union. A waitress was told that if she did not join the union before the strike was won the house would have to turn her out when it was forced to recognize the union; but she refused to join the union and continued at work. Pickets inserted the placards in the faces of a number of persons who indicated an intention to enter the cafés, and many were thus deterred from entering. Stinkballs were thrown in the cafés while meals were being served. And as a result of the conduct detailed above appellee sustained a loss of business in one month of \$2,800.

It is very probable that the pickets were not responsible for all this misconduct. Much of it was no doubt attributable to their sympathizers. But if the witnesses for appellee are to be credited, the pickets were responsible for numerous acts of coercion and intimidation. And if this be true the officers of the union who employed these pickets must be held responsible for this misconduct, although they not only did not

Master and
servant—liability for acts
of pickets.

direct the misconduct, but gave instructions to the contrary; for the misconduct occurred in the discharge of the duties for which the pickets had been employed, and in the

course of their employment as such. *Bryeans v. Chicago Mill & Lumber Co.* 132 Ark. 282, 200 S. W. 1004; *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229, 62 L. ed. 260, L.R.A.1918C, 497, 38 Sup. Ct. Rep. 65, Ann. Cas. 1918B, 461.

The court entered the following decree: ". . . That the defendants, and the agents and employees of each of the defendants, be and they are each restrained and enjoined while on, adjacent, or near plaintiff's premises . . . from interfering with plaintiff's business, his customers, prospective customers, or employees, and from picketing or patrolling, or causing to be picketed or patrolled the sidewalks or streets adjacent to plaintiff's said premises with placards designating said places of business as unfair to union labor, or with placards otherwise so worded as to give said places such designation; and also that the defendants and the agents and employees of each of the defendants be and they are each restrained and enjoined from accosting or detaining or causing to be accosted or detained on the sidewalks or streets adjacent to plaintiff's premises any person or persons seeking to enter plaintiff's restaurants for the purposes of dissuading them from patronizing or working for plaintiff, or from calling their attention to any alleged unfairness of plaintiff's restaurants to union labor, or otherwise undertaking to influence such employees or prospective patrons from entering the service of or patronizing plaintiff's restaurants."

Certain fundamental rights are recognized by each of the parties to this litigation as belonging to the other. It is recognized, and this court has expressly decided, that laborers have the right

Trade union—
right to
organize.

to organize into unions for the purpose of bargaining collectively for the betterment of their condition, and, as an incident thereto, to strike collectively. *Meier v. Speer*, 96 Ark. 618, 32 L.R.A. (N.S.) 792, 132 S. W. 6 A.L.R.—57.

988. They have the right to say for whom and upon what terms they will work, and may act through their unions in the decision of these questions, provided, of course, no contracts of employment are broken. And when they fail, acting thus collectively, to agree with any employer, and have gone upon a strike, they have the right to apprise the public of that fact, and to solicit the support not only of members of the union, but of the public generally, in any legitimate attempt to prevail in their controversy. Against the law as thus stated there appears to be no dissent. On the other hand, it is equally as well settled and as uniformly held by the courts that the labor unions have no right to resort to force, intimidation, or coercion. Publicity, as well as other means of persuasion, may be used; but force, coercion, and intimidation may not be used.

Master and
servant—right to
refuse service.

Strike—right
to apprise
public of facts.

Trade union—
right to resort
to force.

Picketing as an aid to industrial strikes is somewhat of an innovation in the economic life of the nation, and the law on the subject is in the formative period. It is a question of first impression in this state, and a number of other states, like this one, have no cases on the subject. However, there are a number of cases on the subject in both state and Federal courts, but these courts are not in harmony on the subject.

Early cases upholding the right of picketing likened that action to the exercise of the right of free speech. This was upon the theory that, as a striker might tell an individual citizen his grievance and thereby appeal to him for support in his strike, so he might employ any lawful and proper means which gave the greatest effect to that right, and that he might, therefore, inscribe his grievances upon placards to be seen at a distance and to be read by many at the same time, provided the inscription was not libelous or otherwise unlawful. The ex-

istence of this right is still generally conceded, and we think such right exists. But it appears in the history of this movement, as reflected in the opinions of the courts on the subject, that there has been an extension of the rights claimed by the labor unions in this respect, and the differences which appear in the decisions of the courts largely arise out of contrariety of view as to when the assertion of this right by the labor union to give notice of its grievances becomes an infringement on the rights of others by coercing those others into compliance with the demands of organized labor, or, as has been stated, the cases all agree in holding that any conduct on the part of the pickets which amounts to coercion is unlawful, and will be enjoined.

But as the cases continued to come before the courts and the law on the subject to be molded, it became more and more apparent that picketing was practised and resorted to not alone for purposes of publicity and persuasion, but for coercion and intimidation as well; so that, while the tendency of the earlier cases was to uphold picketing as an exercise of the right of free speech, the tendency of later cases is to restrict that right as an act of coercion in its tendencies, and one which in its practical application tends generally to breaches of the peace and other disorders. This fact is recognized and stated by the author of the note to the annotated case of *Re Langell*, 50 L.R.A. (N.S.) 412. The modern and better view on the subject appears to be that, while the labor union which is on a strike has the right to give publicity to that fact and to solicit support in its behalf, it has no right, in doing so, to disregard the equal right of the employer to employ whom he pleases, provided he violates no contract right of employ-

ment, and that the public may bestow its favor and support upon one side or the other, free from any coercive molestation.

The labor union or its representatives and employees had the right to exhibit the placards in question to the public; but it is a far different thing to say that the right to exhibit these placards to the public carried with it the right to so patrol or picket appellee's places of business with these placards as to interfere with his lawful business. The cases all agree that the right to carry on a lawful business without obstruction is a property right, and one which the courts have never hesitated to protect, and its protection is a proper object for the granting of an injunction.

The placard itself may be lawful and its display, therefore, not unlawful; yet, with the use of such a placard, or, for that matter, without the use of any placard, one's right to prosecute his own lawful business may be unnecessarily interfered with. The legality of the inscription on the placard and the right to display such a placard did not give one the right to make any use he pleased of the placard. It is commonly said that one may do as he pleases with his own; but that is not an exact statement of the law. He cannot so use his own as to inflict unnecessary injury upon another. This truth is so just and so apparent that early in the history of our law the maxim grew up, "*Sic utere tuo ut alienum non lædas.*" This maxim was quoted and translated by Mr. Justice Pitney in the *Hitchman Coal & Coke Co. Case*, *supra*, where it was said: "The familiar maxim, '*Sic utere tuo ut alienum non lædas,*' literally translated, 'So use your own property as not to injure that of another person,' but, by more proper interpretation, 'so as not to injure the rights of another' (*Broom Legal Maxims*, 8th ed. 289), applies to conflicting rights of every description.

Picketing—
right to use
placards.

—coercion—
legality.

Property—
right to carry
on business.

Trade union—
right to inter-
fere with
employment of
labor.

For example, where two or more persons are entitled to use the same road or passage, each one in using it is under a duty to exercise care not to interfere with its use by the others, or to damage them while they are using it."

This quotation was used in the case cited in a discussion of the relative rights of the employer and the employee wherein the right of the employer was upheld to discharge the employee for joining a labor union. In that case, as in an infinite number of others, it was recognized that rights are reciprocal, and so are duties. But the occasion may arise when rights are conflicting. I have the right to use the sidewalk, and any portion thereof, and at all hours, subject to necessary police regulations. But so has my neighbor. My right qualifies his, and his right qualifies mine, so that each must exercise his right in a manner not to interfere unnecessarily with the rights of the other. So here, the strikers and the union to which they belonged, and the employees thereof, had the right to give notice to the public that appellee's cafés were open shops, and therefore unfair to union labor; but in doing this they had no right to exercise coercion resulting from the conduct herein set forth. They were not using the streets in front of appellee's place of business for the ordinary purposes for which streets and sidewalks are intended, but were using them for the avowed purpose of injuring his business or driving away the patronage which the public might otherwise have given him. Their interference with his business was direct and immediate, and was intended so to be.

The conduct of the pickets was manifestly not intended merely to give notice to the public that appellee's cafés were unfair to union labor. The area in which the pickets confined their operation is evidence that such alone was not their intention, as their beat was limited to the frontage of appellee's cafés on the streets. Not many, if any, pa-

trons could enter without being observed, and these would know that they had been observed. The number of pickets was increased at the meal hours, when a larger number of people were likely to enter the cafés for their meals. And can there be any real question as to the meaning of the presence of the pickets? Were they not doing something more than giving notice to the public that they had an undecided issue with the business which they were picketing? Were they not saying, even though it was silently said: "See what we are doing to this man, because he has incurred our displeasure? Beware a similar fate!" And was it not necessarily true that many people who had no knowledge or opinion in regard to the existing controversy, and who felt no interest in the terms of its final settlement, were deterred from according the patronage which might otherwise have been given appellee, simply because there was a controversy in which they did not desire to even appear to be parties?

In discussing a similar question in the case of *Jones v. Van Winkle Gin & Mach. Works*, 131 Ga. 336, 17 L.R.A.(N.S.) 848, 127 Am. St. Rep. 235, 62 S. E. 236, the supreme court of Georgia said that conduct which operates upon one's fears, rather than upon his judgment or his sympathy, is coercive.

In the case of *Pierce v. Stablemen's Union*, 156 Cal. 70, 103 Pac. 324, the supreme court of California said: "It [picketing] tends and is designed to drive business away from the boycotted place, not by the legitimate methods of persuasion, but by the illegitimate means of physical intimidation and fear. Crowds naturally collect; disturbances of the peace are always imminent and of frequent occurrence. Many peaceful citizens, men and women, are always deterred by physical trepidation from entering places of business so under a boycott patrol. It is idle to split hairs upon so plain a proposition, and to say

that the picket may consist of nothing more than a single individual, peacefully endeavoring by persuasion to prevent customers from entering the boycotted place. The plain facts are always at variance with such refinements of reason."

This question is discussed in Eddy on Combinations, vol. 1, § 539, where it is said: "A picket is the agent of a combination, and the legality or illegality of the maintenance of a picket has absolutely nothing to do with the number of pickets employed, but depends upon the objects of the combination and the means used by the picket to attain the objects. If the object of the combination is simply to notify parties seeking employment that a strike is on, and to persuade them by peaceful and lawful arguments not to take the places of the striking workmen, then the picket is not illegal, and it is quite immaterial whether there be one picket or many. If, however, the object of the combination in maintaining the picket is to intimidate other workmen and thereby prevent their finding employment, the picket is illegal, whether there be one or many. In determining the object of the combination the courts will probe deeper than resolutions and mere professions of good will and lawful intentions. It unfortunately happens that there is seldom a case where a picket is maintained that the members of the picket or their hangers-on do not resort to acts of violence, and to jeers, cries, epithets, and threats calculated and intended to intimidate workmen who are not members of the combination. So true is this that the very term 'picket' has come to mean in the popular mind threats, violence, and intimidation. It is conceivable, however, that a picket entirely lawful might be established about a factory, but such a picket would go no further than interviews and lawful persuasion and inducement. The slightest evidence of threats, violence, or intimidation of any character ought to be sufficient to convince court and jury of the

unlawful character of the picket, since the picket, under the most favorable consideration, means an interference between employer seeking employees and men seeking employment."

The decree enjoins picketing at and near appellee's premises, and the operation of the injunction is limited to that immediate vicinity. The reason for the limitation is manifest. A presentation of labor's grievances elsewhere gives the member of the public whose support is thus solicited an opportunity for reflection; but when the picketing is conducted in the small space of the frontage of the business picketed, the effect of that conduct is practically immediate. No opportunity for reflection is afforded. One must choose immediately between defying the picket and acceding to his appeal, so that interference necessarily results to the business there being conducted. We conclude, therefore, that the **Injunction—
against
picketing.** decree of the court enjoining the picketing under the conditions stated is right and proper, and should be affirmed.

We have not attempted to collect or cite the numerous cases on this subject. A number of these cases are cited in the excellent briefs of respective counsel; and while it is true, as stated above, that all of these cases do not support the views which we have here expressed, we are of the opinion that our views are in accord with the better-reasoned cases and the soundest principles of natural justice. The following cases on the subject are annotated, and present the different views of the courts, and, in addition, collect and cite most of the cases on the subject, and reference is made to these cases for the use of anyone who may wish to pursue his inquiry further: *Goldberg, B. & Co. v. Stablemen's Union*, 8 L.R.A.(N.S.) 460, 9 Ann. Cas. 1219; *Vegelahn v. Guntner*, 35 L.R.A. 722, 57 Am. St. Rep. 443; *Iron Molders' Union v. Allis-Chalmers Co.* 20 L.R.A.(N.S.) 315; *Kar-*

ges Furniture Co v. Amalgamated Woodworker's Union, 6 Ann. Cas. 829; Everett Waddey Co. v. Richmond Typographical Union, 5 L.R.A. (N.S.) 792, 8 Ann. Cas. 798; St. Louis v. Gloner, 15 L.R.A. (N.S.) 973, 124 Am. St. Rep. 750; Barnes v. Chicago, 122 Am. St. Rep. 129; Beck v. Railway Teamsters' Protective Union, 42 L.R.A. 407, 74 Am. St. Rep. 421; Jensen v. Cooks' & Waiters' Union, 4 L.R.A. (N.S.) 302; George Jonas Glass Co. v. Glass Bottle Blowers' Asso. 41 L.R.A. (N.S.) 445; St. Germain v. Bakery & C. Workers' International Union, L.R.A.1917F, 824.

Hart, J., dissenting:

There is no difference in judicial opinions in respect to the illegality in the use of any act which is calculated to coerce. The difference of judicial opinions arises in respect to what acts should be regarded as coercive. The decision of this question must depend, to a large extent, upon the circumstances surrounding each particular case. I do not think that the law is that picketing in itself, without some other act tending to show coercion, is subject to injunctive relief. There must be taken into account the number of picketers, the extent of their occupation of the sidewalk or street adjacent to the building or place picketed, as well as what they say and do and how they act. If the purpose of

picketing is to interfere with those going into or coming out of the building, or place picketed, an injunction may be granted. On the other hand, if the design of the picketing is merely to give notice to the public that the proprietor of the place picketed is unfair to union labor, or to see who can be made the subject of persuasive argument, such picketing is legal, and ought not to be enjoined.

Judge Humphreys concurs with me in this dissent.

NOTE.

The use of the boycott as a weapon in industrial disputes, including the question of the right to maintain pickets in the vicinity of one's place of business for the purpose of warning away intending patrons, forms the subject of annotation on page 909, post.

The reported case (LOCAL UNION, H. R. E. I. A. v. STATHAKIS, ante, 894) is of special interest for its recognition of the fact that the mere presence of a picket, without any element of physical intimidation, may amount to a constraint upon the will of possible customers, who are deterred from according their patronage not by reason of sympathy with the claims of the labor union, but because they do not wish to become involved in the controversy.

AUBURN DRAYING COMPANY, Respt.,

v.

WILLIAM WARDELL et al., Appts.

New York Court of Appeals — July 15, 1919.

(227 N. Y. 1, 124 N. E. 97.)

Injunction — against boycott to compel organization of plant.

1. Injunction lies to prevent the union labor of a city from undertaking to coerce a particular concern to unionize its plant by threatening patrons with labor trouble if they do not withdraw their patronage from such concern until it complies with the demand.

[See note on this question beginning on page 909.]

Property — right to do business as.

2. The right to be employed by, and to do work for and transact business with, and to receive compensation from, all who voluntarily seek and desire to engage in business with one is a property right.

[See 6 R. C. L. 268; 22 R. C. L. 44.]

Contract — exercise of right — interference with public good.

3. The right to sell and employ labor is subject to the condition that its exercise in a particular transaction shall not be inconsistent with the public interests, or hurtful to the public order, or detrimental to the common good.

[See 6 R. C. L. 268; 16 R. C. L. 414, 471.]

Labor union — right to organize.

4. Laborers have a right to associate, to bring within the labor organizations as members all laborers, and use the solidified power and influence to secure higher wages, shorter hours, arbitration of labor disputes, and better working conditions.

[See 16 R. C. L. 419.]

Tort — interference with customers — liability.

5. One cannot injure the property rights of another by causing or controlling, through duress, coercion, oppression, or fraud, the acts of third persons which produce the injury.

[See 16 R. C. L. 455.]

APPEAL by defendants from a judgment of the Appellate Division of the Supreme Court, Fourth Department, affirming a judgment of an Equity Term for Cayuga County (Sutherland, J.) in favor of plaintiff, in an action brought to enjoin the prosecution of a boycott against its business, and for the recovery of damages. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. Frederick A. Mohr, for appellants:

The findings as to motive or purpose do not sustain the judgment.

Davis v. United Portable Hoisting Engineers, 28 App. Div. 398, 51 N. Y. Supp. 180; *W. P. Davis Mach. Co. v. Robinson*, 41 Misc. 329, 84 N. Y. Supp. 837; *Butterick Pub. Co. v. Typographical Union*, 50 Misc. 1, 100 N. Y. Supp. 292; *Tallman v. Gaillard*, 27 Misc. 114, 57 N. Y. Supp. 420; *National Protective Asso. v. Cummings*, 53 App. Div. 227, 65 N. Y. Supp. 946, affirmed in 170 N. Y. 315, 58 L.R.A. 135, 88 Am. St. Rep. 648, 63 N. E. 369; *Mills v. United States Printing Co.* 99 App. Div. 605, 91 N. Y. Supp. 185; *Kissam v. United States Printing Co.* 199 N. Y. 76, 92 N. E. 214; *Wunch v. Shankland*, 59 App. Div. 482, 69 N. Y. Supp. 349; *Allen v. Flood* [1898] A. C. 1, 62 J. P. 595, 67 L. J. Q. B. N. S. 119, 77 L. T. N. S. 717, 14 Times L. R. 125, 46 Week. Rep. 258, 17 Eng. Rul. Cas. 285; *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, 21 L.R.A. 337, 40 Am. St. Rep. 319, 55 N. W. 119; *Kemp v. Division No. 241*, 255 Ill. 213, 99 N. E. 389, Ann. Cas. 1918D, 347; *John D. Park & Sons Co. v. National Wholesale Druggists' Asso.* 175 N. Y. 1, 62 L.R.A. 632, 96 Am. St. Rep. 578, 67 N. E. 136; *Rosenau v. Empire Circuit Co.* 131 App. Div. 429, 115 N. Y. Supp. 517; *Tanenbaum v. New York F. Ins. Exch.* 33

Misc. 134, 68 N. Y. Supp. 342; *National Fireproofing Co. v. Mason Builders' Asso.* 26 L.R.A. (N.S.) 148, 94 C. C. A. 535, 169 Fed. 259; *Matthews v. Associated Press*, 136 N. Y. 333, 32 Am. St. Rep. 741, 32 N. E. 981; *Chappel v. Brockway*, 21 Wend. 157; *Collins v. American News Co.* 34 Misc. 260, 69 N. Y. Supp. 638; *Reynolds v. Plumbers' Material Protective Asso.* 30 Misc. 709, 63 N. Y. Supp. 303; *Heim v. New York Stock Exch.* 64 Misc. 529, 118 N. Y. Supp. 591.

There is no evidence to sustain the finding that there was injury to or interference with the "property" of the plaintiff.

People v. Davis, 159 App. Div. 464, 144 N. Y. Supp. 284; *Albro J. Newton Co. v. Erickson*, 70 Misc. 291, 126 N. Y. Supp. 949, affirmed without opinion in 144 App. Div. 939, 129 N. Y. Supp. 1111; *Bossert v. Dhuy*, 221 N. Y. 359, 117 N. E. 582, Ann. Cas. 1918D, 661; *John D. Park & Sons Co. v. National Wholesale Druggists' Asso.* 175 N. Y. 1, 62 L.R.A. 632, 96 Am. St. Rep. 578, 67 N. E. 136.

The evidence does not sustain the finding that the motive or purpose of the defendants' combination was the injury or destruction of plaintiff's business.

Gill Engraving Co. v. Doerr, 214 Fed. 111; *National Fireproofing Co. v. Mason Builders' Asso.* 26 L.R.A. (N.S.)

148, 94 C. C. A. 535, 169 Fed. 259; Lambert v. People, 9 Cow. 597.

Defendants' collective action did not violate subd. 5 of § 580 of the Penal Law because injury to the plaintiff's business resulted therefrom, even though such result was intended.

People v. Fisher, 14 Wend. 9, 28 Am. Dec. 501; Butterick Pub. Co. v. Typographical Union, 50 Misc. 1, 100 N. Y. Supp. 292; Green v. Davies, 182 N. Y. 505, 75 N. E. 536, 3 Ann. Cas. 310; Morris v. Tuthill, 72 N. Y. 575; Phelps v. Nowlen, 72 N. Y. 39, 28 Am. Rep. 93; Kiff v. Youmans, 86 N. Y. 324, 40 Am. Rep. 543.

The combination of the defendants was not injurious to trade and commerce in violation of subd. 6, § 580, of the Penal Law.

Diamond Match Co. v. Roeber, 106 N. Y. 481, 60 Am. Rep. 464, 13 N. E. 419; Re Davies, 168 N. Y. 101, 56 L.R.A. 855, 61 N. E. 118; Locker v. American Tobacco Co. 121 App. Div. 443, 106 N. Y. Supp. 115, affirmed in 195 N. Y. 565, 88 N. E. 289; Brooklyn Distilling Co. v. Standard Distilling & Distributing Co. 120 App. Div. 237, 105 N. Y. Supp. 264; Re Jackson, 57 Misc. 1, 107 N. Y. Supp. 799; People v. Dwyer, 160 App. Div. 542, 145 N. Y. Supp. 748, 215 N. Y. 51, 109 N. E. 103.

The acts of the defendants were but the collective exercise of their individual rights, and involved no breach of duty to the plaintiff.

Lough v. Outerbridge, 143 N. Y. 283, 25 L.R.A. 674, 42 Am. St. Rep. 712, 38 N. E. 292; Gill Engraving Co. v. Doerr, 214 Fed. 111.

Mr. Walter Gordon Merritt, with Messrs. George B. Turner and John Taber, for respondents:

Defendants are engaged in an unlawful combination to injure the plaintiff's good will, trade, and business.

Bossert v. Dhuy, 221 N. Y. 342, 117 N. E. 582, Ann. Cas. 1918D, 661; Martin, Labor Unions, § 29, p. 35; Loewe v. California State Federation of Labor, 139 Fed. 71; Pickett v. Walsh, 192 Mass. 572, 6 L.R.A.(N.S.) 1067, 116 Am. St. Rep. 272, 78 N. E. 753, 7 Ann. Cas. 638; State v. Glidden, 55 Conn. 47, 3 Am. St. Rep. 23, 8 Atl. 890; Casey v. Cincinnati Typographical Union, 12 L.R.A. 193, 45 Fed. 135; National Fireproofing Co. v. Mason Builders' Asso. 26 L.R.A.(N.S.) 148, 94 C. C. A. 535, 169 Fed. 259; Curran v. Galen, 152 N. Y. 33, 37 L.R.A. 802, 57 Am. St. Rep. 496, 46 N. E. 297; Aikens v. Wisconsin, 195 U. S. 204, 49 L. ed.

159, 25 Sup. Ct. Rep. 3; Loewe v. Lawlor, 208 U. S. 288, 52 L. ed. 495, 28 Sup. Ct. Rep. 301, 13 Ann. Cas. 815; Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229, 62 L. ed. 260, L.R.A. 1918C, 497, 38 Sup. Ct. Rep. 65, Ann. Cas. 1918B, 461; Martell v. White, 185 Mass. 255, 64 L.R.A. 260, 102 Am. St. Rep. 341, 69 N. E. 1085; Callen v. Wilson, 127 U. S. 540, 32 L. ed. 223, 8 Sup. Ct. Rep. 1301; Grenada Lumber Co. v. Mississippi, 217 U. S. 433, 54 L. ed. 826, 30 Sup. Ct. Rep. 535; Gompers v. Buck's Stove & Range Co. 221 U. S. 418, 50 L. ed. 797, 34 L.R.A. (N.S.) 874, 31 Sup. Ct. Rep. 492; Burnham v. Dowd, 217 Mass. 351, 51 L.R.A. (N.S.) 778, 104 N. E. 841; Barr v. Essex Trades Council, 53 N. J. Eq. 101, 30 Atl. 881; Beck v. Railway Teamsters' Protective Union, 118 Mich. 497, 47 L.R.A. 407, 74 Am. St. Rep. 421, 77 N. W. 13; Purington v. Hinchliff, 219 Ill. 159, 2 L.R.A.(N.S.) 824, 109 Am. St. Rep. 322, 76 N. E. 47; Thomas v. Cincinnati, N. O. & T. P. R. Co. 4 Inters. Com. Rep. 788, 62 Fed. 818; Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co. 19 L.R.A. 387, 5 Inters. Com. Rep. 522, 54 Fed. 730; Branson v. Industrial Workers, 30 Nev. 270, 95 Pac. 354; Casey v. Cincinnati Typographical Union, 12 L.R.A. 193, 45 Fed. 135; Crump v. Com. 84 Va. 941, 10 Am. St. Rep. 895, 6 S. E. 620; Ertz v. Produce Exch. 79 Minn. 140, 48 L.R.A. 90, 79 Am. St. Rep. 433, 81 N. W. 787; Evenson v. Spaulding, 9 L.R.A.(N.S.) 904, 82 C. C. A. 263, 150 Fed. 517; Gray v. Building Trades Council, 91 Minn. 171, 63 L.R.A. 753, 103 Am. St. Rep. 477, 97 N. W. 663, 1118, 1 Ann. Cas. 172; Hopkins v. Oxley Stave Co. 28 C. C. A. 99, 49 U. S. App. 709, 83 Fed. 912; Lucke v. Clothing Cutters' & T. Assembly, 77 Md. 396, 19 L.R.A. 408, 39 Am. St. Rep. 421, 26 Atl. 505; My Maryland Lodge v. Adt, 100 Md. 238, 68 L.R.A. 752, 59 Atl. 721; National Teleph. Co. v. Kent, 156 Fed. 173; Rocky Mountain Bell Teleph. Co. v. Montana Federation of Labor, 156 Fed. 809; Seattle Brewing & Malting Co. v. Hansen, 144 Fed. 1011; State v. Glidden, 55 Conn. 47, 3 Am. St. Rep. 23, 8 Atl. 890; Webb v. Drake, 52 La. Ann. 290, 26 So. 791; Wilson v. Hey, 232 Ill. 389, 16 L.R.A. (N.S.) 85, 122 Am. St. Rep. 119, 83 N. E. 928, 13 Ann. Cas. 82; Lohse Patent Door Co. v. Fuelle, 215 Mo. 421, 22 L.R.A.(N.S.) 607, 128 Am. St. Rep. 492, 114 S. W. 997; Jensen v. Cooks' & Waiters Union, 39 Wash. 531, 4 L.R.A.(N.S.) 302, 81 Pac. 1069; Grassi

Contracting Co. v. Bennett, 174 App. Div. 244, 160 N. Y. Supp. 279.

The strikes against the complainant's customers, for utilizing the plaintiff as a common carrier, are unlawful.

Pickett v. Walsh, 192 Mass. 572, 6 L.R.A.(N.S.) 1067, 116 Am. St. Rep. 272, 78 N. E. 753, 7 Ann. Cas. 638; *Burnham v. Dowd*, 217 Mass. 351, 51 L.R.A.(N.S.) 778, 104 N. E. 841; *Thomas v. Cincinnati*, N. O. & T. P. R. Co. 4 Inters. Com. Rep. 788, 62 Fed. 818; *Moores v. Bricklayers' Union*, 10 Ohio Dec. Reprint, 665; *Kemp v. Division No. 241*, 255 Ill. 213, 99 N. E. 389, Ann. Cas. 1913D, 347; *Jackson Architectural Iron Works v. Hurlbut*, 158 N. Y. 34, 70 Am. St. Rep. 432, 52 N. E. 665; *Heuman v. M. H. Powers Co.* 175 App. Div. 627, 162 N. Y. Supp. 590; *Lawson v. Recorder's Ct. Judge* (*Lawson v. Connolly*) 175 Mich. 375, 45 L.R.A.(N.S.) 1152, 141 N. W. 623.

The combination of the defendants violates the Penal Law.

People v. Davis, 159 App. Div. 464, 144 N. Y. Supp. 284; *Thomas v. Musical Mut. Protective Union*, 121 N. Y. 50, 8 L.R.A. 175, 24 N. E. 24; *People v. Klaw*, 55 Misc. 72, 106 N. Y. Supp. 341; *Davis v. Zimmerman*, 91 Hun. 489, 71 N. Y. S. R. 385, 36 N. Y. Supp. 304; *People v. Dwyer*, 215 N. Y. 46, 109 N. E. 103; *Cooley, Torts*, 3d ed. p. 145; *Cook, Combinations*, 32; *Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co.* 19 L.R.A. 387, 5 Inters. Com. Rep. 522, 54 Fed. 730.

Plaintiff, being irreparably injured in its property rights, is entitled to protection by injunction.

People v. Dwyer, 215 N. Y. 46, 109 N. E. 103; *Merchants Legal Stamp Co. v. Murphy*, 220 Mass. 281, L.R.A.1915C, 520, 107 N. E. 968; *Com. v. North Shore Ice Co.* 220 Mass. 55, 107 N. E. 402; *W. W. Montague & Co. v. Lowry*, 193 U. S. 38, 48 L. ed. 608, 24 Sup. Ct. Rep. 307.

Collin, J., delivered the opinion of the court:

This is a contest between the plaintiff and the labor unions of the city of Auburn, New York. There is no serious dispute concerning the material facts. In so far as there is a dispute, we have concluded that the findings of the special term are supported by the evidence. While there was not unanimity in the decision of the appellate division, the divergence related to legal conclu-

sions or the applicability of legal principles.

The action was commenced November 29, 1913. The plaintiff, a corporation, was extensively and prosperously engaged in the general trucking business in the city of Auburn, New York. It employed from thirty to forty-five men, the greater number of whom were not members of a labor union. There existed in Auburn, as voluntary unincorporated labor organizations, twenty-two local labor unions, representing the various trades and occupations, with an aggregate membership of about 1,400 persons. There existed also the Central Labor Union, an unincorporated association, made up of delegates from the individual unions, and the members of the local unions were members of it and bound by its constitution, rules, regulations, and by-laws. It and certain of the local unions are, through representation by officers, defendants in the action. Code Civ. Proc. §§ 1919-1924. Expressed objects of the Central Labor Union were to secure united action in defense of the rights and for the protection of the interests of the working classes, and to arbitrate and adjust difficulties that might arise between workmen and their employers. Objects of the local unions were increased wages, greater efficiency, employment, and the improvement of working and social conditions through united action.

The defendant Teamsters' Union No. 679 was organized November 9, 1912. The plaintiff neither forbade nor encouraged its employees to join. In July, 1913, representatives of the unions stated to the plaintiff that, unless it took the necessary means to get its men to join the union, Teamsters' Union No. 679, it would be placed on the unfair list. The plaintiff refused to so act, and Teamsters' Union No. 679 passed a resolution placing the plaintiff on the unfair list, that is, listed it as an employer who refused to employ and discriminated against union labor, and refused to give its em-

ployees the conditions asked for by labor organizations, with respect to hours of labor, shop conditions, and other similar working conditions. Union No. 679 reported, in accordance with a standing resolution of the Central Labor Union, the placing of the plaintiff on the unfair list. The Central Union insisted to the plaintiff that all its employees must join the union, and the plaintiff replied they were free to join if they so chose. They refused to join. The Central Labor Union indorsed the placing of the plaintiff upon the unfair list, thus making, under its rules, the action final and operative. The declaration of principles of the Central Labor Union provided, among other things, as follows: "We shall withdraw, and use our influence to have others withdraw, all patronage from any unfair employer, or any person patronizing such unfair employer, let his calling be what it may."

The by-laws and regulations of the unions provided penalties of fines and expulsion for nonconformity. The Central Union and other local unions took the position that they would consider the company unfair toward organized labor until such time as their employees became members of the Teamsters' Union. They withdrew, and used their influence and positions, and their members used their influence and positions, to have the employers of their members withdraw patronage from the plaintiff. The findings set forth at length their acts and their effects. In summary, it may be stated that dealers, ice deliverers, bakers, butchers, builders, plumbers, and contractors, because of the notices, warnings, and declarations of the defendants, in varying and serious degrees discontinued business with the plaintiff, and refused further to employ it to do carting, hauling, or collection work, for fear of loss of business and labor troubles on account of the defendants' combination, if they continued business with it. Further findings are:

"(49) The ultimate hope of the defendants was to better the condition of the members of the unions by bringing into said organization all of the craftsmen and laborers in Auburn, so that their united efforts for higher wages, shorter hours, and better working conditions might be more persuasive and effectual, and without such motive or ultimate purpose the boycott would not have been inaugurated; but the immediate business in hand, the specific and direct thing which the defendants were then and there devoting their energies to and focusing all of the disciplined power of their organization upon, was the destruction of the plaintiff's business, in order that the plaintiff, through its sufferings, might be forced to yield to the demands of the union. What was threatened, intended, and in part accomplished by the defendants was injury to the business and property of the plaintiff; the acts performed and results accomplished being also necessarily injurious to trade and commerce, which injury to trade and commerce was intended to be brought about by the defendants through the performance of such acts.

"(50) All of the foregoing acts of the defendants and those acting in conjunction with them were done in furtherance of the combination and conspiracy to compel the plaintiff to employ union men exclusively, and to discharge any employee who refused to join the union. . . .

"(52) The said combination of the defendants and all acts in furtherance thereof were calculated and intended to injure and destroy the plaintiff's good will, trade, and business, and all of the defendants were members of said combination and acting in furtherance thereof.

"(53) At the time of the commencement of this suit, plaintiff was suffering irreparable loss and damage to its trade, good will, and business from the acts of the defendants in furtherance of their said combination. . . .

"(55) There has been, during the

entire trouble, no force or violence used or threatened. There has been no misstatement of facts, unless the use of the word 'unfair,' when applied to the plaintiff, may have been misleading; and it is not charged that there was any intention to misrepresent the facts in this respect.

"(56) . . . What was feared by the customers (of plaintiff) was not any voluntary self-initiated movement of their own employees to quit, but that they would quit because ordered to do so by the organizations to which they belonged, which possessed disciplinary powers to enforce obedience. . . .

"(58) The said combination of defendants originated solely from the refusal of plaintiff's employees to join the union, the demand made by defendants that plaintiff compel them to join the union, and the refusal of the plaintiff to comply with that demand."

As conclusions of law the special term found that the combination of the defendants constituted an illegal conspiracy to injure the plaintiff's business and property, and their acts were illegal as an intended injury to the plaintiff's business, and as unreasonably restrictive of and injurious to trade and commerce, and the conspiracy was unlawful as designed to prevent the plaintiff from exercising its lawful trade and calling by threats to do illegal acts; the plaintiff had no adequate remedy at law. The plaintiff was entitled to a decree to recover the damages and a reference to ascertain and report the amount of damages, and, on the incoming and confirmation of said report, to a final judgment against all of the defendants for the amount of said damages thus ascertained, and to a further decree for a permanent injunction against the defendants "to prohibit the enforcement of resolutions, rules, or orders of the defendant unions, requiring their members to quit the service of employers who patronize the plaintiff, and the giving of notices by or on behalf of said organizations or the officers

thereof to such employers, or the public, of an intention to quit, provided such employers continued to patronize the plaintiff, and any other attempt or effort to use the powers or authority of the defendant unions over their own members for the purpose of inducing or compelling patrons of the plaintiff, or the public generally, against their will, to refrain from dealing with the plaintiff." A final judgment was entered for such relief, upon the confirmation of the report of a referee.

The briefs and arguments of counsel are concerned with a wide range of problems and principles relative to the rights of labor unions and of employers and employees. The determinative facts presented in the case at bar are, however, few, and the decisive principles are established. The defendants, in concerted actions and measures, interfered with the property rights and the property of the plaintiff. As a part of its property was the right to be employed by, to do work for, to transact

business with, and to receive compensation from, all those who voluntarily sought or desired to thus engage with it. Personal liberty or the right of property embraces the right to make contracts for the purchase of the labor of others, and equally the right to make contracts for the sale of one's own labor and the employment of one's individual and industrial resources. The right is not and cannot be absolute. It is subject to the condition that its exercise in the particular transaction shall not be inconsistent with the public interests, or hurtful to the public order, or detrimental to the common good. Moreover, it is common and reciprocal to all citizens. An unrestrained and unlimited exercise on the part of some persons would clash with and encounter the exercise of a similar freedom on the part of others. The question then arises whether the interference with the action of the one

Property—right to do business as.

Contract—exercise of right—interference with public good.

is justified by the exercise of some right of the interfering other. The right of the citizen to effectuate his desire or judgment without interference or compulsion must always be exercised with reasonable regard for the conflicting rights of others. The law recognizes the right, and holds and enforces that an invasion of it, without a cause or reason which the law deems essential or useful in the existence or betterment of organized society, is a legal and actionable wrong which may be compensated or restrained. *Adair v. United States*, 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764; *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229, 62 L. ed. 260, L.R.A.1918C, 497, 38 Sup. Ct. Rep. 65, Ann. Cas. 1918B, 461; *Curran v. Galen*, 152 N. Y. 33, 37 L.R.A. 802, 57 Am. St. Rep. 496, 46 N. E. 297; *National Protective Asso. v. Cumming*, 170 N. Y. 315, 58 L.R.A. 135, 88 Am. St. Rep. 648, 68 N. E. 369; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636. The action and measures initiated and sustained by the defendants worked serious injury to the property of the plaintiff, in consequence of which it sustained substantial damages. Unless the findings of the special term and the facts present a legal cause or justification for the interference by the defendants with the business and property of the plaintiff, the judgment appealed from is right, and must be affirmed.

The interference with and depreciation of the business and earnings of the plaintiff by the conjoint action of the defendants was of the nature and effect of a barrier against access to the plaintiff, its office, and place of business. Their action towards the destruction of its business was affirmative and aggressive. It was not simply that the members of Union No. 679, from which the defendants insisted the plaintiff must hire its employees, refused to be employed by the plaintiff or its patrons, unless and until it employed members of the union.

The unions and their members sought to induce, and induced, the employers of labor in the various trades and industries, and the people generally in that community, to discontinue employing and to abstain from business transactions with the plaintiff, by directly and affirmatively causing loss and injury to their business or interests, or fear of loss and injury to their business or interests, in case they did not so discontinue and abstain. They sought to compel, and did compel, those employers and the people to coerce the plaintiff to unionize its business. They thus attempted and intended to create a general exclusion and isolation of the business of the plaintiff, or, in other words, its non-existence so long as the plaintiff refused compliance with their demand that it compel its employees to join Union No. 679. The defendants are intentionally attempting to coerce the plaintiff to unionize its business by aggressively inducing its established and potential customers to ignore its existence in order to be free from the loss and injury which the action of the defendants would otherwise bring to those customers.

The rights, in virtue of which the defendants would justify the interference and the injury, are: (a) That of laborers to associate; (b) to bring within the labor organizations as members all laborers; (c) through the coherent and solidified power and influence

Labor union—
right to
organize.

flowing from association and united efforts, to secure for all laborers higher wages, shorter hours, arbitration of labor disputes, and better working conditions. Beyond question those rights exist. Labor unions are, and for a long time have been, recognized by the courts of this country as a legitimate and useful part of the industrial system. Associations of laborers to accomplish lawful objects by legal means have been always recognized and protected by the law of this state. The organizations of the defendants were as lawful as the incorporation

of the plaintiff. Their members might and should have promoted their strength, welfare, and their intelligent and salutary influence and control. Rights that are lawful and purposes that are useful and just cannot, however, be effectuated and accomplished by unlawful means. The individual cannot injure the property rights of another

Tort—interference with customers—liability.

by the means of causing or controlling, through duress, coercion, oppression, or fraud, the acts of third persons which produce the injury. The individual may do, and does, many acts which in their effect are or may be coercive as to another. The right to do those acts inheres in the natural freedom and the civil rights which are his. But there is an important and perceptible distinction, in the realms of justice, civil order, and law, between the voluntary acts of an individual, done in the right of personal freedom, the right to do or to refrain from doing, and their injurious effects, and the acts of others, undesired by them, initiated and performed in virtue of the deception, compulsion, or oppression on the part of that individual, and their injurious effects. The individual may lawfully refuse to be employed to drive from his neighbor's field the stray cattle which are destroying the crop, and thus, in effect, coerce the neighbor to drive them himself or permit the destruction; but he cannot lawfully prevent, through fraud or other form of dishonesty, or compulsion of any nature, another from becoming the employee for such purpose. He may lawfully do that which he cannot lawfully attempt to compel another to do. The one is the exercise of the fundamental right of individual choice and volition; the other is the negation and destruction of the right. In the latter case the individual annihilates as to the others the right which he asserts and maintains for himself, and causes injuries as positively and aggressively as he would, did he in-

tentionally disable the other or his industrial resources. The law does not tolerate inequality in the existence and enforcement of rights or the definition and redress of wrongs, and the first condition of individual freedom and opportunity is servitude to law. In the instant case the contest did not arise because the members of Union No. 679, or members of the same occupation and of other unions, chose not to work for the plaintiff or for or with men who did engage in business with it, or sought to persuade, in an orderly and proper manner, persons generally to abstain from business transactions with it. It did not arise in the ordinary and natural exercise by the unions of the right to control their own labor and of the right of association. It arose because the defendants, constituting the entire union population of the city of Auburn, inaugurated and carried on, affirmatively and aggressively, through the agencies of fear and coercion, a comprehensive exclusion of the plaintiff from the business of the community, in order to compel it to unionize its business. On the part of the defendants there was organized coercion of the plaintiff into compliance with the demand of the unions that it compel its employees to join Union No. 679, by combining to compel third persons to refrain from having any business relations with it. The defendants were an organized combination, with a unified intent and purpose, causing irreparable damage to the business and property of the plaintiff. Financial pressure, loss of business, interference with freedom of action were imposed by them in order to force the unionization. The law should be, and is, that the means were unjustifiable and unlawful, and the defendants should be enjoined from using them.

Injunction—against boycott to compel organization of plant.

Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229, 62 L. ed. 260, L.R.A.1918C, 497, 38 Sup. Ct. Rep. 65, Ann. Cas. 1918B, 461; *Burnham*

v. Dowd, 217 Mass. 351, 51 L.R.A. (N.S.) 778, 104 N. E. 841; Beck v. Railway Teamsters' Protective Union, 118 Mich. 497, 42 L.R.A. 407, 74 Am. St. Rep. 421, 77 N. W. 18; Purvis v. Local No. 500, U. B. C. J. 214 Pa. 348, 12 L.R.A. (N.S.) 642, 112 Am. St. Rep. 757, 63 Atl. 585, 6 Ann. Cas. 275; A. Fink & Son v. Butchers' Union, 84 N. J. Eq. 638, 95 Atl. 182; Harvey v. Chapman, 226 Mass. 191, L.R.A. 1917E, 389, 115 N. E. 304; W. A. Snow Iron Works v. Chadwick, 227 Mass. 382, L.R.A. 1917F, 755, 116 N. E. 801; Martell v. White, 185 Mass. 255, 64 L.R.A. 280, 102 Am. St. Rep. 341, 69 N. E. 1085; Cornellier v. Haverhill Shoe Mfrs. Asso. 221 Mass. 554, L.R.A. 1916C, 218, 109 N. E. 643; New England Cement Gun Co. v. McGivern, 218 Mass. 198, L.R.A.

1916C, 986, 105 N. E. 885; Baush Mach. Tool Co. v. Hill, 231 Mass. 30, 120 N. E. 188, July 16, 1918; Smith v. Bowen, 232 Mass. 106, 121 N. E. 814, Feb. 4, 1919.

What we have written declares sufficiently the clear and inescapable distinction between the facts and legal principles involved in this case and those involved in *Bossert v. Dhuy*, 221 N. Y. 342, 117 N. E. 582, Ann. Cas. 1918D, 661. The right of the plaintiff to a judgment being affirmed, the form or scope of the judgment rendered is not attacked. The judgment should be affirmed, with costs.

Hiscock, Ch. J., and Chase, Cuddeback, McLaughlin, and Crane, JJ., concur.

Hogan, J., not voting.

ANNOTATION.

The boycott as a weapon in industrial disputes.

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- III. The right to refuse to deal with another and to ask others not to do so, 913.
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I. Scope and introduction.

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V.—continued.

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of the various practices generally described as "boycotting," as directed against an employer of labor in consequence of an industrial dispute be-

tween himself and his employees, or, as in *AUBURN DRAYING CO. v. WARDELL* (reported herewith) ante, 901, between himself and a labor union of which his employees are not members. It does not, therefore, assume to include cases of boycotting other than in an industrial dispute, nor even all cases in which some form of boycott has been employed by the parties to an industrial dispute, such as cases in which it has been used as a means of inducing or compelling third persons not to enter or continue in another's employment, or cases of the blacklisting of employees by an employer or association of employers. Recourse has, however, been had to such decisions where they have thrown light on the questions herein discussed.

The word "boycott" is of vague signification, and no accurate and exclusive definition has ever been given (*Gill Engraving Co. v. Doerr* (1914) 214 Fed. 111); although various attempts have been made by the courts to describe its content of meaning (see *Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co.* (1893) 19 L.R.A. 387, 5 Inters. Com. Rep. 527, 54 Fed. 730; *Oxley Stave Co. v. Coopers' International Union* (1896) 72 Fed. 695; *Carter v. Fortney* (1909) 170 Fed. 463; *Meier v. Speer* (1910) 96 Ark. 618, 32 L.R.A. (N.S.) 792, 132 S. W. 988; *Pierce v. Stablemen's Union* (1909) 156 Cal. 70, 103 Pac. 324; *American Federation of Labor v. Buck's Stove & Range Co.* (1909) 33 App. D. C. 83, 32 L.R.A. (N.S.) 748; *Baldwin v. Escanaba Liquor Dealers' Asso.* (1911) 165 Mich. 98, 130 N. W. 214; *Gray v. Building Trades Council* (1903) 91 Minn. 171, 63 L.R.A. 753, 103 Am. St. Rep. 477, 97 N. W. 663, 1118, 1 Ann. Cas. 172; *Lindsay & Co. v. Montana Federation of Labor* (1908) 37 Mont. 264, 18 L.R.A. (N.S.) 707, 127 Am. St. Rep. 722, 96 Pac. 127; *Mills v. United States Printing Co.* (1904) 99 App. Div. 605, 91 N. Y. Supp. 185; *State v. Van Pelt* (1904) 136 N. C. 633, 68 L.R.A. 760, 49 S. E. 177, 1 Ann. Cas. 495; *Moores v. Bricklayers' Union* (1889) 10 Ohio Dec. Reprint, 665; *Brace Bros. v. Evans* (1888) 5 Pa. Co. Ct. 163; *Hailey v. Brooks* (1916) — Tex. Civ. App. —,

191 S. W. 781; *Crump v. Com.* (1888) 84 Va. 927, 10 Am. St. Rep. 895, 6 S. E. 620.). Such definitions vary (as is pointed out in *Lindsay & Co. v. Montana Federation of Labor* (1908) 37 Mont. 264, 18 L.R.A. (N.S.) 707, 127 Am. St. Rep. 722, 96 Pac. 127, and *Mills v. United States Printing Co.* (1904) 99 App. Div. 605, 91 N. Y. Supp. 185); and it is accordingly necessary to read decisions which condemn boycotting as illegal per se (e. g., *Carter v. Fortney* (1909) 170 Fed. 463; *Casey v. Cincinnati Typographical Union* (1891) 12 L.R.A. 193, 45 Fed. 135, and *Walsh v. Association of Master Plumbers* (1902) 97 Mo. App. 280, 71 S. W. 455) in the light of the meaning attached to the word by the judges pronouncing them. A comparison of the definitions attempted by the courts shows that they do not wholly agree as to whether the word "boycott" embodies the notion of a combination, or of the employment of unlawful means. There is, however, no dissent from the proposition that physical force, or threat thereof, is not an essential element.

The term is used to describe a variety of actions, ranging from a mere withdrawal of business by an individual to an organized effort by associated individuals to procure all others to withdraw from such intercourse, by means ranging from simple persuasion to disturbance of their business relations with third persons and physical intimidation. Accordingly, boycotts are sometimes referred to as being divided into two classes, primary and secondary, the primary boycott consisting simply of cessation by concerted action of dealings with another (*Pierce v. Stablemen's Union* (1909) 156 Cal. 70, 103 Pac. 324); while, in the case of the secondary boycott, an attempt is made to procure parties outside the combination to cease dealings as well (*Ibid.*; *American Federation of Labor v. Buck's Stove & Range Co.* (1909) 33 App. D. C. 128, 32 L.R.A. (N.S.) 770).

Notwithstanding the very considerable number of decisions on the subject, the law as to boycotts is in a confused and more or less chaotic condition. When the causes of this

confusion are understood, much of the difficulty attendant upon a comprehension of the subject disappears, and it will be perceived that the differences in the results reached in the decisions are due, in part, to a faulty mode of approach, and, fundamentally, to a difference in judicial opinion upon the point which the courts do not consciously decide, but upon which their decisions nevertheless turn, viz., the extent to which it is expedient to permit organized labor to utilize the powers of its organization for the purpose of securing for its members not only direct benefits in a particular employment, but also the indirect benefit arising from a control of the sources of employment. Instead, therefore, of there being a current of decisions, there is rather an ebb and flow, according to the operation of the unseen forces which control the tide of popular opinion. It is not until the courts shall have come to a conception of the real nature of the problems with which they have to deal that their decisions will attain clarity and order.

As said by Mr. Justice Holmes, in an article on "Privilege, malice, and intent," in 8 Harvard L. Rev. 1: "The ground of decision really comes down to a proposition of policy, of rather a delicate nature, concerning the merit of the particular benefit to themselves intended by the defendant, and suggests a doubt whether judges with different economic sympathies might not decide such a case differently when brought face to face with the issue."

So in *Gill Engraving Co. v. Doerr* (1914) 214 Fed. 111, it was said by Judge Hough: "That wrong and injury are being done in this matter is plain enough. Why does the law refuse or neglect to correct it? Andrews, J., has, I think, given the best answer in *Foster v. Retail Clerks' International Protective Assn.* (1902) 39 Misc. 48, 78 N. Y. Supp. 860: 'Injury . . . is never good, but to suffer it may entail less evil' than to attempt to check it by legal means. . . . In the last analysis this freedom to commit injury, and the bounds imposed upon it, are regulated by what has been thought to be public policy.'"

II. Judicial theories.

As above remarked, one source of confusion has been a faulty mode of approach, due to the fact that the tort involved in boycotting has been conceived as a form of conspiracy, its legality depending upon whether the purpose sought, or the means used, is unlawful. While this theory affords a basis for explaining the difference in result among the cases by attributing it to a difference of opinion, based on considerations of public policy, as to the "lawfulness" of the object sought and of the means used to attain it, it does not constitute a satisfactory formula of decision, because it leaves undefined the purposes or conduct which may be considered unlawful. Further, to approach the legality of the boycott upon the theory that an unlawful boycott is a conspiracy is open to the objection that it is apt to divert the courts from a consideration of the question whether another's rights have been invaded by the doing of a given act, by inviting them to determine the legality in vacuo of the act done, in complete disassociation from its effect upon the rights of others, and to argue, in a circle, that the given act, not being in itself unlawful, violates no right of complainant, and that since it violates no right it cannot be unlawful unless unlawful in itself. Again, the attempt to work out the course involved in boycotting on the theory of conspiracy has necessitated a resort in some cases to the somewhat forced presumption that the object of the combination is primarily to injure the person affected, rather than to benefit its members,—with a resultant conflict of judicial opinion. Still another objection to the conspiracy theory (though one not relevant to the class of boycott cases herein under discussion) is that, by making combination an essential element of the tort, it operates to exempt an individual from liability for the same act, done with the same intent, and producing the same injury, for which he, if acting in combination with others, might be held liable.

Another theory which has been advanced of the tort involved in boycot-

ting is that the essence of the wrong lies in the combination itself, the mere force of numbers giving a coercive character to acts themselves perfectly lawful. See, as sustaining this view, *Oxley Stave Co. v. Coopers' International Union* (1896) 72 Fed. 695; *Allis-Chalmers Co. v. Iron Molders' Union* (1906) 150 Fed. 155; *Lohse Patent Door Co. v. Fuelle* (1908) 215 Mo. 421, 22 L.R.A. (N.S.) 607, 128 Am. St. Rep. 492, 114 S. W. 997, and the opinion of Lord Bramwell in *Mogul S. S. Co. v. McGregor* [1892] A. C. 25, 61 L. J. Q. B. N. S. (Eng.) 295, 66 L. T. N. S. 1, 40 Week. Rep. 337, 7 Asp. Mar. L. Cas. 120, 56 J. P. 101. This theory has been attacked as making, by some sort of legerdemain, acts individually lawful unlawful when viewed in the aggregate, or as equivalent to holding that adding up a sufficient number of ciphers will make a unit. See *Lindsay & Co. v. Montana Federation of Labor* (1908) 37 Mont. 264, 18 L.R.A. (N.S.) 707, 127 Am. St. Rep. 722, 96 Pac. 127. This criticism is based upon the principle that conspiracy of itself furnishes no cause of action, of which it has been assumed to be a necessary sequel that the act for which an action for conspiracy will lie must be something unlawful in itself, and hence that many may combine to do what only one of them may lawfully do. The great preponderance of opinion is, however, that the unlawful means which will render a combination to do an act by such means a conspiracy are not necessarily such as would be wrongful if employed by a single individual, but that the mere force of numbers may create a difference, not only of degree, but also of kind. See *Aikens v. Wisconsin* (1904) 195 U. S. 194, 49 L. ed. 154, 25 Sup. Ct. Rep. 3; *Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co.* (1898) 19 L.R.A. 395, 5 Inters. Com. Rep. 545, 54 Fed. 746; *Arthur v. Oakes* (1894) 25 L.R.A. 414, 4 Inters. Com. Rep. 744, 11 C. C. A. 209, 34 U. S. App. 239, 63 Fed. 320, 9 Am. Crim. Rep. 169; *Oxley Stave Co. v. Coopers' International Union* (1896) 72 Fed. 695, affirmed in (1897) 28 C. C. A. 99, 49 U. S. App. 709, 83 Fed. 912; *Loewe v. California State Federa-*

tion of Labor (1905) 189 Fed. 71; *Allis-Chalmers Co. v. Iron Molders' Union* (1906) 150 Fed. 155; *State v. Glidden* (1887) 55 Conn. 46, 3 Am. St. Rep. 23, 8 Atl. 890; *American Federation of Labor v. Buck's Stove & Range Co.* (1909) 33 App. D. C. 83, 32 L.R.A. (N.S.) 748 (opinion of Robb, J.); *Jetton-Dekle Lumber Co. v. Mather* (1907) 53 Fla. 969, 43 So. 590; *Barnes v. Chicago Typographical Union* (1908) 232 Ill. 424, 14 L.R.A. (N.S.) 1018, 83 N. E. 940, 13 Ann. Cas. 54; *Kemp v. Division No. 241* (1912) 255 Ill. 213, 99 N. E. 389, Ann. Cas. 1913D, 347; *Martell v. White* (1904) 185 Mass. 255, 64 L.R.A. 260, 102 Am. St. Rep. 341, 64 N. E. 1085; *Berry v. Donovan* (1905) 188 Mass. 353, 5 L.R.A. (N.S.) 899, 108 Am. St. Rep. 499, 74 N. E. 603, 3 Ann. Cas. 738; *Pickett v. Walsh* (1906) 192 Mass. 572, 6 L.R.A. (N.S.) 1067, 116 Am. St. Rep. 272, 73 N. E. 753, 7 Ann. Cas. 638; *L. D. Willcutt & Sons Co. v. Driscoll* (1908) 200 Mass. 110, 23 L.R.A. (N.S.) 1236, 85 N. E. 897; *Burnham v. Dowd* (1914) 217 Mass. 351, 51 L.R.A. (N.S.) 778, 104 N. E. 831; *Baldwin v. Escanaba Liquor Dealers' Asso.* (1911) 165 Mich. 98, 130 N. W. 214; *Lohse Patent Door Co. v. Fuelle* (1908) 215 Mo. 421, 22 L.R.A. (N.S.) 607, 128 Am. St. Rep. 492, 114 S. W. 997; *Alfred W. Booth & Co. v. Burgess* (1906) 72 N. J. Eq. 181, 65 Atl. 226; *AUBURN DRAYING Co. v. WARDELL* (reported herewith) ante, 901; *Albro J. Newton Co. v. Ericson* (1911) 70 Misc. 291, 126 N. Y. Supp. 949, affirmed without opinion in (1911) 144 App. Div. 939, 129 N. Y. Supp. 1111; *Moore v. Bricklayers' Union* (1889) 10 Ohio Dec. Reprint, 665; *Patterson v. Building Trades Council* (1902) 11 Pa. Dist. R. 500; *Cote v. Murphy* (1894) 159 Pa. 420, 23 L.R.A. 135, 39 Am. St. Rep. 686, 28 Atl. 190; *Dailey v. Master Plumbers' Asso.* (1899) 103 Tenn. 99, 46 L.R.A. 561, 53 S. W. 853; *State ex rel. Durner v. Huegin* (1901) 110 Wis. 189, 62 L.R.A. 700, 85 N. W. 1046, 15 Am. Crim. Rep. 382; *Walsby v. Anley* (1961) 3 El. & El. 516, 121 Eng. Reprint, 536, 30 L. J. Mag. Cas. N. S. 121, 7 Jur. N. S. 465, 3 L. T. N. S. 666, 9 Week. Rep. 271 (opinion of Crompton, J.); *Mogul*

S. S. Co. v. McGregor (1889) L. R. 23 Q. B. Div. (Eng.) 598 (opinion of Bowen, L. J.), s. c. on appeal [1892] A. C. (Eng.) 25, 61 L. J. Q. B. N. S. 295, 66 L. T. N. S. 1, 40 Week. Rep. 337, 7 Asp. Mar. L. Cas. 120, 56 L. J. 101 (opinions of Lords Halsbury, Bramwell, and Hannen); *Leathen v. Craig* [1899] 2 Ir. R. 667 (opinion of Andrews, J.); *Quinn v. Leathen* [1901] A. C. (Eng.) 495, 1 B. R. C. 397, 70 L. J. P. C. N. S. 76, 65 J. P. 708, 50 Week. Rep. 139, 85 L. T. N. S. 289, 17 Times L. R. 749, 27 Eng. Rul. Cas. 66 (opinion of Lords Lindley, Macnaghten, and Brampton); *Giblan v. National Amalgamated Labor Union* [1903] 2 K. B. (Eng.) 600, 1 B. R. C. 528, 72 L. J. K. B. N. S. 907, 89 L. T. N. S. 386, 19 Times L. R. 708 (opinion of Stirling, J.); *Gibbins v. Metcalfe* (1905) 15 Manitoba L. Rep. 560 (opinion of Killam, Ch. J.).

Various reasons for so holding have been assigned in the cases above cited, all of which approximate the truth, even though they may not fully express it. One of these is the increased power of combination to inflict injuries beyond the power of an individual, any injury inflicted by whom, though wrongful, is not actionable, under the principle, "*De minimis non curat lex*." Another reason (or perhaps only another form of the foregoing reason) is that the union of individual forces by agreement gives the act, by force of numbers, a coercive effect. A supplemental reason given in connection with the foregoing is that the fact of combination creates a presumption that the object is to do harm rather than to exercise the right of its members. The difficulty in explaining how an act not actionable when done by an individual can become actionable when done by persons acting in combination has been surmounted in various ways, one of which is to regard the combination not as one to do the act, but to effect the result of the combined acts. Another is to regard the act itself as an act the intent of the parties to which is open to inquiry, although their intent in doing as individuals the act which

they have combined to do would not be open to inquiry.

It seems preferable, therefore, to discard both the theory that the essence of the wrong lies in the combination itself, as being broad, since not every combination the effect of the acts of which is to cause loss to another is necessarily unlawful, and the theory which views the boycott as a conspiracy, for the reasons already given. The true view appears to be that the tort involved is a nuisance (see *Alfred W. Booth & Bro. v. Burgess* (1906) 72 N. J. Eq. 181, 65 Atl. 226), the existence of which is dependent on the degree of annoyance inflicted upon those to whom the plaintiff looks for patronage, and the actionable quality of which depends upon the point at which the right to conduct one's business without interference ceases to be regarded as merely a permissive right, and becomes also a protected right. Under this view, the fact of combination is material only as bearing upon the degree of annoyance to which one's customers are subjected, and, as pointed out by Mr. Justice Holmes in *Aikens v. Wisconsin* (1904) 195 U. S. 194, 49 L. ed. 154, 25 Sup. Ct. Rep. 3, the act done in combination derives its character from the consequences which follow it under the circumstances under which it is done.

The right to conduct one's business without interference has been termed "a right to a free market." As to just what this right connotes, there is a difference of opinion. According to one view, it is simply a right to a market in which no compulsion is put upon the will of others; according to another, it is a right to a market in which transactions proceed according to the ordinary laws of trade, without interference other than may be occasioned by the bona fide exercise of rights by others.

III. The right to refuse to deal with another and to ask others not to do so.

It is the absolute right of every man to engage to work for or to deal with, or to refuse to work for or to deal with, any man, or class of men, as he sees fit, whatever his motive, or what-

ever the resulting injury, without being held in any way accountable therefor.

United States.—*United States v. Colgate & Co.* (1919) 250 U. S. 306, 63 L. ed. 996, — A.L.R. —, 39 Sup. Ct. Rep. 465; *Casey v. Cincinnati Typographical Union* (1891) 12 L.R.A. 193, 45 Fed. 135; *Oxley Stave Co. v. Coopers' International Union* (1896) 72 Fed. 695, affirmed in (1897) 28 C. C. A. 99, 49 U. S. App. 709, 83 Fed. 912; *Chiatovich v. Hanchett* (1898) 88 Fed. 873.

Arizona.—*Truax v. Bisbee Local C. W. U.* (1918) 19 Ariz. 379, 171 Pac. 121.

Colorado.—*Master Builders' Asso. v. Domascio* (1901) 16 Colo. App. 25, 63 Pac. 782.

Connecticut.—*State v. Glidden* (1887) 55 Conn. 46, 3 Am. St. Rep. 23, 8 Atl. 890.

District of Columbia.—*American Federation of Labor v. Buck's Stove & Range Co.* (1909) 33 App. D. C. 83, 32 L.R.A.(N.S.) 749 (opinion of Van Orsdel, J.).

Illinois.—*Wilson v. Hey* (1908) 232 Ill. 389, 16 L.R.A.(N.S.) 85, 122 Am. St. Rep. 119, 83 N. E. 928, 13 Ann. Cas. 82.

Indiana.—*Jackson v. Stanfield* (1894) 137 Ind. 592, 23 L.R.A. 588, 36 N. E. 345, 37 N. E. 14.

Louisiana.—*Graham v. St. Charles Street R. Co.* (1895) 47 La. Ann. 214, 27 L.R.A. 416, 49 Am. St. Rep. 366, 16 So. 806; *Lewis v. Huie-Hodge Lumber Co.* (1908) 121 La. 658, 46 So. 685.

Mississippi.—*Wesley v. Native Lumber Co.* (1910) 97 Miss. 814, 53 So. 346, Ann. Cas. 1912B, 796.

New York.—*Matthews v. Shankland* (1898) 25 Misc. 604, 56 N. Y. Supp. 123; *People v. McFarlin* (1904) 43 Misc. 591, 89 N. Y. Supp. 527.

Pennsylvania.—*Patterson v. Building Trades Council* (1902) 11 Pa. Dist. R. 500.

Texas.—*International & G. N. R. Co. v. Greenwood* (1893) 2 Tex. Civ. App. 76, 21 S. W. 569.

Vermont.—*Boutwell v. Marr* (1899) 71 Vt. 2, 43 L.R.A. 803, 76 Am. St. Rep. 746, 42 Atl. 607.

He may likewise advise his friends

or the public to do the same (*Oxley Stave Co. v. Coopers' International Union* (1896) 72 Fed. 695; *American Federation of Labor v. Buck's Stove & Range Co.* (1909) 33 App. D. C. 83, 32 L.R.A.(N.S.) 748 (opinion of Van Orsdel, J.)); *Ulery v. Chicago Live Stock Exch.* (1894) 54 Ill. App. 233 (dictum); *Rice v. Albee* (1895) 164 Mass. 88, 43 N. E. 122; *People v. Hughes* (1893) 137 N. Y. 29, 32 N. E. 1105; *People v. Wilzig* (1886) 4 N. Y. Crim. Rep. 403), at least where his object is a proper one (*Hanchett v. Chiatovich* (1900) 41 C. C. A. 648, 101 Fed. 742; *Graham v. St. Charles Street R. Co.* (1895) 47 La. Ann. 214, 27 L.R.A. 460, 49 Am. St. Rep. 366, 16 So. 806; *Wesley v. Native Lumber Co.* (1910) 97 Miss. 814, 53 So. 346, Ann. Cas. 1912D, 786; *Delz v. Winfree* (1891) 80 Tex. 400, 26 Am. St. Rep. 755, 16 S. W. 111; *West Virginia Transp. Co. v. Standard Oil Co.* (1900) 50 W. Va. 611, 56 L.R.A. 804, 88 Am. St. Rep. 895, 40 S. E. 591).

These rights he may exercise in association with others, so long as they all have a proper interest to be subserved.

Arizona.—*Truax v. Bisbee Local C. W. U.* (1918) 19 Ariz. 379, 171 Pac. 121.

Colorado.—*Master Builders' Asso. v. Domascio* (1901) 16 Colo. App. 25, 63 Pac. 782.

District of Columbia.—*American Federation of Labor v. Buck's Stove & Range Co.* (1909) 33 App. D. C. 83, 32 L.R.A.(N.S.) 749 (opinion of Van Orsdel, J.).

Illinois.—*Ulery v. Chicago Live Stock Exch.* (1894) 54 Ill. App. 233.

Iowa.—*Rohlf v. Kasemeier* (1908) 140 Iowa, 182, 28 L.R.A.(N.S.) 1284, 132 Am. St. Rep. 61, 118 N. W. 276, 17 Ann. Cas. 750 (dictum).

Kentucky.—*Brewster v. C. Miller's Sons Co.* (1897) 101 Ky. 368, 38 L.R.A. 505, 41 S. W. 301.

Massachusetts.—*Carew v. Rutherford* (1870) 106 Mass. 1, 3 Am. Rep. 287.

Minnesota.—*George J. Grant Constr. Co. v. St. Paul Bldg. Trades Council* (1917) 186 Minn. 167, 161 N. W. 520, 1055.

Montana.—Lindsay & Co. v. Montana Federation of Labor (1908) 37 Mont. 264, 18 L.R.A.(N.S.) 707, 127 Am. St. Rep. 722, 96 Pac. 127.

Missouri.—Glavish v. Kansas City Live Stock Exch. (1905) 113 Mo. App. 726, 89 S. W. 77.

Pennsylvania.—Buchanan v. Kerr (1894) 159 Pa. 433, 28 Atl. 195; Patterson v. Building Trades Council (1902) 11 Pa. Dist. R. 500.

West Virginia.—West Virginia Transp. Co. v. Standard Oil Co. (1901) 50 W. Va. 611, 56 L.R.A. 804, 88 Am. St. Rep. 895, 40 S. E. 591.

Accordingly it is not wrong for members of a union to cease patronizing anyone, when they regard it as for their interest to do so. Wilson v. Hey (1908) 232 Ill. 389, 16 L.R.A.(N.S.) 85, 122 Am. St. Rep. 119, 83 N. E. 928, 13 Ann. Cas. 82; Truax v. Bisbee Local, C. W. U. (1918) 19 Ariz. 379, 171 Pac. 121.

So also, in *Empire Theater Co. v. Cloke* (1917) 53 Mont. 183, L.R.A. 1917E, 383, 163 Pac. 107, it is said that labor unions may publish and pursue a peaceful boycott against any person or enterprise deemed by them to be unfriendly, and the combination of such unions or their members for such purposes cannot be viewed as a conspiracy.

But the right of an individual to withdraw his patronage, even where actuated by a desire to inflict injury, does not make lawful a combination to accomplish the same purpose by concerted action. *American Federation of Labor v. Buck's Stove & Range Co.* (1909) 33 App. D. C. 83, 32 L.R.A.(N.S.) 748 (appeal to United States Supreme Court dismissed in (1911) 219 U. S. 581, 55 L. ed. 345, 31 Sup. Ct. Rep. 472, on the ground that the settlement by the parties of matters in controversy between them rendered the case a moot one); and see also the cases hereinbefore cited as holding that it is not universally true that what one man may do, any number of men by concerted action may do.

Although the broad statement has been made (in *Boots' Cash Chemists v. Grundy* (1900) 82 L. T. N. S. (Eng.) 769, 48 Week. Rep. 638, 16 Times L.

R. 467,—a case which, however, is not at variance with the decisions following, since the facts show that the request therein complained of was made to subserve the defendant's interest) that "one man is entitled, as against all the world, to ask another to refrain from doing an act which that other may lawfully omit to do," its truth cannot be admitted without qualification. Such request must be made to serve a legitimate purpose of the person making it. *Harvey v. Chapman* (1917) 226 Mass. 191, L.R.A. 1917E, 389, 115 N. E. 304; *Ertz v. Produce Exch.* (1900) 79 Minn. 140, 48 L.R.A. 90, 79 Am. St. Rep. 433, 81 N. W. 737; *Roraback v. Motion Picture Machine Operators' Union* (1918) 140 Minn. 481, 3 A.L.R. 1290, 168 N. W. 766; *Justin Seubert v. Reiff* (1917) 98 Misc. 402, 164 N. Y. Supp. 522; *Delz v. Winfree* (1891) 80 Tex. 400, 26 Am. St. Rep. 755, 16 S. W. 111; *Olive v. Van Patten* (1894) 7 Tex. Civ. App. 630, 25 S. W. 428; *Webb v. Cooks', Waiters' & Waitresses' Union* (1918) — Tex. Civ. App. —, 205 S. W. 465; *Jensen v. Cooks' & Waiters' Union* (1905) 39 Wash. 531, 4 L.R.A.(N.S.) 302, 81 Pac. 1069.

And if a request not to patronize a certain person is made to serve a legitimate purpose of the person making it, it does not become actionable because of hatred of such person. *Gill Engraving Co. v. Doerr* (1914) 214 Fed. 111.

It must not, however, so exceed the bounds of persuasion as to become minatory.

United States.—*Hopkins v. Oxley Stave Co.* (1897) 28 C. C. A. 99, 43 U. S. App. 709, 83 Fed. 912.

California.—*Rosenberg v. Retail Clerks' Asso.* (1918) — Cal. App. —, 177 Pac. 864.

Indiana.—*Jackson v. Stanfield* (1894) 137 Ind. 592, 23 L.R.A. 588, 36 N. E. 345, 37 N. E. 14.

Kentucky.—*Underhill v. Murphy* (1904) 117 Ky. 640, 111 Am. St. Rep. 262, 78 S. W. 482, 4 Ann. Cas. 780.

Michigan.—*Beck v. Railway Teamsters' Protective Union* (1898) 118 Mich. 497, 42 L.R.A. 407, 74 Am. St. Rep. 421, 77 N. W. 13.

Minnesota.—*Steffe v. Motion Picture Mach. Operators' Union* (1917) 136 Minn. 200, 161 N. W. 524.

Missouri.—*Re Heffron* (1914) 179 Mo. App. 639, 162 S. W. 652.

New York.—*Matthews v. Shankland* (1898) 25 Misc. 604, 56 N. Y. Supp. 123; *Butterick Pub. Co. v. Typographical Union* (1906) 50 Misc. 1, 100 N. Y. Supp. 292; *Schlang v. Ladies' Waist Makers' Union* (1910) 67 Misc. 221, 124 N. Y. Supp. 289.

Vermont.—*Boutwell v. Marr* (1899) 71 Vt. 2, 43 L.R.A. 803, 76 Am. St. Rep. 746, 42 Atl. 607.

Subject to these qualifications, it is lawful to request the public to divert its patronage from the person sought to be boycotted.

United States.—*Oxley Stave Co. v. Coopers' International Union* (1896) 72 Fed. 695; *Montgomery Ward & Co. v. South Dakota Retail Merchants' & Hardware Dealers' Asso.* (1907) 150 Fed. 413.

California. — *Rosenberg v. Retail Clerks' Asso.* (1918) — Cal. App. —, 177 Pac. 864.

District of Columbia.—*American Federation of Labor v. Buck's Stove & Range Co.* (1909) 33 App. D. C. 83, 32 L.R.A.(N.S.) 748.

Maryland.—*My Maryland Lodge v. Adt* (1905) 100 Md. 238, 68 L.R.A. 752, 59 Atl. 721.

Michigan.—*Beck v. Railway Teamsters' Protective Union* (1898) 118 Mich. 497, 42 L.R.A. 407, 74 Am. St. Rep. 421, 77 N. W. 13.

Missouri.—*Marx & H. Jeans Clothing Co. v. Watson* (1902) 168 Mo. 133, 56 L.R.A. 951, 90 Am. St. Rep. 440, 67 S. W. 391; *Root v. Anderson* (1918) — Mo. App. —, 207 S. W. 255.

New York. — *People v. Hughes* (1893) 137 N. Y. 29, 32 N. E. 1105; *People v. Wilzig* (1886) 4 N. Y. Crim. Rep. 403; *People v. Radt* (1900) 15 N. Y. Crim. Rep. 174, 71 N. Y. Supp. 846; *Sinsheimer v. United Garment Workers* (1894) 77 Hun, 215, 28 N. Y. Supp. 321; *Cohen v. United Garment Workers* (1901) 35 Misc. 748, 72 N. Y. Supp. 841; *Foster v. Retail Clerks' International Protective Asso.* (1902) 39 Misc. 48, 78 N. Y. Supp. 860; *People v. McFarlin* (1904) 43 Misc. 591,

89 N. Y. Supp. 527; *Butterick Pub. Co. v. Typographical Union* (1906) 50 Misc. 1, 100 N. Y. Supp. 292; *Heitkamper v. Hoffman* (1917) 99 Misc. 543, 164 N. Y. Supp. 533.

Ohio.—*Richter Bros. v. Journeymen Tailors' Union* (1890) 11 Ohio Dec. Reprint, 45; *Riggs v. Cincinnati Waiters Alliance* (1898) 5 Ohio N. P. 386, 8 Ohio S. & C. P. Dec. 565; *McCormick v. Local Union* (1911) 32 Ohio C. C. 165.

The circulation of such a request has been held not to violate a statute providing in substance that, if two or more persons conspire to prevent another from exercising a lawful calling by force, threats, or intimidation, each is guilty of a misdemeanor. *People v. Radt* (1900) 15 N. Y. Crim. Rep. 174, 71 N. Y. Supp. 846; *People v. McFarlin* (1904) 43 Misc. 591, 89 N. Y. Supp. 527.

IV. *Legality of purpose of boycott.*

Acts done in furtherance of a boycott, although legitimate in themselves, are unlawful where the ultimate end aimed at is not lawful, as in such a case a combination to do the act falls within that branch of the definition of an unlawful conspiracy which defines such a conspiracy as a combination to accomplish an unlawful purpose, or, if the element of the combination be disregarded, there is an absence of justification for the interference with the trade relations of the person boycotted. The first question which arises in determining the legality of a boycott is, therefore, whether its purpose is a proper one.

A boycott to compel one to refrain from working as an operative in his own business is unlawful. *Roraback v. Motion Picture Mach. Operators' Union* (1918) 140 Minn. 481, 3 A.L.R. 1290, 168 N. W. 766.

A boycott by members of a labor union of a retail business, in order to compel its owner to coerce his employees to pay back dues to the union or to discharge them, is unlawful. *Harvey v. Chapman* (1917) 226 Mass. 191, L.R.A.1917E, 389, 115 N. E. 804.

A boycott is illegal where its immediate object was to intimidate and coerce one to sign a contract he was

unwilling to sign and that he was under no legal obligation to sign, notwithstanding the ultimate object may have been to increase the force and power of the union. *Webb v. Cooks', Waiters' & Waitresses' Union* (1918) — *Tex. Civ. App.* —, 205 S. W. 465.

The following have been held to be legitimate subjects of industrial disputes:

— the advancement or maintenance of wages, *Pierce v. Stablemen's Union* (1909) 156 Cal. 70, 103 Pac. 324; *Jetton-Dekle Lumber Co. v. Mather* (1907) 53 Fla. 969, 43 So. 590; *Kemp v. Division No. 241* (1912) 255 Ill. 213, 99 N. E. 389, Ann. Cas. 1913D, 347 (per Cooke, J.) s. c. in court below (1910) 153 Ill. App. 344; *L. D. Willcutt & Sons Co. v. Driscoll* (1908) 200 Mass. 110, 23 L.R.A.(N.S.) 1236, 85 N. E. 897; *M. Steinert & Sons Co. v. Tagen* (1907) 207 Mass. 394, 32 L.R.A.(N.S.) 1013, 93 N. E. 584; *Carter v. Oster* (1908) 134 Mo. App. 146, 112 S. W. 995; *New York C. Iron Works v. Brennan* (1907) 105 N. Y. Supp. 865; *Albro J. Newton Co. v. Erickson* (1911) 70 Misc. 291, 126 N. Y. Supp. 949; *Grassi Contracting Co. v. Bennett* (1916) 174 App. Div. 244, 160 N. Y. Supp. 279; *Cook v. Dolan* (1897) 19 Pa. Co. Ct. 401; *Hopkins v. Oxley Stave Co.* (1897) 28 C. C. A. 99, 49 U. S. App. 709, 83 Fed. 912;

— so long as the wage sought is a reasonable one, see *Sayre v. Louisville Union Benev. Assn.* (1863) 1 Duv. (Ky.) 146, 85 Am. Dec. 613;

— shorter periods of labor, *Pierce v. Stablemen's Union* (1909) 156 Cal. 70, 103 Pac. 324; *Kemp v. Division No. 241* (1912) 255 Ill. 213, 99 N. E. 389, Ann. Cas. 1913D, 347 (per Cooke, J.); *M. Steinert & Sons Co. v. Tagen* (1911) 207 Mass. 394, 32 L.R.A.(N.S.) 1013, 93 N. E. 584; *Carter v. Oster* (1908) 134 Mo. App. 146, 112 S. W. 995; *Albro J. Newton Co. v. Erickson* (1911) 70 Misc. 291, 126 N. Y. Supp. 949;

— the betterment of working conditions, *Pierce v. Stablemen's Union* (1909) 156 Cal. 70, 103 Pac. 324; *Kemp v. Division No. 241* (1910) 153 Ill. App. 344, reversed on other grounds in (1912) 255 Ill. 213, 99 N. E. 389, Ann. Cas. 1913D, 347; *Hopkins v. Oxley*

Stave Co. (1897) 28 C. C. A. 99, 49 U. S. App. 709, 83 Fed. 912;

— the payment of wages during working hours, *L. D. Willcutt & Sons Co. v. Driscoll* (1908) 200 Mass. 110, 23 L.R.A.(N.S.) 1236, 85 N. E. 897;

— an increase in the amount of work required, *Searle Mfg. Co. v. Terry* (1905) 56 Misc. 265, 106 N. Y. Supp. 488;

— the recognition in a shop of a system of piecework which allows workers to employ helpers, the effect of which is, in times of slack work, to deprive those not employing helpers of continuous work, *Minasian v. Osborne* (1911) 210 Mass. 250, 37 L.R.A.(N.S.) 179, 96 N. E. 1036, Ann. Cas. 1912C, 1299; but see *W. P. Davis Mach. Co. v. Robinson* (1903) 41 Misc. 329, 84 N. Y. Supp. 837, *infra*;

— the giving to, or obtaining for, the employees, of work which otherwise would be done by others, *National Fireproofing Co. v. Mason Builders' Asso.* (1909) 26 L.R.A.(N.S.) 148, 94 C. C. A. 535, 169 Fed. 259; *Pickett v. Walsh* (1906) 192 Mass. 583, 6 L.R.A.(N.S.) 1067, 116 Am. St. Rep. 272, 78 N. E. 753, 7 Ann. Cas. 638; *Burnham v. Dowd* (1914) 217 Mass. 351, 51 L.R.A.(N.S.) 778, 104 N. E. 841; *New England Cement Gun Co. v. McGivern* (1914) 218 Mass. 198, L.R.A.1916C, 986, 105 N. E. 885 (obiter);

— the limitation of the number of apprentices, *Longshore Printing Co. v. Howell* (1894) 26 Or. 527, 28 L.R.A. 464, 46 Am. St. Rep. 640, 38 Pac. 547.

The members of a labor union may, so long as they act in good faith, lawfully give their employer the alternative of dispensing with their services or with the services of others (see *Clemmitt v. Watson* (1895) 14 Ind. App. 38, 42 N. E. 367; *Carter v. Oster* (1908) 134 Mo. App. 146, 112 S. W. 995; *Mayer v. Journeymen Stonecutters' Asso.* (1890) 47 N. J. Eq. 519, 20 Atl. 492; *Reform Club v. Laborers' Union Protective Soc.* (1899) 29 Misc. 247, 50 N. Y. Supp. 388; *Walsby v. Anley* (1861) 3 El. & El. 516, 121 Eng. Reprint, 536, 7 Jur. N. S. 465, 30 L. J. Mag. Cas. N. S. 121, 3 L. T. N. S. 666, 9 Week. Rep. 271; *Giblan v. National Amalgamated Laborers' Union* [1903]

2 K. B. (Eng.) 600, 1 B. R. C. 528, 72 L. J. K. B. N. S. 907, 89 L. T. N. S. 386, 19 Times L. R. 708), provided that such others are persons whom the employer is not bound to retain for a definite period (see *Read v. Friendly Soc.* [1902] 2 K. B. (Eng.) 732, 1 B. R. C. 503, 71 L. J. K. B. N. S. 994, 51 Week. Rep. 115, 87 L. T. N. S. 493, 19 Times L. R. 20, 66 J. P. 822); although, where the primary purpose is to injure an obnoxious coemployee, it does not constitute an exercise of the right to choose one's associates, and so is not justifiable; it has accordingly been held that one's habits, or conduct, or character may constitute a justification for a combination of his fellow workmen to refuse to work with him (see *Berry v. Donovan* (1905) 188 Mass. 353, 5 L.R.A. (N.S.) 899, 108 Am. St. Rep. 499, 74 N. E. 603, 3 Ann. Cas. 738; *Heywood v. Tillson* (1883) 75 Me. 225, 46 Am. Rep. 373, *arguendo*), but that mere personal dislike, not founded on a definite cause, is not (see *De Minico v. Craig* (1911) 207 Mass. 593, 42 L.R.A. (N.S.) 1048, 94 N. E. 317; *People ex rel. Gill v. Smith* (1887) 5 N. Y. Crim. Rep. 509, 10 N. Y. S. R. 730, which is affirmed in (1888) 15 N. Y. S. R. 17, which is affirmed without opinion in (1888) 110 N. Y. 633, 17 N. E. 871).

The great weight of authority is to the effect that a strike for the purpose of coercing the employer to dispense with the services of coemployees, for the purpose of forcing them to join the union, is not justifiable. See *Plant v. Woods* (1900) 176 Mass. 492, 51 L.R.A. 339, 79 Am. St. Rep. 330, 57 N. E. 1011; *Hanson v. Innis* (1912) 211 Mass. 301, 97 N. E. 756; *Swaine v. Blackmore* (1898) 75 Mo. App. 74; *Carter v. Oster* (1908) 134 Mo. App. 146, 112 S. W. 995; *Ruddy v. United Asso.* (1910) 79 N. J. L. 467, 75 Atl. 742; *Schwarcz v. International Ladies' Garment Workers' Union* (1910) 68 Misc. 528, 124 N. Y. Supp. 968; *Grassi Contracting Co. v. Bennett* (1916) 174 App. Div. 244, 160 N. Y. Supp. 279; *Erdman v. Mitchell* (1903) 207 Pa. 79, 63 L.R.A. 534, 99 Am. St. Rep. 783, 56 Atl. 327. *Contra*: *Wunch v. Shankland* (1901) 59 App. Div. 482, 69 N. Y.

Supp. 349, appeal dismissed for want of jurisdiction in (1902) 170 N. Y. 573, 62 N. E. 1102; and see also *Kemp v. Division No. 241* (1912) 255 Ill. 213, 99 N. E. 389, Ann. Cas. 1918D, 347, in which the division of opinion is such as to render the position of the court on the question doubtful.

The courts have differed as to whether the "closed shop" is a legitimate subject of industrial dispute. That it is not is held in *State v. Glidden* (1887) 55 Conn. 46, 33 Am. St. Rep. 23, 8 Atl. 890; *O'Brien v. People* (1905) 216 Ill. 354, 108 Am. St. Rep. 219, 75 N. E. 108, 3 Ann. Cas. 966; *Folsom v. Lewis* (1911) 208 Mass. 336, 35 L.R.A. (N.S.) 787, 94 N. E. 316; *W. A. Snow Iron Works v. Chadwick* (1917) 227 Mass. 382, L.R.A. 1917F, 755, 116 N. E. 801; *White Mountain Freezer Co. v. Murphy* (1917) 78 N. H. 398, 101 Atl. 357; *W. P. Davis Mach. Co. v. Robinson* (1908) 41 Misc. 329, 84 N. Y. Supp. 837; *Schwarcz v. International Ladies' Garment Workers' Union* (1910) 68 Misc. 528, 124 N. Y. Supp. 968; *Webb v. Cooks', Waiters' & Waitresses' Union* (1918) — Tex. Civ. App. —, 205 S. W. 465,—at least, where the object is not to secure a direct benefit for the employees, but to enable the union to obtain a monopoly of the labor market. *Contra*: *State v. Stockford* (1904) 77 Conn. 227, 107 Am. St. Rep. 28, 58 Atl. 769; *Mayer v. Journeymen Stonecutters' Asso.* (1890) 47 N. J. Eq. 519, 20 Atl. 492; *Jersey City Printing Co. v. Cassidy* (1902) 63 N. J. Eq. 759, 53 Atl. 230; *Albro J. Newton Co. v. Erickson* (1911) 70 Misc. 291, 126 N. Y. Supp. 949, affirmed in (1911) 144 App. Div. 939, 129 N. Y. Supp. 1111.

And the following have been held not to be legitimate subjects of industrial dispute:

— recognition of the union, see *Re Higgins* (1886) 27 Fed. 443; *Tunstall v. Stearns Coal Co.* (1911) 41 L.R.A. (N.S.) 453, 113 C. C. A. 132, 192 Fed. 808; *Wabash R. Co. v. Hannahan* (1903) 121 Fed. 563; *Reynolds v. Davis* (1908) 198 Mass. 294, 17 L.R.A. (N.S.) 162, 84 N. E. 457;

— the use of machinery which will diminish the amount of hand labor re-

quired, *Hopkins v. Oxley Stave Co.* (1897) 28 C. C. A. 99, 49 U. S. App. 709, 83 Fed. 912;

—the refusal of the employer to become a member of an employers' association favored by the union, *Coons v. Chrystie* (1898) 24 Misc. 296, 53 N. Y. Supp. 668;

—the payment by the employer of a fine imposed upon him by the union, *Burke v. Fay* (1908) 128 Mo. App. 690, 107 S. W. 408;

—the refusal of the employer to comply with a rule of the union as to the minimum number of employees, *Haverhill Strand Theater v. Gillen* (1918) 229 Mass. 413, L.R.A.1918C, 813, 118 N. E. 671, Ann. Cas. 1918D, 650. *Contra*: *Scott-Stafford Opera House Co. v. Minneapolis Musicians' Asso.* (1912) 118 Minn. 410, 136 N. W. 1092;

—the refusal of the employer to employ foremen to be selected by the union, *Grassi Contracting Co. v. Bennett* (1916) 174 App. Div. 244, 160 N. Y. Supp. 279.

V. *Legality of means employed.*

a. *Threats and intimidation, in general.*

As above stated, in subdivision III. *supra*, a request to the public not to patronize the person boycotted must not exceed the bounds of legitimate persuasion. Whether these bounds have been exceeded in a particular case is often a question of some nicety. The minatory character of the various devices to which resort is usually had to divert patronage is discussed under the specific heads following.

Although the term "threat" is often applied in the class of decisions under consideration, to what is merely the announcement of an intention to do a perfectly lawful act, its legal significance does not extend so far.

In *Payne v. Western & A. R. Co.* (1884) 13 Lea (Tenn.) 507, 49 Am. Rep. 666, it is said: "In law, a threat is a declaration of an intention or determination to injure another, by the commission of some unlawful act; and an intimidation is the act of making one timid or fearful by such declaration. If the act intended to be done

is not unlawful, then the declaration is not a threat in law, and the effect thereof is not intimidation in a legal sense."

"Generally speaking, what one may do in a certain event, one may give warning of an intention to do in that event; and such a warning is not a threat in the legal sense, whatever may be implied by the term in colloquial usage." *Empire Theater Co. v. Cloke* (1917) 53 Mont. 183, L.R.A.1917E, 383, 163 Pac. 107.

So also in *J. F. Parkinson Co. v. Building Trades' Council* (1908) 154 Cal. 581, 21 L.R.A.(N.S.) 550, 98 Pac. 1027, 16 Ann. Cas. 1165, it was said by Sloss, J., concurring: "One cannot be said to be 'intimidated' or 'coerced,' in the sense of unlawful compulsion, by being induced to forego business relations with A., rather than lose the benefit of more profitable relations with B. It is equally beside the question to speak of 'threats,' where that which is threatened is only what the party has a legal right to do."

And see, to like purport, *National Protective Asso. v. Cumming* (1902) 170 N. Y. 315, 58 L.R.A. 135, 88 Am. St. Rep. 648, 63 N. E. 369; *Albro J. Newton Co. v. Erickson* (1911) 70 Misc. 291, 126 N. Y. Supp. 949, affirmed without opinion in (1911) 144 App. Div. 939, 129 N. Y. Supp. 1111; *Cote v. Murphy* (1894) 159 Pa. 420, 23 L.R.A. 185, 39 Am. St. Rep. 686, 28 Atl. 190; *Macauley Bros. v. Tierney* (1895) 19 R. I. 255, 37 L.R.A. 455, 61 Am. St. Rep. 770, 38 Atl. 1; *Conway v. Wade* [1909] A. C. (Eng.) 506, 78 L. J. K. B. N. S. 1025, 101 L. T. N. S. 248, 25 Times L. R. 779, 53 Sol. Jo. 754.

Interference with one's patronage by persuading his patrons against their will, or, by means of violence or threats, preventing them from having beneficial intercourse with him, is unlawful. *Re Heffron* (1914) 179 Mo. App. 639, 162 S. W. 652.

What will constitute actionable threats or intimidation operating to prevent the customers of a party from dealing with him must be determined in each case from all the circumstances attending it. *Cœur d'Alene Consol. Min. Co. v. Miners' Union*

(1892) 19 L.R.A. 382, 51 Fed. 260; Seattle Brewing & Malting Co. v. Hansen (1905) 144 Fed. 1011; Baldwin v. Escanaba Liquor Dealers' Asso. (1911) 165 Mich. 98, 130 N. W. 214; Gray v. Building Trades Council (1903) 91 Minn. 171, 63 L.R.A. 753, 103 Am. St. Rep. 477, 97 N. W. 663, 1118, 1 Ann. Cas. 172; People v. Wilzig (1886) 4 N. Y. Crim. Rep. 403; State v. Van Pelt (1904) 136 N. C. 633, 68 L.R.A. 760, 49 S. E. 177, 1 Ann. Cas. 495.

If things done or words spoken are such that they will excite fear or a reasonable apprehension of damage, and so influence those for whom designed as to prevent them from freely doing what they desire and the law permits, they may be restrained, and the courts will look beyond the mere letter of the act or word into its spirit and intent. *Cœur d'Alene Consol. Min. Co. v. Miners' Union* (1892) 19 L.R.A. 382, 51 Fed. 260.

If the notices given or things done have the natural effect of exciting a reasonable fear or apprehension on the part of third persons that their business will be injured unless they cease patronizing the person boycotted, it is immaterial that they are not accompanied by direct threats. *Wilson v. Hey* (1908) 232 Ill. 389, 16 L.R.A. (N.S.) 85, 122 Am. St. Rep. 119, 83 N. E. 928, 13 Ann. Cas. 82.

The law recognizes and gives full force to threats which are not spoken as well as those which are spoken. *LOCAL UNION, H. R. E. I. A. v. STATHAKIS* (reported herewith) ante, 894; *Moore v. Cooks', Waiters' & Waitresses' Union* (1919) — Cal. App. —, 179 Pac. 417; *Wilson v. Hey* (Ill.) supra; *Baldwin v. Escanaba Liquor Dealers' Asso.* (1911) 165 Mich. 98, 130 N. W. 214; *Steffes v. Motion Picture Mach. Operators' Union* (1917) 136 Minn. 200, 161 N. W. 524; *Foster v. Retail Clerks' International Protective Asso.* (1902) 39 Misc. 48, 78 N. Y. Supp. 860; *Webb v. Cooks', Waiters' & Waitresses' Union* (1918) — Tex. Civ. App. —, 205 S. W. 465.

Even persuasion and entreaty may be used in such manner and such environment as to constitute intimid-

idation. *Schlang v. Ladies' Waist Makers' Union* (1910) 67 Misc. 221, 124 N. Y. Supp. 289.

Intimidation, within the meaning of the law, is not necessarily limited to threats of violence to person or property. *Baldwin v. Escanaba Liquor Dealers' Asso.* (1911) 165 Mich. 98, 130 N. W. 214; *Gray v. Building Trades' Council* (1903) 91 Minn. 171, 63 L.R.A. 753, 103 Am. St. Rep. 477, 97 N. W. 663, 1118, 1 Ann. Cas. 172; *People v. Wilzig* (1886) 4 N. Y. Crim. Rep. 403; *Purvis v. Local No. 500, U. B. C. J.* (1906) 214 Pa. 348, 12 L.R.A. (N.S.) 642, 112 Am. St. Rep. 757, 63 Atl. 585, 6 Ann. Cas. 275. A man may be intimidated into doing or refraining from doing by fear of loss of business, property, or reputation, as well as by dread of loss of life, or injury to health or limb; and the extent of this fear need not be abject, but only such as to overcome his judgment, or induce him not to do or to do that which he otherwise would have done or left undone. *Barr v. Essex Trades Council* (1894) 53 N. J. Eq. 101, 30 Atl. 881.

b. Circulars, cards, and newspaper articles.

The distribution of circulars or the publication of newspaper articles is not unlawful, where they are put forth in pursuance of a legitimate object and form no part of a scheme of intimidation. *Truax v. Bisbee Local, C. W. U.* (1918) 19 Ariz. 379, 171 Pac. 121; *Watters v. Retail Clerks Union* (1904) 120 Ga. 424, 47 S. E. 911; *Philip Henrici Co. v. Alexander* (1916) 198 Ill. App. 568; *Beck v. Railway Teamsters' Protective Union* (1898) 118 Mich. 497, 42 L.R.A. 407, 74 Am. St. Rep. 421, 77 N. W. 13; *Ex parte Heffron* (1914) 179 Mo. App. 639, 162 S. W. 652; *Root v. Anderson* (1918) — Mo. App. —, 207 S. W. 255; *People v. Radt* (1900) 15 N. Y. Crim. Rep. 174, 71 N. Y. Supp. 846; *Butterick Pub. Co. v. Typographical Union* (1906) 50 Misc. 1, 100 N. Y. Supp. 292; *Heitkamper v. Hoffmann* (1917) 99 Misc. 543, 164 N. Y. Supp. 533; *State v. Van Pelt* (1904) 136 N. C. 633, 68 L.R.A. 760, 49 S. E. 177, 1 Ann. Cas. 495; *Richter Bros. v. Journeymen Tailors' Union* (1890) 11 Ohio Dec.

Reprint, 45; *Riggs v. Cincinnati Waiters Alliance* (1898) 5 Ohio N. P. 386, 8 Ohio S. & C. P. Dec. 565.

But, where the distribution of cards or circulars giving notice of the existence of a boycott and asking the public to withhold their patronage is calculated to intimidate, such cards or circulars are unlawful. *Old Dominion S. S. Co. v. McKenna* (1887) 30 Fed. 48; *Casey v. Cincinnati Typographical Union* (1891) 12 L.R.A. 193, 45 Fed. 145; *Seattle Brewing & Malting Co. v. Hansen* (1905) 144 Fed. 1011; *Rocky Mountain Bell Teleph. Co. v. Montana Federation of Labor* (1907) 156 Fed. 809; *Beck v. Railway Teamsters' Protective Union* (1898) 118 Mich. 497, 42 L.R.A. 407, 77 Am. St. Rep. 421, 77 N. W. 13; *Mulholland v. Waiters' Local Union* (1902) 13 Ohio S. & C. P. Dec. 342; *McCormick v. Local Unions* (1911) 32 Ohio C. C. 165; *Longshore Printing Co. v. Howell* (1894) 26 Or. 527, 28 L.R.A. 464, 46 Am. St. Rep. 640, 38 Pac. 547; *Brace Bros. v. Evans* (1888) 5 Pa. Co. Ct. 163; *Webb v. Cooks, Waiters' & Waitresses' Union* (1918) — Tex. Civ. App. —, 205 S. W. 465.

And where the object sought to be attained by means of the boycott is regarded as unlawful, a distribution of circulars in furtherance thereof is unlawful. For this reason it was held in *Barr v. Essex Trades Council* (1894) 53 N. J. Eq. 101, 30 Atl. 881, that an injunction might issue to restrain defendant from distributing or circulating any circulars, printed resolutions, bulletins, or other publications containing appeals or threats against a certain newspaper or its advertisers, with the design and intention to interfere with their business in publishing said paper, and from making any threats or using any intimidation to the dealers or advertisers in such newspaper, tending to cause them to withdraw their business therefrom.

The publication of circulars in aid of a boycott will not be enjoined because they may have been of a libelous character. *Richter Bros. v. Journeymen Tailors' Union* (1890) 7 Ohio Dec. Reprint, 45; *Beck v. Rail-*

way Teamsters' Protective Union (1898) 118 Mich. 497, 42 L.R.A. 407, 74 Am. St. Rep. 421, 77 N. W. 13.

And it has been held that the display of placards and the circulation of handbills will not be enjoined on the ground that the use of the street for such a purpose is a nuisance, where it does not appear that it results in an obstruction of the street, or that the injury and inconvenience complained of result from such use. *Riggs v. Cincinnati Waiters Alliance* (1898) 5 Ohio N. P. 386, 8 Ohio S. & C. P. Dec. 565.

Instances in which the distribution of cards or circulars has been held lawful.

Members of a labor union engaged in a controversy with a restaurant keeper over wages and hours of labor may lawfully publish and distribute circulars and handbills near such restaurant keeper's place of business, advertising the existence of the strike and appealing to the public in general, and to all persons allied with or friendly to organized labor in particular, not to patronize such restaurant, and may cause banners to be carried up and down the street, bearing the statement that such restaurant is "unfair." *Truax v. Bisbee Local, C. W. U.* (1918) 19 Ariz. 379, 171 Pac. 121.

The publication of a newspaper article relating to the action of a certain firm in refusing to become a party to an agreement among the merchants of a town to close their places of business early during the summer months, stating that in consequence thereof it had been put on the "unfair" list, asking the support of the public in such action by a withholding of patronage, and urging the patronizing of merchants who had agreed to the proposition, and the publication of handbills to the same effect, neither of which publications cast any imputation upon the honesty, solvency, or credit of the firm, will not support an action of libel in the absence of any allegation of special damage. *Watters v. Retail Clerks' Union* (1904) 120 Ga. 424, 47 S. E. 911.

A labor union may lawfully distribute to the public printed matter stat-

ing that one with whom it is in controversy is "unfair." *Philip Henrici Co. v. Alexander* (1916) 198 Ill. App. 568.

In *Marx & H. Jeans Clothing Co. v. Watson* (1902) 168 Mo. 133, 56 L.R.A. 951, 90 Am. St. Rep. 440, 67 S. W. 391, an injunction to restrain the distribution of circulars by a labor union in which the labor union asked the aid of the public in its fight by refusing to patronize the employer, was held to have been properly denied on the ground that, in Missouri, to restrain the issuance and distribution of this circular would be a violation of the state constitutional guaranty of freedom of speech:

It is not within the power of a court of equity to restrain one from distributing cards or circulars concerning the business of another, or addressing remarks concerning one's business to persons passing along the sidewalk, if nothing more appears. *Ex parte Heffron* (1914) 179 Mo. App. 639, 162 S. W. 652.

No cause of action is stated by a petition alleging that defendants, acting in concert, have wrongfully and unlawfully sought to injure plaintiff in his business by distributing circulars requesting the public not to patronize his theater, and by standing near the entrance and urging persons about to enter to refrain from so doing, where the entire tenor of the petition is to the effect that the acts complained of amounted to nothing more than mere matter of argument and persuasion, whereby it was sought to convince persons in the vicinity of plaintiff's theater that they ought not, in fairness, to patronize him, and it is not charged that the defendants or any of them resorted in any way to violence, threats, or intimidation in order to compel or induce persons to refrain from dealing with the plaintiff as customers. *Root v. Anderson* (1918) — Mo. App. —, 207 S. W. 255.

In *People v. Radt* (1900) 15 N. Y. Crim. Rep. 174, 71 N. Y. Supp. 846, the distribution of circular letters among members of the labor union, ending with an appeal "to every member, to every religious and justly thinking

person, to only buy goods," etc., from others, and also the posting up of small posters having on them the words, "Scab Labor! Don't patronize [the complaining witness]! Scab Labor!" did not amount to a conspiracy within § 168 of Penal Code, providing, in substance, that, if two or more persons conspire to prevent another from exercising a lawful calling by force, threats, or intimidation, each is guilty of a misdemeanor.

Equity will not enjoin the publication of circulars setting forth the circumstances of a strike, and requesting the friends of labor to withhold their patronage from the complainant. *Butterick Pub. Co. v. Typographical Union* (1906) 50 Misc. 1, 100 N. Y. Supp. 292.

A labor union is within its legal rights in publishing and distributing a circular, soliciting its sympathizers and friends to withdraw their patronage from, or to refrain from patronizing, one with whom it is in controversy. *Heitkamper v. Hoffmann* (1917) 99 Misc. 543, 164 N. Y. Supp. 533.

It is not criminal to publish in a newspaper that one who has refused to employ only union men is "unfair," together with a statement that union men will thereafter refuse to work materials from his shop. *State v. Van Pelt* (1904) 136 N. C. 633, 68 L.R.A. 760, 49 S. E. 177, 1 Ann. Cas. 495.

In *Richter Bros. v. Journeymen Tailors' Union* (1890) 11 Ohio Dec. Reprint, 45, and *Riggs v. Cincinnati Waiters Alliance* (1898) 5 Ohio N. P. 386, 8 Ohio S. & C. P. Dec. 565, an injunction to restrain the printing and distributing of circulars asking the public to refrain from patronizing persons named therein was denied on the ground that the complaint did not show that any injury would arise from such publication and distribution.

Instances in which the distribution of cards or circulars has been held unlawful.

Interference with one's business by sending threatening notices or messages to his various customers and patrons and other persons usually dealing with him, designed to intim-

idate them from having any dealings with him through threats of loss and expense, is illegal, rendering the persons responsible therefor liable in damages. *Old Dominion S. S. Co. v. McKenna* (1887) 30 Fed. 48.

In *Casey v. Cincinnati Typographical Union* (1891) 12 L.R.A. 193, 45 Fed. 145, the plaintiff was held entitled to an injunction against the publication and distribution of circulars containing statements that he was employing scab or inferior labor, occasioning the loss of custom; but the case itself contains some facts tending to show a covert threat on the part of the labor organizations to withdraw their patronage from firms that patronized the one against whom their boycott was aimed.

In *Seattle Brewing & Malting Co. v. Hansen* (1905) 144 Fed. 1011, the distribution of circulars urging organized labor and its friends not to drink "scab beer" was held unlawful, although the language used was framed in the way of an appeal, because, even though there was no intimidation, there were timid people in the world who would be much influenced by fear of loss if they should refuse to follow even such a request.

In *Rocky Mountain Bell Teleph. Co. v. Montana Federation of Labor* (1907) 156 Fed. 809, an injunction restraining striking employees from using and distributing circulars in which the public and all friends of labor were asked not to patronize the plaintiff telephone company, which circulars characterized the complainant as unfair and a legalized highwayman, and its employees as scabs, and contained a threat on the part of the labor organizations that they would withdraw their patronage from such persons as might patronize plaintiff, was held proper.

In *Beck v. Railway Teamsters' Protective Union* (1898) 118 Mich. 497, 42 L.R.A. 407, 74 Am. St. Rep. 421, 77 N. W. 13, interference with the employers' customers, even by the issuance and distribution of circulars requesting the public not to patronize the employers, was restrained, on the ground, however, that it appeared that

the circulars contained matters that were false and malicious, and that the circulation of them was intended as a menace, intimidation, and coercion. The court, however, recognizes the doctrine that a labor union "may present their cause to the public in newspapers or circulars in a peaceable way, and with no attempt at coercion. If the effect in such case is ruin to the employer, it is *damnum absque injuria*, for they have only exercised their legal rights. The law does not permit either party to use force, violence, threats of force or violence, intimidation, or coercion." To the same effect also is *My Maryland Lodge v. Adt* (1905) 100 Md. 238, 68 L.R.A. 752, 59 Atl. 721.

In *Mulholland v. Waiters' Local Union* (1902) 13 Ohio S. & C. P. Dec. 342, it was held that an injunction should be granted against the acts of strikers in distributing in the vicinity of plaintiff's place of business, cards reading: "Stay away from John Mulholland's 3-cent restaurant, 439 Superior street. Unfair to organized labor. Joint Executive Board H. & R. E. I. A. and B. I. L. of A. Locals 106, 107, 108, 167, 290. Indorsed by United Trades & Labor Council. . . . You are enjoined by organized labor to stop eating at John Mulholland's 3-cent restaurant, 439 Superior street. He is unfair. Bridge & Structural Iron Workers, Local 17,"—and the display on the street and sidewalk of large signs of like purport and effect, and the congregation about the entrance of plaintiff's place of business in large numbers, and attempt by such show of force, and by the use of argument and force, to terrorize intending patrons, where the evidence showed that the defendants conspired together to do the acts complained of, that it was intended to injure the plaintiff's business, and that the plaintiff's business was thereby injured, and that altercations frequently arose between card passers and passers-by, which attracted crowds of people and threatened public disturbance and riot.

In *Longshore Printing Co. v. Howell* (1894) 26 Or. 527, 28 L.R.A. 464, 46

Am. St. Rep. 640, 38 Pac. 547, although an injunction to restrain a labor union from distributing circulars and advertising in a newspaper a statement of their grievance, and asking the aid of the public by refusing to trade with the employer, was denied on the ground that the facts alleged were insufficient to show that the employer would suffer irreparable injury, it was intimated that the plaintiff might have a remedy by a civil action for damages.

In *Brace Bros. v. Evans* (1888) 5 Pa. Co. Ct. 163, the distribution of circulars giving what purported to be a history of the difficulty, alleging abusive treatment of their employees by complainants, and asking all persons to cease patronizing them, some of which had printed in large letters, "Boycott Brace Brothers," whereby large and noisy crowds were collected, and the display of banners bearing the words, "Boycott Brace Brothers," on vehicles which followed the complainant's laundry wagons about, which were often followed by crowds of men and boys, shouting and in some instances throwing mud and stones at the wagons, in consequence of which acts many of complainant's customers withdrew their patronage, was enjoined, apparently on the theory that such acts "were in their nature threatening, and calculated to intimidate."

In *Collard v. Marshall* [1892] 1 Ch. (Eng.) 571, 61 L. J. Ch. N. S. 268, 66 L. T. N. S. 248, 40 Week. Rep. 473, it was held that equity had power to enjoin the publication of placards and circulars containing statements that a strike was on at the plaintiff's works, or that the sweating system was there practised, where it appeared that such allegations were calculated to injure complainant's business and were all untrue in substance and in fact. But it was pointed out that the injunction granted would not prevent publication of the real facts, which were that there had been a strike against the system of contract labor and the employment of an undue proportion of boys at the plaintiff's works.

c. Banners and placards.

The display in the street of banners and placards advising the public of the existence of an industrial dispute, or that the employer is "unfair," is not unlawful if the statements made are true in fact, and if there is no obstruction to traffic or of access to plaintiff's place of business, and no threat, intimidation, or other unlawful interference, and if the object sought to be attained by the boycott is not an unlawful one.

Arizona.—*Truax v. Bisbee Local, C. W. U.* (1903) 19 Ariz. 379, 171 Pac. 121.

Arkansas.—*LOCAL UNION, H. R. E. I. A. v. STATHAKIS* (reported herewith) ante, 894.

California.—*Goldberg, B. & Co. v. Stablemen's Union* (1906) 149 Cal. 429, 8 L.R.A. (N.S.) 460, 117 Am. St. Rep. 145, 86 Pac. 806, 9 Ann. Cas. 1219.

Massachusetts.—*Sherry v. Perkins* (1888) 147 Mass. 212, 9 Am. St. Rep. 689, 17 N. E. 307.

Minnesota.—*Steffes v. Motion Picture Mach. Operators Union* (1917) 136 Minn. 200, 161 N. W. 524; *Roraback v. Motion Picture Machine Operators' Union* (1918) — Minn. —, 3 A.L.R. 1290, 168 N. W. 766.

Montana.—*Iverson v. Dilno* (1911) 44 Mont. 270, 119 Pac. 719; *Empire Theatre Co. v. Cloke* (1917) 53 Mont. 183, L.R.A. 1917E, 383, 163 Pac. 107.

New York.—*People v. Radt* (1900) 53 N. Y. Crim. Rep. 174, 71 N. Y. Supp. 846.

Ohio.—*Richter Bros. v. Journeymen Tailors' Union* (1890) 11 Ohio Dec. Reprint, 45; *Riggs v. Cincinnati Waiters Alliance* (1898) 5 Ohio N. P. 386, 8 Ohio S. & C. P. Dec. 565; *Mulholland v. Waiters' Local Union* (1902) 13 Ohio S. & C. P. Dec. 352.

Pennsylvania.—*Brace Bros. v. Evans* (1888) 5 Pa. Co. Ct. 163.

England.—*Springhead Spinning Co. v. Riley* (1868) L. R. 6 Eq. 551, 37 L. J. Ch. N. S. 889, 19 L. T. N. S. 64, 16 Week. Rep. 1138; *Collard v. Marshall* [1892] 1 Ch. 571, 61 L. J. Ch. N. S. 268, 66 L. T. N. S. 248, 40 Week. Rep. 473.

Instances in which the display of banners or placards has been held lawful.

In *Richter Bros. v. Journeymen Tailors' Union* (Ohio) *supra*, it was held that a display of posters characterizing the plaintiff as "unfair" would not be enjoined in the absence of an allegation in the petition that the plaintiff's employees had been intimidated or threatened with violence in consequence thereof, the court distinguishing the case on this ground from that of *Sherry v. Perkins* (Mass.) *supra*, in which it appeared that the display and carrying of the banner caused a large crowd of people to assemble in front of the plaintiff's place of business when the workmen were leaving their work, and that some of them were injured and threatened with bodily harm if they continued to work for plaintiff.

The display of placards stating that a place of business is "unfair to union labor" is lawful. *LOCAL UNION, H. R. E. I. A. v. STATHAKIS* (reported herewith) *ante*, 894.

In *Steffes v. Motion Picture Mach. Operators Union* (Minn.) *supra*, it was held that the display of a sign reading: "Unfair to organized labor," on the public street near plaintiff's place of business, was not unlawful where there was no obstruction to traffic or of access to plaintiff's place of business, and no threat, intimidation, or other unlawful interference, the court saying, however, that if the display of such a banner be accompanied by acts that constitute obstruction of the street or of access to plaintiff's place of business, or if accompanied by any words or acts which constitute intimidation or threat, the whole transaction is unlawful and should be enjoined.

No right of a keeper of a boarding house is violated by the carrying up and down the street in front of such boarding house of a banner bearing an inscription stating that such boarding house is unfair to organized labor, where there is no allegation that the words inscribed on the banner veiled a threat to plaintiff, her business, or her patrons. *Iverson v. Dilno* (Mont.) *supra*.

Instances in which the display of banners or placards has been held unlawful.

Bannering plaintiff's place of business as unfair to organized labor, and thereby deterring the public from patronizing him, if done for the purpose of compelling him not to work as an operative himself in his own business, is unlawful and may be enjoined. *Roraback v. Motion Picture Machine Operators' Union* (Minn.) *supra*.

In *Springhead Spinning Co. v. Riley* (Eng.) *supra*, it was held, upon demurrer, that the issuance of placards and advertisements might be enjoined, where it was alleged in the bill and consequently admitted by the demurrer that they were part of a scheme of defendants, whereby they, by threats and intimidation, prevented persons from hiring themselves to or accepting work from plaintiff, and that the acts of the defendants tended to the immediate destruction of the value of plaintiff's property.

d. "Unfair" lists.

Since members of a combination having a common interest to subserve may lawfully inform one another, and the public generally, of the names of those whom they deem inimical, they may keep a list of such names, and may publish it as notice to their friends, unless the reason for listing a person as unfair is a false one (*Martineau v. Foley* (1918) 231 Mass. 220, 1 A.L.R. 1145, 120 N. E. 445), or unless a notification to one's customers or prospective customers that he is "unfair" may portend a threat or intimidation (*Seattle Brewing & Malting Co. v. Hansen* (1905) 144 Fed. 1011; *American Federation of Labor v. Buck's Stove & Range Co.* (1909) 33 App. D. C. 83, 32 L.R.A. (N.S.) 748 (appeal to United States Supreme Court dismissed in (1910) 219 U. S. 581, 55 L. ed. 345, 31 Sup. Ct. Rep. 472, on the ground that the settlement of the parties in matters of controversy between them rendered the case a moot one); *Wilson v. Hey* (1908) 232 Ill. 889, 16 L.R.A. (N.S.) 85, 122 Am. St. Rep. 119, 83 N. E. 928, 13 Ann. Cas. 82; *Gray v. Building Trades Council* (1903) 91 Minn. 171,

63 L.R.A. 753, 103 Am. St. Rep. 477, 97 N. W. 663, 1118, 1 Ann. Cas. 172; *Steffes v. Motion Picture Mach. Operators Union* (1917) 136 Minn. 200, 161 N. W. 524; *Mulholland v. Waiters' Local Union* (1902) 13 Ohio S. & C. P. Dec. 352; *Patterson v. Building Trades Council* (1902) 11 Pa. Dist. R. 500).

But whether such a notification is to be regarded as carrying with it a "threat" will usually depend on the view taken by the court of the legality of the secondary boycott, discussed in subdivision V. g, *infra*. In the instances hereinafter set forth in which the "unfair list" has been condemned, it seems to have been because of the implication that persons continuing to deal with the persons listed would themselves be treated as "unfair." Where the secondary boycott is held to be a legitimate weapon, it will follow that the placing of one's name on an unfair list is not an invasion of his legal rights, although it may deter a third person from dealing with him. See *J. F. Parkinson Co. v. Building Trades Council* (1908) 154 Cal. 581, 21 L.R.A. (N.S.) 550, 98 Pac. 1027, 16 Ann. Cas. 1165.

It has been held that the action of a labor union engaged in a strike for higher wages, in placing the name of an employer on its unfair list, cannot be justified as an act of legitimate competition. *My Maryland Lodge v. Adt* (1905) 100 Md. 238, 62 L.R.A. 752, 59 Atl. 721.

Whether a notification that a person is unfair may operate to coerce the customers to refrain from dealing with him is a question to be determined from all the facts and circumstances of the case. *Gray v. Building Trades Council* (1903) 91 Minn. 171, 63 L.R.A. 753, 103 Am. St. Rep. 477, 97 N. W. 663, 1118, 1 Ann. Cas. 172.

In *Seattle Brewing & Malting Co. v. Hansen* (Fed.) *supra*, the circulation of an "unfair" list was restrained, and the violation of the restraining order punished as a contempt, on the ground that the circulation of such list operated per se to influence timid people, by fear of loss, to refrain from dealing with the plaintiff.

A labor union and its members may be enjoined from placing the name of a concern on their "unfair" or "We don't patronize" list, if their sole intention in doing so is, and the result will be, to coerce its customers to refrain from dealing with it, although the remote object sought is a benefit to their own members, and no physical coercion is practised. *American Federation of Labor v. Buck's Stove & Range Co.* (1909) 33 App. D. C. 83, 32 L.R.A. (N.S.) 748 (appeal to United States Supreme Court dismissed in (1910) 219 U. S. 581, 55 L. ed. 345, 31 Sup. Ct. Rep. 472, on the ground that the settlement by the parties of matters in controversy between them rendered the case a moot one). *Van Orsdel, J.*, in his concurring opinion, said: "No one doubts, I think, the right of the members of the American Federation of Labor to refuse to patronize employers whom it regards as unfair to labor. It may procure and keep a list of such employers, not only for the use of its members, but as notice to their friends that the employers whose names appear therein are regarded as unfair to labor. This list may not only be procured and kept available for the members of the association and its friends, but it may be published in a newspaper or series of papers. To this extent they are within their constitutional rights; at least, where a court of equity cannot intervene. But as soon as, by threats or coercion, they attempt to prevent others from patronizing a person whose name appears on the list, it then becomes an unlawful conspiracy,—a boycott."

A labor union may be enjoined from putting persons on the "unfair" list if its purpose and effect are not merely to notify the members of the union so that they may withdraw their patronage, but to compel others to break off business relations with such persons. *Wilson v. Hey* (1908) 232 Ill. 389, 16 L.R.A. (N.S.) 85, 122 Am. St. Rep. 119, 83 N. E. 928, 13 Ann. Cas. 82.

A building trades council has no right to notify builders and contractors that a certain contractor has been declared unfair, and that no union

man will be allowed, either directly or indirectly, to work on any building on which such contractor has performed any work whatever, or furnished material, where the natural tendency and effect of such notification are to destroy the freedom of action of such builders and contractors, and force them, through fear of loss or injury to themselves or their business, to withdraw or withhold their patronage from such contractor. *Patterson v. Building Trades Council* (1902) 11 Pa. Dist. R. 500.

It has been held that the publication of a person's name as being unfair to organized labor, occasioned by his refusal to employ only union labor, and that the members of the union will not work materials sold by him, for the purpose of inducing the public to refrain from purchasing materials from him for fear of incurring the ill will of the union, is not of itself such an unlawful means as to render the parties subject to indictment and punishment for criminal conspiracy. *State v. Van Pelt* (1904) 136 N. C. 633, 68 L.R.A. 760, 49 S. E. 177, 1 Ann. Cas. 495.

It may also be noted in this connection that the placing of one's name upon an "unfair" list will not, of itself, support an action for libel.

Thus in *Watters v. Retail Clerks' Union* (1904) 120 Ga. 424, 47 S. E. 911, it is held that the publication of a newspaper article relating to the action of a certain firm in refusing to become a party to an agreement among the merchants of a town to close their places of business early during the summer months, stating that in consequence thereof they had been put on the "unfair" list, and asking the support of the public in such action by a withholding of patronage, and urging the patronizing of merchants who had agreed to the proposition, and the publication of handbills to the same effect, neither of which publications cast any imputation upon the honesty, solvency, or credit of the firm, will not support an action for libel, in the absence of any allegation of special damage.

In *Labor Review Pub. Co. v. Galliher*

(1907) 153 Ala. 364, 45 So. 188, 15 Ann. Cas. 674, it was held that the publication in a labor journal of a notice that a certain contractor had been placed on the "unfair" list of a carpenters' union, together with the statement that the publication of such notice would be continued until he should decide to set himself square with organized labor, is not susceptible of the meaning ascribed to it by innuendo that such contractor is dishonest, unreliable, and undeserving of the confidence of the public in his vocation, the court saying: "Under the circumstances attending its utterance, primarily its source and the subject-matter to which applied, is the term susceptible of the meaning ascribed by the innuendo? We think not. The term manifestly does not impute a want of personal integrity. To give it such a meaning would be to render wholly meaningless the phrase stating that the matter would be kept 'standing until the parties named have decided to set themselves square with organized labor.' The only possible inference, in the light of the quoted limitations, to be drawn, is that the announcement of the action of the union in placing the contractors on the unfair list will be continued until they have squared themselves with organized labor. It is inconceivable that a want of professional or business integrity—moral decrepitude as contractors—would be thus described, and, if so, that the fault could be cured by a decision to square themselves with organized labor. But, beyond this, the common knowledge which we have already applied, and which current events and history compel us to apply, the placing of parties on an unfair list by organized labor is nothing more or less than a declaration of the unfriendliness of the named parties to the organization which originated the means and term. It has become a familiar weapon, as it were, of the institution to enforce its rules and regulations, and to, from its viewpoint, compel a recognition of its conceived rights. The means and terms and purpose present in the unfair list rob it of any semblance of an effort

to impute moral turpitude to the listed persons. The public have never so understood it. It has been universally taken to mean, and mean only, that the listed persons were rebellious against the rules, regulations, and authority of organized labor, and that that organization pronounced the fact that unfortunate results have and may attend one so listed is true; but, as we have said, the counts here ascribe meanings to the publication, and to these meanings the plaintiff commits the survival of his action. However reprehensible may be the practice of listing as unfair persons violating the rules, etc., of organized labor, and however damnifying to private interests that practice may be, such cannot serve to render libelous that which, as here pleaded, is not so. What, if the matter were pleaded with only the averment of special damage directly and naturally attending the publication, if false, would be our opinion, we are not called upon to say."

In *Smid v. Bernard* (1900) 31 Misc. 35, 63 N. Y. Supp. 278, it was held that a publication purporting to be a communication on behalf of a bakers' union, consisting only of statements that the plaintiff had "declared a fight" against said bakers' union and refused to employ its members because they would not work for 50 cents a day, which the defendant offered, and would wait until workmen got cheaper, and also that the plaintiff once worked for less than union wages, and concluding with a request to the public in the Bohemian quarter to pass by the plaintiff's bakery until he should make up with the union,—is not libelous per se, as he had a legal and moral right to do what the publication said he did, and, further, that the statement that he wanted men to work for 50 cents a day cannot be deemed a libel per se, as holding him up to contempt for offering starvation wages, where there is no allegation in the complaint as to the local rate of wages.

To publish of a corporation maintaining a union shop that it is on the unfair list, and has its adver-

tising printed in scab shops, is libelous per se, if it is shown that it had the patronage of union labor, which was lost because of the publication. *Axton Fisher Tobacco Co. v. Evening Post Co.* (1916) 169 Ky. 64, L.R.A. 1916E, 667, 183 S. W. 269, Ann. Cas. 1918D, 550.

e. Untrue statements.

It is unlawful publicly to state that a strike exists where such is not the fact (*Philip-Henrici Co. v. Alexander* (1916) 198 Ill. App. 568; *Harvey v. Chapman* (1917) 226 Mass. 191, L.R.A. 1917E, 389, 115 N. E. 304; *Collard v. Marshall* [1892] 1 Ch. (Eng.) 571, 61 L. J. Ch. N. S. 268, 66 L. T. N. S. 248, 40 Week. Rep. 473); or that the complainant has reduced his employees' wages (*Goldberg, B. & Co. v. Stablemen's Union* (1906) 149 Cal. 429, 8 L.R.A. (N.S.) 460, 117 Am. St. Rep. 145, 86 Pac. 806, 9 Ann. Cas. 1219); or to publish a circular stating that complainant has violated his agreement with the union, and has discharged his union men, and also conveying the false impression that the complainants do not pay living wages or give their employees fair treatment (*Beck v. Railway Teamsters' Protective Union* (1898) 118 Mich. 497, 42 L.R.A. 407, 74 Am. St. Rep. 421, 77 N. W. 13); or that plaintiff's employees are incompetent botches, and professional tramps, and ex-convicts (*Richter Bros. v. Journeymen Tailors' Union* (1890) 11 Ohio Dec. Reprint, 45).

The circulation by a labor union among master masons of a statement that members of the union would refuse to work for certain contractors, for the false reason that they had been working nonunion masons, for the purpose of preventing such contractors from securing mason work, which results in putting the contractors out of business, is unlawful, even though the purpose of the union may have been the lawful one of furthering the interests of its members. *Martineau v. Foley* (1918) 231 Mass. 220, 1 A.L.R. 1145, 120 N. E. 445.

f. Picketing and physical intimidation.

Picketing is, of course, an infringe-

ment upon the rights of the person picketed, where it is in furtherance of an unlawful purpose. *Harvey v. Chapman* (1917) 226 Mass. 191, L.R.A. 1917E, 389, 115 N. E. 304.

And since interference with another's customers by acts of violence and physical intimidation is actionable, even though its purpose is not primarily to cause loss to such other, but to obtain some benefit for the author of the interference, the picketing of one's premises as a means of promoting a boycott against him is unlawful, where it induces an apprehension of personal injury on the part of intending patrons (*Pierce v. Stablemen's Union* (1909) 156 Cal. 70, 103 Pac. 324; *Goldberg, B. & Co. v. Stablemen's Union* (1906) 149 Cal. 429, 8 L.R.A. (N.S.) 460, 117 Am. St. Rep. 145, 86 Pac. 806, 9 Ann. Cas. 1219; *Jordahl v. Hayda* (1905) 1 Cal. App. 696, 82 Pac. 1079; *Beck v. Railway Teamsters' Protective Union* (1898) 118 Mich. 497, 42 L.R.A. 407, 74 Am. St. Rep. 221, 77 N. W. 13; *Ex parte Heffron* (1914) 179 Mo. App. 639, 162 S. W. 652; *People v. Kostka* (1886) 4 N. Y. Crim. Rep. 429; *People v. Wilzig* (1886) 4 N. Y. Crim. Rep. 403; *Foster v. Retail Clerks' International Protective Asso.* (1902) 39 Misc. 48, 78 N. Y. Supp. 860; *Heitkamper v. Hoffmann* (1917) 99 Misc. 543, 163 N. Y. Supp. 533; *Mulholland v. Waiters' Local Union* (1902) 13 Ohio S. & C. P. Dec. 352; *Jensen v. Cooks' & Waiters' Union* (1905) 39 Wash. 531, 4 L.R.A. (N. S.) 302, 81 Pac. 1069); or where such picketing and the gathering of crowds occasioned thereby interfere with the free access of his patrons to his place of business (*Iverson v. Dilno* (1911) 44 Mont. 270, 119 Pac. 719; *Ex parte Heffron* (1914) 179 Mo. App. 639, 162 S. W. 652; *Heitkamper v. Hoffmann* (1917) 99 Misc. 543, 163 N. Y. Supp. 533).

Beyond this point, however, there is a difference of judicial opinion. In some jurisdictions it has been asserted that there is no such thing as "peaceful picketing," and hence that all picketing is unlawful. See *Pierce v. Stablemen's Union* (Cal.) *supra*; *Rosenberg v. Retail Clerks' Asso.* 6 A.L.R.—59.

(1918) — Cal. App. —, 177 Pac. 864; *Moore v. Cooks', Waiters' & Waitresses' Union* (1919) — Cal. App. —, 179 Pac. 417; *Germain v. Bakery & C. Workers' International Union* (1917) 97 Wash. 282, L.R.A. 1917F, 824, 166 Pac. 665. In others it is permitted for the purpose of notifying the public of the existence of an unsettled industrial dispute. See *Ex parte Heffron* (1914) 179 Mo. App. 639, 162 S. W. 652; *Root v. Anderson* (1918) — Mo. App. —, 207 S. W. 255; *Empire Theater Co. v. Cloke* (1917) 53 Mont. 183, L.R.A. 1917E, 383, 163 Pac. 107; *Justin Seubert v. Reiff* (1917) 98 Misc. 402, 164 N. Y. Supp. 522.

Whether picketing is permissible where the presence of the picketers amounts to nothing more than a covert threat on the part of the boycotters to visit patrons of the person boycotted with their displeasure will depend upon the view taken by the court of the extent to which one may pursue his calling without interference. Where the view favored is that the person whose place of business is picketed has a right to a market for the sale of goods in which no compulsion is put upon the will of intending customers, picketing is necessarily unlawful (see in this connection *LOCAL UNION, H. R. E. I. A. v. STATHAKIS* (reported herewith) *ante*, 894; *Webb v. Cooks', Waiters' & Waitresses' Union* (1918) — Tex. Civ. App. —, 205 S. W. 465; *Jensen v. Cooks' & Waiters' Union* (1905) 39 Wash. 531, 4 L.R.A. (N.S.) 302, 81 Pac. 1069; *St. Germain v. Bakery & C. Workers' International Union* (1917) 97 Wash. 282, L.R.A. 1917F, 824, 166 Pac. 665,—hereinafter set forth); but where such right is regarded as merely one to a market in which transactions proceed according to the ordinary laws of trade, without interference other than such as may be occasioned by the bona fide exercise of rights by others, such picketing may be lawful.

Instances in which picketing has been held to be lawful.

In *Truax v. Bisbee Local, C. W. U.* (1918) 19 Ariz. 379, 171 Pac. 121, in which the owner of a restaurant sought to enjoin the carrying of a

banner up and down the street in front of his place of business, bearing an inscription stating that his restaurant was "unfair to" the cooks' and waiters' union, it was held that in view of the express terms of Arizona Civ. Code 1918, § 1464, prohibiting the courts from granting restraining orders, the issuance of which prohibits any person or persons from attending at or near a house or place where any person resides or works or carries on business, or happens to be for the purpose of peaceably obtaining or communicating information, or of peaceably persuading any person to work or abstain from working, or from ceasing to patronize or employ any party to such dispute, or from recommending, advising, or persuading others by peaceable means so to do, an injunction must be denied, the court saying: "In the absence of this statute, a serious question would likely exist in this jurisdiction whether as a matter of law, in the nature of things, 'peaceful' picketing may exist; but with § 1464, supra, on our statute books, that question is eliminated as a question of law, and expressly made a question of fact during the existence of a labor strike; and, before the courts are permitted to interfere by injunction, the necessity must appear to prevent irreparable injury to property or property rights, and picketing in a peaceful manner creates no such necessity for injunction interference by the courts." The statement made in the opinion that cases that have held picketing to be per se illegal, and that there can be no such thing as peaceable picketing, are only those in which the purpose of the picketing was to watch and influence the employees working or persons seeking employment, and not to affect prospective patrons and customers by causing such patrons and customers to change their minds and trade elsewhere,—is incorrect.

In *Ex parte Heffron* (1914) 179 Mo. App. 639, 162 S. W. 652, it was held that an injunction restraining striking employees, singly or in numbers, from stationing themselves or congregating upon the sidewalk adjoining

and in front of their former employer's place of business, for the purpose of distributing cards or circulars concerning the employer or its business, or addressing remarks concerning the employer or its business to persons passing along the sidewalk, without regard as to whether such acts were done with a view of interfering with the employer's business, its employees, or patrons through threats, violence, intimidation, or by persuading persons desiring to patronize it, or causing them to desist therefrom against their will, was beyond the power of the court, except to restrain the free ingress and egress about the employer's premises, as a private nuisance through continued trespass.

In *Empire Theater Co. v. Cloke* (1917) 53 Mont. 183, L.R.A.1917E, 383, 163 Pac. 107, the court refused to enjoin a labor union from causing a man to carry a banner in front of the plaintiff's theater, bearing the inscription that his theater was unfair to organized labor, or from causing its members to gather or walk in front of the plaintiff's theater at the time it was open, and to request persons about to enter said theater not to patronize it.

Instances in which picketing has been held to be unlawful.

In *LOCAL UNION, H. R. E. I. A. v. STATHAKIS* (reported herewith ante, 394), it was held that the rights of a restaurant keeper were violated by the maintenance in the immediate vicinity of his place of business of pickets who patrolled the sidewalk in front of the entrances, exhibiting large placards stating that "this café is unfair to union labor," and who would occasionally accost customers, asking them not to enter, as the place was unfair to union labor, and whose presence occasionally caused crowds to gather which interfered with the free passage of customers, as a result of which the plaintiff sustained a loss of business in one month of \$2,800. This decision was put on the ground that the presence of such pickets amounted to something more than a giving notice to the public that they had an undecided issue with the business which they were picketing, and was equiva-

lent to a threat to visit patrons of the plaintiff with their displeasure.

The picketing of the employer's place of business is held, in *Pierce v. Stablemen's Union* (1909) 156 Cal. 70, 163 Pac. 324, not to be a lawful means of carrying on a boycott, the court saying: "The inconvenience which the public may suffer by reason of a boycott lawfully conducted is in no sense a legal injury. But the public's rights are invaded the moment the means employed are such as are calculated to and naturally do incite to crowds, riots, and disturbances of the peace. And as illegally interfering with his business, the employer may justly complain when the rights of his nonunion employees and the rights of the public are thus invaded. A picket, in its very nature, tends to accomplish, and is designed to accomplish, these very things. It tends and is designed, by physical intimidation, to deter other men from seeking employment in the places vacated by the strikers. It tends and is designed to drive business away from the boycotted place, not by the legitimate methods of persuasion, but by the illegitimate means of physical intimidation and fear. Crowds naturally collect, disturbances of the peace are always imminent and of frequent occurrence. Many peaceful citizens, men and women, are always deterred by physical trepidation from entering places of business so under a boycott patrol. It is idle to split hairs upon so plain a proposition, and to say that the picket may consist of nothing more than a single individual, peacefully endeavoring by persuasion to prevent customers from entering the boycotted place. The plain facts are always at variance with such refinements of reason. Says Chief Justice Shaw in *Com. v. Hunt* (1842) 4 Met. (Mass.) 111, 38 Am. Dec. 346: 'The law is not to be hoodwinked by colorable pretenses; it looks at truth and reality through whatever disguise it may assume.' If it be said that neither threats nor intimidations are used, no man can fail to see that there may be threats, and there may be molest-

ing, and there may be obstructing, without there being any express words used by which a man should show violent threats toward another, or any express intimidation. We think it plain that the very end to be attained by picketing, however artful may be the means to accomplish that end, is the injury of the boycotted business through physical molestation and physical fear caused to the employer, to those whom he may have employed or who may seek employment from him, and to the general public. The boycott, having employed these means for this unquestioned purpose, is illegal, and a court will not seek, by over-niceties and refinements, to legalize the use of this unquestionably illegal instrument."

It is not lawful for strikers, former employees of a retail merchant, to station pickets in front of his place of business, carrying placards or banners bearing the false statement: "Unfair firm; reduced wages 50 cents per day; please don't patronize," and such conduct will be enjoined. *Goldberg, B. & Co. v. Stablemen's Union* (1906) 149 Cal. 429, 8 L.R.A. (N.S.) 460, 117 Am. St. Rep. 145, 86 Pac. 806, 9 Ann. Cas. 1219.

In *Rosenberg v. Retail Clerks' Asso.* (1918) — Cal. App. —, 177 Pac. 864, it was held that the proprietor of a store was entitled to an injunction against the maintenance in front of his store of pickets wearing badges, who would accost and call out to possible patrons and persons passing by: "This is an unfair house; it is unfair to organized labor. Don't patronize it." where it appeared that, by the presence of such pickets and the statements made by them, many of plaintiff's patrons were intimidated, and in consequence had ceased to and refrained from patronizing him. The court said: "The question whether picketing is a peaceful and lawful means [of presenting the cause of strikers to the public] is one which has also received frequent judicial consideration. The cases in different jurisdictions are not harmonious upon the question. Some of the courts have recognized, or at least do not deny,

that picketing may not be unlawful. The weight of authority, however, and the growing tendency, is to accept the contrary view, and to regard picketing as inherently illegal for the reason that it is inseparably associated with acts that are indisputably illegal. Accordingly it has been held that there is no such thing as peaceful picketing, any more than there could be peaceful mobbing."

In *Moore v. Cooks', Waiters' & Waitresses' Union* (1919) — Cal. App. —, 179 Pac. 417, it was held that the rights of a restaurant keeper were violated by the maintenance in front of his place of business of a picket, consisting of a single individual wearing a badge which at first consisted of a white ribbon with the word "Picket" printed thereon in large black letters, and afterwards simply of a plain white ribbon running across the breast, the effect of which was to give notice to persons passing such restaurant, or intending to patronize it, that it was under boycott and that its patronage was opposed by organized labor. The decision, however, may have been somewhat influenced by the fact that the picket was maintained for the purpose of inducing the plaintiff to unionize the restaurant by compelling the women employees to pay their dues to the union, and to discharge the nonunion cook and employ a union cook in his place.

In *Philip Henrici Co. v. Alexander* (1916) 198 Ill. App. 568, it appeared that because of complainant's refusal to unionize his restaurant a strike was called against him, in consequence of which some of the bakers and cooks employed by him quit work. All of the waitresses, however, continued with their work as before, none of them being members of the union. Members of the waitresses' union patrolled in front of the restaurant, walking back and forth from a point about 25 feet east to a point about the same distance west of the restaurant, and saying to each other so that they could be heard by the passers-by, "There is a strike on at Henrici's," "We want \$8 for six days' work," "Don't eat under police protection,"

and words of similar import. The pickets were supplemented at times by one to three members of the bakers' and cooks' union. The patrolling was done principally at the lunch and supper hours. The pickets were instructed by the union to obey the law and continue moving, that they were not to accost anyone nor allow anyone to accost or speak to them, that the picketing must be peaceful, and that they should give general information to the public in regard to their grievances to gain its moral support. The picketing attracted large crowds to the vicinity and in front of the restaurant. Crowds also congregated on the opposite side of the street, and at times interfered with the business conducted on the street in the vicinity of the restaurant. During the picketing the number of customers per day at the restaurant decreased about 25 percent. Upon this state of facts, it was held that as there was no strike as a matter of fact, there having been no dispute between the complainant and his employees before the resolution was passed by the union calling the strike, and as none of the waitresses quit their employment on account of the calling of the strike, and made no complaint at any time, the statements made by the picket were unjustified, and these, together with the patrolling, constituted picketing which tended unlawfully to interfere with complainant's business, and that a decree granting an injunction against picketing or patrolling complainant's place of business "in such a manner as to intimidate, threaten, or coerce any person or persons from entering or who may desire to enter such premises for the purpose of patronizing the complainant, or for any lawful purpose whatsoever," should be modified by striking therefrom the words quoted.

In *Heitkamper v. Hoffmann* (1917) 99 Misc. 543, 163 N. Y. Supp. 533, where it appeared that, in consequence of the refusal of the complainant, a baker, to unionize his shop, from six to ten members of the union would march up and down on the street in front of his store, wearing a placard

advising the public to purchase only bread bearing the union label, and from time to time advising people on the street not to purchase bread from complainant, but to go across the street and purchase it from another baker who conducted a union shop, that frequently the marchers blocked the entrance to plaintiff's store, spit upon the sidewalk, and made faces at those employed in the store, as the result of which acts the plaintiff's business was injured, it was held that the conduct described constituted an infringement upon the plaintiff's rights, and that a judgment should be entered restraining the individual defendants and the defendant union, its officers, members, agents, and employees, "from congregating in front of plaintiff's shop, from marching up and down upon the sidewalk in front of his shop, from blockading the entrance to his store, and from in any way or manner preventing intending customers from entering or departing from plaintiff's shop, or in any manner, by threats, violence, intimidation, or force, interfering with plaintiff's employees or those who may seek employment from plaintiff."

The distribution by pickets in a labor union boycott, of cards warning patrons of a hotel and saloon not to patronize the place as "unfair," and threatening to publish the names of any who do so, may be enjoined. *McCormick v. Local Unions* (1911) 32 Ohio C. C. 165.

The rights of the owner of a restaurant are violated by the maintenance in front thereof of pickets who handed out to passers-by cards upon which were printed the words, "This café is unfair to organized labor," as a result of which his patronage was considerably diminished, where there was evidence tending to show that such picketing had a coercive effect. *Webb v. Cooks, Waiters' & Waitresses' Union* (1918) — Tex. Civ. App. —, 205 S. W. 465. The court said: "We as a people are exceedingly sensitive to influences of the kind indicated. We have adopted as a slogan the saying, 'Vox populi, vox Dei.' The voice of the people determines the tenure and

rewards of the officeholder and who shall hold the offices. The influence of such voice enters into all of our laws, and it is therefore particularly true of us that the officeholder, the candidate for office, those engaged in business, and those of the general public to whom participation in a heated controversy of any kind is distasteful and repugnant, are all influenced in varying degrees by efforts, vocal or otherwise, of a labor organization with which other labor organizations are affiliated. The evidence shows without dispute that in the city of Fort Worth there are numerous labor organizations with a large membership, which have headquarters in what is designated in the evidence as 'Labor Temple,' where the defendant union has its headquarters. It therefore seems idle to say, under circumstances as indicated, that the acts complained of and shown are not provocative of violence and bloodshed, and do not amount to intimidation and coercion. We at least cannot hide nor obscure the truth with the specious contention urged herein that no open threats or violence were proven. We must know, what has frequently been declared in adjudicated cases, that restraint of the mind is just as potent as a threat of physical violence."

In *Jensen v. Cooks' & Waiters' Union* (1905) 39 Wash. 531, 4 L.R.A. (N.S.) 302, 81 Pac. 1069, it was held that striking employees and the union to which they belong, and which is aiding them, may be enjoined from congregating about the entrance to the place of business of their former employer and endeavoring to persuade his customers to withhold their patronage from him. The court said: "One man singly, or any number of men jointly, having no legitimate interests to protect, may not ruin the business of another by maliciously inducing his patrons and other persons not to deal with him. Men cannot lawfully jointly congregate about the entrance of one's place of business, and there, either by persuasion, coercion, or force, prevent his patrons and the public at large from entering his place of business or dealing with

him. To destroy his business in this manner is just as reprehensible as it is to physically destroy his property. Either is a violation of a natural right,—the right to own, and peaceably enjoy, property."

That picketing is unlawful per se seems to have been held in *St. Germain v. Bakery & C. Workers' International Union* (1917) 97 Wash. 282, L.R.A. 1917F, 824, 166 Pac. 665, in which the court sustained an appeal from so much of an injunction order as permitted the defendant to place and maintain two pickets in front of each of plaintiff's places of business, wearing a badge or scarf characterizing such places as unfair to organized labor, the court saying: "Whether the picketing was peaceable or otherwise under the facts in this case is entirely immaterial, because the sole object of the respondents was to intimidate not only the public, but also these appellants, and force them to enter into a contract which they were unwilling to enter into. . . . The idea upon which picketing by any means cannot be sustained is that it intimidates the public from entering into the place and doing business with the person before whose store or place of business a line of guards is stationed. Where a line of guards consisting of one or more is stationed in front of a place of business, everyone knows that such guard is there for the purpose of intimidating and preventing the public from dealing with the person whose place of business is picketed. That this is contrary to the spirit of our institutions, and the right to conduct a lawful business in a lawful way, without molestation of other persons, needs no argument to sustain it."

Picketing as a nuisance.

The congregation of members of a labor union and their sympathizers in such large numbers in the vicinity of plaintiff's property as to impede travel on the sidewalk, and to interfere with plaintiff and her customers in getting to and from her place of business, is a nuisance within the meaning of a statute declaring to be a nuisance anything which is an obstruction to the

free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstruct the free passage or use in the customary manner of public street or highway. *Iverson v. Dilno* (1911) 44 Mont. 270, 119 Pac. 719.

The carrying by one man of a banner in front of a boycotted theater when a show is to be given therein, and the causing of one or more men to stand upon and walk along the street in front of and near the theater, who say to persons desiring to enter it that it is unfair to organized labor, are not within a statute making it a nuisance unlawfully to obstruct the free passage or use in the customary manner of any public street. *Empire Theater Co. v. Cloke* (1917) 58 Mont. 183, L.R.A. 1917E, 383, 163 Pac. 107.

Picketing as a violation of Anti-trust Law.

The act of a labor union in interfering with the patronage of another's business, by picketing, having a coercive effect, is violative of the Texas statute which defines a trust as "a combination of capital, skill, or acts, by two or more persons, firms, corporations, or associations of persons, or either two or more of them, for either, any, or all of the following purposes: To create, or which may tend to create, or carry out restrictions in trade or commerce or aids to commerce or in the preparation of any product for market or transportation, or to create or carry out restrictions in the free pursuit of any business authorized or permitted by the laws of this state," and declaring that "any and all trusts, monopolies, and conspiracies in restraint of trade, as herein defined, are prohibited and declared to be illegal." *Webb v. Cooks', Waiters', & Waitresses' Union* (1918) — Tex. Civ. App. —, 205 S. W. 465.

g. Secondary boycotts; notifying third persons not to deal with person boycotted under penalty of losing patronage or having strike called.

Whether a labor union may, as a means of bringing pressure to bear on the other parties to an industrial dispute, notify third persons that their patronage with such other party will

cause them to lose the services or patronage of the members of the labor organization, is a question of considerable difficulty, and one upon which there are differences of judicial opinion.

If it be borne steadfastly in mind that not every announcement of an intention to do an act which will result in injury to another, but only the announcement of an intention to do an unlawful act, is a "threat," and that not every constraint placed upon the free will of another, but only such constraint as results from the announcement of an intention to do, or from the doing of, an unlawful act, to the prejudice of the party constrained, is coercion (see *V. a.*, ante), much of the perplexity in which the subject may seem at first to be involved will disappear, and it will be perceived that the differences in the conclusions reached in the various decisions rest, in the last analysis, upon differences in the conception of the extent of the complainant's rights.

The fundamental question involved in cases arising out of labor disputes is whether one has a right to enjoy business relations with his fellow men (including his right to employ or to purchase goods from them, as well as to enjoy their patronage), unhindered by extraneous influences other than superior inducements offered by his competitors, or such influence as may be exerted through the medium of a simple request; or whether his right to immunity from interference with the free formation of such business relations (where such interference is not prompted primarily by a desire to cause loss, rather than a desire to advance the interests of the persons responsible for the interference) is limited to cases of fraud or force, and does not extend to the employment of such influence upon those who otherwise would be likely to have business relations with him, as the prospect of diminished gains may exert. If the first of these views is adopted, its necessary sequence is that any attempt to interfere with another's business relations with third persons by the course of conduct un-

der discussion is unlawful, the announcement of an intention to pursue such course is a "threat," and its effect "coercion," within the legal significance of those terms.

Where the second view is adopted, a secondary question at once arises, which is whether the acts complained of were done in the exercise of a legal right or whether they were done for the purpose of inflicting injury. Accordingly, courts which agree in entertaining the second view as to the extent of complainant's rights may arrive at a different result in cases involving an identical state of facts, through differences of opinion as to whether the relation of the parties is such as to justify the conduct of the defendant. In other words, the conduct which the existence of a legitimate purpose to be subserved would make justifiable, and hence no invasion of the complainant's rights, may, in a different relation of the parties, or under a different view of their relation, or under a different finding as to the real purpose to be subserved, be unjustifiable, and so unlawful.

Hence, the secondary boycott cannot, independently of the relation of the parties involved, or the purpose for which it is put into operation, be regarded as unlawful; but its legality must be tested by its encroachment upon the legal rights of the complainant; and the extent of those rights may be limited by the existence of the correlative rights in the defendants.

The real position of the courts as to the right of a labor union to attempt to divert patronage from one with whom it is in controversy by the means herein under discussion is rendered obscure by the circumstance that the question has usually arisen upon an application in equity for injunctive relief, so that it is not possible to say whether it was held in such a case that, as a matter of fact, the action of the union in the particular instance was a measure of retaliation rather than an attempt to advance the interests of its members, or whether it was meant therein to deny as a matter of law the existence of any right susceptible of legitimate exercise. The character of the suit

in which the question arises should, therefore, be noted in examining the decisions.

The existence of a right in members of a labor organization to withdraw their patronage from or to leave the service of anyone who may patronize any person with whom they may have a legitimate controversy, and may give notice of their intention to do so, is impliedly recognized in *Quinn v. Leatham* [1901] A. C. 495, 1 B. R. C. 197, 70 L. J. P. C. N. S. 76, 65 J. P. 708, 50 Week. Rep. 139, 85 L. T. N. S. 289, 17 Times L. R. 749, 27 Eng. Rul. Cas. 66,—a case which has sometimes been regarded as holding the secondary boycott to be per se unlawful. In that case the plaintiff, a butcher, had in his employ certain nonunion men. Upon being asked to unionize his shop, he offered to pay all fines and debts and demands against his men, and asked to have them admitted to the union. This was refused, the union insisting that he should turn off his men and employ in their places members of the union. Thereupon the union instituted a strike against him, and procured one of his customers to refrain from further dealing with him by threatening to call out such customer's employees. Upon an action for damages occasioned by such acts, no evidence was given on behalf of the defendants. The court, in submitting the case to the jury, told them that the questions left to them were questions of fact to be determined on the evidence, but that they included questions as to the intent of the defendants, and, in particular, their intent to injure the plaintiff in his trade, as distinguished from the intent of legitimately advancing their own interests. The jury having found a verdict in favor of plaintiff, a motion was made to set aside the verdict and judgment and to enter a verdict for the defendants, or, in the alternative, for a new trial, on the ground of misdirection in refusing to direct for the defendants; leaving to the jury the case as against all the defendants on the evidence; and in that, on the evidence, no actionable wrong was shown; and on other grounds not material to the present

discussion. It is desired to emphasize in connection with the statement of this case the fact that the verdict of the jury necessarily implied a finding of the fact that the action of the defendants which caused loss to the plaintiff was without justification or excuse, in that their intent was to injure plaintiff in his trade rather than legitimately to advance their own interests. It may be noted, also, that the circumstances of the case, especially the refusal to receive plaintiff's employees into the union, afforded a basis for the construction put by the jury upon the acts of the defendants. The case was ultimately carried to the House of Lords, where it was held that a combination of two or more, without justification or excuse, to injure a man in his trade by inducing his customers or servants to break their contracts with him, or not to deal with him or continue in his employment, is, if it results in damage to him, actionable.

The importance of this decision seems to render desirable an attempt to summarize the opinions rendered by the law lords participating in it.

Lord Halsbury said that upon the findings of the jury that the defendants had wrongfully and maliciously induced customers and servants to cease to deal with the plaintiff; that the defendants did this in pursuance of a conspiracy framed among them; that in pursuance of the same conspiracy they induced servants of the plaintiff not to continue in the plaintiff's employment; and that all this was done with malice, in order to injure the plaintiff, and that it did injure the plaintiff,—there could be no doubt other than that cast by the decision in *Allen v. Flood* [1898] A. C. 1, 67 L. J. Q. B. N. S. 119, 77 L. T. N. S. 717, 46 Week. Rep. 258, 14 Times L. R. 125, 62 J. P. 595, 17 Eng. Rul. Cas. 285, that plaintiff had a cause of action. He admitted that, if some of the observations made in *Allen v. Flood* were to be pushed to their logical conclusion, they would warrant a contrary decision; and then proceeded to distinguish *Allen v. Flood* upon the ground that the hypothesis of fact

upon which that case was decided, by the majority of those who took part in the decision, was that the defendant there neither uttered nor carried into effect any threat at all. He simply warned the plaintiff's employers of what the men themselves, without his persuasion or influence, had determined to do; that no resolution of the trade-union had been arrived at, at all; and the defendant had no authority himself to call out the men, which was argued to be the threat which coerced the employers to discharge the plaintiff Allen; that it was, further, an element in the decision that there was no case of conspiracy, or even combination; while in the case under consideration there were conspiracy, threats, and threats carried into execution, so that loss of business and interference with the plaintiff's legal rights were abundantly proved.

Lord Macnaghten expressed the opinion that *Allen v. Flood* had very little to do with the question under consideration; that, in his opinion, *Allen v. Flood* laid down no new law, but simply brushed aside certain dicta (to the effect that a bad motive may make actionable what would not otherwise be actionable) found in the judgments delivered by Lord Esher in *Bowen v. Hall* (1881) L. R. 6 Q. B. Div. 333, 50 L. J. Q. B. N. S. 305, 44 L. T. N. S. 75, 29 Week. Rep. 367, 45 J. P. 373, 1 Eng. Rul. Cas. 717, and *Temperton v. Russell* [1893] 1 Q. B. (Eng.) 715, 62 L. J. Q. B. N. S. 412, 4 Reports, 376, 69 L. T. N. S. 78, 41 Week. Rep. 565, 57 J. P. 676; that, disembarrassed of these expressions, *Temperton v. Russell* stands on the ground that a violation of legal right committed knowingly is a cause of action, and that it is a violation of legal right to interfere with contractual relations recognized by law, if there be no sufficient justification for the interference; and that the present case depends on precisely the same considerations. He further held that the proposition that a conspiracy to injure, resulting in damage, gives rise to civil liability, is founded both on authority and good sense; that a conspiracy to injure differs widely from

an invasion of civil rights by a single individual, in that a man may resist without much difficulty the wrongful act of an individual, but that it is a very different thing when one man has to defend himself against many combined to do him wrong.

Lord Shand said that while combination of different persons in pursuit of a trade object is lawful, although resulting in such injury to others as may be caused by legitimate competition in labor, yet that competition for no such object, but in pursuance merely of a malicious purpose to injure another, is unlawful; that it having been found by the jury that it was the intention of the defendants to injure the plaintiff in his trade, as distinguished from the intention of legitimately advancing their own interests, the question raised was whether, in consequence of the decision in *Allen v. Flood*, such conduct is lawful; but that *Allen v. Flood* is distinguishable upon the ground that there the purpose of the defendant was, by the acts complained of, to promote his own trade interest, which it was held he was entitled to do, although injurious to his competitors; whereas in the present case, while it was clear that there was combination, the purpose of the defendants was to injure the plaintiff in his trade, as distinguished from the intention of legitimately advancing his own interests.

Lord Brampton also held that the judgment in *Allen v. Flood*, rightly understood, did not control the present case, the alleged cause of action being very different; not being dependent upon coercion to break any particular contract or contracts, though such causes of action are introduced into the claim, but the real and substantial cause of action being an unlawful conspiracy to molest the plaintiff, a trader, in carrying on his business, and by so doing to invade his undoubted right; and that no ground existed upon which the acts of defendants might be excused or justified. With regard to the conspiracy part of the claim, he said, adopting the words of Willes, J., in *Mulcahy*

v. Reg. (1868) L. R. 3 H. L. (Eng.) at page 317, that when two or more agree to do an unlawful act, or to do a lawful act by unlawful means, the very plot is an act in itself which, when resulting in the infliction of damage, becomes actionable; that as the overt acts which follow a conspiracy form of themselves no part of the conspiracy, but are only things done to carry out the illicit agreement already formed, if they are sufficient to accomplish the wrongful object of it, it is immaterial whether, singly, those acts would have been innocent or wrongful, for they have, in their combination, brought about the intended mischief, and it is the wilful doing of that mischief, coupled with the resulting damage, which constitutes the cause of action; not, of necessity, the means by which it was accomplished.

Lord Lindley said that *Allen v. Flood* had so important a bearing on the case under consideration that it was necessary to ascertain exactly what was really decided thereby; that it established two propositions: one, a far-reaching and extremely important proposition of law, and the other a comparatively unimportant proposition of mixed fact and law, useful as a guide, but of very different character from the first. That the first and important proposition is that an act otherwise lawful, although harmful, does not become actionable by being done maliciously, in the sense of proceeding from a bad motive and with intent to annoy or harm another; that this is a legal doctrine not new or laid down for the first time in *Allen v. Flood*; that it had been gaining ground for some time, but was never before so fully and authoritatively expounded as in that case. That in applying this proposition care must be taken to bear in mind, first, that in *Allen v. Flood* criminal responsibility had not to be considered; secondly, that even in considering a person's liability to civil proceedings the proposition in question applies only to "acts otherwise lawful," i. e., to acts involving no breach of duty, or, in other words, no wrong to anyone.

That the second proposition is that what *Allen* did (which, in the opinion of the majority of the House of Lords, was simply to inform the employers of the plaintiffs that most of their workmen would leave them if they did not discharge plaintiffs) infringed no right of the plaintiffs, even though he acted maliciously and with a view to injure them; but that no court or jury is bound as a matter of law to draw from the facts before it inferences of fact similar to those drawn by the House of Lords from the evidence relating to *Allen* in the case before them. Passing to the facts of the case under consideration, Lord Lindley said that the liberty of plaintiff to earn his own living in his own way involved the liberty to deal with other persons who were willing to deal with him; that this liberty is a right recognized by law, its correlative being the general duty of everyone not to prevent the free exercise of this liberty, except in so far as his own liberty of action may justify him in so doing. Continuing, he said: "But a person's liberty or right to deal with others is nugatory unless they are at liberty to deal with him if they choose to do so. Any interference with their liberty to deal with him affects him. If such interference is justifiable in point of law, he has no redress. Again, if such interference is wrongful, the only person who can sue in respect of it is, as a rule, the person immediately affected by it; another who suffers by it has usually no redress; the damage to him is too remote, and it would be, obviously, practically impossible and highly inconvenient to give legal redress to all who suffered from such wrongs. But if the interference is wrongful and is intended to damage a third person, and he is damaged in fact,—in other words, if he is wrongfully and intentionally struck at through others, and is thereby damaged,—the whole aspect of the case is changed; the wrong done to others reaches him, his rights are infringed, although indirectly, and damage to him is not remote or unforeseen, but is the direct consequence of what has been done." And

he further held that the defendants' conduct amounted to a violation of their duty to the plaintiff and his servants and customers, to leave them in the undisturbed enjoyment of their liberty of action; that such conduct was without legal justification or excuse; and that the intention to injure the plaintiff negatived all excuses and disposed of any question of remoteness of damage.

That a secondary boycott is not necessarily unlawful is also more or less directly affirmed by the courts of California, Montana, and Arizona. In *Duplex Printing Press Co. v. Deering* (1918) — C. C. A. —, 252 Fed. 722, it was held, applying the law of New York as ascertained and announced by its highest court in *Bosert v. Dhuy* (1917) 221 N. Y. 342, 117 N. E. 582, Ann. Cas. 1918D, 661, that secondary boycott is lawful if unaccompanied by malice, force, violence, or fraud. But, in view of the decision in *AUBURN DRAYING CO. v. WARDELL* (reported herewith) ante, 901, this conclusion seems not to have been warranted.

The fact that *J. F. Parkinson Co. v. Building Trades Council* (1908) 154 Cal. 581, 21 L.R.A. (N.S.) 550, 98 Pac. 1027, 16 Ann. Cas. 1165, goes further in some respects than any other decision on the subject, makes necessary a somewhat extended statement of the grounds upon which it proceeded. The facts were as follows: Plaintiff was a manufacturer of and dealer in building materials. The principal defendant, the Building Trades Council, was a voluntary association composed of delegates from various labor unions of the locality, and the other defendants were labor unions composed of artisans engaged in the various crafts concerned in building operations, the officers of the council and of the several unions, and a number of the members of the unions. The rules of the various unions forbade union men to work on the same job or in the same shop with nonunion men, or to handle or use in their several employments materials supplied by a dealer who had been declared "unfair" by the council because of the employment by him of

nonunion workmen. The main cause of controversy between the plaintiff and defendants appears to have been the employment of a nonunion tinner, who had sought admission to the tinners' union, understanding from information given by a member of another union that the initiation fee would be \$25. A few days afterwards he was informed that the initiation was \$50. This and other circumstances induced him and the plaintiff's manager to believe that the initiation fee had been raised for the express purpose of "freezing him out." It was shown by the evidence, however, that the preliminary steps for raising the initiation fee had been taken some time before the tinner was employed by the plaintiff, and that it had been ratified by all the superior bodies whose approval was required, as early as the day upon which the tinner made his application. Acting upon the advice of the plaintiff's manager, he determined to withdraw his application for a journeyman's card, and instead thereof to apply for a master tinner's card, which would enable him to continue the work he was doing without any violation of the rules of the union, and would cost only \$5. It was necessary, however, in order to entitle him to a master's card, that he should be a boss and an employer of labor, not a journeyman working for wages. In order to comply with this condition he purchased a small amount of stock in the plaintiff corporation, and upon this basis claimed to be an employer within the rules of the union. This claim was disputed by the union, and is characterized by the court as clearly untenable. The tinner having finally refused to take out a journeyman's card, and the plaintiff having refused to discharge him, the plaintiff was duly declared "unfair," and its union employees given notice of that fact, whereupon, in pursuance of their union's rules, they quit work. The Trades Council also sent to all contractors of the vicinity employing union men a notice that the plaintiff had been placed on the "unfair" list, and that union men could not work for or handle any material

furnished by plaintiff until further notice. Most of the contractors thereupon ceased to purchase materials from plaintiff, who instituted an action for an injunction and damages, and in the court below obtained a final injunction restraining the defendants "from boycotting plaintiff,—that is to say, from coercing others against their will to withdraw from plaintiff their beneficial business intercourse, through or by threats that unless those others do so the defendants will cause, directly and indirectly, loss to them," etc. There was also a judgment for \$1 damages and the costs.

The case having been carried to the supreme court, Beatty, Ch. J., delivered the main opinion; and, in reviewing the evidence, laid stress upon the circumstance that the combination of the defendants was not inspired by any malicious purpose or feeling against the plaintiff, but that it embraced the world at large, and consisted wholly in an agreement, to which all the members were pledged, that they would refuse to work for any person or firm who employed non-union men, and that they would refuse to work upon or handle any material supplied by an employer of nonunion men; and upon the circumstance that the upshot of the controversy was the inevitable outcome of the rules of the council as applied to a situation brought about by causes implying no actual desire on the part of the defendants to injure the plaintiff specially, or to injure it at all, except in so far as the enforcement of the rules of the council and its affiliated unions must affect injuriously all those who might undertake to carry on business in defiance of those rules. He then said: "Can it be said, in view of this more specific and detailed statement of the probative facts involved in the general finding of the trial judge, that the defendants entered into a conspiracy for the purpose of compelling the plaintiff, by coercion and intimidation, to subject its business to their control? Can it be said that they entered into a conspiracy at all? A combination there certainly was, but it had no reference to the

plaintiff except as the business of the plaintiff put it into the general class (employers of labor) who would necessarily be affected by the enforcement of the regulations of the unions. Their object was to secure higher wages, shorter hours, and more favorable conditions generally than employers of labor might be willing to concede, and, just so far as they might be successful in accomplishing this object, it may be assumed that employers, as a class, the plaintiff included, would incur a corresponding loss. But assuming all this, would that constitute the combination a conspiracy? A conspiracy is a combination of two or more persons to accomplish by concerted action a criminal or unlawful purpose, or a lawful purpose by criminal or unlawful means; and, to support the conclusion that these defendants were guilty of a conspiracy, it must be held that their purpose was, at least, unlawful, if not criminal; or, their purpose being lawful, that they proposed to attain it by the employment of some unlawful means. Limiting our consideration for the present to this question of conspiracy, it is clear that the avowed object of these organizations—the several unions of workingmen and the council in which they were combined—was in no sense unlawful, and the discussion may be confined to the question whether the means proposed for its attainment were unlawful,—a question as to which there is a wide divergence of view disclosed by the decisions of the courts of different jurisdictions, and often by the different opinions of judges of the same court." After the examination of a number of decisions (notably *National Protective Asso. v. Cumming* (1902) 170 N. Y. 315, 58 L.R.A. 135, 88 Am. St. Rep. 648, 63 N. E. 369; *Allen v. Flood* [1898] A. C. 1, 67 L. J. Q. B. N. S. 119, 77 L. T. N. S. 717, 46 Week. Rep. 258, 17 Times L. R. 125, 62 J. P. 595, 17 Eng. Rul. Cas. 285; *Quinn v. Leatham* [1901] A. C. 495, 1 B. R. C. 197, 70 L. J. P. C. N. S. 76, 65 J. P. 708, 50 Week. Rep. 139, 85 L. T. N. S. 289, 17 Times L. R. 749, 27 Eng. Rul. Cas. 66) bearing upon the ques-

tion whether an act lawful in itself is converted by a malicious or bad motive into an unlawful act, so as to make the doer of the act liable to a civil action, and arriving at the conclusion that the rule that a bad motive cannot make actionable what is otherwise lawful was not unsettled, but was more firmly established by the decision in *Quinn v. Leatham*, he continued: "We may, therefore, in the further consideration of this case, confine our attention to what the defendants did and threatened to do, and to the simple question whether those things were or were not in themselves lawful. The general objects of the union and the council being lawful, if they used no unlawful means for their attainment, the motives which inspired their action in this case are irrelevant to the question of conspiracy, and immaterial as affecting the cause of action. . . . Was it unlawful to send the written notices to the contractors employing union labor that the plaintiff had been declared unfair, and that union men could not work for it or handle material supplied by it till further notice? There are authorities on both sides of this question, but I think those which would answer it in the negative have the better reason. The contractors were working in harmony with the unions (as, indeed, the plaintiff had previously done), and fair dealing required that the council, representing and acting for the unions, should protect such contractors from any loss they might incur if left in ignorance of the action it had taken. If they had not sent the notices, some of those contractors who felt constrained to stop dealing with plaintiff when informed that it had been declared unfair might have purchased material which they could not have used; and it is only upon the assumption that such purchases would have been made that the plaintiff can base a claim that it was damaged by the notices. But can plaintiff make such a claim as a ground for equitable relief? It seems very clear that it cannot; for with full knowledge that it had been declared unfair, and of all the consequences

flowing from that declaration, it would not have been justified in selling material to a contractor employing union men, without disclosing a fact so essential to his freedom of contract. And if good faith and fair dealing imposed an equal obligation upon the plaintiff and the council to inform the contractors of what the plaintiff knew, it is difficult to see what right of plaintiff was infringed by the sending of the notices. Their only effect was to enable the contractors and plaintiff to conduct their future dealings on equal terms. . . . The fact that the business agent of the council, in the course of the dispute over the Waterman affair, told Mr. Parkinson that they would drive him out of business if he refused to observe their rules, is material only in so far as it is an item of evidence tending to show that the course pursued by the council was dictated by a malicious purpose to injure the plaintiff, and not by a desire to benefit its members. I think myself, as I have in substance said, that it has very slight probative force for that purpose, and that it is completely refuted by all the facts of the case. But, conceding that it might have warranted the superior court in concluding that the motives of defendants were tainted with malice, it cannot be denied that all the acts of the council and its affiliated unions were lawful, and that they were adapted to the promotion of the plans devised by them for bettering the condition of the members. Being so adapted, and being lawful in themselves, they could not be rendered actionable by the mere fact that some feeling of animosity had been engendered in the course of the controversy between the parties."

He then proceeded to consider the question whether defendants were liable for causing certain of the contractors who had withdrawn their patronage from plaintiff in consequence of the notice, to violate existing contracts, saying: "The law is pretty thoroughly settled, both in England and in this country, that causing another to violate his contract with a third party, without a legal justifica-

tion, is an actionable injury; from which it follows that if the defendants, by sending the notices to the contractors, caused some of them to break their contracts, and did so maliciously and without justification, they made themselves liable, at least, to an action for damages. But I do not think it can be said that the sending of the notices was without justification. The plaintiff had been declared unfair, and it was certain that, until that action of the council should be reversed, no member of any of the unions—so long as he remained a member—would handle material supplied by the plaintiff. The contractors to whom the notices were sent were all employing union men, and it was no less the duty of the plaintiff than of the council to inform them, with a view to future transactions, that they could not use material supplied by the Parkinson Company without engaging nonunion men in place of the men they had. If this is so,—if the notice to the contractors was proper and essential to fair dealing as between them and the plaintiff,—the fact that some of them violated their existing contracts cannot be deemed a wrong caused by the defendants. It was a wrong for which the contractors alone were responsible."

In conclusion, he said: "I have not attempted to review in detail the numerous cases cited by counsel in support of the judgment. The task, indeed, would be endless. Speaking generally, it may be said that many of them relate to propositions which are not here questioned, while many of the others, like *Quinn v. Leatham* (Eng.) *supra*, were actions for damages for unlawful interference with a legitimate business, in which, as in that case, the verdicts were sustained, and on substantially the same grounds. We do not question the doctrine of *Quinn v. Leatham* as we gather it from the opinions of the judges—particularly those of Lords Brampton and Lindley, with which the Lord Chancellor agreed. Any injury to a lawful business, whether the result of a conspiracy or not, is *prima facie* actionable, but may be defended upon the

ground that it was merely the result of a lawful effort of the defendants to promote their own welfare. To defeat this plea of justification, the plaintiff may offer evidence that the acts of the defendants were inspired by express malice, and were done for the purpose of injuring plaintiff, and not to benefit themselves. The principle is the same which permits proof of express malice to defeat the plea of privilege in libel, or the defense of probable cause in actions for malicious prosecution or false imprisonment. In such cases as *Quinn v. Leatham* a verdict for the plaintiff imports a finding by the jury that the injurious acts of the defendants which, standing by themselves, are actionable, have not been justified; or, in other words, that they were done to injure the plaintiff, and not to benefit the defendants; or that the means employed were unlawful. In *Quinn v. Leatham* the verdict was supported on both grounds. There was proof of express malice, and of unlawful means employed to injure plaintiff's business. In this case there was overwhelming proof that the council, when the occasion arose, simply put in force a rule long before adopted for their own benefit, and not directed against the plaintiff or any particular person. Nor did the council, the unions, or their members generally, use any unlawful means to injure the plaintiff, unless it was unlawful to send the notices. I have expressed the opinion that, so far from being unlawful, the sending of the notices was only the fulfilment of a duty under the circumstances."

Lorigan, J., concurred in the foregoing opinion.

Sloss, J., said that while he concurred in the judgment, he was not prepared to assent to anything said in the main opinion; that it was to be borne in mind that the case involved neither the use of violence nor the fear of violence, nor the question how far it is unlawful, whether by persuasion or other means, to induce one of the parties to a contract to break it to the damage of the other, since any acts of the latter character which might have been committed had oc-

curring prior to the commencement of the action, and there was no evidence that any further interference in that direction was to be anticipated; but that the real question turned upon whether it was unlawful to give the notice in question. "In this inquiry I think it is unimportant that the defendants were merely acting in accordance with a rule adopted before any difference with the plaintiff had arisen. The opinion of the chief justice appears to proceed upon the theory that, since the defendants had bound themselves to act in a certain way in the event of a controversy of this kind, it was not only proper, but laudable, for them to notify contractors of their intended action and of the consequences which would follow to contractors who should continue to deal with the plaintiff. More than this, that it was in some way incumbent upon plaintiff to notify contractors dealing with him that a continuance of their patronage would be likely to result in loss to them. I cannot agree to the proposition that the rights of the parties are in any way affected by such considerations. If the defendants' course of conduct amounted to an unlawful interference with plaintiff's rights, it was not made lawful by the fact that the defendants had decided, in advance, to act in this way whenever an occasion should present itself. But was their action unlawful? They had a right, as has been said, to cease working for Parkinson. They had an equal right to cease working for any other employer. Upon what ground, then, is it claimed that, while their refusal to work for plaintiff gave plaintiff no cause of complaint, the refusal to work for others did give plaintiff a ground of action? Because, it is said, they are bringing to bear upon the Parkinson Company, with which they have a controversy, the pressure of loss inflicted by third persons not connected with the main dispute, and are, by holding over these third persons the risk of financial loss, compelling them against their will to inflict upon Parkinson the damage resulting from a cessation of their patronage. This is the argument com-

monly advanced to establish the illegality of what has been called, in much of the recent discussion of the subject, a 'secondary' rather than a 'primary' boycott. I do not see that we are helped to a solution of the question of the illegality of the defendants' acts by looking into the 'motive' or 'intent' with which they acted. Even if we assume, contrary to the decisions of this court, that an improper motive may, as a general proposition, render actionable an act otherwise lawful; or, to use another form of statement, that damage intentionally inflicted will be actionable unless its infliction can be justified by showing that it was inspired by a proper motive,—the motive with which these defendants acted was not, in my opinion, one which the law regards as improper. The defendants were seeking, in all they are shown to have done, to secure employment by the plaintiff for themselves to the exclusion of those not associated with them, and to secure that employment upon terms deemed satisfactory or advantageous to them. That is the effort of every dealer in goods. It is the struggle of competition, and is no more to be frowned upon where the subject of trade is labor than where it is a specific commodity. The uniting or combining of a number of persons to accomplish a lawful object by lawful means will not per se render the conduct of the many any more unlawful than would be the same conduct on the part of any one of them. . . . The injunction, then, must rest upon the principle that it is unlawful in an effort to compel A. to yield a legitimate benefit to B., for B. to demand that C. withdraw his patronage from A. under the penalty of losing B.'s services or patronage, to which he has no contract right. . . . Upon a consideration of the authorities, I think the sounder rule is that one who is under no contract relations to another may freely and without question withdraw from business relations with that other. This includes the right to cease to deal not only with one person, but with others; not only with the individual who may be pursuing

a course deemed detrimental to another who opposes it, but with all who, by their patronage, aid in the maintenance of the objectionable policies. In other words, if the defendants violated no right of the Parkinson Company by refusing to work for it, they violated none by refusing to work for contractors who used material bought of Parkinson. Such refusal, as is shown in the opinion of the chief justice, and as is stated in the testimony of plaintiff's manager and principal witness, was the 'sum total of the interference' which was practised or threatened."

He further said that workmen have an absolute right to dispose of their labor as they see fit, and that "so long as they abstain from breach of contract, violence, duress, menace, fraud, misrepresentation, or other unlawful means, they may lawfully inflict such damage as results from the withholding of their labor or patronage. To quote again from Judge Holmes's opinion in *Vegeahn v. Guntner* (1896) 167 Mass. 92, 35 L.R.A. 722, 57 Am. St. Rep. 443, 44 N. E. 1077: 'If it is true that workingmen may combine, with a view, among other things, to getting as much as they can for their labor, just as capital may combine with a view to getting the greatest possible return, it must be true that, when combined, they have the same liberty that combined capital has to support their interests by argument, persuasion, and the bestowal or refusal of those advantages which they otherwise lawfully control.' The terms 'intimidation' and 'coercion,' so frequently used in the discussion of this question, seem to me to have no application to such acts as were here committed. One cannot be said to be 'intimidated' or 'coerced,' in the sense of unlawful compulsion, by being induced to forego business relations with A., rather than lose the benefit of more profitable relations with B. It is equally beside the question to speak of 'threats,' where that which is threatened is only what the party has a legal right to do. It may be that the combination of great numbers of men, as of great amounts of capital,

has placed in the hands of a few persons an immense power, and one which, in the interest of the general welfare, ought to be limited and controlled. But if there be, in such combinations, evils which should be redressed, the remedy is to be sought, as to some extent it has been sought, by legislation. If the conditions require new laws, those laws should be made by the lawmaking power, not by the courts."

Angellotti, J., said that he concurred in the judgment and, generally, in what has been said by the chief justice in his opinion upon such matters as were material to a determination of the appeal; that the only material question in the case as to which there could be any doubt was whether defendants had been guilty of any such coercion or intimidation toward the patrons of the plaintiff, tending to injure its business, as would warrant the granting of relief by injunction; that while the notice given was in effect a statement to the effect that if persons notified desired to retain union men in their employ they must refrain from using materials supplied by plaintiff, and was thus effectual to deprive it, to its injury, of the patronage of those who preferred to retain such union employees, it did not constitute the coercion or intimidation as to which the courts can extend relief. Continuing, he said: "In the absence of statutory prohibition of such combinations, the right of persons, no matter how numerous, to voluntarily agree among themselves to withhold their labor from anyone for any reason they see fit, and voluntarily abide by such agreement, seems clear. The decisions now generally recognize that right, so far as an employer with whom some dispute has arisen, and who refuses to grant demands which they deem essential to their interests, is concerned, even though the effect of their refusal to work for him would be most injurious to him. If he yields to their demands, he may be said to have been coerced into doing so by the fear that, if he does not, he will not be able to obtain such employees as will enable him to

properly carry on his business; but this is not the kind of coercion of which the courts can take notice. Those who have labor to give have the same right to insist upon the terms upon which it shall be given by them, as have employers to refuse to employ except upon such terms as they see fit to make; and the law will not interfere with either class in the lawful exercise of that right. Even where the courts hold that the motive with which an otherwise lawful act is done may render the act unlawful, it is held that there is no unlawful motive where there is a mere refusal of organized labor to work for one who refuses to concede such terms as to wages, hours, etc., as they in good faith demand, for the purpose of compelling him to accede to more reasonable terms. But in this state and in most of the other states, the motive with which a lawful act is done is absolutely immaterial. Where such is the rule, the right of persons associated in labor unions to voluntarily withhold their labor for any reason, and with any motive, would appear to be absolute; and, after careful consideration of the authorities, I can see no material distinction, so far as the lawfulness of the act is concerned, between the withholding it from A., with whom they have some dispute arising out of his treatment of union labor, and withholding it from B., against whom they have no other grievance than that he is assisting A. by trading with him. That their motive in withholding it from B. is to induce A. to accede to their terms through the apprehended loss of B.'s patronage is immaterial, even if it be conceded that there is anything wrong in such a motive, which I do not grant. On this point I am in entire accord with the views expressed by Justice Sloss. But, regardless of this, their simple withholding of labor being lawful, the courts will not inquire into their motives. We are, of course, speaking of cases where there is no contract between employer and employee under the terms of which the legal obligation rests upon the employees to continue work. There is

no consideration of that kind in this case, and we need not consider how it would affect the question. If employees thus banded together have a lawful right to withhold their labor from one unless he refrains from patronizing another, there can be nothing unlawful in their simple announcement that they intended to do so. It may be claimed by some that such combinations of labor are inimical to the public welfare; but that, it appears to me, is purely a question for the legislative department of the government. The question, in this respect, is the same in character as would arise over any kind of combination for business purposes."

In this opinion Henshaw, J., and Melvin, J., concurred.

Shaw, J., dissenting, said: "The claim of the defendants appears to be that these notices were intended for the benefit of the several persons to whom they were sent, to warn them of the consequences that might attend their patronizing the plaintiff, so that they could avoid doing so and thereby escape the evil results that would otherwise come to them, and that the sending of notices for such a purpose is not only lawful and innocent, but praiseworthy as well; that these consequences would not come as a result of any act done with reference to the parties warned, but as the result of conditions that existed under the union rules, established long before any difficulty with plaintiff arose. These rules seem to be regarded as of similar force to the law of the land, and a notice not to disregard them as a friendly act, similar to a notice to a friend not to violate the law. I concede, of course, that where a strike has been determined upon the mere sending of a notice of the fact is not unlawful or blameworthy, and cannot be made the foundation of an action. Perhaps the sending of these notices under some circumstances might have been considered as an act of this character. But, under the circumstances disclosed in this case, and in view of the findings of the court, which show that the acts of the defendants were intended to coerce

plaintiff's patrons to cease dealing with plaintiff in order to injure plaintiff in its property rights, the conduct of the defendants must be considered as malicious and unlawful. The defendants had the right, by lawful means, to persuade or induce others to cease dealing with plaintiff, although their purpose in so doing was to injure the plaintiff in its business, and constrain plaintiff to yield to their demands in regard to the conduct of plaintiff's business. It is only when they seek to accomplish such injury by the use of means which the law deems unlawful that their action to that end becomes unlawful, and the resulting injury an actionable wrong. The entire case depends on the question whether or not the means by which the defendants induced the plaintiff's customers to cease dealing with it were unlawful."

He further said that where one person induces another to do an act injurious to a third person, the mere fact that the person instigating the doing of the act was actuated by a bad motive, or by malice toward the third person, will not make his instigation unlawful, but that to make such instigation unlawful the customer must be induced to cease dealing with the party intended to be injured, by means of some force, intimidation, or coercion which destroys his freedom of action and constrains him to cease such dealing when he does not wish to do so, and would not do so, except for the constraint put upon him; that it is not necessary, in order to constitute such undue influence or coercion, that there should be any sort of physical violence done or threatened, or that there should be any act done or threatened which, in itself and apart from its effect in controlling the action of the person coerced, would be unlawful; but that it is sufficient, if the acts threatened, although lawful, are of such a character that, if done, they will cause loss or injury to the person threatened, of so serious a nature that the mere threat prevents him from exercising his own will in the matter, and causes him, against his will, to act injuriously to the person

intended to be injured. And after reviewing a number of decisions tending to support the principles thus laid down, he said, recurring to the facts of the case: "It is of no importance that the rules were adopted without special reference to the plaintiff. They were adopted for the express purpose of being put in force against any person when the occasion should arise which made it desirable that the conduct of such person should be influenced or controlled. The effect, in contemplation of law, is the same as if they had been made expressly for the occasion for which they were used. Nor is the case of plaintiff defeated by the fact that the only act done by the defendants at the time of the boycott was the sending of notices that the plaintiff has been declared unfair, without threat of any sort accompanying it. It is in evidence that all the persons thus notified knew of the purport and effect of the union rules which would be applied in such a case. The defendants had created this engine of oppression for use at any time they desired, and had prepared the signal upon which it was to become active. The parties notified were aware of all this, and the defendants also knew that these parties had this knowledge. Further words were unnecessary. The threat would not have been more complete if the notice had expressly stated that all business with the Parkinson Company must stop under penalty of a strike of their union workmen. The defendants had arranged this condition of affairs. They cannot escape its effects on the ground that they were simply giving information of action which would inevitably take place, and were doing it for the benefit of the contractors, so that they might act as requested, and thus avoid the damages otherwise ensuing. If the action of which this notice was given had been that of third persons, for whom defendants were in no wise responsible, or with whom they were not in collusion, such a claim might stand. But the action of which they were so kindly notifying the contractors was their own action, long before resolved upon. If they had no right

to act in this manner for this purpose, the fact that it was previously arranged or decided upon for this or any similar occasion was immaterial. It is further argued that the only thing with which the customers were threatened was a strike of these customers' employees; that this threat was made by the men themselves, through their agents, authorized to act for them; and that they had a lawful right to strike at any time and for any cause, or no cause, and hence that their conduct was not unlawful. The principle settled by the cases cited, however, is that, while men have a right to strike, they have no right by that means to coerce their employers so as to compel them to act to the injury of a third person. The fact that they were to strike in such numbers gave them a power over the threatened customers of plaintiff which constituted undue influence over them, or coercion, or intimidation, as most of the authorities usually express it, and this coercion, exercised for the purpose of injuring a third person, is an unlawful act, and makes the resulting injury an unlawful injury, which may be enjoined if only threatened, and which, if committed, may be redressed by an action for damages. It is the control of another's conduct against his will that is the unlawful element in this proposition. This being unlawful, the resulting injury to a third person is unlawful, although every other act in the transaction is lawful in itself. So far as this unlawful element is concerned, it is immaterial whether that control is obtained by fear produced by the immediate prospect of serious pecuniary loss, as the result of a threatened strike, or by fear produced by a threat of bodily injury."

The opinions of the majority of the court seem to put the decision on the ground that the conduct of the defendants was justifiable as a lawful effort to promote their own welfare, and that the evidence was insufficient to support the claim that the acts of the defendants were inspired by express malice, and were done for the purpose of injuring plaintiff, and not for the benefit of themselves; and thus

far the case is perfectly consistent with *Quinn v. Leatham*. But they go further in the attempt to justify their decision, when they take the position that, the right of the members of the unions to refuse to work for those who should purchase materials from the plaintiff being an absolute one, an intent to injure a third person by its exercise cannot render it unlawful as to such third person; and therefore that, it being a lawful act, a threat to do it could not work coercion in a legal sense. The weak link in this chain of logic is the assumption that the exercise of an absolute right can never infringe upon the rights of third persons indirectly affected thereby. This assumption seems unwarrantable in that it overlooks the fact that the exercise of such a right may operate to control another's conduct against his will, and that it may be so exercised with the direct intention of thereby inflicting loss upon a third person. The necessary implication is that one has a right to enjoy business relations with his fellow men only upon the sufferance, not of themselves, but of those whose relation to them is such as to enable them to control their conduct,—a sufferance which may at any time and for any reason, or no reason whatever, be withdrawn. Such a condition might become intolerable. It would leave the individual to the tyranny of the mob,—a tyranny far worse than that of the most absolute ruler, because unrestrained by the fear of consequences.

The position taken in the foregoing case is reaffirmed in *Pierce v. Stablemen's Union* (1909) 156 Cal. 70, 103 Pac. 324, in which, in holding an injunction against "intimidating, harassing, or interfering with any customer or customers, patron or patrons, of plaintiffs, in connection with the business of plaintiffs, either by boycott or by threats of boycott, or by any other threats," to be too broad, it is said: "The right of united labor to strike in furtherance of trade interests (no contractual obligation standing in the way) is fully recognized. The reason for the strike may be based upon the refusal to comply

with the employees' demand for the betterment of wages, conditions, hours of labor, the discharge of one employee, the engagement of another,—any one or more of the multifarious considerations which in good faith may be believed to tend toward the advancement of the employees. After striking, the employee may engage in a boycott, as that word is here employed. As here employed, it means not only the right to the concerted withdrawal of social and business intercourse, but the right by all legitimate means—of fair publication, and fair oral or written persuasion—to induce others interested in, or sympathetic with, their cause, to withdraw their social intercourse and business patronage from the employer. They may go even further than this, and request of another that he withdraw his patronage from the employer, and may use the moral intimidation and coercion of threatening a like boycott against him if he refuses so to do. This last proposition necessarily involves the bringing into a labor dispute between A. and B., C., who has no difference with either. It contemplates that C., upon request of B., and under the moral intimidation lest B. boycott him, may thus be constrained to withdraw his patronage from A., with whom he has no controversy. This is the 'secondary boycott,' the legality of which is vigorously denied by the English courts, the Federal courts, and by the courts of many of the states of this nation. Without presenting the authorities, which are multitudinous, suffice it to state the other view, in language of the President of the United States, but recently uttered: 'A body of workmen are dissatisfied with the terms of their employment. They seek to compel their employer to come to their terms by striking. They may legally do so. The loss and inconvenience he suffers he cannot complain of. But when they seek to compel third persons, who have no quarrel with their employer, to withdraw from all association with him, by threats that unless such third persons do so the workmen will inflict similar injury on such third per-

sons, the combination is oppressive, involves duress, and, if injury results, it is actionable.' President Taft, *McClure's Magazine*, June, 1909, p. 204. Notwithstanding the great dignity which attaches to an utterance such as this, which, as has been said, is but the expression of numerous courts upon the subject-matter, this court, after great deliberation, took what it believed to be the truer and more advanced ground, above indicated, and fully set forth in *J. F. Parkinson Co. v. Building Trades Council* (1908) 154 Cal. 581, 21 L.R.A.(N.S.) 550, 98 Pac. 1027, 16 Ann. Cas. 1165. In this respect this court recognizes no substantial distinction between the so-called primary and secondary boycott. Each rests upon the right of the union to withdraw its patronage from its employer, and to induce by fair means any and all other persons to do the same, and in exercise of those means, as the unions would have the unquestioned right to withhold their patronage from a third person who continued to deal with their employer, so they have the unquestioned right to notify such third person that they will withdraw their patronage if he continues so to deal." From this conclusion, however, Shaw, J., dissented upon the ground that the means employed for the coercion or intimidation of a third person in a "secondary boycott" are unlawful whenever they are such as are calculated to, and actually do, destroy his free will and cause him to act contrary to his own volition in his own business, to the detriment of the person toward whom the main boycott or strike is directed; saying that a close analysis of the cases on the subject shows that the supreme court of California stands alone.

In *Truax v. Bisbee Local, C. W. U.* (1918) 19 Ariz. 379, 171 Pac. 121, the court referred with approval to the statement made in *Pierce v. Stablemen's Union* (1909) 156 Cal. 70, 103 Pac. 324, that striking employees may request of another that he withdraw his patronage from the employer, and may use the moral intimidation and coercion of threatening a like boycott against him, if he refuse to do so.

In *Lindsay & Co. v. Montana Federation of Labor* (1908) 37 Mont. 264, 18 L.R.A. (N.S.) 707, 127 Am. St. Rep. 722, 96 Pac. 127, it was held that a combination of workmen to withdraw their patronage from a merchant, and from those who deal with him, is not an unlawful act which equity may enjoin. The reasoning on which the court bases its conclusion is that it is not necessarily unlawful for many to combine to do what any one of them alone might lawfully do; and that therefore a labor organization may, in furtherance of the objects of its existence, divert the trade to third parties from one with whom it is in controversy, so long as the means used to make the boycott effective are not illegal. This decision seems clearly to recognize the existence of a right in a labor union which may lawfully be exercised, notwithstanding it may cause loss to another.

So also in *Empire Theater Co. v. Cloke* (1917) 53 Mont. 183, L.R.A. 1917E, 383, 163 Pac. 107, it was held that a publication to the effect that patrons of a concern alleged to be unfair to union labor will themselves be regarded as unfair, and disciplined if members of unions, or boycotted by union labor, is not an unlawful threat which can be enjoined. The court said: "What, then, was the 'threat' conveyed by the acts of the defendants, according to the findings? In the last analysis, it was that all those who patronized the theater in defiance of the boycott would themselves be classed as unfriendly and subjected to boycott in their turn, a warning similar to that conveyed by the Lindsay circular, implicit in the Dilno banner, and necessarily involved in every earnest boycott. We realize that many courts treat this as a threat in the legal sense because of the power of numbers behind it, and have enjoined the execution of it upon the assumption that the person boycotted is, through the intimidation of others, deprived of something to which he has a vested right. As we see it, this position is unwarranted in every particular. There is no intimidation in the legal sense unless there is a threat

in the legal sense. Every person has the right, singly and in combination with others, to deal or refuse to deal with whom he chooses; to reach his decision in that, as in all other matters, upon or without good reason; to regard as unfriendly all those who, with or without justification, refuse to co-operate or sympathize. These rights do not depend upon the character, numbers, or influence of those who seek to exercise them; nor upon the occasion for their exercise; nor upon the consequences which may follow from their legitimate use. They have been recognized by this court as existing in an incorporated railway benefit society (*Peek v. Northern P. R. Co.* (1915) 51 Mont. 295, L.R.A. 1916B, 835, 152 Pac. 421), and it may be said in passing that they likewise belong to the merchants' associations, to consumers interested in the cost of living, and, in some measure, to all other persons or groups of persons by whom a boycott may be conceived and practised. The defendants had these rights, and, having them, could lawfully announce their intention to assert them. The plaintiff, on the other hand, has no vested right in the patronage of the defendants, or of anyone else who may choose to withhold it; and, no more than the plaintiff, have the persons who may choose to patronize it any vested right to such patronage. Such persons may take such patronage on the terms imposed, or not, as they see fit, just as the defendants and their friends may, if they see fit, choose to regard a rejection of these terms as a rejection of their patronage. In short, the 'threat' conveyed was to do what the defendants lawfully could do,—a mere warning of their intention, which they could lawfully give."

In some cases it is not possible to state with any degree of positiveness whether the decision that the conduct of defendant in carrying on or threatening a secondary boycott was based on a finding of fact as to the existence of an unlawful purpose, or upon the denial, as a matter of law, of the existence of any right capable of exercise for a lawful purpose. See *Ameri-*

can Federation of Labor v. Buck's Stove & Range Co. (1909) 33 App. D. C. 83, 32 L.R.A.(N.S.) 748 (an action for an injunction); Wilson v. Hey (1908) 232 Ill. 389, 16 L.R.A.(N.S.) 85, 122 Am. St. Rep. 119, 83 N. E. 928, 13 Ann. Cas. 82 (action for an injunction); Matthews v. Shankland (1898) 25 Misc. 604, 56 N. Y. Supp. 123 (motion to vacate preliminary injunction); Patterson v. Building Trades Council (1902) 11 Pa. Dist. R. 500 (motion to continue preliminary injunction); Loewe v. California State Federation of Labor (1905) 139 Fed. 71 (motion for preliminary injunction); Rocky Mountain Bell Teleph. Co. v. Montana Federation of Labor (1907) 156 Fed. 809 (action for an injunction).

Other cases clearly deny that the conduct of a labor union in instituting a secondary boycott is justifiable as an act of competition. Hopkins v. Oxley Stave Co. (1897) 28 C. C. A. 99, 49 U. S. 709, 88 Fed. 912; Iron Molders' Union v. Allis-Chalmers Co. (1908) 20 L.R.A.(N.S.) 315, 91 C. C. A. 631, 166 Fed. 45; Fink v. Butchers' Union (1915) 84 N. J. Eq. 638, 95 Atl. 182; AUBURN DRAYING Co. v. WARDELL (reported herewith) ante, 901; Justin Seubert v. Reiff (1917) 98 Misc. 402, 164 N. Y. Supp. 522; McCormick v. Local Unions (1911) 32 Ohio C. C. 165. See also Thomas v. Cincinnati, N. O. & T. P. R. Co. (1894) 4 Inters. Com. Rep. 788, 62 Fed. 808; Alfred W. Booth & Bro. v. Burgess (1906) 72 N. J. Eq. 181, 65 Atl. 226.

In Hopkins v. Oxley Stave Co. (Fed.) supra, a suit for an injunction, the court held that the conduct of labor organizations in declaring a boycott, to be made effective by refusal to purchase products packed in machine-made casks or barrels, and by notifying complainant's customers of an intention to do so, is not justifiable on the ground that the acts contemplated were legitimate and lawful means to prevent a possible future decline in wages, and to secure employment for a greater number of coopers.

The existence of a right to divert the trade of persons not directly interested in an industrial dispute is de-

nied in Iron Molders' Union v. Allis-Chalmers Co. (1908) 20 L.R.A.(N.S.) 315, 91 C. C. A. 631, 166 Fed. 45, in which the court said: "Dividends and wages must both come from the joint product of capital and labor; and in the struggle wherein each is seeking to hold or enlarge his ground, we believe it is fundamental that one and the same set of rules should govern the action of both contestants. For instance, employers may lock out (or threaten to lock out) employees at will, with the idea that idleness will force them to accept lower wages or more onerous conditions; and employees at will may strike (or threaten to strike), with the idea that idleness of the capital involved will force employers to grant better terms. These rights (or legitimate means of contest) are mutual and are fairly balanced against each other. Again, an employer of molders, having locked out his men, in order to effectuate the purpose of his lockout, may persuade (but not coerce) other foundrymen not to employ molders for higher wages or on better terms than those for which he made his stand, and not to take in his late employees at all, so that they may be forced back to his foundry at his own terms; and molders, having struck, in order to make their strike effective, may persuade (but not coerce) other molders not to work for less wages or under worse conditions than those for which they struck, and not to work for their late employer at all, so that he may be forced to take them back into his foundry at their own terms. Here, also, the rights are mutual and fairly balanced. On the other hand, an employer, having locked out his men, will not be permitted, though it would reduce their fighting strength, to coerce their landlords and grocers into cutting off shelter and food; and employees, having struck, will not be permitted, though it might subdue their late employer, to coerce dealers and users into starving his business. The restraints, likewise, apply to both combatants and are fairly balanced. These illustrations, we believe, mark out the line that must be observed by

both. In contests between capital and labor the only means of injuring each other that are lawful are those that operate directly and immediately upon the control and supply of work to be done, and of labor to do it, and thus directly affect the apportionment of the common fund; for only at this point exists the competition the evils of which organized society will endure, rather than suppress the freedom and initiative of the individual." It was held in this case that striking employees would not be enjoined from inducing employees in factories where their former employer was attempting to get work done to fill his contracts, to refrain from working on it,—apparently on the theory that the strikers and their former employer were competitors with respect to the work to be done, the court saying: "Appellants were aiming to prevent, and appellee to secure, the doing of certain work in which the skill of appellants' trade was necessary. Here was the ground of controversy, and here the test of endurance. If appellee had the right (and we think the right was perfect) to seek the aid of fellow foundrymen to the end that the necessary element of labor should enter into appellee's product, appellants had the reciprocal right of seeking the aid of fellow molders to prevent that end. To whatever extent employers may lawfully combine and co-operate to control the supply and the conditions of work to be done, to the same extent should be recognized the right of workmen to combine and co-operate to control the supply and the conditions of the labor that is necessary to the doing of the work."

In *Fink v. Butchers' Union* (1915) 84 N. J. Eq. 638, 95 Atl. 182, the court condemned a boycott which was directed not only against plaintiffs, but against all persons who, as merchants or otherwise, dealt in or purchased the complainants' products, the court saying: "If it were lawful to go as far as this, there is no limit to the mischief to the public which such combination and confederacy would not reach to. It would go to the extent of forbidding an absolutely dis-

interested person from purchasing or eating meat prepared by the complainants—a most absurd proposition."

A secondary boycott is an unlawful interference with trade and commerce, and those who agree to bring it about are engaged in a conspiracy, against acts done in furtherance of which a court of equity will relieve. *Justin Seubert v. Reiff* (1917) 98 Misc. 402, 164 N. Y. Supp. 522.

In *Patterson v. Building Trades Council* (1902) 11 Pa. Dist. R. 500, it is said that a boycott in which others are forced to join through fear of resulting injury or loss to themselves if they fail to do so is clearly unlawful; that what makes it so is the employment of the means by which such fear is induced and the will overcome.

—withdrawal of patronage from persons dealing with party to industrial dispute.

By reason of the difference in judicial opinion as to the extent of one's right to immunity from interference with his business relations with third persons, and as to the existence of a competitory relation between labor unions and employers which will form a basis for justification of acts of interference with the employer's trade relations with third persons, it is held in some cases that members of a labor union may lawfully combine to refrain from patronizing those who may have dealings with one with whom they are in controversy, and may announce their intention of doing so (see *J. F. Parkinson Co. v. Building Trades Council* (1908) 154 Cal. 581, 21 L.R.A. (N.S.) 550, 98 Pac. 1027, 16 Ann. Cas. 1165; *Pierce v. Stablemen's Union* (1909) 156 Cal. 70, 108 Pac. 324; *Lindsay & Co. v. Montana Federation of Labor* (1908) 37 Mont. 264, 18 L.R.A. (N.S.) 707, 127 Am. St. Rep. 722, 96 Pac. 127—above set forth), while in other cases a contrary conclusion is reached (see *Hopkins v. Oxley Stave Co.* (1897) 28 C. C. A. 99, 49 U. S. App. 609, 83 Fed. 902; *Loewe v. California State Federation of Labor* (1905) 139 Fed. 71 (injunction made permanent (1911) 189 Fed. 714); *Rocky Mountain Bell Teleph. Co. v. Montana Federation of Labor* (1907) 156 Fed. 809;

State v. Stockford (1904) 77 Conn. 227, 104 Am. St. Rep. 28, 58 Atl. 769; Wilson v. Hey (1908) 232 Ill. 389, 16 L.R.A.(N.S.) 85, 122 Am. St. Rep. 119, 83 N. E. 928, 13 Ann. Cas. 82; People v. McFarlin (1904) 43 Misc. 591, 89 N. Y. Supp. 527; Matthews v. Shankland (1898) 25 Misc. 604, 56 N. Y. Supp. 123; AUBURN DRAYING CO. v. WARDELL (reported herewith) ante, 901; Krug Furniture Co. v. Berlin Union, A. W. (1903) 5 Ont. L. Rep. 463).

The extent of the right of a labor union to enforce compliance with its demands by withholding patronage is discussed by Van Orsdel, J., in his concurring opinion in American Federation of Labor v. Buck's Stove & Range Co. (1909) 33 App. D. C. 83, 32 L.R.A.(N.S.) 748, as follows: "Applying the same principle [as underlies the right of laboring men to organize and to conduct peaceable strikes], I conceive it to be the privilege of one man, or a number of men, to individually conclude not to patronize a certain person or corporation. It is also the right of these men to agree together, and to advise others, not to extend such patronage. That advice may be given by direct communication or through the medium of the press, so long as it is neither in the nature of coercion nor a threat. As long as the actions of this combination of individuals are lawful, to this point it is not clear how they can become unlawful because of their subsequent acts directed against the same person or corporation. To this point, there is no conspiracy,—no boycott. The word 'boycott' is here used as referring to what is usually understood as 'the secondary boycott;' and, when used in this opinion, it is intended to be employed exclusively in that sense. It is, therefore, only when the combination becomes a conspiracy to injure by threats and coercion the property rights of another, that the power of the courts can be invoked. This point must be passed before the unlawful and unwarranted acts which the courts will punish and restrain are committed."

The same limitation of the right to

induce the public not to patronize was also recognized and stated by the court in Matthews v. Shankland (1898) 25 Misc. 604, 56 N. Y. Supp. 123, wherein the court refused to vacate a preliminary injunction issued restraining defendant labor unions from carrying into effect and further prosecuting a boycott of a newspaper, the purposes of the boycott being to equalize wages of the employees and to unionize the plant. In this case the labor unions, not only as organizations, boycotted the paper, but also took action by way of resolution to the effect that the members of such unions would not patronize any firm that might use this paper as an advertising medium. Copies of these resolutions of the different unions were sent to the patrons of the paper, and boycotts were established and actively enforced against patrons of the paper. The decision of the court was based on the ground that both the purpose sought to be attained and the means used were unlawful. These facts were said by the court to show that the labor unions had overstepped the bounds of prudence and of law in order to gain their object, and had gone beyond mere persuasion, mere moral force, and threatened, intimidated, and frightened patrons of the paper into ceasing to give it patronage or support. The right of the labor organizations, however, to refuse to patronize the paper and to give support to any patron of the paper, was expressly recognized; but the right to go farther than this, by actively boycotting patrons of the paper, and pursuing a course that indicated an intent to annihilate the paper as well as all who might patronize it, was denied.

With substantially the same limitation, this doctrine was recognized in State v. Stockford (1904) 77 Conn. 227, 107 Am. St. Rep. 28, 58 Atl. 769, in which the purpose sought to be attained was said to be a lawful purpose; and the question before the court was whether or not the means used to accomplish the purpose were unlawful and a crime, within the provisions of a statute of that state that every person who shall threaten or use any

means to intimidate any person, to compel such person against his will to do or abstain from doing any act which such person has a legal right to do, or shall persistently follow such person in a disorderly manner, or injure, or threaten to injure, his property with intent to intimidate him, shall be fined, etc. The court said that it was the right of the members of these unions to solicit the business which is being done by the employers, who are liverymen and team owners, "and induce their customers by fair means to employ the defendants and their friends; but that a combination to do these things by threats and intimidation was a criminal combination."

This case seems to be a relaxation of the doctrine stated in a prosecution for conspiracy under the same statute, in *State v. Glidden* (1886) 55 Conn. 46, 3 Am. St. Rep. 23, 8 Atl. 890, which case has been frequently cited by such cases as have enunciated the doctrine that attempts to divert trade, without reference to the means used, are unlawful; although, so far as the facts are concerned, the case can hardly be said to be authority, because the prosecution was under the statutory provision above mentioned. The language of the court, however, tends to support the doctrine of these cases. In the case last above cited, where a union demanded a discharge of non-union workmen, and the employment of members of the union, and in pursuance of such purpose threatened to boycott the patrons of the employer, it was said that, *prima facie*, such conduct must be regarded as malicious and corrupt, and that the purpose of the conspiracy, or the means by which it was to be accomplished, or both, were unlawful.

In *Wilson v. Hey* (1908) 232 Ill. 389, 16 L.R.A. (N.S.) 85, 122 Am. St. Rep. 119, 83 N. E. 928, 18 Ann. Cas. 82, it is held that a labor union may not lawfully notify customers not to deal with a person whom it has put on the unfair list, although no threat accompanies the notice, if the persons receiving it understand that injury will result to those failing to comply

with it. The court said: "It is not wrong for members of a union to cease patronizing anyone when they regard it for their interest to do so, but they have no right to compel others to break off business relations with the one from whom they had withdrawn their patronage, and to do this by unlawful means, with a motive of injuring such person. Such means, as giving notices which excite the fear or reasonable apprehension of other persons that their business will be injured unless they do break off such relations or cease patronizing another, are wrong and unlawful."

In considering the sufficiency of an indictment for a violation of § 168 of the New York Penal Code, which makes it unlawful to conspire to prevent another from exercising a lawful trade or calling, or doing any other lawful act, by force, threats, or intimidation, the court, in *People v. McFarlin* (1904) 43 Misc. 591, 89 N. Y. Supp. 527, said: "The precise dividing line may not be always easy to point out with academic precision, but I apprehend that in each case, as it arises, a question for the jury is likely to be presented, whether the persons accused were only doing what they had the right to do in bestowing their favor upon their friends, and withholding their business and beneficial intercourse from those whom they believed to be unfriendly, or whether, on the other hand, their immediate object and intent were to injure another in his trade or business, and the means employed exceeded the exercise of inherent rights, and were maliciously directed to that specific end."

. . . In so far as the threats against the manufacturers were confined to the withdrawal of the union men from their employ, and the withdrawal of all business relations and intercourse between the union men and said manufacturers unless their demands were complied with, no law was violated, and no illegal act threatened. And it has been said that they may lawfully use fair argument and persuasion to influence their friends to withdraw their patronage from the manufacturers in order to bring them to terms.

But to go further, and threaten the manufacturers with business annihilation, with the waging of a war of destruction against them by the malicious use of the boycott, compelling would-be customers to desist from purchasing because of fear induced by threats that, if they do purchase, the full power of the organization will be focused and projected against them, to their destruction,—such action has never been called legal by any court, so far as my investigation has disclosed, but on the contrary, was condemned at common law, and has been declared illegal by modern text-writers, and in a large number of recent decisions by judicial tribunals worthy of the highest respect.”

In *Loewe v. California State Federation of Labor* (1905) 139 Fed. 71, which was a motion for a preliminary injunction against a boycott of complainant on the part of organized labor, which did not stop with a mere refusal to purchase his product, but extended to a refusal to deal with anyone who should handle it, the court said, in reply to the contention that the allegations of the bill of complaint and the supporting affidavits were insufficient to justify the court in issuing a temporary injunction, in that it did not appear that any force, threat, or intimidation had been used by the defendants to enforce the alleged boycott against the product of complainant's factory, but that all that had been done by the labor organizations named in the bill was to urge upon the friends of labor to use their patronage for the benefit of labor,—that they had a constitutional right to do this, either by publication of their views upon the subject, or by communicating them orally to their friends and the public generally. “But can it be truthfully said that this is all that has been done by the defendants and those who have acted with them in enforcing the boycott described in the bill of complaint? Are they not doing something more than speak, write, and publish their sentiments? Are they not using the power of their combined numbers, acting in concert, to drive the complainants out

of business and destroy their property unless they are willing to surrender the control and management of their business to a labor organization? Are they not acting in combination, not merely for the ultimate purpose of advancing their own interests as workmen, but for the direct and immediate purpose of injuring the complainants in their business and property? If these questions must be answered in the affirmative,—and upon the facts before the court they cannot be answered otherwise,—then what follows? The weight of authority is that these acts are unlawful and may be restrained by injunction.”

The injunction granted in this case was made permanent in (1911) 189 Fed. 714.

In *Rocky Mountain Bell Teleph. Co. v. Montana Federation of Labor* (1907) 156 Fed. 809, an injunction restraining striking employees from using and distributing circulars in which the public and all friends of labor were asked not to patronize the plaintiff telephone company, which circulars characterized the complainant as unfair and a legalized highwayman, and its employees as scabs, and contained a threat on the part of the labor organizations that they would withdraw their patronage from such persons as might patronize plaintiff, was held proper.

The secondary boycott is also condemned in *Hopkins v. Oxy Stave Co.* (1897) 28 C. C. A. 99, 49 U. S. App. 709, 83 Fed. 912, where it was held that the conduct of the labor organizations in notifying complainant's customers of their intention not to purchase products packed in complainant's machine-made casks or barrels was not justifiable.

In *Krug Furniture Co. v. Berlin Union, A. W.* (1903) 5 Ont. L. Rep. 463, an action for an injunction, it was intimated that the act of strikers in ascertaining the destination of goods shipped by the employer, and communicating with their friends at such place with a view to the prevention of the purchase or sale of any of such goods, resulting in the intimidation of a dealer therein, was unlawful.

In *Cote v. Murphy* (1894) 159 Pa. 420, 23 L.R.A. 135, 39 Am. St. Rep. 686, 28 Atl. 190, an action for damages in which the court below directed a verdict for the plaintiff, and in which the supreme court held that a verdict should have been directed for defendant, in which it seems to have been assumed as a matter of law that the purpose was to advance the interest of the employers rather than to inflict injury upon the workmen, it was held that the sending of notices to wholesalers that members of an employers' association, formed to resist the demands by workmen of an increase in wages, would withdraw their patronage if sales should be made to persons acquiescing in the workmen's demands, was not an unlawful act.

It has been held that an employer has a right of action against a union which has threatened to boycott any boarding-house keeper who entertains, or any merchant who supplies with the necessities of life, workmen in his employ. *F. R. Patch Mfg. Co. v. Protection Lodge* (1905) 77 Vt. 294, 107 Am. St. Rep. 765, 60 Atl. 74.

—coercing third persons not to deal with party to industrial dispute by threat to strike.

The disagreement of the courts as to the extent of one's right to immunity from interference with his business relations with third persons, and as to the existence of a competitive relation between labor unions and employers which will form a basis for justification of acts of interference with an employer's trade relations with third persons, also operates to produce a difference in result in the cases which consider the question whether the members of a labor organization may lawfully withdraw from the service of a third person, or announce their intention of doing so, in order to constrain him to refrain from dealing with one with whom they are in controversy.

In one case (*Iron Molders Union v. Allis-Chalmers Co.* (1908) 20 L.R.A. (N.S.) 315, 91 C. C. A. 631, 166 Fed. 45) it has been held that striking employees cannot be enjoined from inducing employees in factories by

which their former employer is attempting to get the work done to fill his contract, to refuse to work on it, although it results in the owners of such factories breaking their contracts, apparently on the theory that the strikers and their former employer were competing with one another for the labor to do the work which the employer sought to have done.

But in another case it was held that a union may not call a strike against a person contracting to manufacture goods for one with whom the union is in controversy, upon the ground that when the strikers have compelled the manufacture of goods in shops where conditions demanded by the union prevail, then the union has won its point. *Schlang v. Ladies' Waist Makers' Union* (1910) 67 Misc. 221, 124 N. Y. Supp. 289. In this case it was said: "It might be argued on behalf of the defendants that the work that these other manufacturers are under contract to perform for plaintiffs is the same kind of work that was formerly performed in plaintiffs' factory by members of defendants' union; that a different question might arise if the secondary strike were directed against customers handling plaintiffs' shirt waists, or against weavers furnishing plaintiffs raw material; that the defendants are quite within their rights in making their strike effective by refusing not only to have members of their union work in the plaintiffs' factory, but also in refusing to let them make plaintiffs' shirt waists in the factories of other persons under contract with plaintiffs, and that no strike against the manufacturer (unless directed simultaneously against the entire industry) would ever be effective, as a manufacturer could have his goods manufactured by others. But the answer to this is that, when the strikers have compelled the manufacture of the goods in shops where the conditions demanded by the union prevail, then the union has in reality won its point, and has reduced the other manufacturers from the position of manufacturers to that of mere jobbers or purchasers of goods manufactured

by others; and that the union has no right to order shops which have complied with union demands not to sell goods to persons against whom the union has made a demand which it seeks to enforce by such boycott."

And it has been held that, while employees have the right to quit their employment, they have no right to combine to quit, in order thereby to compel their employer to withdraw from a mutually profitable relation with a third person, for the purpose of injuring that third person, when the relation thus sought to be broken has no effect whatever on the character or reward of their service. *Thomas v. Cincinnati, N. O. & T. P. R. Co.* (1894) 4 Inters. Com. Rep. 788, 62 Fed. 803. In this case a combination of railway employees to inflict pecuniary injury on the owner of Pullman cars, and thereby to induce him to yield to the demands of his employees by compelling the railway companies to give up using his cars, and, on their refusal to do so, to inflict injury upon them by a strike, was held to be an unlawful conspiracy and a violation of the Federal Anti-trust Act.

It is not lawful for members of a labor union to strike to compel their employer, with whom they have no trade dispute, to compel the general contractor on a building to compel the owner to compel the plaintiff to employ members of the union. *New England Cement Gun Co. v. McGivern* (1914) 218 Mass. 198, L.R.A.1916C, 986, 105 N. E. 885.

See also, as holding in effect that the officers of the affiliated unions of a certain trade sustain no such relation to an employer as will justify their interfering in his business by threatening to call out the employees of customers, in case such customers purchase goods of the employer, the case of *Alfred W. Booth & Bro. v. Burgess* (1906) 72 N. J. Eq. 181, 65 Atl. 226.

That strikers cannot lawfully notify other concerns not to do work for the person with whom they are in controversy is held in *Dayton Mfg. Co. v. Metal Polishers, B. P. & B. Workers*

Union (1901) 11 Ohio S. & C. P. Dec. 643.

The conduct of a labor union in refusing to permit its members employed in other shops to handle any work sent to such shops by an employer with whom they are in controversy is held, in *York Mfg. Co. v. Oberdick* (1901) 10 Pa. Dist. R. 463, to constitute an unlawful conspiracy.

In *Lyons v. Wilkins* [1896] 1 Ch. (Eng.) 811, 74 L. T. N. S. 358, 65 L. J. Ch. N. S. 601, 45 Week. Rep. 19, 60 J. P. 325, it was held that the acts of a trade-union in informing one whose own workmen had no cause of complaint that if he continued to do work for one with whom the union was in dispute they would call out his workmen, and, upon his refusal to do so, in ordering a strike, were unlawful at common law, and were not rendered lawful by the Conspiracy and Protection Act of 1875.

In *Duplex Printing Co. v. Deering* (1918) — C. C. A. —, 252 Fed. 722, it was held, albeit reluctantly, that the effect of § 20 of the Clayton Act of October 14, 1914, which provides that no restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from peacefully persuading any person to work or abstain from working, or from ceasing to patronize, or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do, and that such act shall not be considered or held to be a violation of any law of the United States, is to legalize a secondary boycott,—at least, in so far as it rests on or consists of refusing to work for anyone who deals with the principal offender.

Officers of a trade-union may be held liable for threatening to call a strike against a customer of complainants unless he shall cease to deal with complainants, where their motive is to injure complainants rather than to advance their legitimate interests. *Quinn v. Leathem* [1901] A. C. 495, 1 B. R. C. 197, 70 L. J. P. C. N. S. 76, 65 J. P. 708, 50 Week. Rep. 139, 85 L. T. N. S. 239, 17 Times L. R. 749, 27 Eng. Rul. Cas. 66.

And in *Beattie v. Callanan* (1903) 82 App. Div. 7, 81 N. Y. Supp. 413, it was held that members of a labor union have no right, because an employer refuses to recognize the association, and offers an alleged affront to its walking delegate, maliciously to cause parties who have entered into contracts with him deliberately to break them by means of threats to cause, or by actually causing, a strike of all the workmen in the employ of such parties.

b. Refusal to handle goods manufactured or sold by person boycotted.

Whether the members of a labor union may lawfully refuse to handle goods sold by one with whom the union is in controversy will depend upon the position of the court upon the question of the extent of one's right to immunity from interference with his business relations with third persons, and the question of the existence of a competitory relation between labor unions and employers which will form a basis for justification of acts of interference. In some instances, the legality of such conduct has been affirmed (see *Paine Lumber Co. v. Neal* (1917) 244 U. S. 459, 61 L. ed. 1256, 37 Sup. Ct. Rep. 718 (obiter); *J. F. Parkinson Co. v. Building Trades Council* (1908) 154 Cal. 581, 21 L.R.A. (N.S.) 550, 98 Pac. 1027, 16 Ann. Cas. 1165; *Bossert v. Dhuy* (1917) 221 N. Y. 342, 117 N. E. 582, Ann. Cas. 1918D, 661; *Searle Mfg. Co. v. Terry* (1907) 56 Misc. 265, 104 N. Y. Supp. 438; *State v. Van Pelt* (1904) 136 N. C. 633, 68 L.R.A. 760, 49 S. E. 177, 1 Ann. Cas. 495; *Patterson v. Building Trades Council* (1902) 11 Pa. Dist. R. 500); and denied in others (see *Shine v. Fox Bros. Mfg. Co.* (1907) 86 C. C. A. 311, 156 Fed. 357; *Irving v. Joint Dist. Council*, U. V. C. J. (1910) 180 Fed. 896; *Burnham v. Dowd* (1914) 217 Mass. 351, 51 L.R.A. (N.S.) 778, 104 N. E. 841; *Lohse Patent Door Co. v. Fuelle* (1908) 215 Mo. 421, 22 L.R.A. (N.S.) 607, 128 Am. St. Rep. 492, 114 S. W. 997; *Albro J. Newton Co. v. Erickson* (1911) 70 Misc. 291, 126 N. Y. Supp. 949, affirmed without opinion in (1911) 144 App. Div. 939, 129 N. Y. Supp. 1111; *Purvis v. Local No.*

500, U. B. C. J. (1906) 214 Pa. 348, 12 L.R.A. (N.S.) 642, 112 Am. St. Rep. 757, 63 Atl. 585, 6 Ann. Cas. 275).

Where the facts are such as to warrant the inference that the action of the defendants is retaliatory, and not primarily for the purpose of advancing their own interests, as where there is a refusal to handle materials sold by one who continues to furnish supplies to one with whom the union is in controversy, such refusal is unlawful. See *Moores v. Bricklayers' Union* (1889) 10 Ohio Dec. Reprint, 665; *Temperton v. Russell* [1893] 1 Q. B. (Eng.) 715, 62 L. J. Q. B. N. S. 412, 4 Reports, 376, 69 L. T. N. S. 78, 41 Week. Rep. 565, 57 J. P. 676,—hereinafter set forth.

It has been held that the refusal by a carpenters' union to work any material coming from a dealer in lumber, on account of his refusal to employ only union men, is not such an unlawful means as to render the parties subject to indictment and punishment for criminal conspiracy. *State v. Van Pelt* (1904) 136 N. C. 633, 68 L.R.A. 760, 49 S. E. 177, 1 Ann. Cas. 495.

But in *Piano & O. Workers' International Union v. Piano & O. Supply Co.* (1906) 124 Ill. App. 357, where a labor union adopted a resolution that all members in factories using the product of complainant should refuse to handle or work upon any material supplied by it to its customers, and caused notice of this resolution to be mailed to piano and organ manufacturers in the city of Chicago, who were customers of complainant, and also to be published in an issue of the union's official journal, it was held that such action, in attempting to establish a boycott of the complainant's goods and thus injure its business until certain wishes and demands of the union were complied with, was, irrespective of its legal character at common law, unlawful under an act contained in § 46 of division 1 of the Criminal Code, passed June 16, 1887, which provides that "if any two or more persons conspire or agree together, or the officers or executive committee of any society or organization or corporation shall is-

sue or utter any circular or edict as the action of or instruction to its members or any other persons, societies, organizations, or corporations, for the purpose of establishing a so-called boycott or black list, or shall post or distribute any written or printed notice in any places with the fraudulent or malicious intent wrongfully and wickedly to injure the person, character, business or employment or property of another . . . or to do any illegal act injurious to the public trade, health, morals, police, or administration of public justice . . . they shall be deemed guilty of a conspiracy." 3 Starr & C. Anno. Stat. Supp. p. 346.

Instances in which the right to refuse to handle goods has been affirmed.

In *Paine Lumber Co. v. Neal* (1917) 244 U. S. 459, 61 L. ed. 1256, 37 Sup. Ct. Rep. 718, an action to enjoin a labor organization from conspiring to have its members refuse to work upon material made by the plaintiff, because not made by union labor, and to enjoin them from enforcing by-laws intended to prevent its members from working upon material not made by union labor, in which an injunction was denied on the ground that even if such conduct is a violation of the Sherman Act the remedy by injunction given by such act is available only to the government, Mr. Justice Holmes, in delivering the opinion of the court, said: "As this court is not the final authority concerning the laws of New York, we say but a word about them. We shall not believe that the ordinary action of a labor union can be made the ground of an injunction under those laws until we are so instructed by the New York court of appeals. *National Protective Asso. v. Cumming* (1902) 170 N. Y. 815, 58 L.R.A. 135, 88 Am. St. Rep. 648, 63 N. E. 369. Certainly the conduct complained of has no tendency to produce a monopoly of manufacture or building, since the more successful it is the more competitors are introduced into the trade."

In *J. F. Parkinson Co. v. Building Trades Council* (1908) 154 Cal. 581, 21 L.R.A. (N.S.) 550, 98 Pac. 1027, 16 Ann. Cas. 1165, it was held that the mere

enforcement by a building trades council and labor unions which it represents, and their members, of a rule of the union that members will not work with nonunion men or handle the product of their labor, by calling out its members from a plant which employs nonunion men, and informing consumers that the plant is unfair, does not constitute a conspiracy to subject the business of such plant to their control, against which an injunction will lie, and that the motives by which they were actuated are immaterial. The grounds of this decision are stated at length in subd. V. g. supra. It is also held in the foregoing case that the sending by a labor union of notices to patrons of a concern against which a strike has been declared, notifying them that the concern is unfair, and that union men will not handle material furnished by it, which causes the patrons to cancel orders for materials to be furnished by the concern, is not without justification, so as to bring the union within the rule that one who, without justification, induces another to break his contract with a third person, is responsible in damages to the latter.

In *Bessert v. Dhay* (1917) 221 N. Y. 342, 117 N. E. 582, Ann. Cas. 1918D, 661, it was held that a labor union may, so long as its action is not directed against a particular manufacturer, refuse to allow its members, under penalty of fine or expulsion, to work upon material coming from a nonunion shop. The court said: "When it is determined that a labor organization can control the body of its members for the purpose of securing to them higher wages, shorter hours of labor, and better relations with their employers, and, as a part of such control, may refuse to allow its members to work under conditions unfavorable to it, or with workmen not in accord with the sentiments of the labor union, the right to refuse to allow them to install nonunion-made material follows as a matter of course, subject to there being no malice, fraud, violence, coercion, intimidation, or defamation in carrying out their resolutions and orders." The court went

on to say, however, that if the defendants had called upon the public generally to discontinue using the plaintiff's material, and had sought to prevent all persons by communication, written or otherwise, from dealing with the plaintiff, their acts would have been illegal.

In *Searle Mfg. Co. v. Terry* (1907) 56 Misc. 265, 106 N. Y. Supp. 438, it was held that where certain members of a labor union were on a strike other members of the same union had the right to refuse to handle the goods of the manufacturer against whom the strike was directed.

A union in controversy with an employer may refuse to deal with him or handle material furnished by him, and may advise and persuade by fair argument, but may not compel, others to do the like. *Patterson v. Building Trades Council* (1902) 11 Pa. Dist. R. 500.

The case of *Meier v. Speer* (1910) 96 Ark. 618, 32 L.R.A. (N.S.) 792, 132 S. W. 988, which has sometimes been regarded as authority for the proposition that members of a labor union may lawfully refuse to handle material sold by another, holds simply that the officers of a union are not liable in damages for the loss of a brickmaker of the sale of brick for a building, because of a statement by a member of a labor union that union laborers would not handle them, where it is not shown that such member was authorized to speak for the officers.

Instances in which the right to refuse to handle goods has been denied.

In *Irving v. Joint Dist. Council, U. B. C. J.* (1910) 180 Fed. 896, a preliminary injunction was granted against the calling out of employees in other trades, and the notification of owners, builders, architects, and other third persons that they would be likely to have labor troubles if they should use complainant's products.

In *Shine v. Fox Bros. Mfg. Co.* (1907) 86 C. C. A. 311, 156 Fed. 357, an attempt by a labor organization to unionize a factory was held unlawful, where the means adopted were the issuing of circulars giving lists of the factories which ran as closed shops,

and delivering them to contracting builders and architects of the city where complainant's factory was located, who would have to do with the preparation of plans and specifications and the construction of buildings, and also to owners of property who were about to improve the same. This list implied that all those not named in the list were unfair. The circulars annexed thereto contained a notice or a warning that union carpenters would not be permitted to work upon any building materials not the product of the closed shop. Other active measures were the enforced signing of contracts, not to patronize complainant, and a compulsion of union carpenters, who did not desire to quit work, to do so, by threats of discipline at the hands of the organization.

In *Burnham v. Dowd* (1914) 217 Mass. 351, 51 L.R.A. (N.S.) 778, 104 N. E. 841, it was held that members of a labor union might be enjoined from refusing to handle material sold by one who had been declared by the union to be "unfair" because he had furnished supplies to an employer of nonunion labor and refused to promise not to sell to any party who should not be in good standing with the union, although they did not act from actual personal malice toward the plaintiffs, but for the purpose of strengthening their union. The court said: "Although there has been a little contrariety of decisions in other jurisdictions, we do not consider that there is any doubt as to the rule of law to be applied in this case. The defendants have no real trade dispute with the plaintiffs. No one of the members of the union is, or, so far as appears, ever has been, employed by the plaintiffs. The plaintiffs have not interfered or sought to interfere with the employment of any of those members, or with the rates of pay, the periods of labor, or any of the conditions of such employment. There is no competition between these parties, as there was in *Bowen v. Matheson* (1867) 14 Allen (Mass.) 499. The matter that lies at the foundation of these proceedings is a dispute between the union and Gauthier. He employs,

or has employed, nonunion labor; the defendants (including under this term all the members of the union) object to this. They have a right to say that they will do no work for him unless he will give to them all the work of their trade; that they will do all or none of his work. That was settled by our decision in *Pickett v. Walsh* (1906) 192 Mass. 572, 6 L.R.A. (N.S.) 1067, 116 Am. St. Rep. 272, 78 N. E. 753, 7 Ann. Cas. 638. If they were employed by Gauthier, and if he employed also nonunion men of their craft, they would have a right, unless they were bound by some term of their contract of employment, to strike, unless all of this work should be given to them or to their associates. But it was pointed out in the same case that not all strikes are lawful; and it now is settled in this commonwealth that it is a question of law whether any particular strike is a lawful one. *Reynolds v. Davis* (1908) 198 Mass. 294, 17 L.R.A. (N.S.) 162, 84 N. E. 457; *De Minico v. Craig* (1911) 207 Mass. 593, 42 L.R.A. (N.S.) 1048, 94 N. E. 317. But the second point decided in *Pickett v. Walsh* (Mass.) *supra*, is, in our opinion, decisive of the principal question raised in this case. It was there held that the members of a labor union who are employed by a contractor to do work upon a building, and who have no dispute with that contractor as to work which they or their fellows are doing for him, cannot lawfully strike against him for the mere reason that he is doing work and employing some of their fellows upon another building upon which nonunion men are employed to do like work, not by him, but by the owner of that building. The language and reasoning of that decision are applicable here. The reason of the decision was that, as the court said (*Loring, J.*, 192 Mass. 587), such a strike 'has an element in it like that in a sympathetic strike, in a boycott, and in a blacklisting, namely, it is a refusal to work for A., with whom the strikers have no dispute, because A. works for B., with whom the strikers have a dispute, for the purpose of forcing A. to force B. to yield to the strikers' demands.' So in

the case at bar, the threat of the defendants was to strike against owners and contractors, with whom the defendants had no dispute, for the purpose of forcing those owners and contractors to refuse to buy masons' supplies from the plaintiffs, and thus, by the loss of business and of the profits to be derived therefrom, force the plaintiffs to refuse to sell to Gauthier or others whom the defendants might call unfair, and thus put a pressure upon those persons which should force them to cease employing nonunion masons, and to give all their masonwork to the defendants. This was a step further than what was held in *Pickett v. Walsh* to be an unlawful combination for an unjustifiable interference with another's business. It was in intention and effect a boycott; and it was none the less so because it was aimed at only one branch of the plaintiffs' business. There is no more right to interfere with one branch of a merchant's business, to obstruct it and lessen its profits, and, so far as may be done, to destroy it entirely, than there is so to interfere with, obstruct, and destroy the whole of that business. The difference is merely one of degree, not of kind. And *Pickett v. Walsh* is well supported as to this point, both upon the reasoning of the opinion and by authority. See the cases collected on page 588 of 192 Mass. It has been cited and followed in our later decisions. *Reynolds v. Davis* (Mass.) *supra*; *M. Steinert & Sons Co. v. Tagen* (1911) 207 Mass. 394, 32 L.R.A. (N.S.) 1013, 93 N. E. 584; *Folsom v. Lewis* (1911) 208 Mass. 836, 35 L.R.A. (N.S.) 787, 94 N. E. 816; *Hanson v. Innis* (1912) 211 Mass. 301, 97 N. E. 756. Most of the decisions in other jurisdictions, besides those cited in *Pickett v. Walsh*, are to the same effect. *Aikens v. Wisconsin* (1904) 195 U. S. 194, 49 L. ed. 154, 25 Sup. Ct. Rep. 3; *Emack v. Kane* (1888; C. C.) 34 Fed. 46; *Shine v. Fox Bros. Mfg. Co.* (1907) 86 C. C. A. 811, 156 Fed. 357; *Rocky Mountain Bell Teleph. Co. v. Montana Federation of Labor* (1907; C. C.) 156 Fed. 809; *American Federation of Labor v. Buck's Stove & Range Co.*

(1909) 33 App. D. C. 83, 32 L.R.A. (N.S.) 748; *Gompers v. Buck's Stove & Range Co.* (1909) 33 App. D. C. 516; *Doremus v. Hennessy* (1898) 176 Ill. 608, 43 L.R.A. 797, 802, 68 Am. St. Rep. 203, 52 N. E. 924, 54 N. E. 524; *Kemp v. Division No. 241* (1910) 153 Ill. App. 344; *Perkins v. Pendleton* (1897) 90 Me. 166, 60 Am. St. Rep. 252, 38 Atl. 96; *Lucke v. Clothing Cutters' & T. Assembly* (1893) 77 Md. 396, 19 L.R.A. 408, 39 Am. St. Rep. 421, 26 Atl. 505; *Albro J. Newton Co. v. Erickson* (1911) 70 Misc. 291, 126 N. Y. Supp. 949; *State ex rel. Durner v. Huegin* (1901) 110 Wis. 189, 249, 62 L.R.A. 700, 85 N. W. 1046, 15 Am. Crim. Rep. 332. As was said in *Hopkins v. Oxley Stave Co.* (1897) 28 C. C. A. 99, 105, 49 U. S. App. 709, 83 Fed. 917: 'Persons engaged in any service have the power with which a court of equity will not interfere by injunction, to abandon that service, either singly or in a body, if the wages paid or the conditions of employment are not satisfactory; but they have no right to dictate to an employer what kind of implements he shall use, or whom he shall employ.'

A case which, although not strictly in point, may be noticed in this connection, is *Purington v. Hinchliff* (1905) 219 Ill. 159, 2 L.R.A. (N.S.) 824, 109 Am. St. Rep. 322, 76 N. E. 47. There a combination was made by an association of brick manufacturers, a masons' and builders' association, and a bricklayers' union, whereby, in consideration of certain concessions made by the manufacturers' association, the masons' and builders' association agreed to buy brick only from members of the association, and the bricklayers' union agreed to lay only brick purchased from members of the association; and it was held that a manufacturer, the market for whose product was thereby restricted or destroyed, might recover the damages thereby inflicted upon him from any or all of the members of the combination.

In *Lohse Patent Door Co. v. Fuelle* (1908) 215 Mo. 421, 22 L.R.A. (N.S.) 607, 128 Am. St. Rep. 492, 114 S. W. 997, it was held that a labor union, in 6 A.L.R.—61.

notifying customers of a person against whom a strike has been declared that its members will not handle material furnished by him, and that any attempt on their part to force them to do so will cause a strike to be called against them, the direct object of such action being to injure and damage the business of such person, and thereby compel him to discharge his nonunion labor, and thereby indirectly and incidentally benefit the union, is guilty of illegal boycott.

In *Albro J. Newton Co. v. Erickson* (1911) 70 Misc. 291, 126 N. Y. Supp. 949, affirmed without opinion in (1911) 144 App. Div. 939, 129 N. Y. Supp. 1111, in which it was held that defendants would be enjoined from conspiring to injure or interfere with plaintiff's good will, trade, or business, for the purpose of coercing it to employ union labor, either by sending to any customer or prospective customer of plaintiff any communication which, in terms or by inference, would suggest that labor troubles would follow the use of materials purchased from plaintiff, or by requiring any person to refrain from or cease working for any concern because of its use of material purchased of or furnished by plaintiff, the decision was placed upon the ground that, although the means used were not illegal, the end aimed at, namely, the interference with the good will of plaintiff's business, was.

Interference by a labor union with another's business by a refusal to handle supplies sold by him, on account of his having furnished supplies to one who had been declared unfair, is not in the bona fide exercise of trade, is without just cause, and is therefore malicious, its immediate motive being to show what punishment and disaster necessarily follow a defiance of their demands; and the remote motive of wishing to better their condition by the power so acquired will not constitute a legal justification. *Moore v. Bricklayers' Union* (1889) 10 Ohio Dec. Reprint, 665.

In *Purvis v. Local No. 500, U. B. C. J.* (1906) 214 Pa. 348, 12 L.R.A. (N.S.) 642, 112 Am. St. Rep. 757, 63 Atl. 585, 6 Ann. Cas. 275, in holding that the

attempt by a labor union to coerce a mill owner to unionize his mill, by refusing to handle his product unless he does so, and notifying prospective customers of that fact, may be enjoined as an unlawful conspiracy, the court, after holding that the immediate purpose of the defendants was unlawful, although the remote purpose to benefit the members of the union was justifiable, further quoted with approval from the opinion of the court below, as follows: "Turning from a consideration of the nature of the purpose of defendants, as indicated by their words and deeds, I desire to briefly consider the means used to effect that purpose. On part of plaintiffs, it is alleged that the means used are a boycott of their business. The defendants contend that their methods were persuasive, and were not accompanied with violence, threats, or intimidation. No violence was used, nor does any seem to have been contemplated or threatened. But acts may be coercive in character without threats or commission of violence or personal injury. When the district council, with its 7,000 members in the Pittsburgh district, gave notice to practically all the building contractors of that district that the plaintiffs refused to run their mill in accordance with union rules, and called attention to the working rule which forbids union workmen to work material from any nonunion mill, the contractors understood what the request not to patronize plaintiffs' mill meant. When the members of Local No. 500, who were willingly working material from plaintiffs' mill, were visited by the business agent of the union, who called them off, they doubtless knew that it meant trial, fine, or expulsion and ostracism if they continued to work. When the owner of the Central Hotel was required, in the urgency of his situation, to sign a contract with the business agent of the union not to purchase any more material from plaintiffs as the condition of having work continued on his building, it can scarcely be said that his freedom of action was not interfered with; when the business agents

of the district council declared that they had come to Butler prepared to drive Purvis & Company into the union; when they stated to plaintiffs there was going to be trouble if the mill was not unionized, and gave them to understand that they must unionize their mill or quit business,—all parties well understood what that meant. In all these things the attitude of the defendants was threatening and coercive, rather than persuasive."

In *Temperton v. Russell* [1893] 1 Q. B. (Eng.) 715, 62 L. J. Q. B. N. S. 412, 4 Reports, 376, 69 L. T. N. S. 78, 41 Week. Rep. 565, 57 J. P. 676, it appeared that, a firm of builders having refused to obey certain rules laid down by unions connected with the building trade with regard to building operations, the unions sought to compel them to do so by preventing the supply of building materials to them. In pursuance of this object they requested the plaintiff to cease to supply such firm, but he refused to do so. Thereupon, with the object of injuring the plaintiff in business, in order to compel him to comply with such request, the defendants induced persons who, to the knowledge of the defendants, had entered into contracts with the plaintiff for the purchase of materials, to break their contracts, and not to enter into further contracts with the plaintiff, by informing them that the members of the unions would not work on such materials. It was held that the plaintiff might maintain an action for damages sustained thereby, against the defendants, for procuring such breaches of contract in order to inflict an injury upon him and thereby compel him to do something which he did not want to do, and also for conspiring together with the intent to injure the plaintiff, to hamper him in his trade, or to put undue pressure upon him, in order to compel him to do something which he did not want to do, by preventing persons from entering into contracts with him.

1. *Refusal to work on job on which person with whom union is in dispute is a contractor.*

Save in one instance (*Patterson v.*

Building Trades Council (1902) 11 Pa. Dist. R. 500—set forth *infra*), it has been held that members of labor unions may lawfully refuse to work on a job upon which a contractor with whom they are at variance may do work or furnish material, or for a subcontractor under him, or may refuse to handle the work of anyone who will not agree to give all his work to union shops. This is sometimes put upon the ground that such conduct is an exercise of the absolute right to work or to refrain from working, and sometimes upon the ground that it is justifiable as an effort to obtain a legitimate business advantage. See *National Fireproofing Co. v. Mason Builders' Asso.* (1909) 26 L.R.A.(N.S.) 148, 94 C. C. A. 535, 169 Fed. 259; *Gill Engraving Co. v. Doerr* (1914) 214 Fed. 111; *Meier v. Speer* (1910) 96 Ark. 618, 32 L.R.A.(N.S.) 792, 182 S. W. 988; *COHN & R. ELECTRIC Co. v. BRICKLAYERS, MASONS, & PLASTERERS LOCAL UNION* (reported herewith) ante, 887; *Gray v. Building Trades Council* (1903) 91 Minn. 171, 63 L.R.A. 753, 103 Am. St. Rep. 477, 97 N. W. 663, 1118, 1 Ann. Cas. 172; *George J. Grant Constr. Co. v. St. Paul Bldg. Trades Council* (1917) 136 Minn. 167, 161 N. W. 520, 1055.

Thus, it has been held that an agreement between a master masons' association and a bricklayers' union that provisions in a building contract for the fireproofing of the building should not be sublet, which is made for the benefit of the bricklayers, is not a conspiracy, although it incidentally works injury to manufacturers of fireproofing materials; and the enforcement of such a provision by a clause forbidding bricklayers to work for those who do not comply with it, and by strikes and notifications to contractors that they cannot take contracts contrary to the terms of the agreement without incurring the penalty, is not unlawful or oppressive so as to effect a conspiracy. *National Fireproofing Co. v. Mason Builders' Asso.* (Fed.) *supra*.

The proprietor of a nonunion shop is not entitled to enjoin the acts of members of a photo-engravers' union

in concertedly refusing to do work for any customer of their several employers who will not agree to patronize exclusively union photo-engravers, where the object is to increase the power of the union, so as to get more, better, easier, and better-paid work for its members, notwithstanding the injury to the plaintiff was foreseen. *Gill Engraving Co. v. Doerr* (1914) 214 Fed. 111.

In *Meier v. Speer* (1910) 96 Ark. 618, 32 L.R.A.(N.S.) 792, 182 S. W. 988, it was held that members of a labor union could not be held liable to one whose refusal to employ only union labor had antagonized the unions, by reason of their having notified their immediate employer, without making any threats whatever against his business, that they would not work for him in laying the stone foundation of a building if such third party should have the contract to build the structure.

In *COHN & R. ELECTRIC Co. v. BRICKLAYERS, MASONS, & PLASTERERS LOCAL UNION* (reported herewith) ante, 887, it was held that an employer of non-union labor was not entitled to enjoin defendant labor union from interfering with the plaintiffs' business by refusing, in pursuance of by-laws adopted by it, to work on any job on which nonunion men are employed, and by notifying general contractors and owners of property of its intention to cease work if nonunion men should be employed, where the end the defendant had in view was the strengthening of the union rather than the infliction of injury upon the plaintiff or the nonunion men it employed. The court said: "Whatever injury was done the plaintiff was a consequence of trade competition, and an incident to a course of conduct by the defendants, begun and prosecuted for their own legitimate interests, the means adopted were lawful; no unlawful compulsion in act or word was present."

In *Gray v. Building Trades Council* (1903) 91 Minn. 171, 63 L.R.A. 753, 103 Am. St. Rep. 477, 97 N. W. 663, 1118, 1 Ann. Cas. 172, a labor union had placed certain electrical contract-

ors and engineers on its "unfair" list, and, in order to compel them to employ union labor only, notified persons having jobs in the line of business of such contractors that members of this labor union would not work on any building where such contractors were working. This was held not to amount to a boycott, but rather to a threat to strike; and, to the extent that an injunction issued in the lower court restrained the labor union from having its members refuse to work on a building where such contractors were working, it was held erroneous. As to this provision of the injunction, the court says: "But it goes beyond this, and restrains acts other than acts constituting boycotting. This particular provision specifically enjoins defendants, their members, agents, and representatives, from going upon the premises where plaintiffs are employed, for the purpose of ordering, directing, or notifying men belonging to the various allied unions to desist from work upon the premises by reason of the fact that plaintiffs are employed thereon. The authorities, as already noted, very generally hold that a strike is not unlawful, that members of labor unions may, singly or in a body, quit the service of their employer, and, for the purpose of strengthening their association, may persuade and induce others in the same occupation to join their union, and, as a means to that end, refuse to allow their members to work in places where nonunion labor is employed. . . . They may refuse to have any sort of dealings with an employer of nonunion labor, singly or collectively; they may persuade and induce their members to join them, and there would seem to be no reason why they should be limited as to the place where they may do such acts."

In *George J. Grant Constr. Co. v. St. Paul Bldg. Trades Council* (1917) 136 Minn. 167, 161 N. W. 520, 1055, it was held not to be unlawful for the members of labor unions to agree among themselves that they will not work for a building contractor with whom they have a controversy, nor for

any subcontractor, on any contract he may have on hand.

The contrary view is exemplified in *Patterson v. Building Trades Council* (1902) 11 Pa. Dist. R. 500, in which it is held that a building trades council has no right to notify builders and contractors that a certain contractor has been declared unfair, and that no union man will be allowed, either directly or indirectly, to work on any building on which such contractor has performed any work whatever, or furnished material, where the natural tendency and effect of such notification are to destroy the freedom of action of such builders and contractors, and force them, through fear of loss or injury to themselves or their business, to withdraw or withhold their patronage from such contractor.

j. Enforcement of union by-law.

The same differences of opinion which have been traced in the decisions above reviewed also mark the cases which consider the right of a person injured to complain of a union by-law, by which the boycott against him is made effective.

In *Bossert v. Dhuy* (1917) 221 N. Y. 342, 117 N. E. 582, Ann. Cas. 1918D, 661, the court said: "The bounds beyond which an association of employees may not, as a general rule, go in controlling its members in their dealings with employers, are not easily determined. They cannot, at least, extend beyond the point where its or their direct interests cease. There is a material difference in the power of an association so far as it affects its primary or secondary interest. Where the acts of an employee or employees in their individual or associate capacity are reasonably and directly calculated to advance lawful objects, they should not be restrained by injunction."

In some cases it is held that the enforcement of such by-laws constitutes no ground for complaint, for the reason that the act is one of legitimate competition. See *Paine Lumber Co. v. Neal* (1917) 244 U. S. 459, 61 L. ed. 1256, 37 Sup. Ct. Rep. 718,—set out under subd. V. h, *supra*; *Gill Engrav-*

ing Co. v. Doerr (1914) 214 Fed. 111, and COHN & R. ELECTRIC CO. v. BRICKLAYERS, MASONS, & PLASTERERS LOCAL UNION (reported herewith) ante, 887, both of which are set out in subd. V. i, supra.

It has also been held that the enforcement of such by-laws by fine or expulsion is not coercive in character, upon the ground that the members of the organization not willing to obey such by-laws have the alternative of withdrawing from the organization. See *Bossert v. Dhuy* (N. Y.) supra; *Seubert v. Reiff* (1917) 98 Misc. 402, 164 N. Y. Supp. 522; also *Bohn Mfg. Co. v. Hollis* (*Bohn Mfg. Co. v. Northwestern Lumbermen's Asso.*) (1893) 54 Minn. 223, 21 L.R.A. 337, 40 Am. St. Rep. 319, 55 N. W. 1119 (not a trade-union case). But this conclusion has been disputed (see *Jackson v. Stanfield* (1894) 137 Ind. 592, 23 L.R.A. 588, 36 N. E. 345, 37 N. E. 14, —not a trade-union case), and it has been held that where the penalty attached to the violation of such a by-law is of such a character as to amount to a moral intimidation, the person suffering less as a result of its operation is entitled to complain thereof (see *Barr v. Essex Trades Council* (1894) 53 N. J. Eq. 101, 30 Atl. 881; *Alfred W. Booth & Bro. v. Burgess* (1906) 72 N. J. Eq. 181, 65 Atl. 226,—set forth infra; also *Martell v. White* (1904) 185 Mass. 255, 65 L.R.A. 260, 102 Am. St. Rep. 341, 69 N. E. 1085; *Bailey v. Master Plumbers' Asso.* (1899) 103 Tenn. 99, 46 L.R.A. 561, 52 S. W. 853; *Boutwell v. Marr* (1899) 71 Vt. 2, 43 L.R.A. 803, 76 Am. St. Rep. 746, 42 Atl. 607; *Gatzow v. Buening* (1900) 106 Wis. 1, 49 L.R.A. 475, 80 Am. St. Rep. 17, 81 N. W. 1003, —which are not trade-union cases).

But where it does not appear that the plaintiff would probably enjoy the patronage of members of the association but for the constraint of the by-laws, the alleged damage is too remote and conjectural to support an action. See *Downes v. Bennett* (1901) 63 Kan. 653, 55 L.R.A. 560, 88 Am. St. Rep. 256, 66 Pac. 623.

In *Barr v. Essex Trades Council* (1894) 53 N. J. Eq. 101, 30 Atl. 881,

in discussing the question whether there was any element of coercion in the action of a trades council, composed of representatives of various trade-unions, in withdrawing its indorsement from a newspaper with which one of the unions was in controversy, thereby diverting the patronage of organized labor from the paper and its advertisers, the court said: "Next, as to the members of the various labor unions. According to Mr. Beckmeyer, all the organizations represented in the trades council and the individual members thereof, in strict conformity with the purpose and object for which the said council was organized, withheld their patronage from the said newspaper on the mere announcement by the typographical union to the trades council that that union had withdrawn its indorsement from the 'Times.' Why? It is said that it was only the exercise by each person of his right to spend his money as his own will dictated. The fallacy of this is apparent. It loses sight of the combination, the whole strength of which lies in the fact that each individual has surrendered his own discretion and will to the direction of the accredited representative of all the organizations. He no longer uses his own judgment, but, by entering into the combination, agrees to be bound by its decree. As is said in *Temperton v. Russell* [1893] 1 Q. B. (Eng.) 715, 62 L. J. Q. B. N. S. 412, 4 Reports, 376, 69 L. T. N. S. 78, 41 Week. Rep. 565, 57 J. P. 676: "Those men had bound themselves to obey, and they knew they had done so; and that if they did not obey they would be fined or expelled from the union to which they belonged." It is common knowledge, if indeed it does not amply so appear by the papers in this case, that a member of a labor organization who does not submit to the edict of his union asserts his independence of judgment and action at the risk, if not the absolute sacrifice, of all association with his fellow members. They will not eat, drink, live, or work in his company. Branded by the peculiarly offensive epithets adopted, he must exist ostracized, so-

cially and industrially, so far as his former associates are concerned. Freedom of will under such circumstances cannot be expected."

In *Alfred W. Booth & Bro. v. Burgess* (1906) 72 N. J. Eq. 181, 65 Atl. 226, in discussing the question whether the coercion exercised by a labor union on its members, in order to induce them to refuse to work for anyone who should purchase complainant's product, was justified (and therefore not a violation of complainant's rights) by the fact that such employees had voluntarily joined the union and subjected themselves to its by-laws^{*} and regulations, the court said: "When, however, the threat of fine and expulsion is employed for the purpose of coercing the employees of a large number of different employers to refrain from renewing their contracts for labor, in order to coerce all these employers to boycott the complainant, with the ultimate object of coercing the complainant in respect of a matter with which the employees who are first coerced have absolutely no concern whatever, then it seems to me the whole scheme becomes an attack upon the complainant's right to a free market. No surrender of liberty or voluntary agreement to abide by by-laws on the part of the employees who are first coerced, made by them when they enter their labor unions, can, in my judgment, affect the right of the complainant to a free market, which right he will enjoy for all it may be worth if these employees are permitted to exercise their liberty. The employees may be able to surrender their own right, but they certainly cannot surrender the right of other parties."

k. Imposition of fine on nonmember.

It has been held, upon the ground that the combination was one employing unlawful means, that money paid by a manufacturer upon demand of the labor union, to prevent its members from refusing to handle his products because he had sold to those considered by the union as unfair, may be recovered as having been obtained by extortion. *March v. Bricklayers' & Plasterers' Union* (1906) 79 Conn.

7, 4 L.R.A.(N.S.) 1198, 118 Am. St. Rep. 127, 63 Atl. 291, 6 Ann. Cas. 848.

And in *Carew v. Rutherford* (1870) 106 Mass. 1, 8 Am. Rep. 237, an employer was held entitled to recover a sum which he was compelled, by a threat to call a strike, to pay as a penalty for having sent stone to another locality to be cut.

l. Refusal of railway employees to handle cars or freight.

It has been held that a combination to inflict pecuniary injury on the owner of cars for the purpose of coercing him to increase the wages of his employees, by compelling the railway companies to give up using his cars, and, on their refusal to yield to compulsion, to inflict pecuniary loss upon them by inciting their employees to quit their service, is an unlawful conspiracy; and, where such cars are employed in interstate commerce, a violation of the Federal Anti-trust Act. *Thomas v. Cincinnati, N. O. & T. P. R. Co.* (1894) 4 Inters. Com. Rep. 788, 62 Fed. 303.

And where its members intend to stop all mail trains as well as other trains, it is unlawful as a conspiracy to obstruct the mails. *Ibid.*

It has also been held that a rule of an organization of railway employees which forbids its members to handle property belonging to any railroad with which the organization is in controversy, in any way which would benefit such railroad, is a rule or agreement in restraint of trade or commerce, and violative of § 1 of the Act of Congress of July 2, 1890. *Waterhouse v. Comer* (1898) 19 L.R.A. 403, 5 Inters. Com. Rep. 564, 55 Fed. 149.

Members of a labor organization who procure railroad companies to refuse to handle interstate freight from a company with which such organization is in conflict violate the provision of the Interstate Commerce Law, declaring any carrier, or any director, officers, receiver, agent, or person acting for or employed by an incorporated carrier, who, alone or with any other corporation, person, or party, shall wilfully fail or omit to do any act required to be done, or shall cause or

willingly suffer or permit any act required by such act to be done not to be done, or aid or abet such omission or failure, to be guilty of a misdemeanor. *Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co.* (1893) 19 L.R.A. 387, 5 Inters. Com. Rep. 522, 54 Fed. 730.

And all persons combining to carry out the rule of a union which requires employees on one railroad to refuse to handle property belonging to a connecting road, on which a strike of engineers is pending, are, in case such roads are subject to the Interstate Commerce Law, punishable under Rev. Stat. § 5440, Comp. Stat. § 10,201, relating to conspiracies to commit offenses against the United States, if any one of them does an act in furtherance of the combination. *Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co.* (Fed.) *supra*.

VI. Statutes permitting workmen to combine as affecting validity of boycott.

A statute making it lawful "for any two or more persons to unite, combine, or bind themselves by oath, covenant, agreement, alliance, or otherwise, to persuade, advise, or encourage, by peaceable means, any person or persons to enter into any combination for or against leaving or entering into the employment of any person or persons or corporations," does not legalize a conspiracy to injure a man's business, to be effected by means other than those of a combination to enter into or leave his employment, and therefore does not make lawful a combination to injure one's business by a concerted action on the part of an immense number of persons to cease to deal with and to persuade others to cease to deal with him, by threats to withdraw their custom from them, for the purpose of obliging him to accede to their demands,—or, in other words, boycott him. *Barr v. Essex Trades Council* (1894) 53 N. J. Eq. 101, 30 Atl. 881.

The Pennsylvania Acts of May 8, 1869, P. L. 1260; June 14, 1872, P. L. 1175; April 20, 1876, P. L. 45; and June 16, 1891, P. L. 300, relating to the rights of workmen to combine

and to do various acts calculated to further their interests, do not legalize boycotting in furtherance of a strike (1) because they relate to persons in their relation of employees, while those engaged in boycotting do not all sustain such relation to the complainant; (2) because (generally) acts in violation of constitutional right, and (particularly) the use of "force, threats, and menace of harm to person or property," are expressly excepted from the operation of the statute and left as at common law; (3) because they do not legalize combinations to boycott; and (4) because the legislative intent was "to relieve employees" from liability "to indictment for conspiracy at common law or under the criminal laws of this commonwealth," but not to deprive any citizen of legal redress for any injury sustained by the acts referred to. *Patterson v. Building Trades Council* (1902) 11 Pa. Dist. R. 500.

A combination to annoy a person's customers so as to compel them to leave him unless he obeys the combination is not rendered lawful by 38 & 39 Vict. chap. 86 (the Conspiracy and Protection of Property Act). Per Lord Lindley, in *Quinn v. Leatham* [1901] A. C. 495, 1 B. R. C. 197, 70 L. J. P. C. N. S. 76, 65 J. P. 708, 50 Week. Rep. 189, 85 L. T. N. S. 289, 17 Times L. R. 749, 27 Eng. Rul. Cas. 66.

The provision in § 3 of such act that an agreement or combination by two or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute between employers and workmen shall not be indictable as a conspiracy, if such act committed by one person would not be punishable as a crime, has nothing to do with civil damages, and therefore does not preclude the maintenance of an action for damages arising from acts done in pursuance of such a combination. *Ibid*.

VII. Remedies of person aggrieved by boycott.

a. Actions for damages.

Inasmuch as the right to engage in a lawful business or occupation is not only an inherent and natural right, but

is also one which the law will recognize and protect, it follows that a person against whom an unlawful boycott has been instituted may have his action for the damages thereby occasioned against any or all of the persons who have combined against him (see *Burnham v. Dowd* (1914) 217 Mass. 351, 51 L.R.A.(N.S.) 778, 104 N. E. 841; *New England Cement Gun Co. v. McGivern* (1914) 218 Mass. 198, L.R.A. 1916C, 986, 105 N. E. 885; *AUBURN DRAYING CO. v. WARDELL* (reported herewith) ante, 901; also *Purington v. Hinchliff* (1905) 219 Ill. 159, 2 L.R.A.(N.S.) 824, 109 Am. St. Rep. 322, 76 N. E. 47; *Doremus v. Henessy* (1898) 176 Ill. 608, 43 L.R.A. 797, 68 Am. St. Rep. 203, 52 N. E. 924, 54 N. E. 524,—which are not trade-union cases), provided there is a causal connection between the acts complained of and the damage suffered (*Boots v. Grundy* (1900) 82 L. T. N. S. (Eng.) 769, 48 Week. Rep. 638, 16 Times L. R. 457).

Members of a labor union who have caused loss of business to a merchant because of an unlawful boycott of his materials cannot avoid liability to him for such damages as are capable of substantial proof, by the fact that it is impossible to determine the total amount of loss, and it may be difficult to ascertain with absolute certainty the money value of even the damages which can be proved. *Burnham v. Dowd* (Mass.) supra.

One who has, at the request of the building owner, consented to the cancellation of a contract to do certain work in connection therewith because of a threatened strike against the building, cannot recover damages from those who threaten the strike because of breach of contract as such, but may recover the damages caused to his business by the unlawful act of the defendant. *New England Cement Gun Co. v. McGivern* (1914) 218 Mass. 198, L.R.A.1916C, 986, 105 N. E. 885.

It has been held that officers of affiliated trade-unions cannot escape liability for inducing parties having contracts with plaintiff to break them and to refrain from further contracting

with the plaintiff, with the object of coercing plaintiff into refusing to supply another party with whom the unions were in controversy, by giving notice that the members of the union would not handle material furnished by the plaintiff, upon the ground that the damage to the plaintiff must be considered as having arisen from spontaneous action of the individual workmen themselves. *Temperton v. Russell* [1893] 1 Q. B. (Eng.) 715. Upon this point, it was said by Lord Esher: "It was argued that the steps which the joint committee and Russell, their representative, took with regard to the men working for Brentano, were only what they had a perfect right to take; that they merely gave notice or advice to such workmen that the rules were being infringed, and that they should withdraw from his employment if he carried out his contract with the plaintiff; and that the workmen could then do as they liked in the matter. It may be spoken of as 'notice' or 'advice' argumentatively; but those words do not represent the truth of the thing. These men had bound themselves to obey; and they knew that they had done so, and that if they did not obey they would be fined or expelled from the union to which they belonged. It was really an order which was given to them, just as much as a direction given to a servant is one. It might be said that such a direction is not an order, because the servant could not be compelled to obey it; but if he does not he will lose his place. The unions, through their joint committee, as it appears to me, ordered their members employed by Brentano to cease to work for him if he performed his contract with the plaintiff, or if he went on dealing with the plaintiff." And *Lopes, L. J.*, said: "It was contended that the damage to the plaintiff must be considered as having arisen from the spontaneous action of the individual workmen themselves. I cannot think that that view is maintainable. We know something of the action of trade-unions and their officials. So far from the injury to the plaintiff arising from the

men acting of their own accord, I think it is clear that, if it had not been for the fear of the trade-unions and of the consequences of breaking the compacts which they had entered into as members of the union, there would have been no question of the men withdrawing from their employ."

For a similar decision, in a case involving the right to an injunction, see *American Federation of Labor v. Buck's Stove & Range Co.* (1909) 33 App. D. C. 83, 82 L.R.A.(N.S.) 748, *infra*, VII. b, 3.

The United States Supreme Court has held that a combination by members of labor organizations to destroy an existing interstate traffic by preventing manufacturers, through the instrumentality of a boycott, from manufacturing goods intended for transportation beyond the state, and to prevent their vendees in other states from reselling the goods so transported, and from further negotiating with the manufacturers for the purchase and transportation of such goods from the place of manufacture to the various places of destination, is a combination "in restraint of trade or commerce among the several states," within the meaning of the Anti-trust Act of July 2, 1890, members of which are liable for threefold damages under § 7 of that act. *Loewe v. Lawlor* (1908) 208 U. S. 274, 52 L. ed. 488, 28 Sup. Ct. Rep. 301, 13 Ann. Cas. 815.

Whether or not this decision has been practically annulled by the Clayton Act (38 Stat. at L. 730, chap. 323, Comp. Stat. § 8835a, 9 Fed. Stat. Anno. 2d ed. p. 730) of October 15, 1914, will apparently take a decision of the United States Supreme Court to determine. See *Duplex Printing Press Co. v. Deering* (1918) — C. C. A. —, 252 Fed. 722.

b. Injunctive relief.

1. Right to, in general.

Injunction is an appropriate remedy for unjustifiable interference with one's business by boycotting, where irreparable injury is likely to ensue and the defendants threaten to continue their unlawful interference with complainant's business.

California.—*J. F. Parkinson Co. v. Building Trades Council* (1908) 154 Cal. 581, 21 L.R.A.(N.S.) 550, 98 Pac. 1027, 16 Ann. Cas. 1165.

Maryland.—*My Maryland Lodge v. Adt* (1905) 100 Md. 238, 68 L.R.A. 752, 59 Atl. 721.

Massachusetts.—*Harvey v. Chapman* (1917) 226 Mass. 191, L.R.A. 1917E, 389, 115 N. E. 304.

Missouri.—*Lohse Patent Door Co. v. Fuelle* (1908) 215 Mo. 421, 22 L.R.A.(N.S.) 607, 128 Am. St. Rep. 492, 114 S. W. 997; *Re Heffron* (1914) 179 Mo. App. 639, 162 S. W. 652.

Montana.—*Iverson v. Dilno* (1911) 44 Mont. 270, 119 Pac. 719.

New Jersey.—*Barr v. Essex Trades Council* (1894) 53 N. J. Eq. 101, 30 Atl. 881.

New York.—*AUBURN DRAYING Co. v. WARDELL* (reported herewith) ante, 901; *Matthews v. Shankland* (1898) 25 Misc. 604, 56 N. Y. Supp. 123; *Heitkamper v. Hoffmann* (1917) 99 Misc. 548, 164 N. Y. Supp. 533.

Ohio.—*Mulholland v. Waiters' Local Union* (1902) 13 Ohio S. & C. P. Dec. 342; *McCormick v. Local Unions* (1911) 32 Ohio C. C. 165.

Oregon.—*Longshore Printing Co. v. Howell* (1894) 26 Or. 527, 28 L.R.A. 464, 46 Am. St. Rep. 640, 38 Pac. 547.

Pennsylvania. — *Brace v. Evans* (1888) 5 Pa. Co. Ct. 163; *Patterson v. Building Trades Council* (1902) 11 Pa. Dist. R. 500.

The right to injunctive relief may, however, be affected by statute. See *Truax v. Bisbee Local, C. W. U.* (1918) 19 Ariz. 379, 171 Pac. 121, set forth in subd. V. f, *supra*, construing Ariz. Civ. Code 1913, ¶ 4064; *Duplex Printing Press Co. v. Deering* (1918) — C. C. A. —, 252 Fed. 722, as set out in subd. V. b, *supra*, construing the Clayton Act (38 Stat. at L. 738, chap. 323, § 20, Comp. Stat. § 1243d, 6 Fed. Stat. Anno. 2d ed. p. 141). As to the extent to which the Clayton Act prevents the issuance of an injunction against picketing in connection with a strike, see *Alaska S. S. Co. v. International Longshoremen's Asso.* (1916) 236 Fed. 964; *Stephens v. Ohio State Teleph. Co.* (1916) 240 Fed. 759.

Injunction is a proper remedy for

unlawful interference with the business of a restaurant keeper by an attempt, by picketing and show of force, to terrorize intending patrons. *Mulholland v. Waiters' Local Union* (1902) 13 Ohio S. & C. P. Dec. 342.

Where the congregation of defendants and their sympathizers in the vicinity of plaintiff's place of business for the purpose of rendering a boycott effective amounts to a nuisance, the plaintiff is entitled to injunctive relief. *Iverson v. Dilno* (1911) 44 Mont. 270, 119 Pac. 719.

Equity has jurisdiction, both on the ground that the injury threatens irreparable damage and on the ground that the legal remedy would involve a multiplicity of suits, to enjoin a boycott against a newspaper. *Barr v. Essex Trades Council* (1894) 53 N. J. Eq. 101, 30 Atl. 881.

The difficulty of ascertaining the damages arising from interference with business renders the injury an irreparable one, within the meaning of the rule relative to the granting of injunctions. *Brace Bros. v. Evans* (1888) 5 Pa. Co. Ct. 163.

An injury must be threatened and imminent which will become irreparable in order to justify an injunction against a conspiracy to injure business or property rights; and an injunction will not be granted to restrain the continuance of a strike and boycott by a printers' union because of a single act of trespass in entering the plaintiff's premises to call out his workmen, and of publications announcing the withdrawal of the union from the plaintiff's shop, with the exercise of influence causing loss to the plaintiff of city printing and of two private customers during a space of about ten months, with threats of the union to make war to the knife and fight the plaintiff to the death, since these facts do not show such an irreparable injury impending as will justify equitable relief. *Longshore Printing Co. v. Howell* (1894) 26 Or. 527, 28 L.R.A. 464, 46 Am. St. Rep. 640, 38 Pac. 547.

The fact that certain of the acts charged in a bill for an injunction against an unlawful boycott amount

to crimes, or threaten crimes, does not constitute a reason why equity should refuse to restrain them. While equity will not attempt to restrain the commission of a crime as such, the fact that an act threatening irreparable injury to a property right is of itself criminal does not deprive a court of equity of its right and power to enjoin its commission. *Pierce v. Stablemen's Union* (1909) 156 Cal. 70, 103 Pac. 324; *Matthews v. Shankland* (1898) 25 Misc. 604, 56 N. Y. Supp. 123; *Dayton Mfg. Co. v. Metal Polishers B. P. & B. Workers Union* (1901) 11 Ohio S. & C. P. Dec. 643; *Brace Bros. v. Evans* (1888) 5 Pa. Co. Ct. 163; *Patterson v. Building Trades Council* (1902) 11 Pa. Dist. R. 500.

On the other hand, the fact that the defendant's act may constitute a crime under a statute making it a misdemeanor for two or more persons to conspire to prevent another from exercising a lawful trade or calling, or doing any other lawful act, or to commit any act injurious to trade or commerce, is not ground for injunctive relief *pendente lite*. *Gill Engraving Co. v. Doerr* (1914) 214 Fed. 111.

Equity may enjoin the use of spoken words or written matter in furtherance of a boycott, notwithstanding the rule that the publication of a libel is not a proper subject for equitable interposition. *Gompers v. Buck's Stove & Range Co.* (1910) 221 U. S. 418, 55 L. ed. 797, 34 L.R.A. (N.S.) 874, 31 Sup. Ct. Rep. 492; *Beck v. Railway Teamsters' Protective Union* (1898) 118 Mich. 497, 42 L.R.A. 407, 74 Am. St. Rep. 421, 77 N. W. 13; *McCormick v. Local Unions* (1911) 82 Ohio C. C. 165. In *Gompers v. Buck's Stove & Range Co.* (U. S.) *supra*, in which it was held that a court of equity may enjoin the continuance of a boycott, although spoken words or written matter are used as one of the instrumentalities by which the boycott is made effective, the court said: "In the case of an unlawful conspiracy, the agreement to act in concert when the signal is published gives the words 'unfair,' 'We don't patronize,' or similar expressions, a force not inhering in the words themselves, and therefore ex-

ceeding any possible right of speech which a single individual might have. Under such circumstances they become what have been called 'verbal acts,' and as much subject to injunction as the use of any force whereby property is unlawfully damaged. When the facts in such cases warrant it, a court having jurisdiction of the parties and subject-matter has power to grant an injunction."

But equity will not enjoin what is, at most, only a slander. *Goldberg, B. & Co. v. Stablemen's Union* (1906) 149 Cal. 429, 8 L.R.A.(N.S.) 460, 117 Am. St. Rep. 145, 86 Pac. 806, 9 Ann. Cas. 1219.

And in *Riggs v. Cincinnati Waiters Alliance* (1898) 5 Ohio N. P. 386, 8 Ohio S. & C. P. Dec. 565, it is said that the power of the court to enjoin the display of placards upon the ground that they are libelous would necessarily seem to be absolutely wanting, in view of the constitutional provision regarding the freedom of speech and the liberty of the press, whereby it is guaranteed to every citizen that he may freely speak, write, or publish his sentiments on all subjects, being responsible for the abuse of the right, and that no law shall be passed to abridge the liberty of speech or of the press.

A statute limiting the use of restraining orders or injunctions in disputes between employers and employees, if susceptible of a construction which will prohibit a court from enjoining the maintenance of pickets for the purpose of enforcing a boycott, is, to that extent, void, because violative of a constitutional right to acquire, possess, enjoy, and protect property (*Goldberg, B. & Co. v. Stablemen's Union* (Cal.) *supra*), and of a constitutional provision forbidding special legislation, as well as of a provision which forbids the granting of privileges and immunities to certain citizens or classes of citizens, which, upon the same terms, have not been granted to all citizens (*Pierce v. Stablemen's Union* (1909) 156 Cal. 70, 103 Pac. 324).

The remedy by injunction, given by the Federal Anti-trust Act against

conduct constituting a violation of such act, is available only to the government, and does not authorize injunctive relief to an individual injured thereby. *Paine Lumber Co. v. Neal* (1917) 244 U. S. 459, 61 L. ed. 1256, 37 Sup. Ct. Rep. 718; *National Fireproofing Co. v. Mason Builders' Asso.* (1909) 26 L.R.A.(N.S.) 148, 94 C. C. A. 535, 169 Fed. 259.

An injunction will lie to prevent the chief officers of a labor organization from enforcing or putting into operation a rule of such organization, making it the highest offense against the order for a member in the employ of a railroad company to handle cars received from another company with which a conflict approved by such chief officers exists, where refusal to handle such cars would constitute a violation of the Interstate Commerce Act, requiring the furnishing of equal facilities for the interchange of traffic; and such officers may be required to rescind a direction already given for the enforcement of the rule,—especially where the orders so directed to be rescinded may induce violations of an injunction previously granted against the company and its employees. *Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co.* (1893) 19 L.R.A. 387, 5 Inters. Com. Rep. 522, 54 Fed. 730.

—as affected by constitutional guaranty of free speech.

There is a difference of opinion upon the question whether the granting of injunctive relief against publications in furtherance of a boycott is precluded by constitutional guaranties of the freedom of speech, some courts holding that the constitutional guaranty does not protect one in the doing of an act which is unlawful on grounds other than slander or libel. See *Thomas v. Cincinnati, N. O. & T. P. R. Co.* (1894) 4 Inters. Com. Rep. 788, 62 Fed. 803; *Jordahl v. Hayda* (1905) 1 Cal. App. 696, 82 Pac. 1079; *American Federation of Labor v. Buck's Stove & Range Co.* (1909) 33 App. D. C. 83, 32 L.R.A.(N.S.) 748; *McCormick v. Local Unions* (1911) 32 Ohio C. C. 165; *Webb v. Cooks, Waiters' & Waitresses' Union* (1918) —

Tex. Civ. App. —, 205 S. W. 465,—set forth *infra*.

Others hold that its effect is to relegate the complainant to his remedy by action at law (see *Marx & H. Jeans Clothing Co. v. Watson* (1902) 168 Mo. 133, 56 L.R.A. 951, 90 Am. St. Rep. 440, 67 S. W. 391; *Re Heffron* (1914) 179 Mo. App. 639, 162 S. W. 652; *Lindsay & Co. v. Montana Federation of Labor* (1908) 37 Mont. 264, 18 L.R.A. (N.S.) 707, 127 Am. St. Rep. 722, 96 Pac. 127; *Richter Bros. v. Journeymen Tailors' Union* (1890) 24 Ohio L. J. 189, 11 Ohio Dec. Reprint, 45,—set forth *infra*), even though the defendant may not be pecuniarily responsible (*Marx & H. Jeans Clothing Co. v. Watson* (Mo.) *supra*; *Lindsay & Co. v. Montana Federation of Labor* (1908) 37 Mont. 264, 18 L.R.A. (N.S.) 707, 127 Am. St. Rep. 722, 96 Pac. 127, *supra*).

In *Thomas v. Cincinnati, N. O. & T. P. R. Co.* (1894) 4 Inters. Com. Rep. 788, 62 Fed. 803, in considering the question whether the right of free speech was infringed by enjoining the exercise thereof for the purpose of aiding in carrying out an illegal conspiracy to boycott the railroads by refusing to handle Pullman cars, Taft, J., said: "It would be strange, indeed, if that right could be used to sustain the carrying out of such an unlawful and criminal conspiracy as we have seen this to be. It never has been supposed to protect one from prosecution, or suits for slander, or for any of the many malicious and tortious injuries which the agency of the tongue has been so often employed to inflict. If the obstruction to the operation of the road by the receiver was unlawful and malicious, it is not less a contempt because the instrument which he used to effect it was his tongue, rather than his hand."

In *Rocky Mountain Bell Teleph. Co. v. Montana Federation of Labor* (1907) 156 Fed. 809, in which the court granted an injunction against the distribution of boycott circulars containing threats to boycott patrons of complainant, it was said that while the right of free speech and to print or publish what one pleases is guaranteed by the Constitution, yet there

is also guaranteed the right of an individual to carry on business in a lawful way, and every constitutional guaranty is subject to the limitation that a man pursuing a business or enjoying his rights shall always be bound by the restraints of law.

In *Jordahl v. Hayda* (1905) 1 Cal. App. 696, 82 Pac. 1079, holding that a provision of the California Constitution which guarantees every person the right freely to speak, write, and publish his sentiments on all subjects does not authorize striking employees of a restaurant and their friends to congregate in front of a restaurant, carrying banners and placards and interfering with the business of the restaurant by intimidating, insulting, or threatening the patrons, the court said: "While the right of free speech is guaranteed to all citizens by the Constitution, there is also guaranteed to them by the same Constitution the right of 'acquiring, possessing, and protecting property, and possessing and obtaining safety and happiness' . . . and it is a maxim of jurisprudence prescribed by the statute law of this state that 'one must so use his rights as not to infringe upon the rights of another.' . . . These guaranties are equally important to, and equally necessary for the protection of, all classes of citizens."

No constitutional interference with freedom of speech is effected by enjoining the placing by a labor union of the name of a concern on its "We Don't Patronize" list, in furtherance of a boycott against it. *American Federation of Labor v. Buck's Stove & Range Co.* (1909) 33 App. D. C. 83, 32 L.R.A. (N.S.) 748 (appeal to United States Supreme Court dismissed in (1910) 219 U. S. 581, 55 L. ed. 345, 31 Sup. Ct. Rep. 472, on the ground that the settlement by the parties of matters in controversy between them rendered the case a moot one).

No right of trial by jury or any constitutional provisions as to the freedom of speech or the press are violated by enjoining the distribution of printed or written matter or the utterance of words having a coercive effect upon prospective patrons. *Mc-*

Cormick v. Local Unions (1911) 32 Ohio C. C. 165.

It does not follow that because a single individual may, under constitutional guaranty, freely speak or write as he pleases without injunctive restraint, an association or combination of persons may lawfully do likewise, as in such case the views expressed are not merely those of an individual, but express the concerted will and desire of a powerful organization. *Webb v. Cooks, Waiters, & Waitresses' Union* (1918) — Tex. Civ. App. —, 205 S. W. 465.

The contrary view is maintained in *Marx & H. Jeans Clothing Co. v. Watson* (1902) 168 Mo. 133, 56 L.R.A. 951, 90 Am. St. Rep. 440, 67 S. W. 391, in which it was held that, in view of the provision of the Missouri Constitution that every person shall be "free to say, write, or publish whatever he will on any subject, being responsible for all abuse of that liberty," the publication of a circular letter and the solicitation of merchants not to deal with a boycotted firm, as a means of enforcing the boycott, could not be enjoined, although the injury to plaintiff's business was great and defendant was not pecuniarily responsible, the court saying: "The authority to enjoin finds no better harbor in the empty pocket of the poor man than in the full pocket of the rich man. And such authority to enjoin can have no existence in circumstances such as the present case presents, if the Constitution is to be obeyed. If these defendants are not permitted to tell the story of their wrongs, or, if you please, their supposed wrongs, by word of mouth, or with pen or print, and to endeavor to persuade others to aid them by all peaceable means in securing redress of such wrongs, what becomes of free speech, and what of personal liberty? The fact that in exercising that freedom they thereby do plaintiff an actionable injury, such fact does not go a hair towards a diminution of their right of free speech, etc., for the exercise of which, if resulting in such injury, the Constitution makes them expressly responsible. But such responsibility is utterly in-

compatible with authority in a court of equity to prevent such responsibility from occurring." This case should be distinguished,—as, in fact, is done by the court deciding it,—from cases involving threats to destroy property, which, from present ability to be carried into execution, amount to verbal acts, and threats of personal violence, made with the view to intimidate in its ordinary sense, employers or their employees.

So also in *Re Heffron* (1914) 179 Mo. App. 639, 162 S. W. 652, it is held that because of a constitutional provision insuring the right of free speech, injunction will not lie to restrain the distribution of cards and circulars in furtherance of a boycott, even though such conduct may entail an actionable injury at law for which the offender may be required to answer.

And in *Lindsay & Co. v. Montana Federation of Labor* (1908) 37 Mont. 264, 18 L.R.A. (N.S.) 707, 127 Am. St. Rep. 722, 96 Pac. 127, it was held that, in view of a similar constitutional provision, equity would not enjoin the publication by a labor organization of a circular declaring a merchant to be unfair, the court saying: "It cannot be said that a citizen of Montana is free to publish whatever he will on any subject, while an injunction preventing him from publishing a particular item upon a particular subject hangs over his head like a sword of Damocles, ready to fall with all the power which can be invoked in contempt proceedings, if he does the very thing the section of the Constitution says he may do. It is impossible to conceive the idea that the individual has an absolute right to publish what he pleases, subject to the restriction mentioned, and at the same time to entertain the idea that a court may prevent him from doing so. The two ideas cannot possibly coexist." And it was further held that the insolvency of defendant was immaterial, the court saying: "But it is suggested by counsel for respondent company that these defendants are insolvent, and that a judgment for damages would be worthless. Even granting this to be

so, still the Constitution does not discriminate among men according to the amount of their possessions. The guaranty of this section extends as fully to the poorest as to the wealthiest citizen of the state; and, though an abuse of the liberty so guaranteed may result in loss for which there cannot be any adequate compensation, the framers of our Constitution, in preparing it, and the people, in adopting it, doubtless concluded that it was better that such results be reached in isolated cases, than that the liberty of speech be subject to the supervision of a censor. To declare that a court may say that an individual shall not publish a particular item is to say that the court may determine in advance just what the citizen may or may not speak or write upon a given subject,—is, in fact, to say that such court is a censor of speech as well as of the press.”

In *Richter Bros. v. Journeymen Tailors' Union* (1890) 24 Ohio L. J. 189, 11 Ohio Dec. Reprint, 45, the court refused to restrain the posting and circulating of notices to the effect that the plaintiff's tailoring establishment was a scab shop and should be shunned by all fair-minded citizens, that their employees were incompetent botches and professional tramps and ex-convicts. While conceding that this circular was a libel on the business of the plaintiff, the court held that a court of equity—especially in view of the constitutional guaranty of freedom of speech—could not enjoin the circulation of the libel, but that the remedy was in an action at law.

2. Considerations affecting complainant's right to relief.

A complainant is not to be denied equitable relief because it has declared war on the union by discharging all members found in its shop. *Gill Engraving Co. v. Doerr* (1914) 214 Fed. 111.

An employer is not deprived of his right to the interposition of equity to protect him against a boycott upon the theory that he first boycotted the union by taking a stand which he knows will, under the rules of the union, prevent members in regular

standing and who wish to retain their membership, from being employed by him, where he distinctly states that he does not desire thereby to have any of his employees quit their work, and that he will still maintain the union prices. *Barr v. Essex Trades Council* (1894) 53 N. J. Eq. 101, 30 Atl. 881.

Nor is one's right to equitable relief affected by the fact that he is a member of a combination in unlawful restraint of trade, since the inequity that will bar a complainant must be so directly connected with the subject-matter of the litigation that it affects the equitable relations of the parties arising out of the transaction in question. *Patterson v. Building Trades Council* (1902) 11 Pa. Dist. R. 500.

But an injunction will not be granted against the sending of circulars to complainant's customers, urging them not to patronize complainant, where complainant has by similar methods sought to prevent the employment of those with whom he is in controversy. *Sinsheimer v. United Garment Workers* (1894) 77 Hun, 215, 28 N. Y. Supp. 321, reversing (1893) 5 Misc. 448, 26 N. Y. Supp. 152.

3. Parties against whom injunction granted.

The executive officers of a labor union who indorse a local boycott and place the name of a boycotted concern on their "We Don't Patronize" list, knowing that the result will be the actual maintenance of a boycott by the members of the union throughout the country, cannot defeat the issuance of an injunction against themselves on the theory that they are not connected with or responsible for the acts done under the boycott. *American Federation of Labor v. Buck's Stove & Range Co.* (1909) 33 App. D. C. 83, 32 L.R.A.(N.S.) 748, appeal to the United States Supreme Court dismissed in (1910) 219 U. S. 581, 55 L. ed. 345, 31 Sup. Ct. Rep. 472.

4. Extent of relief granted.

An injunction should not issue against boycotting where it does not appear that a boycott was intended (*Grassi Contracting Co. v. Bennett* (1916) 174 App. Div. 244, 160 N. Y.

Supp. 279); and where granted should be limited to acts of commission (American Federation of Labor v. Buck's Stove & Range Co. (1909) 33 App. D. C. 83, 32 L.R.A.(N.S.) 748, appealed to the United States Supreme Court, dismissed in (1910) 219 U. S. 581, 55 L. ed. 345, 31 Sup. Ct. Rep. 472, on the ground that the settlement by the parties of matters in controversy between them rendered the case a moot one).

In one case an injunction against "boycotting," as such, has been held too broad (Mills v. United States Printing Co. (1904) 99 App. Div. 605, 91 N. Y. Supp. 185), but whether this will hold true elsewhere will depend upon the signification attached to the word.

It has also been held that an injunction restraining defendant from "in any wise interfering with" the complainant's business is too broad, as covering such modes of interference as publication, reasonable persuasion, and threats to withdraw patronage which defendants have a right to employ. *Pierce v. Stablemen's Union* (1909) 156 Cal. 70, 103 Pac. 324.

But an injunction restraining the defendant from in any manner interfering with the business of complainants by means of threat or intimidation of any kind directed against their customers or prospective customers, and from interfering with such customers by threats of any kind or nature, does not go beyond nor restrain defendant from acts other than boycotting, and is therefore proper. *Gray v. Building Trades Council* (1903) 91 Minn. 171, 63 L.R.A. 753, 103 Am. St. Rep. 477, 97 N. W. 663, 1118, 1 Ann. Cas. 172.

An injunction is properly granted against the use of force, violence, threats, menaces, or intimidation in furtherance of a boycott. *Re Heffron* (1914) 179 Mo. App. 639, 162 S. W. 652.

An injunction is not so indefinite and uncertain that it is impossible to ascertain therefrom what acts the defendants are enjoined from performing, because it fails to enumerate the particular acts which will be regarded

as acts of intimidation of customers or threats used for the purpose of diverting patrons from plaintiff's place of business. *Jordahl v. Hayda* (1905) 1 Cal. App. 696, 82 Pac. 1079.

An injunction which purports to enjoin striking employees, either singly or in numbers, from patrolling the sidewalk adjoining their former employer's place of business, is too vague and indefinite. *Re Heffron* (Mo.) supra. The court said: "It was certainly competent for the court to enjoin patrolling against patrons or prospective patrons of plaintiff's business from entering there, or for the purpose of interfering with its employees. It was competent, too, for the court to enjoin such patrolling as might interfere with the free use of the sidewalk to afford ingress and egress to plaintiff's premises, or such as should be accompanied with threats, intimidation, violence, or conduct that should annoy and deter plaintiff's patrons or employees, but nothing of this kind is enjoined. The word 'patrolling,' in and of itself, implies nothing unlawful, and the act may, therefore, not be forbidden except as it is attended by the conduct of the patrol, or the circumstances of the situation introducing an unlawful element."

An injunction goes too far which prevents the strikers from expressing an opinion at any time or place of the complainant or his business, which, at most, would be only a slander. *Goldberg, B. & Co. v. Stablemen's Union* (1906) 149 Cal. 429, 8 L.R.A.(N.S.) 460, 116 Am. St. Rep. 145, 86 Pac. 806, 9 Ann. Cas. 1219.

It has been held that the publication and circulation of a newspaper cannot be enjoined merely because it contains the "unfair" list of a labor union which is published in furtherance of a boycott. *American Federation of Labor v. Buck's Stove & Range Co.* (1909) 33 App. D. C. 83, 32 L.R.A. (N. S.) 748 (appeal to United States Supreme Court dismissed in (1910) 219 U. S. 581, 55 L. ed. 345, 31 Sup. Ct. Rep. 472, on the ground that the settlement by the parties of matters

in controversy between them rendered the case a moot one).

Labor unions will not be enjoined from notifying customers that complainants are unfair, where there is nothing in the case showing or tending to show that such notification is intended as a threat or intimidation. *Gray v. Building Trades Council* (1903) 91 Minn. 171, 63 L.R.A. 753, 108 Am. St. Rep. 477, 97 N. W. 663, 1118, 1 Ann. Cas. 172.

A manufacturer engaged in a trade dispute with his employee is entitled to enjoin the officers of affiliated labor organizations directing or inducing by threats, etc., the employees of those who may purchase his product to strike. *Alfred W. Booth & Bro. v. Burgess* (1906) 72 N. J. Eq. 181, 65 Atl. 226.

An injunction against picketing or patrolling complainant's place of business "in such a manner as to intimidate, threaten, or coerce any person or persons from entering, or who may desire to enter said premises for the purpose of patronizing the complainant, or for any lawful purpose whatsoever," is too narrow, where it appears that statements made by the pickets that there was a strike on were untrue in fact. *Philip Henrici Co. v. Alexander* (1916) 198 Ill. App. 568.

An idea of the nature and extent of the injunctive relief granted by the courts in injunction cases is best gained by an examination of the decrees which the appellate courts have approved. The substance of some of these is below set forth.

In *Goldberg, B. & Co. v. Stablemen's Union* (1906) 149 Cal. 429, 8 L.R.A. (N.S.) 460, 117 Am. St. Rep. 145, 86 Pac. 806, 9 Ann. Cas. 1219, the decree, as modified by the appellate court, enjoined defendants, their agents, servants, etc., from interfering with or harassing or obstructing plaintiff in the conduct of its business at any of its said places of business, "by causing any agent or agents, representative or representatives, or any picket or pickets, or any person or persons, to be stationed in front of, or in the immediate vicinity of, said places of business, with a placard or transpar-

ency having on it the words and figures as alleged in the complaint herein, or any placard or transparency (having words or figures) of similar import, and from, at said places of business, or in front thereof, or in the immediate vicinity thereof, by means of pickets or transparencies, or otherwise, threatening or intimidating any person or persons transacting or desiring to transact business with said plaintiff, or being employed at said place or places by the plaintiff."

In *Jordahl v. Hayda* (1905) 1 Cal. App. 696, 82 Pac. 1079, a decree, enjoining defendants from stationing themselves in the doorway of plaintiff's restaurant or upon the sidewalk in front of the same, and there interfering with the business of plaintiff by intimidation, insults, or threats to his patrons, thereby inducing persons not to patronize the restaurant of said plaintiff, and from in any manner interfering with the said business of plaintiff by means of threats or intimidation of any kind or nature directed against the patrons or customers, was approved.

In *American Federation of Labor v. Buck's Stove & Range Co.* (1909) 33 App. D. C. 83, 32 L.R.A. (N.S.) 749 (appeal to the United States Supreme Court dismissed in (1910) 219 U. S. 581, 55 L. ed. 345, 31 Sup. Ct. Rep. 472, on ground that case had become a moot one), the judgment enjoined the defendants, their agents, servants, etc., "from conspiring or combining to boycott the business or product of complainant, and from threatening or declaring any boycott against said business or product, and from abetting, aiding, or assisting in any such boycott, and from directly or indirectly threatening, coercing, or intimidating any person or persons whomsoever from buying, selling, or otherwise dealing in complainant's product, and from printing the complainant, its business or product, in the 'We Don't Patronize' or 'unfair' list of defendants in furtherance of any boycott against complainant's business or product, and from referring either in print or otherwise, to complainant, its business, or product, as in said 'We

Don't Patronize' or 'unfair' list, in furtherance of any such boycott."

In *Barnes v. Chicago Typographical Union* (1908) 232 Ill. 424, 14 L.R.A. (N.S.) 1018, 83 N. E. 940, 13 Ann. Cas. 54, a decree was affirmed which enjoined defendants "from organizing or maintaining any boycott against said complainants or any of them; from attempting to induce customers or other persons to abstain from working for or accepting work from said complainants or any of them; from attempting to prevent, by threats of injury, or by threats of calling strike, any person from accepting work from, or doing work for, said complainants or any of them; from attempting to create or enforce any boycott against any of the employees of the complainants, or any of them, and from attempting to induce people in their neighborhood or elsewhere not to deal with them; from sending any circular or other communications to customers or other persons who might deal or transact business with said complainants, or either of them, for the purpose of dissuading such persons from so doing; and from doing any other act or thing in furtherance of the conspiracy set forth in said bill."

In *Piano & O. Workers' International Union v. Piano & O. Supply Co.* (1906) 124 Ill. App. 357, the court affirmed a decree enjoining defendants "from preventing or attempting to prevent, by threats of boycott or strike, any person or persons from dealing with said complainant, or completing any contracts with said complainant, or from purchasing or receiving goods manufactured by said complainant, or from calling out a strike in any plant or factory owned or operated by any other person, because of the fact that such person may purchase supplies or products from said complainant, or sell supplies or materials to said complainant, or by reason of the fact that said person or persons may use in their factory any material manufactured by said complainant, or coming from the plant of said complainant."

In *My Maryland Lodge v. Adt* (1905) 6 A.L.R.—62.

100 Md. 238, 68 L.R.A. 752, 59 Atl. 721, the court affirmed an injunction restraining defendants "from in any manner interfering with, or hindering, or attempting directly or indirectly to interfere with, the said plaintiff, . . . his agents, servants, and employees, in conducting his said business, by following his said delivery wagons in the streets for the purpose of finding where work is to be done, or from going to or sending any communication, letters, or circulars to places of business" where the plaintiff has done, or is now doing, or shall hereafter do, work, "for the purpose of inducing, persuading, or compelling, by threats or intimidation in any other manner, the owner or owners of such places of business . . . to withhold or fail to give to the complainant such work as they might otherwise give him, or to compel him to stop any work ordered from or commenced by him; from publishing, printing, writing, or circulating in any manner whatever any matter or thing that would tend to discredit in the eyes of the public, or to injure the business of, any person for whom the plaintiff has done, is now doing, or will hereafter do, work, by reason of such work; from in any manner boycotting the said plaintiff or his manufactured goods, or anyone for whom the plaintiff has worked, is now working, or shall hereafter work, or manufactured articles of such last-named person by reason of such work; and from in any way menacing, hindering, or obstructing the plaintiff by interfering with the business of customers in the full enjoyment of such patronage or business as he might possess independent of such interference."

In *Baldwin v. Escanaba Liquor Dealers' Asso.* (1911) 165 Mich. 98, 130 N. W. 214, the court approved a judgment directing the issuance of the injunction prayed in the bill, "restraining the defendants from interfering with, intimidating, boycotting, molesting, or threatening in any manner the customers or patrons of complainant, or any other person or persons, for the purpose of inducing such person or persons not to deal

with or advertise or do business with complainant; from boycotting complainant, either by the distribution of letters or circulars, or in any other manner; from giving any directions or orders to committees, associations, agents, or otherwise, for the pursuance of any such acts hereinbefore complained of, and from in any manner whatsoever impeding, obstructing, or interfering with the regular operation and conduct of the business of complainant."

In *Foster v. Retail Clerks' Protective Asso.* (1902) 39 Misc. 48, 78 N. Y. Supp. 860, an injunction order was directed, enjoining and restraining the defendants, "their servants, agents, coadjutors, and assistants, from entering upon the premises of the plaintiffs for the purpose of interfering with or interrupting their trade or customers, or from in fact, while upon such premises, interrupting or interfering with such trade or customers; from obstructing access to the plaintiff's store by any physical means; from so acting as to collect crowds in front of or adjacent to said store, which crowds shall obstruct travel upon the streets or sidewalks at or in the neighborhood thereof; and finally from the use of threats, violence, or intimidation with the intent of preventing travelers upon the highway or intending customers of the plaintiffs from entering the store of the plaintiffs or trading with them, or whereby such result is attained."

In *Albro J. Newton Co. v. Erickson* (1911) 70 Misc. 291, 126 N. Y. Supp. 949, affirmed without opinion in (1911) 144 App. Div. 989, 129 N. Y. Supp. 1111, the court directed an order enjoining defendants, their agents, etc., "from conspiring, combining, or acting in concert in any manner to injure or interfere with plaintiff's good will, trade, or business, for the purpose of coercing it to employ union labor, either, first, by sending to any customer or prospective customer of plaintiff any letter, circular, or communication printed, written, or oral, which in terms or by inference suggests that labor troubles will follow the use of materials purchased from

plaintiff or from any person, firm, or corporation declared 'unfair,' or whose material does not bear the union label, meaning plaintiff thereby; or, second, by ordering, directing, requiring, or compelling by any by-law, rule, or regulation, or any act thereunder, any person whatever to refrain from or cease working for any person, firm, or corporation because they use material purchased of or furnished by plaintiff, or by any person, firm, or corporation declared 'unfair,' or whose material does not bear the union label, meaning plaintiff thereby."

In *Heitkamper v. Hoffmann* (1917) 99 Misc. 543, 164 N. Y. Supp. 533, a judgment was entered restraining the individual defendant and the defendant's union, its officers, members, agents, and employees, "from congregating in front of plaintiff's shop, from marching up and down upon the sidewalk in front of his shop, from blockading the entrance to his store, and from in any way or manner preventing intending customers from entering or departing from plaintiff's shop."

In *Dayton Mfg. Co. v. Metal Polishers, B. P. & B. Workers Union* (1901) 11 Ohio S. & C. P. Dec. 643, defendants were enjoined "from boycotting plaintiff either by threats, intimidation, persuasion, or otherwise; from interfering, intimidating, boycotting, molesting, or threatening in any manner any person or persons with the purpose or intent of inducing such person or persons not to deal with or do business with the plaintiff; from congregating or loitering about or in the neighborhood of the premises of the plaintiff or at any other places, with intent to interfere with the employees of plaintiff, or to interfere with the prosecution of plaintiff's business, or to interfere with or to obstruct in any manner the business or trade of plaintiff, or to prevent or induce the public not to trade with or deal with the plaintiff."

5. Contempt.

What conduct will constitute a violation of an injunction against boycotting, and therefore expose one to punishment for contempt, is, of course,

dependent upon the circumstances of each individual case. Such contempt may lie in a participation in the adoption of a resolution, or the making of statements intended to incite others to continue the boycott, although, literally interpreted, such statements may not constitute a technical contempt (as in *Gompers v. Buck's Stove & Range Co.* (1909) 33 App. D. C. 516, reversed for another reason in (1910) 221 U. S. 418, 55 L. ed. 797, 34 L.R.A. (N.S.) 874, 31 Sup. Ct. Rep. 492); or the ordering of a strike on buildings because of the use of lumber and material furnished by the complainant (as in *Mears Slayton Lumber Co. v. District Council, C. U. B. C. J. A.* (1910) 156 Ill. App. 327); or the publication of a "fair list" in which the name of the complainant does not appear (as in *Huttig Sash & Door Co. v. Fuelle* (1906) 143 Fed. 363).

VIII. *Criminal Liability.*

Whether a boycott is punishable as a criminal conspiracy will depend upon the character of the acts done, and the view taken by the court of their legality.

In *Reg. v. Rowlands* (1851) 5 Cox, C. C. 436, 2 Den. C. C. 364, 17 Q. B. 671, 117 Eng. Reprint, 1439, 21 L. J. Mag. Cas. N. S. 81, 16 Jur. 268, it is held that a conspiracy to molest or obstruct an employer in the prosecution of his business is indictable.

A combination to compel an employer to yield to the demands of a union, by notifying his customers that if they should continue to deal with him their patronage would similarly be interfered with, is a criminal conspiracy. *Crump v. Com.* (1888) 84 Va. 927, 10 Am. St. Rep. 895, 6 S. E. 620.

But a conspiracy to injure one's business is not made indictable because of the means employed to effectuate it, where they consist in notifying him by a committee of three that he will not be considered in sympathy with organized labor unless he employs only union men, which would involve his breaking contracts with others, and, upon his refusal to do so, publishing in a newspaper the fact that he is unfair, together with a

statement that union men will thereafter refuse to work material from his shop. *State v. Van Pelt* (1904) 186 N. C. 633, 68 L.R.A. 760, 49 S. E. 177, 1 Ann. Cas. 495.

A statute making it a crime to conspire to prevent another from exercising a lawful trade or calling, or doing any other lawful act, by force, threat, or intimidation, is not violated by the distribution of circulars and the posting of placards asking the public not to patronize a certain person. *People v. Radt* (1900) 15 N. Y. Crim. Rep. 174, 71 N. Y. Supp. 846; *People v. McFarlin* (1904) 43 Misc. 591, 89 N. Y. Supp. 527, but such a statute may be violated by the distribution of offensive boycott circulars in a manner calculated to intimidate (*People v. Kostka* (1886) 4 N. Y. Crim. Rep. 429), or the sending of threatening notices or messages to one's customers or patrons, and other persons usually dealing with him, designed to intimidate them from having any dealings with him through threats of loss and expense (*Old Dominion S. S. Co. v. McKenna* (1887) 30 Fed. 48, where it is said that such conduct is also a misdemeanor at common law).

Such statute is violated by a combination to prevent one from exercising the lawful trade or calling of horseshoer, by threatening his customers to call strikes on work on which the horses of the customers were used unless the customers should refrain from and refuse to have their horses shod by him. *People v. Davis* (1913) 159 App. Div. 464, 144 N. Y. Supp. 284.

A combination to accomplish a lawful purpose by threatening and intimidating business customers of an employer, to force and compel them to give up all business relations with him, is made a criminal offense by a statute providing that "every person who shall threaten or use any means to intimidate any person to compel such person against his will to do or abstain from doing any act which such person has a legal right to do, or shall persistently follow such person in a disorderly manner, or injure or threaten to injure his property with intent

to intimidate him," shall be subject to a certain penalty. *State v. Stockford* (1904) 77 Conn. 227, 107 Am. St. Rep. 28, 58 Atl. 769.

In *George J. Grant Constr. Co. v. St. Paul Bldg. Trades Council* (1917) 136 Minn. 167, 161 N. W. 520, 1055, it was held that an agreement among union employees in the building trade, who had a bona fide dispute with a contractor, to withhold their services from such contractor or his subcontractors until the dispute is settled, is not a violation of the statute which makes unlawful any conspiracy to do an act injurious to trade and commerce, nor of a statute which forbids combinations in restraint of trade.

The action of a labor union in adopting a resolution that all members employed in factories using the product of complainant shall refuse to handle or work upon any material supplied by it to its customers, and in causing notice thereof to be mailed to complainant's customers and to be published in an issue of the union's official journal, is violative of a statute which provides that "if any two or more persons conspire or agree together, or the officers or executive committee of any society or organization or corporation shall issue or utter any circular or edict as the action of or instruction to its members or any other persons, societies, organizations, or corporations, for the purpose of establishing a so-called boycott or black list, or shall post or distribute any written or printed notice in any places with the fraudulent or malicious intent, wrongfully and wickedly to injure the person, character, business or employment or property of another . . . they shall be deemed guilty of a conspiracy." *Piano & O. Workers' International Union v. Piano & O. Supply Co.* (1906) 124 Ill. App. 357 (construing § 46 of division 1 of the Criminal Code passed June 16, 1887).

One who exacts money by a threat to institute a boycott, or as a condition of its discontinuance, may be convicted of extortion. *People v. Hughes*

(1898) 137 N. Y. 29, 32 N. E. 1105; *People v. Wilzig* (1886) 4 N. Y. Crim. Rep. 408.

It has also been held that the sending of letters or circulars through the mails by officers of a labor union to customers of a manufacturer, to induce them to withdraw their custom from him, either for the purpose of exacting the payment of a fine imposed on the manufacturer for employing nonunion workmen, or, should he not yield, for the purpose of injuring his business, amounts to a use of the mails to defraud, in violation of Revised Statutes, § 5480, Comp. Stat. § 10,385. *United States v. Raish* (1908) 163 Fed. 911.

And it has been held, though not in a criminal prosecution, that a combination to inflict pecuniary injury on the owner of cars by compelling the railway companies to give up using his cars, and, on their refusal to yield to compulsion, to inflict pecuniary injury on them by inciting their employees to quit, is unlawful as a conspiracy to obstruct the mails, where its members intend to stop all mail trains as well as other trains. *Thomas v. Cincinnati, N. O. & T. P. R. Co.* (1894) 4 Inters. Com. Rep. 788, 62 Fed. 803.

It has also been held, although not in a criminal case, that members of a labor organization who procure railroad companies to refuse to handle interstate freight from a company with which such organization is in conflict violate the provision of the Interstate Commerce Law, declaring any carrier or any director, officer, receiver, agent, or person acting for or employed by an incorporated carrier, who, alone or with any other corporation, person, or party, shall wilfully fail or omit to do any act required to be done, or cause or willingly suffer or permit any act required by such act to be done not to be done, or aid or abet such omission or failure, to be guilty of a misdemeanor. *Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co.* (1893) 19 L.R.A. 387, 5 Inters. Com. Rep. 522, 54 Fed. 730. E. S. O.

CATHRYN L. WRIGHT, Appt.,
v.

C. T. STARR, Respt.

Nevada Supreme Court — April 21, 1919.

(— Nev. —, 179 Pac. 877.)

Assault — civil action — consent.

1. One consenting to an assault cannot maintain a civil action against the assailant to recover for the injury thereby inflicted.

[See note on this question beginning on page 985.]

— consent — effect.

2. Consent by the victim is no defense to a criminal prosecution for assault and battery.

[See 2 R. C. L. 562.]

Definition — battery.

3. A battery is any unlawful beating, or other wrongful physical violence or constraint, inflicted on a human being without his consent.

[See 2 R. C. L. 525.]

Pleading — assault — consent.

4. Consent need not be affirmatively pleaded in defense of a civil action for assault and battery.

Appeal — rejection of evidence — curing error.

5. Error, if any, in refusing to permit defendant to be cross-examined as to statements made out of court, is cured by permitting persons present when the statements were made to testify in regard to them.

[See 2 R. C. L. 253.]

APPEAL by plaintiff from an order of the District Court for Washoe County (Moran, J.) denying a motion for new trial of an action brought to recover damages for alleged assault and battery. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. H. V. Morehouse and James T. Boyd for appellant.

Messrs. Hoyt, Gibbons, French, & Henley, for respondent:

If the party alleging to have been wronged consented to the acts done and performed, there can be no invasion of the rights of that party, and no assault or battery can result.

Courtney v. Clinton, 18 Ind. App. 620, 48 N. E. 799; Goldnamer v. O'Brien, 98 Ky. 569, 36 L.R.A. 715, 56 Am. St. Rep. 378, 33 S. W. 831; O'Brien v. Cunard S. S. Co. 154 Mass. 272, 13 L.R.A. 329, 28 N. E. 266; Smith v. Simon, 69 Mich. 481, 37 N. W. 548; Gibeline v. Smith, 106 Mo. App. 543, 80 S. W. 961; Pillow v. Bushnell, 5 Barb. 156; Christopherson v. Bare, 11 Q. B. 473, 116 Eng. Reprint, 554, 17 L. J. Q. B. N. S. 109, 12 Jur. 374; Hegarty v. Shine, Ir. L. R. 4 C. L. 283, 14 Cox, C. C. 145; Reg. v. Young, 10 Cox, C. C. 371; Nicholls v. Colwell, 113 Ill. App. 219; State v. Pickett, 11 Nev. 255, 21 Am. Rep. 754.

Ducker, J., delivered the opinion of the court:

This is an action for damages alleged to be the result of an assault and battery. The complaint, in substance, alleges that respondent assaulted appellant by grabbing and pressing her throat and neck with his hands, and by grabbing and taking hold of her left wrist, and pressing her wrist watch into the flesh, and by grabbing and twisting her right hand, and by tearing her clothes from her person, by all of which she was hurt, wounded, and bruised, and caused physical suffering, etc. These allegations are denied in the answer.

The alleged assault occurred in a room occupied by appellant, at which respondent, who is a dentist by profession, had called. Appellant's testimony tended to establish the allegations of the complaint. Respondent contradicted her testimony

in this regard, and testified that he merely kissed her with her consent. He also stated that he sought to kiss her goodby, at which she demurred and he desisted.

The verdict of the jury was in favor of respondent, and from the order denying a motion for a new trial, appellant brings this appeal.

Error is assigned in giving the following instruction to the jury: "The gist of this action is the commission of the acts alleged and lack of consent thereto by the plaintiff, and you are instructed that, if you believe from the evidence that plaintiff consented to or was willing that defendant do the acts alleged in the complaint to have been committed by him, then your verdict should be for the defendant. If the plaintiff consented to or acquiesced in such acts, or if she was willing that defendant do them, then she is not entitled to recover damages from defendant."

One of the objections to the instruction is that consent of the party assailed is no defense in an action for assault and battery. In a criminal prosecution for assault and battery, consent to

**Assault—
consent—effect.**

a beating is no defense; the reason being that a wrong is committed against the public peace. The state punishes a person for fighting. "There are three parties here; one being the state, which, for its own good, does not suffer the others to deal on a basis of contract with the public peace. The rule of law is therefore clear and unquestionable that consent to an assault is no justification." 1 Cooley, Torts, p. 283.

The learned author extends this rule to civil actions upon the ground that a consent which the law forbids cannot be accepted as a legal protection. This doctrine is the basis of the authorities cited by appellant to sustain her contention and of others we have examined, in which the same contention is sustained.

On the other hand, the author in Bishop, Non-Contract Law, § 196,

says that "rape, one of the most aggravated batteries, is, if the woman consents, neither rape nor even assault," and that "the execution of any unlawful contract places it past annulment, and leaves no right of action in either party against the other. So that, though a mutual beating by consenting parties is a wrong against the public, because a breach of the peace, it is not such as between themselves, since neither can complain of that to which he consented. . . . Such is the distinct and inevitable deduction of the reasoning of the law; applicable, however, in all its consequences, only where the beating was not in excess of the consent. But we have American cases in which the judges have overlooked the distinction between the civil and criminal remedy, and so have held that one may maintain his civil suit for a battery to which he consented and in which he participated. Decisions like these, proceeding on a misapprehension, and overlooking established law not brought to the notice of the judges, should not be followed in future cases."

We think the true rule is stated by the learned author last quoted. To permit a recovery of damages in a civil action for an assault, by one who

**—civil action—
consent.**

has consented to or participated in the acts causing the injury, is to countenance a principle that one may profit by his own wrong, —a theory obnoxious to both law and equity. It is a general rule of law that no person can maintain an action for a wrong where he has consented to the act which occasions his loss (Broom, Legal Maxims, 268; 1 Wait, Act. & Def. 344), and we perceive no real reason why a civil action for damages in an ordinary case of assault and battery is an exception to the rule. "If the defendant is guilty of no wrong against the plaintiff, except a wrong invited and procured by the plaintiff for the purpose of making it the foundation of an action, it would be

most unjust that the procurer of the wrongful act should be permitted to profit by it." 1 Jaggard, Torts, 199.

The state is not interested in damage suits for assault and battery, except in so far as its laws intend equal justice to all. As it is wrong to make an assault, it is equally wrong to consent to it. Neither the party who is injured, and who seeks to make a mutual wrong the basis of an action, nor his coviolator of the law, can derive aid from the state by reason of their unlawful encounter. Both are punishable, for their consent, illegally given, violates the criminal law, and in this the state is an interested party. The contention that one may maintain an action for damages for an assault to which consent is given furnishes an anomaly which cannot be justified by reason or sound authority. Let us apply it to the case at bar. If appellant's version of the acts complained of is correct, what was the purpose of the assault? Clearly a rape,—one of the most aggravated batteries. But if she had consented to such an intention she would have no redress, either civilly or in a criminal action. Yet for the minor degree of the assault, even though consent were given, if her contention is allowed, respondent is liable to a criminal prosecution and a civil action for damages.

We do not wish to be understood as holding that damages may not be recovered for injuries inflicted in an assault and battery, where the beating is excessively disproportionate to the consent, given or implied, or where the party injured is exposed to loss of life or great bodily harm. No such case is before us. But we do hold that, in an ordinary assault and battery in the common course of things, consent precludes a right of action for injuries received. Bishop, Non-Contract Law, ¶ 196; Pillow v. Bushnell, 5 Barb. 156; Christopherson v. Bare, 11 Q. B. 473, 116 Eng. Reprint, 554, 17 L. J. Q. B. N. S. 109, 12 Jur. 374; Hegarty v. Shine, Ir. L. R. 4 C. L. 288, 14 Cox, C. C. 145; O'Brien v. Cunard

S. S. Co. 154 Mass. 272, 13 L.R.A. 329, 28 N. E. 266; Goldnamer v. O'Brien, 98 Ky. 569, 36 L.R.A. 715, 56 Am. St. Rep. 378, 33 S. W. 831; Nicholls v. Colwell, 113 Ill. App. 219.

It is contended that the instruction is erroneous because no issue is made by the pleadings on the question of consent. The answer consisting of denials only, appellant insists that, because consent is not affirmatively pleaded as a justification, it is not available as a defense.

Lack of consent is an essential element of the offense of assault and battery. It is true the law punishes for an assault in a criminal action, even if consent is given the assailant; but this is because consent to a battery is illegal as against the state, on account of the breach of public peace involved. One is forbidden to consent to an assault, but lack of consent is no less an element of the offense. "An assault implies force upon one side, and repulsion, or at least want of assent, upon the other. An assault upon a consenting party would therefore be a legal absurdity." 1 Wait, Act. & Def. p. 344.

A battery is defined by Bishop to be: "Any unlawful beating, or other wrongful physical violence or constraint, inflicted on a human being without his consent."

Definition—
battery.

This court in the case of State v. Pickett, 11 Nev. 255, 21 Am. Rep. 754, distinctly recognized that lack of consent is an essential ingredient of an assault. Holding that there is no such crime as assault with intent to commit rape upon a consenting female, the court in its discussion said: "An assault is a necessary ingredient of every rape, or attempted rape. But it is not a necessary ingredient of the crime of carnally knowing a child under the age of twelve years, with or without her consent. . . . It is obvious that here are two crimes differing essentially in their nature, though called by the same name. To one force and resistance are essential ingredients, while to the other they

are not essential; they may be present or absent without affecting the criminality of the fact of carnal knowledge. As an assault implies force and resistance, the crime last defined may be committed, or at least attempted, without an assault, if there is actual consent on the part of the female."

As want of consent is a necessary element of an assault, when considered from the standpoint of criminality, it, of course, follows that, when the acts constituting the assault are made the basis of a civil action, lack of consent to their commission is an essential element in the cause of action.

Pleading—
assault—consent. Under this view it was unnecessary to affirmatively plead consent in justification of the acts charged in the complaint, which were denied in the answer.

In support of their contention that consent, to be available as a defense in an action of this kind, must be affirmatively pleaded, counsel for appellant have cited a line of cases which are inapplicable to the case at bar. They hold generally that, where a party seeks to justify the acts charged on the ground of self-defense, such defense must be specially pleaded; or, as in *Neilsen v. Hovander*, 56 Wash. 93, 105 Pac. 172, 21 Ann. Cas. 113, where, under a general denial, the defendants sought to justify the assault by proving that the person assaulted was interfering with their going over a public highway. Consent to the commission of the acts alleged as an assault was not involved in any of these cases. The assault was admitted, and the defendant in each case attempted to show by new matter why the assault was not wrongful. In this case, if the respondent's version of the acts charged as assault and battery is true, and the jury, by returning a verdict in his favor, must have accepted his statement of the acts as true, then there was no assault because the appellant consented to what was done. An

essential element of the offense was lacking.

Error is assigned in the ruling of the court in sustaining defendant's objection to the following question propounded to the defendant, who was a witness in his own behalf: "And saw plaintiff, and that you were in such a condition that you don't know what you did, but that you were very sorry that you had gone as far as you did, and that you would not have done what you did, had you been yourself and not under the influence of liquor; that you drank, and when you did so lost your mind and your capacity to remember what you had done. Now, did you have any such conversation, and did you make any such statement to W. M. Gardiner and Mr. Judd?"

Appellant contends that the court committed reversible error in sustaining the objection to the question, for the reason that its purpose was to show an inconsistent statement on a material matter, made by respondent a few days after the alleged assault, and affecting his credibility as a witness.

The question to which the objection was taken and sustained, is incomplete; but, taken in connection with preceding questions in the record, it was in substance a question asked to elicit testimony to the effect that, several days after the alleged assault, at the office of William Gardiner, an attorney, in the presence of one Mr. Judd, the respondent made the statement that, when the acts complained of by appellant occurred, he was under the influence of liquor, and when in that condition he lost his mind and capacity to remember what he had done. The purpose of the question was also to lay the proper foundation for impeachment in case the assumed inconsistent statement was denied by respondent. By previous questions the attention of the witness had been properly called to the time and place of the statement and

persons present. We think it sufficient to say that, if the ruling was error, it was subsequently cured by the admission of the testimony of Mr. Gardiner, who was called as a witness by appellant.

The witness Gardiner testified that respondent, in his presence and in the presence of Mr. Judd, on the occasion referred to in the question, stated that at the time of the alleged assault he did not know what he was doing. This was in substance the

testimony which the question, asked of respondent on cross-examination and ruled against by the court, was designed to elicit. The impeaching testimony sought by appellant was thus received by the jury, and the credibility of the respondent as successfully attacked as though he had answered the question and denied the statement attributed to him.

The order of the District Court denying the motion for a new trial is affirmed.

Coleman, Ch. J., and Sanders, J., concur.

ANNOTATION.

Civil action for assault upon female person.

I. Assault and battery:

- a. General rule, 986.
- b. Necessity of physical contact or injury:
 1. In general—exciting fear in plaintiff, 989.
 2. Putting plaintiff in fear of attack upon her chastity, 993.
 3. Exposure of person to plaintiff, 994.
 4. Improper familiarities, 994.
 5. Assault upon or by others, 995.

II. Justification:

- a. In general, 997.
- b. Self-defense, 998.
- c. Defense of property, 999.
- d. Provocation, 999.
- e. Ejecting plaintiff:
 1. In general, 999.
 2. Where plaintiff was servant of defendant, 1001.
 3. Where plaintiff was tenant of defendant or guest of tenant, 1002.
- f. Attempt by defendant to retake property of which plaintiff had possession, 1003.
- g. Where defendant was public officer or was engaged in serving process, 1006.
- h. Where defendant was parent, or was in a position of loco parentis to plaintiff, 1006.
- i. Liability of principal or master, 1007.

III. Indecent assaults, ravishment, etc.:

- a. In general, 1011.
- b. Matters constituting indecent assault, 1013.

III.—continued.

c. Effect of consent of female:

1. In general, 1014.
2. Consent through fear or use of drugs, 1015.
3. Where female under age of consent, 1016.
4. Consent after partial resistance, 1016.
5. Extent of force by defendant and resistance by female to show want of consent, 1017.
6. Failure to make outcry or complaint, 1018.
7. Subsequent relations of and conduct of parties to each other as bearing upon consent, 1019.

IV. Pleading and practice:

- a. Matter of pleading:
 1. Declaration or complaint, 1021.
 2. Plea or answer, 1022.
- b. Matters of practice:
 1. Parties:
 - (a) Plaintiff, 1023.
 - (b) Defendant, 1025.
 2. Joinder of actions, 1025.

V. Evidence:

- a. In plaintiff's behalf:
 1. Burden of proof, 1026.
 2. Physical condition or appearance of plaintiff or her clothing, 1026.
 3. Prior or subsequent conduct of the parties, 1028.
 4. Complaint of plaintiff, 1029.
- b. In defendant's behalf, 1029.

VI. Instruction to jury, 1030.

Scope.

In a note appended to *Nickolay v. Orr*, post, 1051, will be found a discussion of the competency of evidence affecting the character of the parties to a civil action for an assault upon a female person. And a note to *Austin v. Metropolitan L. Ins. Co.* post, 1062, considers the question of the measure of damages for an assault upon female persons. A matter of interest in some jurisdictions is as to whether or not a cause of action for an assault upon a married woman is community property. This is the subject of a note appended to *Schneider v. Biberger*, post, 1059. A note appended to *Johnson v. Johnson*, post, 1038, covers the question as to the right of a wife to maintain an action against her husband for an assault and battery committed upon her. For holdings of the courts as to adequate and excessive damages for assaults upon females, see note appended to *Bye v. Isaacson*, post, 1074.

The question of assault and battery on persons of the female sex, in its general principles, does not differ from assault and battery upon persons of the male sex. Hence, in citing cases sustaining the general principles applicable to assaults and assaults and batteries upon female persons, the cases cited are not exhaustive of the cases supporting such principle, since cases involving assaults upon male persons are not included. In the development of the cases, however, there is a distinction in the application of these general principles between assaults upon females and assaults upon males, although there may be a similarity as to some of the cases; as, for example, cases involving an ordinary assault and battery. While this is true of ordinary assaults, it is not necessarily true, and indeed generally is not true, as regards assaults by putting the plaintiff in fear, or the exposure by a male of his person to a female; improper familiarities toward a female; and assaults by males upon other males, thereby causing fear or mental anguish or injury to a female. Cases of this character are generally confined to the female sex,

in the sense, at least, that they are not reliable precedents to be used in cases involving assaults upon the male sex under similar circumstances. An even greater distinction arises in construing the many classes of justification for an assault and battery. Of course, here again it is obvious that the underlying principle is common to either sex. In the application of the principles, however, the distinction is notable. For example, the general rules as to the right of self-defense, the defense of property, or the ejection of a trespasser, are the same without regard to sex. The application of these rules, however, almost invariably involves the question of excess force, and while the rule of excess force is also common to both sexes, each case necessarily depends upon the peculiar circumstances presented, and in this regard the sex of the assaulted party is not only important but frequently controlling. It therefore follows that cases included herein, involving matters of justification, cannot be safely relied upon as precedents in cases involving an assault and battery upon a male person under similar circumstances, even though the general principles are common to both.

I. Assault and battery.**a. General rule.**

In *Patterson v. Pillans* (1915) 43 App. D. C. 505, in considering an assault upon a woman, an assault was defined to be an attempt with force or violence to do a corporal injury to another; and it may consist of any act tending to such corporal injury, accompanied with such circumstances as denote at the time an intention, coupled with the present ability, of using actual violence against a person.

In *Raefeldt v. Koenig* (1913) 152 Wis. 459, L.R.A.1918E, 1052, 140 N. W. 56, it is said that "an assault is an unlawful attempt, coupled with the apparent or real present ability, to do bodily harm to another. . . . Not every laying on of hands constitutes an assault. The attempt, or the force used, if it proceeds beyond the stage of a mere attempt, must be unlawful. The intention to do harm, or an unlaw-

ful intent, is of the very essence of an assault, and without it there can be none. . . . To gently touch another for the purpose of doing a lawful act does not amount to an assault and battery. The touching of, or injury to, another, must be done in an angry, revengeful, rude, or insolent manner, so as to render the act unlawful, before it can constitute assault and battery."

So far as concerns liability for damages for an assault and battery upon female persons, a person commits an assault and battery by unlawfully touching her person. The degree of violence is immaterial and the act need not be wilful. It is sufficient in this respect if the act is unlawful or the defendant is in fault. Where there is no violence, the unlawfulness of the act is the test to determine whether or not the offense has been committed.

United States.—Fitch v. Huff (1914) 134 C. C. A. 31, 218 Fed. 17.

Alabama.—Hardeman v. Williams (1907) 150 Ala. 415, 10 L.R.A.(N.S.) 653, 43 So. 726; Birmingham R. Light & P. Co. v. Parker (1909) 161 Ala. 248, 50 So. 55; Singer Sewing Mach. Co. v. Methvin (1913) 184 Ala. 554, 63 So. 997; Haydon v. State (1916) 15 Ala. App. 61, 72 So. 586.

Arizona.—Hageman v. Vanderdoes (1914) 15 Ariz. 312, L.R.A.1915A, 491, 138 Pac. 1053, Ann. Cas. 1915D, 1197.

Arkansas.—Pine Bluff & A. R. R. Co. v. Washington (1915) 116 Ark. 179, 172 S. W. 872.

California.—Lind v. Closs (1891) 88 Cal. 6, 25 Pac. 972.

Colorado. — Clark v. Aldenhoven (1914) 26 Colo. App. 501, 143 Pac. 267.

Connecticut. — Brown v. Wheeler (1846) 18 Conn. 199; Hull v. Bartlett (1881) 49 Conn. 64.

Delaware.—Thomas v. Black (1889) 8 Houst. 507, 18 Atl. 771.

District of Columbia.—Hubbard v. Perlle (1905) 25 App. D. C. 477.

Georgia.—Suggs v. Anderson (1853) 12 Ga. 461; Hammond v. Hightower (1888) 82 Ga. 290, 9 S. E. 1101.

Idaho.—Labonte v. Davidson (1918) 31 Idaho, 644, 175 Pac. 588.

Illinois.—Smith v. Slocum (1872) 62 Ill. 354; Dimick v. Downs (1876) 82

Ill. 570; Hennies v. Vogel (1877) 87 Ill. 242; Chicago Consol. Traction Co. v. Mahoney (1907) 131 Ill. App. 591, affirmed in (1907) 230 Ill. 562, 82 N. E. 868; Johnson v. Lamm (1910) 156 Ill. App. 287; Hidden v. Baker (1914) 190 Ill. App. 561.

Indiana.—Isley v. Huber (1873) 45 Ind. 421; Kepler v. Hyer (1874) 48 Ind. 499; Johnson v. Putnam (1884) 95 Ind. 57; Hamm v. Romine (1884) 98 Ind. 77; Kline v. Kline (1902) 158 Ind. 602, 58 L.R.A. 397, 64 N. E. 9; Sturgeon v. Sturgeon (1891) 4 Ind. App. 232, 30 N. E. 805; Smith v. Wickard (1908) 42 Ind. App. 508, 85 N. E. 1080; Singer Sewing Mach. Co. v. Phipps (1911) 49 Ind. App. 116, 94 N. E. 793.

Iowa.—Smith v. Milburn (1864) 17 Iowa, 30; Redfield v. Redfield (1888) 75 Iowa, 435, 39 N. W. 688; Stone v. Moore (1891) 88 Iowa, 186, 49 N. W. 76; Smith v. Dawley (1894) 92 Iowa, 312, 60 N. W. 625; McDonald v. Franchere Bros. (1897) 102 Iowa, 496, 71 N. W. 427; Keller v. Lewis (1902) 116 Iowa, 369, 89 N. W. 1102; Haupt v. Swenson (1904) 125 Iowa, 694, 101 N. W. 520; Luttermann v. Romey (1909) 143 Iowa, 233, 121 N. W. 1040; Moran v. Martinson (1914) 164 Iowa, 712, 146 N. W. 841.

Kansas.—Loneragan v. Small (1909) 81 Kan. 48, 25 L.R.A.(N.S.) 976, 105 Pac. 27.

Kentucky. — McGee v. Vanover (1912) 148 Ky. 787, 147 S. W. 742, Ann. Cas. 1913E, 500; Chesapeake & O. R. Co. v. Robinett (1913) 151 Ky. 778, 45 L.R.A.(N.S.) 432, 152 S. W. 976; Crosby v. Bradley (1890) 11 Ky. L. Rep. 954; Faulkner v. Davis (1897) 18 Ky. L. Rep. 1004, 38 S. W. 1049; Morgan v. O'Daniel (1899) 21 Ky. L. Rep. 1044, 53 S. W. 1040; Trimble v. Spiller (1828) 7 T. B. Mon. 395, 18 Am. Dec. 189.

Louisiana.—Deppeart v. Rombotis (1905) 115 La. 49, 38 So. 890; Parri-coni v. Greco (1905) 115 La. 558, 39 So. 599.

Maine.—Flint v. Bruce (1878) 68 Me. 183; Rogers v. Foote (1912) 109 Me. 564, 84 Atl. 643.

Maryland.—Thillman v. Neal (1898) 88 Md. 525, 42 Atl. 242.

Massachusetts.—Quigley v. Turner

(1889) 150 Mass. 108, 22 N. E. 586; *Miller v. Curtis* (1893) 158 Mass. 127, 35 Am. St. Rep. 469, 32 N. E. 1039; *Martin v. Golden* (1902) 180 Mass. 549, 62 N. E. 977.

Michigan.—*Everts v. Everts* (1855) 3 Mich. 580; *Zube v. Weber* (1887) 67 Mich. 52, 34 N. W. 264; *Frederickson v. Nelson* (1903) 135 Mich. 246, 97 N. W. 678; *Henderson v. Agon* (1907) 148 Mich. 252, 111 N. W. 778; *Gungrich v. Anderson* (1915) 189 Mich. 144, 155 N. W. 379.

Minnesota.—*Jacobs v. Hoover* (1864) 9 Minn. 204, Gil. 189; *Colvill v. Langdon* (1876) 22 Minn. 565; *Schuek v. Hagar* (1877) 24 Minn. 339; *Fredericksen v. Singer Mfg. Co.* (1888) 38 Minn. 356, 37 N. W. 453; *Mitchell v. Mitchell* (1895) 45 Minn. 50, 47 N. W. 308; *Austin v. Moffett* (1911) 113 Minn. 290, 129 N. W. 388; *Nikolay v. Orr*, post, 1048.

Missouri.—*Willi v. Lucas* (1892) 110 Mo. 219, 33 Am. St. Rep. 436, 19 S. W. 726; *Sloan v. Speaker* (1895) 63 Mo. App. 323; *Stuppy v. Hof* (1900) 82 Mo. App. 272; *Williams v. Williams* (1908) 132 Mo. App. 266, 111 S. W. 837; *Dix v. Martin* (1913) 171 Mo. App. 266, 157 S. W. 133.

Nebraska.—*Goracke v. Hintz* (1882) 13 Neb. 390, 14 N. W. 379; *Barr v. Post* (1898) 56 Neb. 698, 77 N. W. 123; *Kast v. Link* (1911) 90 Neb. 25, 132 N. W. 717.

New Hampshire.—*Wood v. Gale* (1839) 10 N. H. 247, 34 Am. Dec. 150; *Kendall v. Drake* (1893) 67 N. H. 592, 30 Atl. 524.

New Jersey.—*Slingerland v. Gillespie* (1900) 65 N. J. L. 92, 47 Atl. 47; *Moore v. Camden & T. R. Co.* (1907) 74 N. J. L. 498, 122 Am. St. Rep. 399, 65 Atl. 1021.

New York.—*Noonan v. Luther* (1912) 206 N. Y. 105, 41 L.R.A.(N.S.) 761, 99 N. E. 178, Ann. Cas. 1914A, 1038, reversing (1911) 142 App. Div. 922, 127 N. Y. Supp. 1184; *Faurie v. Lazelle* (1912) 205 N. Y. 526, 99 N. E. 80; *Andersen v. Schlesinger* (1896) 16 Misc. 535, 38 N. Y. Supp. 296; *Prince v. Ridge* (1900) 32 Misc. 666, 66 N. Y. Supp. 454; *Zwerling v. Annenberg* (1902) 38 Misc. 169, 77 N. Y. Supp. 275; *McKeon v. Taylor* (1911) 132 N.

Y. Supp. 445; *Smith v. Kahn* (1913) 141 N. Y. Supp. 520; *Galvin v. Starin* (1909) 132 App. Div. 577, 116 N. Y. Supp. 919; *Haulish v. Boller* (1902) 72 App. Div. 559, 75 N. Y. Supp. 992; *Maloney v. McAlpin* (1914) 147 N. Y. Supp. 453; *Uertz v. Singer Mfg. Co.* (1885) 35 Hun, 116; *Pillow v. Bushnell* (1849) 5 Barb. 156; *Gunn v. Fellows* (1886) 41 Hun, 257; *Fort v. Brown* (1866) 46 Barb. 366.

North Dakota.—*Selland v. Nelson* (1911) 22 N. D. 14, 132 N. W. 220.

Ohio.—*Stevenson v. Morris* (1881) 37 Ohio St. 10, 41 Am. Rep. 481; *Hendricks v. Fowler* (1898) 16 Ohio C. C. 597, 9 Ohio C. D. 209; *August v. Finnerty* (1908) 30 Ohio C. C. 330.

Oklahoma.—*Long v. McWilliams* (1902) 11 Okla. 562, 69 Pac. 882.

Oregon.—*Dornsife v. Ralston* (1910) 55 Or. 254, 97 Pac. 713, 106 Pac. 13; *Stark v. Epler* (1911) 59 Or. 262, 117 Pac. 276.

South Carolina.—*Chapman v. Hardy* (1807) 4 S. C. L. (2 Brev.) 170; *Elwell v. Bradham* (1843) 29 S. C. L. (2 Speers) 168; *Jones v. Parker* (1908) 81 S. C. 214, 62 S. E. 261.

South Dakota.—*Bartlett v. Bartlett* (1918) 40 S. D. 544, 168 N. W. 633.

Texas.—*Texas Coal & Fuel Co. v. Arenstein* (1900) 22 Tex. Civ. App. 441, 55 S. W. 127.

Vermont.—*Earl v. Tupper* (1873) 45 Vt. 275; *Newell v. Whitcher* (1880) 53 Vt. 589, 38 Am. Rep. 703; *Parker v. Coture* (1890) 63 Vt. 155, 25 Am. St. Rep. 750, 21 Atl. 494; *Parker v. Coture* (1891) 63 Vt. 449, 21 Atl. 1102; *McKinstry v. Collins* (1904) 76 Vt. 221, 56 Atl. 985; *Dubois v. Roby* (1911) 84 Vt. 465, 80 Atl. 150.

Washington.—*Hannan v. Gross* (1893) 5 Wash. 703, 32 Pac. 787; *Neilson v. Hovander* (1909) 56 Wash. 93, 105 Pac. 172, 21 Ann. Cas. 113; *Howell v. Winters* (1910) 58 Wash. 436, 108 Pac. 1077.

Wisconsin.—*Barnes v. Martin* (1862) 15 Wis. 240, 82 Am. Dec. 670; *Morely v. Dunbar* (1869) 24 Wis. 183; *Nichols v. Brabazon* (1896) 94 Wis. 549, 69 N. W. 842; *Bruske v. Neugent* (1903) 116 Wis. 488, 93 N. W. 454; *Raefeldt v. Koenig* (1913) 152 Wis. 459, L.R.A.1918E, 1052, 140 N. W. 56.

England.—*Forde v. Skinner* (1890) 4 Car. & P. 239; *Simpson v. Morris* (1818) 4 Taunt. 821, 128 Eng. Reprint, 555.

Canada.—*Hubert v. Payson* (1903) 36 N. S. 211.

In *Libby v. Berry* (1882) 74 Me. 286, 43 Am. Rep. 589, it was held, since a married woman could not maintain an action against her husband for an assault and battery, that where he is the principal in the assault upon her by compelling her to submit to an abortion, she cannot maintain an action for assault against the persons who actually performed the abortion. See note appended to *Johnson v. Johnson*, post, 1088. Compare with *Fitch v. Huff*, II. e, 3.

Before a charge of assault and battery upon a woman can be sustained, it must appear that defendant threatened plaintiff with violence, coupled with the intent and at least the apparent means of carrying the threat into execution. The mere locking of or obstructing a door opening into a room occupied by a woman is not an assault upon her. *Patterson v. Pillans* (1915) 43 App. D. C. 505. An assault and battery may be committed by spitting in a woman's face. *Draper v. Baker* (1884) 61 Wis. 450, 50 Am. Rep. 143, 21 N. W. 527. Throwing a quantity of water upon a woman constitutes an assault. *Simpson v. Morris* (1813) 4 Taunt. 821, 128 Eng. Reprint, 555. The act of poorhouse authorities in cutting off the hair of a female inmate constituted an assault, where the purpose was to take down her pride. *Forde v. Skinner* (1890) 4 Car. & P. (Eng.) 239.

Where a woman had peaceable possession of a receipt for money, the act of the defendant merely in snatching the paper from her constituted a technical assault, although no injury followed, and entitled plaintiff to some damage. *Dyk v. De Young* (1890) 133 Ill. 82, 24 N. E. 520.

In *Smith v. Kahn* (1913) 141 N. Y. Supp. 520, the defendant was held guilty of assault and battery where he induced plaintiff to put her hand through a window to receive money he was owing her, and then violently

pushed down the window upon her hand.

In *Henderson v. Agon* (1907) 148 Mich. 252, 111 N. W. 778, the defendant was a proprietor of a store. In the presence of others, he rudely and insolently laid his hands upon the plaintiff, one of his clerks, and led her to the basement of the store, and took from her money he found upon her person. This was held to constitute an assault upon her.

Of course, the act must be against the consent of the woman. For example, where a woman was being removed by her husband from the premises occupied by a religious society, and it was claimed that, at her request, members of this society rescued her from her husband, the court held that if the claim was established, it constituted a complete defense to an action by the husband to recover damages for the assault thus committed upon his wife. *Pillow v. Bushnell* (1849) 5 Barb. (N. Y.) 156.

b. Necessity of physical contact or injury.

1. In general—exciting fear in plaintiff.

To constitute an assault upon a female person, physical contact is unnecessary; neither is it necessary that there should be a physical injury inflicted. An injury through fright, the proximate cause of which is the unlawful act of the defendant, will render him liable for injuries to the plaintiff, attributable thereto. In this regard a distinction has been made between assaults and acts of negligence.

For example, in *Kline v. Kline* (1902) 158 Ind. 602, 58 L.R.A. 397, 64 N. E. 9, it is said that while the weight of authority supports the doctrine that there can be no recovery for mental suffering where there has been no physical injury in ordinary actions for mere negligence, yet that is not the law as applied to a wilful injury to another, although no physical injury is suffered.

As pointed out, by the great weight of authority actual physical injury to a woman is not essential to her right to recover substantial damages on the ground of an assault upon her, but

injuries due to fright caused by the assault may be recovered for, although no other physical injury is suffered. In this regard it is to be noted that, in a broad sense, injuries due to fright are physical injuries.

For example, in *Hickey v. Welch* (1901) 91 Mo. App. 4, the facts were that defendant entered upon the premises of the plaintiff and used toward her violent and threatening language, and pointed a pistol at her in a menacing way. He was held liable to the plaintiff for injury to her from fright which caused a nervous disorder. In considering the right to recover damages for fright without physical injury, the court said that "when a nervous disorder, acute or chronic, or an illness such as reputable physicians recognize as a genuine disease and can trace with reasonable certainty to its true cause, follows an unlawful act, no sound reason can be given why the party injured should not be compensated in damages, although there was no visible hurt at the time. Why should the fact that the sufferer was frightened cut him off from redress? Fright is itself a result of an agitation or shock to the nervous system, and when this shock is severe enough, it produces more than fright; namely, an impairment of health in some form or other, and more or less serious. All emotions are due to minute physical changes in the nervous system, and when the change resulting from the shock is extensive, it sometimes induces disease. The suffering thus occasioned is as much due to physical injury as that which results from an open wound on the surface of the body. If human bodies were composed only of bones, muscles, and viscera, or if suffering could only be caused by injuring those parts, the theory of this legal doctrine would be accurate; but it is matter of common knowledge that a person may be physically whole and uninjured, to all appearances, and still be a great sufferer from nervous afflictions. A physical injury is at the basis of this class of disorders as of all others, but is too obscure to be readily observed. False pathology and physiology seem to have led to appli-

cations of the rule in question which were extremely unjust. The ancient superstition which found the proximate cause of mental and nervous diseases in diabolical possession was scarcely more ridiculous than the theory that when an ailment of that kind follows a great fright, due to another's tortious act, the fright, and not the tort, is the proximate cause of the injury. Such diseases, like all others, have their origin in a physical lesion, not a metaphysical state."

On this point in *Loneragan v. Small* (1909) 81 Kan. 48, 25 L.R.A. (N.S.) 976, 105 Pac. 28, the court said: "There are well-recognized exceptions to the general rule making a contemporaneous bodily injury essential to a recovery of damages, and among them may be mentioned assault, illegal arrest, malicious prosecution, false imprisonment, and seduction. While there is some diversity of judicial opinion on some of the exceptions to the rule and the grounds on which they rest, there is general concurrence in the view that the rule has no application to wilful and wanton wrongs and those committed with the intention of causing mental distress and injured feelings." In the foregoing case, the defendant was held guilty of having committed an assault upon the plaintiff by seizing a box which the plaintiff held under her arm, and taking it from her possession, the box being the property of the plaintiff, and it was found as a fact by the jury that the plaintiff did not suffer any bodily injury from the assault, and that any mental suffering she may have endured was not due to any physical injury.

In *Cooper v. Hopkins* (1900) 70 N. H. 271, 48 Atl. 100, the defendant was held guilty of an assault upon the plaintiff, where the manager of his store, when she was in the store, touched her on the shoulder and asked her to come into another room, and, upon her failing to do so, accused her of larceny, and seized and searched her shopping bag in the presence of customers and clerks. The court held that it was proper to refuse to instruct the jury "that if no injury was done

to plaintiff's person by the assault, and she was not put in fear of such injury, she could not recover for injuries to her mind or feelings."

It constitutes an assault where the acts complained of amount to inchoate violence to the person of a female, with the intention on the part of the wrongdoer to do her harm, and with the present means of carrying such intention into effect. *Townsdin v. Nutt* (1877) 19 Kan. 282. Any unlawful invasion of a woman's right of personal security by any act of inchoate violence constitutes an actionable assault. *Kline v. Kline* (1902) 158 Ind. 602, 58 L.R.A. 397, 64 N. E. 9.

The following cases are illustrative of facts which may constitute an assault upon a female without coming in physical contact with her. For example, it constitutes an assault for a man to shake his fist in the face of a woman, and use toward her vile and opprobrious language (*Howell v. Winters* (1910) 58 Wash. 436, 108 Pac. 1077); or for a man to shake his fist in a woman's face and threaten to strike her (*Mitchell v. Mitchell* (1890) 45 Minn. 50, 47 N. W. 308). The act of defendant in attempting to ride down a woman while he was on his horse constitutes an unlawful assault, and where injury results to her therefrom, he is liable for the damage occasioned, although she does not suffer physical injury. *Townsdin v. Nutt* (1877) (Kan.) supra. So, where a man by threatening gestures indicates to a woman his intention to strike her, and uses toward her violent and threatening language, it constitutes an assault regardless of his actual intent, and the question of his actual intent should not be submitted to the jury. *Morgan v. O'Daniel* (1899) 21 Ky. L. Rep. 1044, 53 S. W. 1040. Threatening to throw a stick at a woman and assuming a threatening attitude, causing the woman to fall unconscious, constitute an assault. *Ibid.* In *Western U. Teleg. Co. v. Bowdoin* (1914) — Tex. Civ. App. —, 168 S. W. 1, the agent of the defendant made a gesture as if to strike plaintiff, who could have been hit if she had not stepped out of the way, and at the same time such agent,

a female, called the plaintiff poor white trash. It was held to constitute an unlawful assault. In *Kline v. Kline* (Ind.) supra, where the defendant threatened to burn the house over the head of the plaintiff, a married woman, and commenced to pour oil upon the siding for that purpose, and also threatened to shoot her, thereby causing her to flee from the house with her children, such conduct was held to be an unlawful assault.

In *Plonty v. Murphy* (1901) 82 Minn. 268, 84 N. W. 1005, the defendant unceremoniously entered the home of the plaintiff and demanded that she have her five-year-old boy remove some refuse from the defendant's yard, and informed her that if he found the child in his yard again he would thresh him. The defendant remained in the plaintiff's house about ten minutes, during which time he, in an angry and excited manner, shook his fist at the plaintiff within striking distance, and raised his hand as though he would strike her. She testified that she was afraid he would strike her. Under these circumstances he was held guilty of an assault.

In *Engle v. Simmons* (1906) 148 Ala. 92, 7 L.R.A. (N.S.) 96, 121 Am. St. Rep. 59, 41 So. 1023, 12 Ann. Cas. 740, it appeared that the defendant entered the dwelling house of the plaintiff when her husband was away, and refused to leave when requested to do so by the plaintiff. The defendant represented that he had a claim for collection against the husband, and persisted in interrogating the plaintiff, and in taking an inventory of the household goods. He also made threats greatly frightening the plaintiff, which resulted in her miscarriage. Although the defendant did not come into close contact with her, this conduct was held to render him liable.

In *Brownback v. Frailey* (1898) 78 Ill. App. 262, it is held that a married woman is entitled to recover in an action of tort for the unlawful act of the defendant in entering her home at night, when her husband was absent, and insisting that she secure payment of a claim due him by the husband, by conveying to him certain land she

owned. The defendant threatened her in a violent manner with legal proceedings which he claimed would result in the loss of her home if she did not comply with this request, thereby greatly frightening the plaintiff and causing her to suffer a miscarriage. In holding the defendant liable, the court distinguished *Phillips v. Dickerson* (1877) 85 Ill. 12, pointing out that the fright of the woman in that case was due to the assault upon others near her, but not in her presence, and it did not appear that defendant knew of her proximity to the quarrel.

Pointing a pistol at a woman within its range constitutes an assault. *Winston v. Terrace* (1914) 78 Wash. 146, 138 Pac. 673. In *Barbee v. Reese* (1883) 60 Miss. 906, it is held to constitute an assault for a drunken man to cross the street with a drawn pistol, enter the house of a woman, and curse and threaten to shoot her. The plaintiff, in her fright caused by the threatening conduct of the defendant, fled from her home, and, in undertaking to climb a fence, fell, causing a miscarriage. She was held entitled to recover substantial damages from the defendant. In *Casteel v. Brooks* (1915) 46 Okla. 189, 148 Pac. 158, it appeared that the plaintiff, together with her husband, managed a hotel. The plaintiff, hearing the report of the discharge of a firearm in an adjoining room, entered it to investigate, when she was met near the door by the defendant, who pointed his revolver at her and compelled her to return to her room, after which he returned to the room from which he had driven the plaintiff, and shot and killed a woman therein and also himself. His estate was held liable to the plaintiff for assault.

In *Wilkinson v. Downton* [1897] 2 Q. B. (Eng.) 57, the defendant, as a joke, falsely represented to a woman that her husband had met with an accident and broken both legs. The plaintiff, believing the statement, suffered a violent nervous shock which rendered her ill, and the defendant was held liable for the injury thus resulting. The court said: "I think,

however, that the verdict may be supported upon another ground. The defendant has, as I assume for the moment, wilfully done an act calculated to cause physical harm to the plaintiff,—that is to say, to infringe her legal right to personal safety, and has in fact thereby caused physical harm to her. That proposition, without more, appears to me to state a good cause of action, there being no justification alleged for the act. This wilful injuria is in law malicious, although no malicious purpose to cause the harm which was caused nor any motive of spite is imputed to the defendant. It remains to consider whether the assumptions involved in the proposition are made out. One question is whether the defendant's act was so plainly calculated to produce some effect of the kind which was produced that an intention to produce it ought to be imputed to the defendant, regard being had to the fact that the effect was produced on a person proved to be in an ordinary state of health and mind. I think that it was. It is difficult to imagine that such a statement, made suddenly and with apparent seriousness, could fail to produce grave effects under the circumstances upon any but an exceptionally indifferent person, and therefore an intention to produce such an effect must be imputed, and it is no answer in law to say that more harm was done than was anticipated, for that is commonly the case with all wrongs."

But it has been held that fright, unaccompanied by any immediate physical injury to a woman, cannot be made the basis for the recovery of damages for a result which could not be contemplated by the wrongdoer. *Nelson v. Crawford* (1899) 122 Mich. 466, 80 Am. St. Rep. 577, 81 N. W. 335. In the foregoing case, the defendant, in a spirit of fun, without intending any injury to the plaintiff, dressed in women's clothing and went to her residence. He made no demonstration and threatened no violence other than to tap the ground with his parasol. His dress and behavior, however, greatly frightened the plaintiff, and resulted

in her miscarriage, but he was held not guilty of an assault.

In *Braun v. Craven* (1898) 175 Ill. 401, 42 L.R.A. 199, 51 N. E. 657, 5 Am. Neg. Rep. 15, it is held that it did not constitute actionable negligence for a landlord suddenly to appear in the apartments of his tenant, at an open door of the bedroom in which the tenant, a woman, was packing her clothing, and forbid her to move, and threaten to call a constable, although the shock and fright seriously injured the plaintiff. It is to be noted that the liability of the defendant in this case was based on his alleged negligence, and not upon an assault upon the plaintiff. Cases of this character are not within the scope of the note. The foregoing case is referred to merely as illustrative of the class excluded.

More violent, threatening, or abusive language directed to a woman in talking to her over a telephone does not constitute an assault. *Kramer v. Ricksmeier* (1913) 159 Iowa, 48, 45 L.R.A.(N.S.) 928, 139 N. W. 1091. In the foregoing case the court said that the case cannot be maintained on the ground of the assault, for it is well settled that mere words, even at short range, do not constitute an assault. "The fact that the words were spoken over the telephone line would, of itself, quite negative the theory of assault. Regardless of particular theory, the court usually looks with some disfavor on this kind of an action because of the great uncertainty presented both as to cause and effect. Some courts, including our own, have gone further than others in sustaining a right of action for physical injuries resulting from fright alone when caused by the unlawful conduct of the defendant. These cases have usually involved acts of the defendants committed in the immediate presence of the plaintiff. In *Watson v. Dilts* (1902) 116 Iowa, 249, 57 L.R.A. 559, 93 Am. St. Rep. 239, 89 N. W. 1068, we held in favor of a right of action for physical injuries resulting from fright caused by the unlawful entry of the defendant into the home of the plaintiff in the nighttime, and by his unlawful conduct therein, whereby a

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plaintiff and members of her family were put in great peril of bodily injury. This wrongful conduct included an assault upon plaintiff's husband. Though the petition in the case before us charges that the conduct of the defendant was wilful, wanton, and malicious, it charges no act which was unlawful or wrongful in a legal sense. The defendant only talked with the plaintiff over the telephone, imparting to her truthful information in regard to the cattle, and complained thereof. He was clearly within his rights in so doing, unless it be that the condition of the plaintiff was so enfeebled that she could not endure such speech, and that the defendant knew it,—a point upon which we intimate no opinion."

And it has been held that merely by persuasion and flattery to induce a woman to submit to sexual intercourse with him does not constitute an assault upon the part of the man. *Prince v. Ridge* (1900) 32 Misc. 666, 66 N. Y. Supp. 454. And a man does not commit an assault upon a woman merely by soliciting sexual intercourse with her. *Davis v. Richardson* (1905) 76 Ark. 348, 89 S. W. 318; *Reed v. Maley* (1903) 115 Ky. 816, 62 L.R.A. 900, 74 S. W. 1079, 2 Ann. Cas. 453. See, however, cases cited *infra*, b, 4.

2. Putting plaintiff in fear of attack upon her chastity.

Even though a man does not come into physical contact with a woman, it has been held that he may be guilty of an assault and battery upon her, where, by his conduct, he places her in fear of an attack by him upon her chastity. Applying this principle, the head of the house was held guilty of an assault where he entered the chamber of a lady guest in the nighttime, while she was in bed, sat upon her bed, and, leaning over her person, made repeated and persistent solicitations for sexual intimacy, thereby alarming and putting her in fear and so outraging her feelings as to make her sick. The court said: "The approach to her person in the manner her testimony tends to prove, sitting on the bed and bedclothes that covered her person, and leaning over her with the proffer of criminal sexual intercourse,

so near as to excite the fear and apprehension of force in the execution of his felonious purpose, was an assault. The whole act and motive was unlawful, sinister, and wicked. The act of stealing stealthily into the bedroom of a virtuous woman at midnight to seek gratification of criminal lust is sufficiently dishonorable and base in purpose and in act; but especially so when the intended victim is a poor blind girl, under the protecting care of the very man who would violate every injunction of hospitality, that he might dishonor and ruin, at his own hearthstone, this unfortunate child, who had the right to appeal to him to defend her from such outrage." *Newell v. Whitcher* (1880) 53 Vt. 589, 38 Am. Rep. 703.

A very similar case in which the same result was reached is *McGlone v. Hauger* (1913) 56 Ind. App. 243, 104 N. E. 116. In this case the defendant was held guilty of an assault where he entered his housekeeper's chamber, attired only in a shirt, after she had retired at night, and called to her and remained in the room after she had ordered him to leave, and until she had escaped through a window. The court instructed the jury that the defendant was guilty of an assault if he "went into plaintiff's bedroom without the consent of plaintiff, and against her will, with intent to assault her, and that plaintiff ordered defendant to leave said room, and that defendant did not do so, and did not offer any explanation for his presence in said room, and while defendant was in said room, plaintiff became frightened and went over the foot of her bed and attempted to get out of the door of said room, and that defendant was between the plaintiff and the door, and that plaintiff then went out of said room through a window, and went half a mile to the house of defendant's daughter, where she stayed all night, and as a result of the foregoing facts she suffered physical and mental pain, then you shall find for plaintiff if you also find, from a preponderance of the evidence, that the plaintiff believed and had reasonable grounds to believe

that defendant intended to use force upon her then and there."

In *Leach v. Leach* (1895) 11 Tex. Civ. App. 699, 33 S. W. 703, involving an attempt to secure carnal intercourse with plaintiff, it is said that a wilful violator of woman's most sacred right of personal security, though her body be not touched except by his foul breath and speech, should respond in damages for an outrage to her feelings which proceeds so directly from his concurrent criminal purpose and act.

In *Reed v. Maley* (1903) 115 Ky. 816, 62 L.R.A. 900, 74 S. W. 1079, 2 Ann. Cas. 453, the facts were that a woman was sitting near a window in her house, and the defendant came up near to the window and solicited sexual intercourse with her. This was held not to constitute an assault, although the result was greatly to excite her, there being no averment that the defendant entered her house, or was in reach of her so as to put her in fear.

3. *Exposure of person to plaintiff.*

An invasion of a woman's right to absolute security against violence to her person is unlawful; hence, if a man exposes his person to her in such a manner as to indicate a purpose to violate her person, and justly to put her in fear that he will do so, he is guilty of an actionable assault upon her. *Parker v. Couture* (1891) 63 Vt. 449, 21 Atl. 1102. In *Alexander v. Blodgett* (1872) 44 Vt. 476, it is held that where a man exposes his person, and in this condition approaches near enough to a woman to indicate his intention to violate her person, he is guilty of an assault, although he does not actually touch her.

4. *Improper familiarities.*

It is clear that where the defendant comes into physical contact with the plaintiff by taking improper familiarities with her against her consent, he is guilty of an assault and battery upon her although she suffers no physical injury therefrom. The injury resulting from fear, shame, humiliation, etc., is sufficient to entitle the plaintiff to recover substantial damages for the assault.

For example, improper familiarities

with the person of the plaintiff for the purpose of inducing her to submit to the sexual embraces of the defendant constitute an assault and battery. *Luttermann v. Romey* (1909) 143 Iowa, 233, 121 N. W. 1040. So, a defendant is guilty of assault and battery where he enters the home of a married woman and makes improper proposals to her, and, upon her resenting it and undertaking to leave the room, he grasps her by the arm and requests her to remain, and tries to force her to sit down. *Kepler v. Hyer* (1874) 48 Ind. 499. In *Hatchett v. Blacketer* (1915) 162 Ky. 266, 172 S. W. 533, it was held to constitute an assault and battery for the defendant to place his hand upon a woman's face and let it fall to her breast, and squeeze her breast. While the case is not in point as to the facts, in *Union P. R. Co. v. Botsford* (1891) 141 U. S. 250, 35 L. ed. 734, 11 Sup. Ct. Rep. 1000, Mr. Justice Gray thus states the rule: "To compel anyone, and especially a woman, to lay bare the body, or to submit it to the touch of a stranger, without lawful authority, is an indignity, an assault, and a trespass." So, it constitutes an assault and battery for a man to draw a woman into a position to be kissed, where she does not consent thereto. *Van Voorhis v. Hawes* (1855) 12 How. Pr. (N. Y.) 406. And the act of the defendant in seizing the plaintiff in his arms and kissing her, and soliciting sexual favors, constitutes an assault and battery. *Barton v. Bruley* (1903) 119 Wis. 326, 96 N. W. 815.

So, undue, improper, or indecent familiarities with a woman's person may constitute an assault and battery, where she elects to limit the offense in this regard, and in such case improper or lascivious conduct of the defendant may be relied upon to aggravate the damages. Thus, in a civil action for assault and battery accompanied with ravishment, the latter act does not change the nature of the action, but the ravishment is only a matter of aggravation, bearing on the measure of damages. *Totten v. Totten* (1912) 172 Mich. 565, 138 N. W. 257. It has been held that the intent of the

defendant to have sexual intercourse with the plaintiff is not an essential element of assault and battery. If, against her will and consent, he subjected her to violent and lustful contact, he is guilty of assault and battery, for which she may recover damages. *Booher v. Trainer* (1913) 172 Mo. App. 376, 157 S. W. 848. But it has been held that an assault accompanied by ravishment is not an assault and battery within the Statute of Limitations restricting the time for which an assault and battery may be brought. *Kramer v. Weigand* (1912) 91 Neb. 47, 185 N. W. 230.

5. Assault upon or by others.

It has been held that an assault upon the husband in the presence of his wife, by pointing a gun at him and threatening to shoot him, cursing him, and using toward him vile language, also constitutes an assault upon the wife, entitling her to recover damages for the assault, including fright. *Jeppsen v. Jensen* (1916) 47 Utah, 536, L.R.A.1916D, 614, 155 Pac. 429.

In *Jeppsen v. Jensen* (Utah) *supra*, the court based its holding of liability of the defendant upon the ground that his acts were wanton and wilful, and it is said that the question whether or not they were is largely, if not entirely, a question for the jury. The court remarked: "Can we, can any court, say as a matter of law that the threats, acts, and conduct, say nothing of the grossly vulgar and abusive language used by the defendant, as shown by plaintiff's evidence, were not wilful nor wanton? Can we say as a matter of law that to threaten to shoot another with a revolver which the threatener then and there holds in his hands is not a wilful nor a wanton act? Such acts in law constitute an assault. It might just as well be contended that the court can say as a matter of law that any assault with any weapon is not wilful nor wanton. Indeed, a jury, under certain circumstances, might find such acts to have been so wanton and cruel as to call for punitive, as well as actual, damages, as is pointed out in some of the cases before referred to. We do not mean to be understood as

expressing an opinion, or even as intimidating, that the acts alleged in the complaint are necessarily such as a matter of fact, but what we mean, and now hold, is that he cannot say, as a matter of law, that the acts complained of were neither wilful nor wanton. *Prima facie*, the acts complained of and testified to constituted an unlawful assault. We must assume that the defendant intended just what it is said he did. We are not permitted to minimize nor to magnify his acts and conduct. His counsel contend that he went to plaintiff's home for a lawful purpose, and that he was rightfully there. Let this be conceded. That, however, gave him no right to commit an unlawful act after he had arrived there. Suppose one goes to his neighbor upon a mission of mercy, but before he leaves the premises he commits an assault. Is he any the less culpable or responsible for his conduct? We are of the opinion, therefore, that the acts described in the complaint are such as bring this case clearly within the rule that damages may be recovered for injuries to health or for shock to the nervous system, although caused by terror or fright alone, and where there was no actual bodily injury inflicted upon the injured person and none such intended by the wrongdoer. Such acts cannot be considered as merely ordinary negligent acts, for which no recovery from fright alone is, as a general rule, permitted."

In *Watson v. Dils* (1902) 116 Iowa, 249, 57 L.R.A. 559, 93 Am. St. Rep. 239, 89 N. W. 1068, the defendant entered the home of the plaintiff and her husband, and when the latter undertook to compel his removal, he resisted and engaged the husband in combat. Under these circumstances, he was held liable for injury to the wife by the fright thus occasioned her.

But in *McGee v. Vanover* (1912) 148 Ky. 737, 147 S. W. 742, Ann. Cas. 1913E, 500, the facts were that the defendant, in attempting an assault upon the husband of the plaintiff, shoved the plaintiff out of his way, and he was held guilty of an assault upon her, even though he intended to

injury to her. Another man engaging with him in the assault, however, but who did not come in physical contact with the plaintiff, was held not guilty, since the mere fright of the plaintiff, due to the assault and battery upon her husband, did not render the assaulting party guilty of an assault upon her.

In *Reed v. Ford* (1908) 129 Ky. 471, 19 L.R.A. (N.S.) 225, 112 S. W. 600, it was held not to constitute an assault upon the plaintiff for the defendant, in an intoxicated condition, to enter that portion of the plaintiff's house occupied by another, and use toward such person vile and abusive language, and threaten to take his life, the result being greatly to alarm and frighten plaintiff and shock her to the extent that she was threatened with a miscarriage, it not appearing that the defendant knew of the presence of the plaintiff in the house, or of her physical condition.

Upon this point see *Renner v. Canfield* (1886) 36 Minn. 90, 1 Am. St. Rep. 654, 30 N. W. 435, which holds that defendant is not liable in an action of tort for injuries resulting to a woman through fright caused by his shooting a dog upon her premises, and in her sight and hearing. The action, however, was not on the theory of assault and battery upon the plaintiff.

In *Chesapeake & O. R. Co. v. Robi-*
nett (1913) 151 Ky. 778, 45 L.R.A. (N.S.) 433, 152 S. W. 976, it was claimed that where a trainman unjustifiably assaulted the plaintiff's father while she occupied a seat with him as a passenger, causing his body to strike the plaintiff, the defendant carrier was guilty of an assault upon her. It was pointed out, however, that it would not constitute an assault if the father unjustifiably resisted the trainman, and in making such resistance caused his body to strike the plaintiff.

In *Hartwig v. Kell* (1917) 199 Mich. 603, 165 N. W. 693, the defendant was held liable for an assault upon and ravishment of a female upon the ground that he might be found guilty under the evidence either of an assault upon or ravishment of the plaintiff

himself or for aiding or encouraging another man to commit such acts.

II. Justification.

a. In general.

An assault and battery upon a woman is shown if the act occasioning the injury is unlawful; that is, if it cannot be justified. In such case, the intent of the wrongdoer is immaterial; but where the party inflicting the injury is not a wrongdoer, and is doing an act not unlawful, and injury results to another, then he is not liable unless he acts maliciously. So, where the act of the defendant is lawful, unless he uses greater force and violence than are justifiable under the circumstances, or is reckless or negligent in his conduct, by reason whereof the woman is injured, the defendant is not liable. In other words, where an assault and battery are shown to have been committed by the defendant upon the plaintiff, the latter is entitled to recover therefor unless the defendant is able to justify the act by showing that he acted in self-defense, or in the protection of his person or property, or that he was exercising some other lawful right, and that he used no more force than was reasonably necessary under the circumstances. As heretofore pointed out, while the general rule of justification is common alike to assaults upon either sex, the application of the rule differs to the extent, at least, that the use of excessive force defeats the plea of justification, and force which would be excessive if used toward a woman might not be excessive if used toward a man; or the manner of handling a woman might constitute excessive force where it would not if the assailed party were a man. The following cases support the rule that excessive or improper force employed toward a woman will constitute an assault and battery upon her even though the act would have been lawful if excessive or improper force had not been used:

United States. — *Fitch v. Huff* (1914) 184 C. C. A. 31, 218 Fed. 17.

Alabama.—*Marbury Lumber Co. v. Wainwright* (1907) 150 Ala. 405, 43 So. 733; *Hardeman v. Williams* (1907)

180 Ala. 415, 10 L.R.A.(N.S.) 653, 43 So. 726; *Miller v. McGuire* (1918) — Ala. —, 80 So. 433; *Singer Sewing Mach. Co. v. Methvin* (1913) 184 Ala. 554, 63 So. 997.

Arizona.—*Hageman v. Vanderdoes* (1914) 15 Ariz. 312, L.R.A.1915A, 491, 138 Pac. 1053, Ann. Cas. 1915D, 1197, California.—*Riffel v. Letts* (1916) 31 Cal. App. 426, 160 Pac. 845; *McLean v. Colf* (1918) — Cal. —, 176 Pac. 169. **Delaware.**—*Thomas v. Black* (1889) 8 Houst. 507, 18 Atl. 771.

District of Columbia.—*Hubbard v. Perlle* (1905) 25 App. D. C. 477; *Patterson v. Pillans* (1915) 43 App. D. C. 505.

Georgia.—*Suggs v. Anderson* (1853) 12 Ga. 461; *Hammond v. Hightower* (1888) 82 Ga. 290, 9 S. E. 1101.

Illinois.—*Smith v. Slocum* (1872) 62 Ill. 354; *Jones v. Jones* (1874) 71 Ill. 562; *Dyk v. De Young* (1890) 133 Ill. 82, 24 N. E. 520; *Hitzelberger v. Kanter* (1913) 181 Ill. App. 459.

Indiana.—*Treschman v. Treschman* (1905) 28 Ind. App. 206, 61 N. E. 961; *Smith v. Wickard* (1908) 42 Ind. App. 508, 85 N. E. 1030; *Singer Sewing Mach. Co. v. Phipps* (1911) 49 Ind. App. 116, 94 N. E. 793.

Iowa.—*Redfield v. Redfield* (1888) 75 Iowa, 435, 39 N. W. 638; *Keller v. Lewis* (1902) 116 Iowa, 369, 89 N. W. 1102; *Biggs v. Seufferlein* (1914) 164 Iowa, 241, L.R.A.1915F, 673, 145 N. W. 507; *Moran v. Martinson* (1914) 164 Iowa, 712, 146 N. W. 841.

Kentucky.—*Wood v. Young* (1899) 20 Ky. L. Rep. 1931, 50 S. W. 541; *Thornton v. Taylor* (1899) 21 Ky. L. Rep. 1082, 54 S. W. 16.

Louisiana.—*McDermott v. American Brewing Co.* (1901) 105 La. 124, 52 L.R.A. 684, 83 Am. St. Rep. 225, 29 So. 498.

Maine.—*Flint v. Bruce* (1878) 68 Me. 183.

Maryland. — *Steinman v. Baltimore Antiseptic Steam Laundry Co.* (1908) 109 Md. 62, 21 L.R.A.(N.S.) 884, 71 Atl. 517.

Massachusetts. — *Meador v. Stone* (1843) 7 Met. 147; *Levi v. Brooks* (1877) 121 Mass. 501; *Drury v. Hervey* (1879) 126 Mass. 519.

Michigan.—*Taylor v. Adams* (1885)

58 Mich. 187, 24 N. W. 864; Drinkhorn v. Bubel (1891) 85 Mich. 532, 48 N. W. 710; Gungrich v. Anderson (1915) 189 Mich. 144, 155 N. W. 379.

Minnesota. — Jacobs v. Hoover (1864) 9 Minn. 204, Gil. 189; Fredericksen v. Singer Mfg. Co. (1888) 38 Minn. 356, 37 N. W. 453; Souther v. Northwestern Teleph. Exch. Co. (1912) 118 Minn. 102, 45 L.R.A.(N.S.) 601, 136 N. W. 571, Ann. Cas. 1913E, 472.

Mississippi. — Fortinberry v. Holmes (1906) 89 Miss. 373, 42 So. 799.

Nebraska. — Clasen v. Pruhs (1903) 69 Neb. 278, 95 N. W. 640, 5 Ann. Cas. 112.

New Hampshire. — Wood v. Gale (1839) 10 N. H. 247, 34 Am. Dec. 150; Sterling v. Warden (1871) 51 N. H. 217, 12 Am. Rep. 80.

New Jersey. — Slingerland v. Gillespie (1904) 70 N. J. L. 720, 59 Atl. 162, 1 Ann. Cas. 886; Moore v. Camden & T. R. Co. (1907) 74 N. J. L. 498, 122 Am. St. Rep. 399, 65 Atl. 1021.

New York. — Noonan v. Luther (1912) 206 N. Y. 105, 41 L.R.A.(N.S.) 761, 99 N. E. 178, Ann. Cas. 1914A, 1038, reversing (1911) 142 App. Div. 922, 127 N. Y. Supp. 1134; McGrath v. Michaels (1903) 80 App. Div. 458, 81 N. Y. Supp. 109; O'Connell v. Samuel (1894) 81 Hun, 357, 30 N. Y. Supp. 889; Feneran v. Singer Mfg. Co. (1897) 20 App. Div. 574, 47 N. Y. Supp. 284; Peddie v. Gally (1905) 109 App. Div. 178, 95 N. Y. Supp. 652; Regg v. Buckley-Newhall Co. (1911) 72 Misc. 387, 130 N. Y. Supp. 172; McKeon v. Taylor (1911) 132 N. Y. Supp. 445; Makuc v. Majestic Hotel Co. (1917) 165 N. Y. Supp. 232; Maloney v. McAlpin (1914) 147 N. Y. Supp. 453.

Oklahoma. — Weatherly v. Manatt (1919) — Okla. —, 179 Pac. 470.

South Carolina. — Pagan v. Drake Furniture Co. (1905) 78 S. C. 364, 53 S. E. 542.

Washington. — Neilsen v. Hovander (1909) 56 Wash. 93, 105 Pac. 172, 21 Ann. Cas. 113; Geissler v. Geissler (1917) 96 Wash. 150, 164 Pac. 746, 166 Pac. 1119.

West Virginia. — Stevens v. Friedman (1905) 58 W. Va. 78, 51 S. E. 132.

Wisconsin. — Barnes v. Martin

(1862) 15 Wis. 240, 82 Am. Dec. 670; Morely v. Dunbar (1869) 24 Wis. 183; Raefeldt v. Koenig (1913) 152 Wis. 459, L.R.A.1918E, 1052, 140 N. W. 56; Gerstein v. Adams Co. (1919) — Wis. —, 173 N. W. 209.

England. — Gregory v. Hill (1799) 8 T. R. 299, 101 Eng. Reprint, 1400.

Canada. — Hubert v. Payson (1903) 36 N. S. 211.

Questions of justification have been subdivided according to the particular matter relied upon by the defendant as a defense to the action against him to recover damages for an assault upon a female person.

b. Self-defense.

Where a woman aggressively attacked defendant, and the latter only repelled the attack, he is not guilty of assault and battery unless he used excessive force. Drinkhorn v. Bubel (1891) 85 Mich. 532, 48 N. W. 710; Sterling v. Warden (1871) 51 N. H. 217, 12 Am. Rep. 80; Barnes v. Martin (1862) 15 Wis. 240, 82 Am. Dec. 670. But the fact that a small woman struck a large man does not justify him in brutally beating her. Smith v. Wickard (1908) 42 Ind. App. 508, 85 N. E. 1030. And an assault upon the plaintiff, made when she came to the rescue of her father when he was being assaulted by the defendant, constitutes an unlawful assault and battery. Flint v. Bruce (1878) 68 Me. 183. So, in Hollingshead v. Watkins (1919) — Iowa, —, 173 N. W. 4, the defendant was held guilty of assault and battery upon a woman, where he struck her in the mouth when she took hold of him and implored him to save the life of her husband, whom he at the time was holding down and severely beating.

In Thornton v. Taylor (1899) 21 Ky. L. Rep. 1082, 54 S. W. 16, it appeared that the defendant was attacked by several men and women, including the plaintiff, and, in defending himself, he slapped the plaintiff. It was held that the question to be submitted to the jury was whether or not, in the exercise of a reasonable discretion, in view of the number attacking him, he used undue and unnecessary violence in resisting the assault; and that it was error to instruct the jury to the

effect that the question was whether he used undue and unnecessary violence to repel the attack of the plaintiff.

In *Moran v. Martinson* (1914) 164 Iowa, 712, 146 N. W. 841, where the plaintiff was trespassing upon property of the defendant, and, upon his remonstrating with her, she pointed a loaded revolver at him, it was held that, as a matter of self-defense, he might use such force to disarm the plaintiff as at that time appeared to him to be reasonably necessary.

c. Defense of property.

Where a trespass is defended by the owner of premises, and the battery is committed upon her while she is making such defense, an assault is committed, and the employer is liable therefor if the assault is committed by his servant while acting within the scope of his employment. *Moore v. Camden & T. R. Co.* (1907) 74 N. J. L. 498, 122 Am. St. Rep. 399, 65 Atl. 1021. To the same effect, where the plaintiff was the wife of the owner, is *Souther v. Northwestern Teleph. Exch. Co.* (1912) 118 Minn. 102, 45 L.R.A. (N.S.) 601, 136 N. W. 571, Ann. Cas. 1913E, 472.

In *Slingerland v. Gillespie* (1904) 70 N. J. L. 720, 59 Atl. 162, 1 Ann. Cas. 886, a daughter was left in charge of property, with directions to protect it and resist any attempts to enter thereon, either upon the right of way or otherwise, except by persons who should show to her the proper authority to do so; in attempting to prevent the servants of a water company from laying a pipe through the land, the plaintiff was injured when the servants of such company rolled a large pipe against her. In reversing a judgment for the defendants, the court said that the plaintiff was justified, under her authority, in resisting the defendants or their servants in any attempt to enter upon the land of her father outside the right of way, no matter what her motive in so doing may have been. The defendants had no right to enter upon the Slingerland land outside the right of way, for the purpose of moving the pipes upon the

right of way. It would have been a trespass upon the land of Slingerland to have broken down a fence on his land adjacent to the right of way, while moving the pipes into position on the right of way, for which he could have recovered nominal damages at least. If the daughter was authorized to resist the defendants if they came upon the land of her father, she could use all the force necessary in so doing; and if, in exercising this lawful right, she was injured by the defendants while they were moving the pipes off the land of her father, and while she was where she had a lawful right to be, the defendant must answer for the damages.

d. Provocation.

A man is not justified in committing an assault and battery upon a woman because she called him a liar. *Gungrich v. Anderson* (1915) 189 Mich. 144, 155 N. W. 379. And the fact that the plaintiff was using towards the defendant's wife uncivil language will not justify him in using violence towards her. *Hubbard v. Perlie* (1905) 25 App. D. C. 477. Nor is a man justified in using violence toward a woman, although she has been talking about him and his wife. *Suggs v. Anderson* (1853) 12 Ga. 461.

An assault or injury to a woman cannot be justified or the damages arising therefrom in any degree mitigated by proof of the previous misconduct of her husband, although he joined with the wife in an action to recover damages for an assault and battery upon her. *Jacobs v. Hoover* (1864) 9 Minn. 204, Gil. 189.

e. Ejecting plaintiff.

1. In general.

While the same rules as to the right to eject a trespasser apply without reference to the sex of the trespasser, nevertheless, as heretofore pointed out, when it comes to the question of the use of force, the force employed in ejecting a female person cannot be measured by the force which might be employed in removing a male. In other words, in forcibly removing a woman, due regard must be had for her sex, under penalty of having the

force employed construed to be excessive.

The general rule, of course, applies to women, that it constitutes an assault and battery forcibly to remove a woman from the premises of another, even though she is there without authority or right, without first requesting her to leave, and giving her a reasonable opportunity in which to take her departure. *Miller v. McGuire* (1918) — Ala. —, 80 So. 433; *Makuc v. Majestic Hotel Co.* (1917) 165 N. Y. Supp. 232; *Austin v. Metropolitan L. Ins. Co.* post, 1061.

In *Miller v. McGuire* (Ala.) supra, plaintiff entered a place of amusement after she had been forbidden to come there by the defendant, the proprietor; according to her claim, the proprietor, without requesting her to leave, forcibly ejected her from the premises. It was held that if the plaintiff's claim was true, the defendant was liable for assault and battery, since it was his duty to at first request the plaintiff to leave, and give her a reasonable opportunity to do so before he would be entitled to resort to force.

In *Jones v. Jones* (1874) 71 Ill. 562, it is held that the owner of property has the right to use all necessary and reasonable force to remove a woman who refuses to leave after he has requested her to do so, but he has no right to use more force than is necessary to effect that end. For example, beating and kicking a woman as she was leaving the defendant's premises, after he had ordered her therefrom, constitutes an assault and battery. *Morely v. Dunbar* (1869) 24 Wis. 183.

In *Gregory v. Hill* (1799) 8 T. R. 299, 101 Eng. Reprint, 1400, the plaintiff sought to recover damage from the defendant for an assault and battery committed by him upon the wife of the plaintiff by kicking and beating her and knocking her down. The defendant pleaded in defense that the plaintiff's wife came upon the defendant's premises and created a disturbance and refused to leave when requested to do so, and the assault complained of was committed in removing the plaintiff's wife from the defendant's premises. The plaintiff's demurrer to this

plea on the ground that it did not set up facts constituting a defense was sustained. The court said that though a plea *molliter manus impositus* would justify what the law considers as an assault such as might have been necessary to put the party out of the house, without outrage and violence, yet it never was considered as any answer to a charge such as that contained in the declaration, of beating, wounding, and knocking the party down.

In *Taylor v. Adams* (1885) 58 Mich. 187, 24 N. W. 864, the facts were that defendant was the owner of premises which he had purchased under foreclosure proceedings, and had leased the same. At the time in question they were temporarily vacant when the plaintiff, who had lost the premises under foreclosure proceedings, moved into the house and refused to leave when requested to do so by defendant, and she said that she would not be carried out save as a corpse. Under these circumstances the defendant was held entitled to use force to remove her, exercising, however, reasonable care and prudence, and he was not liable for incidental injuries to plaintiff in removing her, or for injuries occasioned by the plaintiff's persistence in the wrongful course she was pursuing, or by fighting against removal.

In *Hammond v. Hightower* (1888) 82 Ga. 290, 9 S. E. 1101, the judgment for the defendant was affirmed in an action by a woman to recover damages for an assault and battery upon her by the owner of premises upon whom she had called to collect money due her. The defense was that the plaintiff refused to leave the premises, and that the defendant used only such force as was necessary to remove her.

In *Thomas v. Black* (1889) 8 Houst. (Del.) 507, 18 Atl. 771, it appeared that the plaintiff was the former owner of premises, and refused to leave after foreclosure proceedings had resulted in title to another. The subsequent owner was held not liable for assault and battery in removing her from the premises, unless he used excess force, or acted maliciously for the purpose of injuring her.

In *Wood v. Gale* (1889) 10 N. H. 247, 34 Am. Dec. 150, it appeared that a guardian forcibly removed from the house of his ward a female of bad reputation, she having refused to leave after the guardian had requested her to do so and had given her a reasonable time in which to take her departure. The guardian was held not liable for assault and battery if, in effecting her removal, and in the distance he removed her from the premises, he used no more force, and removed her no further, than was necessary to keep her away from his ward.

3. Where plaintiff was servant of defendant.

Where a servant employed upon the master's premises has been discharged and is requested to vacate the premises, after a lapse of a reasonable time for the servant to comply, the master is entitled to use necessary force to enforce compliance; and this is true although the servant is a woman. The manner of removing a man servant, or the force employed, is not, however, necessarily or even usually the test, as applied to a woman servant. In this regard the intent of the master in the use of force has been held to be a material matter of inquiry.

In *Noonan v. Luther* (1912) 206 N. Y. 105, 41 L.R.A.(N.S.) 761, 99 N. E. 178, Ann. Cas. 1914A, 1038, reversing (1911) 142 App. Div. 922, 127 N. Y. Supp. 1134, it is held that where the owner of premises undertook to remove a female servant therefrom after he had discharged her and given her a reasonable time in which to leave, the question of intent in using such force as is necessary under such circumstances is a material subject of inquiry. The court said: "The question of the defendant's intent was of vital importance, not on the amount of damages alone, but on the plaintiff's right of action. Defendant had the right to withdraw the license to the plaintiff to remain on his premises, and if, after having afforded her a reasonable opportunity to leave, or while she was behaving in a disorderly manner, she refused to go, he had the right to use reasonable force to eject her. He could use that force only for one pur-

pose, and that was to remove her from the premises. However violent her conduct may have been, he could not inflict violence to her person for punishment or through passion, but simply for the purpose of removing her. Therefore, his intent in using force, which he conceded he used to some extent, was the first thing for him to establish in order to justify what would otherwise have been an assault. True, his testimony on the subject would not have been conclusive, but it was competent."

In *Gungrich v. Anderson* (1915) 189 Mich. 144, 155 N. W. 379, it was held not to be a justification for an assault upon domestic help, that the employer undertook to eject her from his residence after having discharged her, but before he had given her a reasonable time in which to leave.

In *Makuc v. Majestic Hotel Co.* (1917) 165 N. Y. Supp. 232, it is held not to constitute assault and battery for a mistress occupying an apartment in a hotel to authorize the management to use necessary force to remove a female servant from her premises after she has been requested to leave and has refused to do so, although excessive force is actually used. In this case, however, the proprietor of the house was held liable on the ground that his servants used excessive force.

In *Maloney v. McAlpin* (1914) 147 N. Y. Supp. 453, it is held that a discharged servant is a trespasser where she remains upon the premises more than a reasonable time after the employer had requested her to leave, and upon her refusal to leave, the employer may use such reasonable force as may be necessary to remove her without thereby rendering himself liable for assault and battery. In this case the mistress took the plaintiff by the arm and shook her, according to plaintiff's claim. The defendant claimed she merely took the plaintiff by the arm in an endeavor to induce her to be carried to the station by the defendant's automobile. The question as to whether an assault and battery was committed was held to be for the jury.

In *Patterson v. Pillans* (1915) 43

App. D. C. 505, it appeared that the plaintiff was a servant of the defendant, and upon finding the apartments occupied by them locked upon her returning in the evening, arranged with the clerk to unlock the same, so that she could enter. In the morning she found that in the meantime the defendant had locked her in and taken the key from the door, and upon her requesting the defendant to unlock the door in order that she might go to breakfast, the defendant, some time after the request, unlocked it and permitted the plaintiff to leave the apartment. This conduct was held not to constitute an assault.

In *Hageman v. Vanderdoes* (1914) 15 Ariz. 312, L.R.A.1915A, 491, 138 Pac. 1053, Ann. Cas. 1915D, 1197, a wife was held liable for damages for assaulting a woman employed by her husband, the wife undertaking to eject the employee from her husband's place of business on the ground that she was alienating the affections of her husband. The question of excess force was apparently not an issue in the case.

3. Where plaintiff was tenant of defendant or guest of tenant.

Violence toward a woman in the peaceable possession of land, to remove her therefrom, constitutes an assault without reference to her title. *Neilsen v. Hovander* (1909) 56 Wash. 93, 105 Pac. 172, 21 Ann. Cas. 113. Inducing a feeble old woman to leave her house, and then locking her out and forcibly preventing her re-entry, constitutes an assault and battery. *Jacobs v. Hoover* (1864) 9 Minn. 204, Gil. 189. In *Wood v. Young* (1899) 20 Ky. L. Rep. 1931, 50 S. W. 541, it was held that the defendant was guilty of assault and trespass, where he went upon the premises of his tenant, removed most of the furniture from the house, and attempted to smoke out the plaintiff while she was lying sick in bed, by removing a lid from the stove, and pouring water upon the fire, and closing and locking the doors of the house.

In *Fitch v. Huff* (1914) 134 C. C. A. 31, 218 Fed. 17, a married woman was held entitled to recover damages for

an assault upon her by several persons, including the landlord of apartments rented to her husband. The facts were that the husband and wife were living apart and divorce proceedings were pending between them. The wife went to the husband's apartments, and after the husband requested her to leave, she disrobed and occupied his bed. The defendants, including the landlord, in attempting to remove the plaintiff while in bed, slapped and beat her and exposed her to observation while in a naked condition. The husband was present, aiding the assault, but he was not made a party to the action. Compare with *Libby v. Berry*, I. a.

In *Suggs v. Anderson* (1853) 12 Ga. 461, the landlord was held guilty of assault and battery for forcibly removing the guest of a tenant from the premises occupied by the tenant.

In *Redfield v. Redfield* (1888) 75 Iowa, 435, 39 N. W. 688, a landlord was held liable for an assault and battery committed in attempting forcibly to remove from the leased premises the wife of his tenant, without giving her a reasonable opportunity to quit the premises after notice.

In *Weatherly v. Manatt* (1919) — Okla. —, 179 Pac. 470, it is held that as to a tenant in possession of land, the landlord, having no right to eject her without process of law, is guilty of assault and battery, where he resorts to violence in attempting to eject her.

But in *Meador v. Stone* (1843) 7 Met. (Mass.) 147, where it appeared that the landlord entered the leasehold premises after default by the tenant and notice to quit, and removed the windows from the room in which the wife of the tenant lay sick in bed, this was held not to constitute an assault upon her, where it did not appear that the landlord knew that she was in the room, and there was no evidence of any force, threat, or demonstration of force.

In *McKeon v. Taylor* (1911) 132 N. Y. Supp. 445, the plaintiff refused to leave the room of a guest at a hotel, until the guest had paid her what she owed her. Under such circumstances

the hotel clerk was held justified in removing the plaintiff from the room, provided he used no more force than was necessary for that purpose.

f. Attempt by defendant to retake property of which plaintiff had possession.

The question as to what constitutes an assault and battery where force is used in retaking property, where the right to take it is contested by a woman, depends, first, upon whether or not the defendant is entitled to use force in retaking the property, and secondly, upon the question as to whether or not, assuming that he was entitled to use force in retaking the property, he used excessive force. Of course, if the defendant was not entitled to use force to retake the property,—if it was his duty to resort to legal proceedings rather than to any force, however slight,—the use of any force in retaking property constitutes an assault and battery. In this regard the rule is not in any way influenced by the sex of the assaulted party.

Alabama. — *Hardeman v. Williams* (1907) 150 Ala. 415, 10 L.R.A.(N.S.) 653, 43 So. 726; *Singer Sewing Mach. Co. v. Methvin* (1913) 184 Ala. 554, 63 So. 997.

California.—*Riffel v. Letts* (1916) 31 Cal. App. 426, 160 Pac. 845; *Silverstin v. Kohler* (1919) — Cal. —, 183 Pac. 451.

Illinois.—*Dyk v. DeYoung* (1890) 133 Ill. 82, 24 N. E. 520.

Indiana.—*Singer Sewing Mach. Co. v. Phipps* (1911) 49 Ind. App. 116, 94 N. E. 793.

Iowa.—*Biggs v. Seufferlein* (1914) 164 Iowa, 241, L.R.A.1915F, 673, 145 N. W. 507.

Louisiana.—*McDermott v. American Brewing Co.* (1901) 105 La. 124, 52 L.R.A. 684, 83 Am. St. Rep. 225, 29 So. 498.

Maryland. — *Steinman v. Baltimore Antiseptic Steam Laundry Co.* (1908) 109 Md. 62, 21 L.R.A.(N.S.) 884, 71 Atl. 517.

Massachusetts. — *Levi v. Brooks* (1877) 121 Mass. 501; *Drury v. Hervey* (1879) 126 Mass. 519.

Minnesota.—*Fredericksen v. Singer*

Mfg. Co. (1888) 33 Minn. 356, 37 N. W. 453.

New York. — *McGrath v. Michaels* (1903) 80 App. Div. 458, 81 N. Y. Supp. 109; *O'Connell v. Samuel* (1894) 81 Hun, 357, 30 N. Y. Supp. 889; *Feneran v. Singer Mfg. Co.* (1897) 20 App. Div. 574, 47 N. Y. Supp. 284; *Peddie v. Gally* (1905) 109 App. Div. 178, 95 N. Y. Supp. 652; *Regg v. Buckley-Newhall Co.* (1911) 72 Misc. 387, 130 N. Y. Supp. 172.

South Carolina. — *Pagan v. Drake Furniture Co.* (1906) 73 S. C. 364, 52 S. E. 542.

Washington.—*Geissler v. Geissler* (1917) 96 Wash. 150, 164 Pac. 746, 166 Pac. 1119.

Wisconsin.—*Gerstein v. Adams Co.* (1919) — Wis. —, 173 N. W. 209.

In *Biggs v. Seufferlein* (1914) 164 Iowa, 241, L.R.A.1915F, 673, 145 N. W. 507, the court held that "if one has intrusted his property to another who afterwards, honestly, though erroneously, claims it as his own, or claims the right to the possession, the real owner has no right to retake it by force or violence. The law will not permit or tolerate that persons take the settlement of conflicting claims into their own hands. The law gives the right to defend possession of property, but not the right to redress for the wrongful taking. The general rule is that a right of property merely joined with right of possession will not justify the owner in committing an assault and battery upon the person in possession, for the purpose of regaining possession, although the possession is wrongfully withheld."

For example, in the absence of evidence that the plaintiff obtained by force from the defendant a receipt for money, he was not entitled to employ force to take the receipt from her until after he had requested her to return it and she had refused to do so. *Dyk v. DeYoung* (1890) 133 Ill. 82, 24 N. E. 520.

Where the defendant is entitled to use force in retaking or protecting the property, or it is assumed that he was entitled to use such force, it is clear that he can use no more force than would have seemed necessary to an or-

dinarily prudent and cautious man under the circumstances. The use of force beyond this degree constitutes excessive force, and will render the defendant liable for assault and battery. And, as heretofore pointed out, one of the matters to be considered in determining whether excess force was used is the fact that the assailed party is a woman.

For example, even though the defendant is the owner of personal property and is entitled to possession thereof, where a woman is actually in possession of the property, if the circumstances are such as to entitle the owner to retake it, he can use no more force than is actually necessary to retake it, and if he uses excessive force, he is guilty of assault and battery. *McLean v. Colf* (1918) — Cal. —, 176 Pac. 169; *Riffel v. Letts* (1916) 31 Cal. App. 426, 160 Pac. 845; *Biggs v. Seufferlein* (Iowa) *supra*; *Stevens v. Friedman* (1905) 58 W. Va. 78, 51 S. E. 132.

The question as to whether or not the defendant used unnecessary force to repossess himself of property of which he claimed to have been fraudulently or illegally deprived by a woman is for the jury. *Ibid*.

The following cases are illustrative of the rule of excessive force in this regard:

Thus, where the seller of property upon a conditional sale, following default by the buyer, undertook to retake the property, and, in order to do so, tipped the article so as to remove a female member of the buyer's family, who was sitting upon it to prevent the removing of the article, thereby causing her to fall to the floor, he was guilty of an assault and battery upon her. *Singer Sewing Mach. Co. v. Phipps* (1911) 49 Ind. App. 116, 94 N. E. 793. It is not clear in this case that the act of the defendant would not have been unlawful regardless of the question of excessive force.

So, in *Fredericksen v. Singer Mfg. Co.* (1888) 38 Minn. 356, 37 N. W. 453, it is held that the seller of property upon conditional sale is guilty of assault where he aids in restraining the plaintiff while his employees remove

from her residence property he had sold the husband on conditional sale, although the husband was in default in paying therefor. Under such circumstances, it was held that authority to take possession of the article in event of the failure of the buyer to pay for the same in accordance with the contract is no justification for the assault, although it may be relied upon in mitigation of damages.

In *McLean v. Colf* (1918) — Cal. —, 176 Pac. 169, *supra*, the plaintiff took from a table a letter belonging to the defendant and placed it inside her bodice, stating that she would keep it. The defendant, after having demanded the letter and been refused by the plaintiff, undertook to take it away from her, and called to his aid two other men. The plaintiff resisted all three of them and screamed for help. Upon help arriving, the men desisted. The defense was made that the failure of the defendant to obtain the letter established the fact that they did not use excessive force. The court, however, held that this defense was without merit; since their want of success may have been due to a variety of causes other than their moderation. In this case the plaintiff claimed to have been handled roughly and even brutally by the defendant, and the court said that, under all the circumstances, the question of whether or not the defendant used excessive force was properly left to the jury.

In *Stevens v. Friedman* (1905) 58 W. Va. 78, 51 S. E. 132, *supra*, it appeared that the plaintiff went to the defendant's store, and by pretending that she wanted to take it, got possession of a hat on which she had previously made a payment. The defendant, believing the plaintiff intended to carry the hat away without paying for it, rushed at her, seized and took the hat from her and pushed her towards the door. The plaintiff claimed that this conduct of the defendant injured her side and wounded her feelings. The question whether, under these circumstances, the defendant was guilty of an assault and battery, was held to be for the jury.

In *Riffel v. Letts* (1916) 31 Cal. App.

426, 160 Pac. 845, *supra*, the defendant's servant claimed that the plaintiff took money from his hand after paying it to him on a bill. In an effort to retake the money the servant seized the plaintiff violently, pulled her from place to place in the yard, and finally lifted her up and carried her to the street and placed her in a wagon in a caged inclosure. Whether these acts constituted excessive force which would render the defendant liable for an assault and battery was held to be a question for the jury.

In *Biggs v. Seufferlein* (1914) 164 Iowa, 241, L.R.A.1915F, 673, 145 N. W. 507, on the defendant's theory of the case, he had taken possession of a stove with the consent of the plaintiff. She subsequently recalled her consent and undertook to prevent the removal of the stove by sitting upon it. The defendant claimed he was guilty of no personal violence to the plaintiff, and only used sufficient force to remove her from the stove. It was held that the case should have been submitted to the jury upon the defendant's theory as well as upon that of the plaintiff, the assumption being that if the facts were found to sustain the defendant's theory, he would not be guilty of an assault.

In *Geissler v. Geissler* (1917) 96 Wash. 150, 164 Pac. 746, 166 Pac. 1119, a man was held guilty of assault and battery where he used slight force in preventing the wife of the purchaser of an automobile from getting in the front seat when he was about to remove the car from the garage of the plaintiff's husband, for default of the latter in paying for the car.

In *Pagan v. Drake Furniture Co.* (1905) 73 S. C. 364, 53 S. E. 542, the defendant was held liable for assault and battery where he entered the plaintiff's home and seized property which he had sold her upon conditional sale. She claimed that he pointed a pistol at her and cursed and threatened to kick her.

In *Drury v. Hervey* (1879) 126 Mass. 519, the facts were that the seller of property by conditional sale went upon the premises of a third person, where the property was stored,

and refused the request of the wife of the owner of the premises to wait a short time until the buyer of the property returned, and removed her from the doorway leading to the room in which the property was stored. This was held to constitute assault and battery.

In *Steinman v. Baltimore Antiseptic Steam Laundry Co.* (1908) 109 Md. 62, 21 L.R.A.(N.S.) 884, 71 Atl. 517, the facts were that an employee of the defendant, in taking from the plaintiff by a ruse, blankets upon which he claimed a lien, accidentally touched her knee with his knee. His conduct in taking the blankets greatly frightened her and caused a nervous shock, causing a uterine hemorrhage. This conduct was held not to constitute a battery. The court said that "the only evidence that . . . touched the plaintiff's person at all was her evidence that, when he took the blankets from the chair upon which they were lying, and which was beside the chair in which she was seated, his knee came in contact with her knee, causing her, as she says, no pain. There is no evidence whatever of any threat of violence or any attempt to use force, or of any gesture indicating such purpose. It would not be possible, if his knee had not touched hers, that an action for assault alone could be maintained, and, to warrant a recovery, the evidence must establish a battery. The weight of authority is decided that the mere touching of one's person by another, unless wilfully or in anger, or in a contemptuous or insolent (insolent) manner, does not constitute a battery."

In *Raefeldt v. Koenig* (1918) 152 Wis. 459, L.R.A.1918E, 1052, 140 N. W. 56, the plaintiff claimed that the defendant enticed her back of a counter to get some candy, when he put his arm around her and grabbed her breast. The defendant denied this and claimed that the plaintiff went behind his counter without his invitation and was about to take some candy, and upon her refusing to desist at his request, he took her by the hand and led her out of the store. The court said that, under the defendant's claim, he

would not be guilty of an assault, since the force he used was no more than he was justified in using in order to protect his property.

g. Where defendant was public officer or was engaged in serving process.

Unlawfully arresting a woman and taking her to a police station against her will or by force, and confining her, constitute an assault. *Martin v. Golden* (1902) 180 Mass. 549, 62 N. E. 977.

In *Hull v. Bartlett* (1881) 49 Conn. 64, it was held that an officer, in attempting to serve process upon a woman who had wrapped a covering around her to prevent identification, was guilty of assault and battery, although he used only such force as was necessary to remove the covering from the woman's face sufficiently to identify her. The court said that the right to "overcome with necessary force all active resistance is clear, but is there the same right to overcome, by the same means, mere passive resistance? We think not. It is obvious that the plaintiff could do or omit to do many things to delay, hinder, and embarrass the service of a writ, not only with impunity, but without giving the officer any right to use force. She could flee from town to town and hide herself. She could make identification difficult by change of dress, by cutting or dyeing her hair, or blacking her face, or wearing a mask or a veil. The law must declare the circumstances and occasions when an assault is justifiable. It would not do to leave it to the jury to determine whether the conduct was reasonable unless the law first declares it to be a case for the use of such force. . . . Suppose [she] . . . had fled before the officer and had entered her own dwelling house, closing after her the outer doors; the law surely would have said to the officer, 'thus far and no farther;' but the dwelling surely is not more sacred than the person of the dweller. The law has given everyone an inherent right to immunity from interference with or violence or injury to his body at the hands of any other person. The exceptions where an assault is justifiable are all founded on the highest necessity. We do not think the mere

importance of identifying a person for the service of civil process comes up to the spirit and reason of any of the recognized grounds for justifying an assault."

In *Austin v. Moffett* (1911) 113 Minn. 290, 129 N. W. 388, it appeared that the defendant came to the plaintiff's residence to serve process upon her. He acted angrily toward her and told her if she did not settle the matter within a certain time, he would come and kick her out of the house. When on the porch, and plaintiff on the inside of the house, he reached for her through the open door, causing her to jump back. The fright and shock to the plaintiff resulted in her miscarriage. Under these circumstances, it was held to be a question for the jury whether or not the defendant was guilty of assault and battery.

In *Hitzelberger v. Kanter* (1913) 181 Ill. App. 459, the facts were that the plaintiff, a little girl nine years old, was picking a piece of glass out of one of the defendant's windows, when he approached her. Upon her attempting to run away, he pursued her and she fell and he stumbled over her. The little girl claimed that the defendant kicked her. It was held that since the plaintiff was committing a misdemeanor in the presence of the defendant, he had the right to arrest her without a warrant; hence, in trying to apprehend her, he was in the exercise of a legal right, and if, in his effort to do so, he accidentally kicked or harmed her, he was not guilty of an assault and battery, although he would be if the act was intentional.

h. Where defendant was parent, or was in a position of loco parentis to plaintiff.

Where a parent or person standing in loco parentis administers unreasonable and immoderate chastisement upon a female child, he is liable for assault and battery. The question as to whether or not such punishment was inflicted, and as to the reasonableness thereof, is for the jury. *Clasen v. Pruhs* (1903) 69 Neb. 278, 95 N. W. 640, 5 Ann. Cas. 112; *Treschman v. Treschman* (1902) 23 Ind. App. 206, 61 N. E. 961.

In *Smith v. Slocum* (1872) 62 Ill. 354, it appeared that an adult child, boarding with her parents, engaged in a controversy with a female servant, and, upon remonstrance by her father, spoke disrespectfully to him of her stepmother, then present, accusing the latter of having been unchaste prior to her marriage with her father. Under these circumstances, the father was held justified in using such force as was reasonably necessary to compel the daughter to retire to her own room; and the use of such force did not render him guilty of assault and battery. The court said that "the language addressed to the appellant in regard to his wife was such as no husband could permit, whether by a member of his own family or a stranger. Had a stranger used such slanderous words to the appellant in his own house in regard to his wife, no one would deny his right to have ejected him at once from the premises. He would have precisely the same legal right to protect his wife from such slanderous accusations by a member of his family as from a stranger. The law makes no distinction. If we shall take the most favorable view possible of the case, the appellee had no right to continue to wrangle with the hired girl after the appellant had requested her not to do so. She ought to have left the room. This she refused to do, and when the appellant undertook to assert his authority to preserve the peace of his household, a struggle ensued. She resisted with all the strength she had, and if the evidence on the part of the defense can be relied on, the appellant did not use any more force than was absolutely necessary to remove her from the room. The authority to govern must rest in someone, and the law has placed that power in the hands of the father as the head of the family. His right to exercise such authority in moderation and justly will not be denied. It is as unlawful in itself for a grown son or daughter to create a disturbance in the family as for a mere stranger, and the father may as rightfully interpose to preserve the good order and propriety of his household. It is admitted by the appellee

that she was engaged in an angry dispute with [appellant] . . . and that she refused to submit to the authority of the appellant when requested to do so, and no reason is perceived why he could not interpose to preserve the peace of his family if he used no more force than was absolutely necessary for that purpose."

In *Fortinberry v. Holmes* (1906) 89 Miss. 373, 42 So. 799, it appeared that the mother left her little girl with the defendant to be supported, educated, and cared for and treated as his own child, but with a specific agreement that he was not to whip her. He was, however, held not guilty of assault and battery for whipping the child. No claim was made that the whipping was immoderate, the case going upon the point as to the effect of the agreement that he was not to whip her.

In *Treschman v. Treschman* (1902) 28 Ind. App. 206, 61 N. E. 961, the facts were that a stepmother grabbed her stepdaughter by the ears, and repeatedly knocked her head against a brick wall. The relationship was held not to justify such a cruel and immoderate punishment.

In *Corning v. Corning* (1851) 6 N. Y. 97, it appeared that the plaintiff was a niece of the defendant, and had lived with him from the time she was about nine years old until she was nearly thirty years of age. When about the latter age she left the abode of the defendant, and a short time thereafter he struck her with a whip. He claimed the act to be accidental, that the blow was intended for her escort. On the theory, however, that it was intended for the plaintiff, it was held that their relationship did not entitle the defendant to have considered as a defense the question of the right of chastisement.

1. Liability of principal or master.

An employer is not liable for an assault committed by an employee or agent, unless the act was committed while he was acting within the apparent scope of his employment, or in an attempted discharge of the duties he was directed or engaged to perform; but where the employee or agent is engaged in performing a certain

service he is instructed to perform, if he commits an assault while thus engaged, the employer or principal is liable therefor, although committed in violation of the explicit instructions of the employer. This is a general rule without reference to the sex of the assaulted party. It is obvious, however, that the question of sex may be a factor in determining the liability of the employer in a given case. The following cases sustain the general rule above stated where the assaulted party was a woman:

Alabama.—*Hardeman v. Williams* (1907) 150 Ala. 415, 10 L.R.A.(N.S.) 653, 43 So. 726; *Singer Sewing Mach. Co. v. Methvin* (1913) 184 Ala. 554, 63 So. 997.

California.—*Riffel v. Letts* (1877) 31 Cal. App. 426, 160 Pac. 845.

Indiana.—*Singer Sewing Mach. Co. v. Phipps* (1911) 49 Ind. App. 196, 94 N. E. 793.

Iowa.—*Biggs v. Seufferlein* (1914) 164 Iowa, 241, L.R.A.1915F, 673, 145 N. W. 507.

Massachusetts.—*Levi v. Brooks* (1877) 121 Mass. 501.

Minnesota.—*Frederickson v. Singer Mfg. Co.* (1888) 38 Minn. 356, 37 N. W. 453.

New York.—*Peddie v. Gally* (1905) 109 App. Div. 178, 95 N. Y. Supp. 652; *O'Connell v. Samuel* (1894) 81 Hun, 357, 30 N. Y. Supp. 889; *Regg v. Buckley-Newhall Co.* (1911) 72 Misc. 387, 130 N. Y. Supp. 172.

Wisconsin.—*Gerstein v. Adams Co.* (1919) — Wis. —, 173 N. W. 209.

The following cases are illustrative of acts by a servant which will constitute an assault and battery upon a woman by the master:

In *Regg v. Buckley-Newhall Co.* (N. Y.) *supra*, it is held that an employee was acting within the scope of his employment in retaking property sold conditionally, and that hence, the employer was liable for an assault committed by him in retaking the property, where his instruction was to enter the premises where the property was situated, if permitted to do so, and to repossess himself of the chattel for the benefit of the defendant. He was instructed, however, to use only

lawful means, and not to interfere with the rights of the purchaser. The court said that "the defendant clothed him with the discretion of determining whether the means by which he repossessed himself of the chattel were 'lawful or without interference with the rights of the plaintiff.' Having vested its agent with this discretion, the agent's acts in doing the thing he was directed to do were within the scope of his authority, and the defendant was not relieved from responsibility, therefore, by his departure from his instructions as to the manner in which it was done. . . . Even if the agent acted in direct violation of his instructions as to the use of force or the committing of an assault, the rule is the same. The master cannot avail himself of the benefits of his servant's acts, as, in this case, by the retention of the chattels so taken possession of by the agent, and repudiate responsibility for the manner of the taking." The court also approves of the general rule that "a principal cannot exonerate himself from liability for the acts of his agent by showing that they were committed in violation of instructions."

In *Texas Coal & Fuel Co. v. Arenstein* (1900) 22 Tex. Civ. App. 441, 55 S. W. 127, the facts were that a coal mining company operated a mercantile establishment in connection with its mining business. An employee of the company, under the direction of the manager of the mercantile business, committed an assault and battery upon the plaintiff in an effort to compel her to desist from selling merchandise against a rule of the company. No justification for this assault was attempted, and the company was held liable for the act of its employee.

In *O'Connell v. Samuel* (1894) 81 Hun, 357, 30 N. Y. Supp. 889, the seller of goods by conditional sale is held liable for an assault upon a female purchaser by an employee in endeavoring to retake the goods. In this case the employee forced his way into the purchaser's house despite her resistance. In the *mêlée* the plaintiff's dress was torn, and she claimed some bodily injuries were inflicted upon her.

In *Geraty v. Stern* (1883) 30 Hun (N. Y.) 426, the facts were that the plaintiff, while purchasing at the defendant's store an article of clothing, put it on preparatory to making the purchase; an employee of the defendant approached her and told her that she did not want to purchase the garment, and used language to indicate that she was a spy for a rival store. He directed the saleswoman to take the garment off from the plaintiff, which was done. This conduct was held to constitute an assault, for which the defendant was liable.

In *McDonald v. Franchere Bros.* (1897) 102 Iowa, 496, 71 N. W. 427, it was held to constitute an assault for a clerk to touch a lady customer and request her to come with him to another room, where he accused her of shoplifting.

In *Gerstein v. Adams Co.* (1919) — Wis. —, 173 N. W. 209, the defendant's employees tore the plaintiff's waist and punched her in the abdomen in forcibly taking from her a clock which she had purchased on the instalment plan, and which she had not entirely paid for. The court said: "The evidence is practically undisputed that the clock was taken by the employees of the defendant while engaged in the course of their employment; hence their employer, the defendant here, was liable for the negligent or wrongful act of his servants, committed while endeavoring to perform a duty delegated to them by the master, notwithstanding the method adopted by the servants may not have been authorized, and even may have been prohibited, by the master."

In *Makuc v. Majestic Hotel Co.* (1917) 165 N. Y. Supp. 232, it is held that the management of a hotel is liable for the act of a special officer in using unnecessary force by roughly handling a female servant of a guest in ejecting her from the hotel, although the servant was ejected at the request of the guest. But it was held that the mistress was not liable to the servant for the assault.

In *Bouillon v. Laclede Gaslight Co.* (1910) 148 Mo. App. 462, 129 S. W. 401, it appeared that the representa-

tive of a gas company wrongfully entered the plaintiff's house when she was confined to her bed by sickness, and engaged in an altercation with a nurse, he insisting upon going through the apartment to reach the basement in order to read a meter there which was connected with a gas pipe line to another apartment. The result of the altercation was greatly to shock and frighten the plaintiff. This conduct, however, was held not to constitute an assault and battery, although it did constitute trespass.

As pointed out, even where the act of the defendant's servant clearly constitutes an assault upon the injured woman, the important question may be whether or not the act was within the scope of the servant's employment, and this question has in some cases apparently been determined without reference to the sex of the assaulted party. For example, the master has been held not liable for an assault committed by his servant, on the ground that the servant, in forcibly taking from the buyer property conditionally sold to the plaintiff, was acting contrary to his express instructions. *Feneran v. Singer Mfg. Co.* (1837) 20 App. Div. 576, 47 N. Y. Supp. 284. In *McGrath v. Michaels* (1903) 80 App. Div. 458, 81 N. Y. Supp. 109, the master was held not liable for an assault committed upon a woman by his collector in endeavoring to retake property conditionally sold to her, where the employee grabbed the plaintiff by the shoulder, forced her against the door, threw her upon the floor, and fell upon her, calling her vulgar names. The court said that the defendant was not responsible for the wilful misconduct of the servant, which was not within the scope of his employment.

In *Hardeman v. Williams* (1907) 150 Ala. 415, 10 L.R.A. (N.S.) 653, 43 So. 726, the facts were that a man having a lien upon household furniture for a money loan sent his employees to take the furniture under a power contained in a mortgage on the furniture. Before any attempt was made to remove the furniture, the defendant's servants and the plaintiff engaged in

an altercation which finally resulted in considerable fighting, in which the plaintiff was more or less bruised and beaten. It was held that the defendant was not liable for the acts of his employees, on the ground that they had not yet undertaken to remove the furniture, and hence the assault was not committed during the course of or in the scope of their employment. The court said that the evidence did not afford any inference that the assault was committed for the purpose of promoting any interest of the defendant, or that the employees' conduct was in line with their duties as agents.

In *Kohl v. H. P. Lenhart Furniture Co.* (1914) 58 Ind. App. 7, 106 N. E. 399, it appeared that the seller of goods on conditional sale sued out a writ of replevin to recover the goods. The officer serving the writ, in order to obtain possession of one of the articles, directed an employee of the seller to release the plaintiff's hold on the article. For the assault committed in removing the plaintiff's hands from the stove, the employer was held not liable, since the employee was acting under the instruction of the officer, and not within the scope of his employment. It was apparently assumed that the acts complained of constituted an assault.

It has been held that where a servant delivers goods c. o. d., and delivers them without getting his pay, and by the rules of his employer he does this at his own risk, a battery committed by him at a subsequent time in undertaking to collect the amount due is beyond the scope of his employment, and his employer is not liable therefor. *McDermott v. American Brewing Co.* (1901) 105 La. 124, 52 L.R.A. 684, 83 Am. St. Rep. 225, 29 So. 498; *Steinman v. Baltimore Antiseptic Steam Laundry Co.* (1908) 109 Md. 62, 21 L.R.A. (N.S.) 884, 71 Atl. 517.

But, as already pointed out, the master may be liable for an assault committed by an employee upon a woman, although the employee was clearly acting in violation of the master's instructions, the circumstances, however, being such as to impose upon the

master the duty of protecting the assailed party.

For example, a carrier is liable for the damage to a female passenger by her forcible defilement by an employee of the carrier during the existence of the relation of passenger and carrier. *Garvik v. Burlington, C. R. & N. R. Co.* (1906) 131 Iowa, 415, 117 Am. St. Rep. 432, 108 N. W. 327. In *Dickinson v. Scruggs* (1917) 155 C. C. A. 488, 242 Fed. 900, the carrier was held liable for assault and ravishment committed by a porter upon a passenger, providing the act of the porter was against the consent of the passenger. It was, however, held that if the consent was produced through fear, it was no bar to the action.

In *Pine Bluff & A. R. Co. v. Washington* (1915) 116 Ark. 179, 172 S. W. 872, a carrier was held liable for an assault upon a female passenger by the act of a brakeman in shooting her through the arm because she refused to resume immoral relations with him.

In *Birmingham R. Light & P. Co. v. Parker* (1909) 161 Ala. 248, 50 So. 54, a carrier was held liable for an assault by its conductor upon a female passenger by his grasping her by the arm and shoulder and winking and smiling at her.

In *Strother v. Aberdeen & A. R. Co.* (1898) 123 N. C. 197, 81 S. E. 386, a common carrier is held liable in an action of tort for the acts of its conductor in making insolent remarks to a female passenger while she was on the train in charge of this conductor.

In *McGhee v. McCarley* (1900) 44 C. C. A. 252, 103 Fed. 55, a carrier is held liable for the death of a little girl, caused by being run over by a train, where she ran upon the track in front of the train through fright caused by an assault upon her mother by the station agent in attempting to defile her.

In *Dawson v. Metropolitan Street R. Co.* (1911) 157 Mo. App. 642, 138 S. W. 665, the court assumed the liability of a common carrier for the act of a servant in committing an assault and battery upon a young girl. The case, however, was disposed of on other grounds.

In *Friar v. Orange & N. W. R. Co.* (1907) 45 Tex. Civ. App. 564, 101 S. W. 274, it appeared that an intoxicated passenger gave his pistol to his wife and she sat upon it. The brakeman of the train reached under her and secured the pistol. His conduct was held not to constitute an assault upon her.

In *Western & A. R. Co. v. Jackson* (1917) 21 Ga. App. 50, 93 S. E. 547, a carrier was held not liable for an assault based upon insulting proposals made to a female passenger by a man employed by an agent of the carrier to convey the passenger a distance back on the line of the carrier's road, the carrier having mistakenly carried the passenger by the station. This holding, however, was not based on the ground that the carrier might not be liable under such circumstances, but on the ground that the agent of the carrier was not guilty of negligence in employing the driver, he being a man of good reputation.

A carrier is not liable for frightening a female passenger by an attempt by its servants to eject from the car the father of such female. *Chesapeake & O. R. Co. v. Robinett* (1909) 151 Ky. 778, 45 L.R.A.(N.S.) 438, 152 S. W. 976.

There are many cases considering the liability of a common carrier for the acts of its employees in ejecting passengers from a train. These cases are not included herein, since, while they may involve an assault or an assault and battery, they also involve questions peculiar to the relation of passenger and carrier.

III. Indecent assaults, ravishment, etc.

a. In general.

Where an assault is accompanied by lascivious conduct by the assailant, and he improperly handles the wronged female, or indulges in undue or indecent familiarities with her person, it constitutes at least an indecent assault, and if the intention is to secure carnal knowledge of the female, it will constitute assault with intent to rape, and where actually accompanied by ravishment, it will constitute rape, providing the woman does not

consent to the acts complained of. This doctrine finds support in the following cases, which involve an assault of one of the characters mentioned:

Alabama.—*Haydon v. State* (1916) — Ala. App. —, 72 So. 586 (indecent assault).

Arkansas. — *Davis v. Richardson* (1905) 76 Ark. 349, 89 S. W. 318 (indecent assault).

California.—*Lind v. Closs* (1891) 88 Cal. 6, 25 Pac. 972 (ravishment); *Valencia v. Milliken* (1916) 31 Cal. App. 583, 160 Pac. 1086 (assault and ravishment).

Connecticut. — *Stratton v. Nichols* (1850) 20 Conn. 327 (assault with intent to have illicit intercourse); *List v. Miner* (1901) 74 Conn. 50, 49 Atl. 856 (ravishment).

Georgia.—*Pye v. Gillis* (1911) 9 Ga. App. 725, 72 S. E. 190 (assault to rape).

Illinois. — *Dickey v. McDonnell* (1866) 41 Ill. 62 (assault to rape); *Timmons v. Broyles* (1868) 47 Ill. 92 (assault with intent to rape); *Sutton v. Johnson* (1871) 62 Ill. 209 (assault to rape); *Beseler v. Stephani* (1874) 71 Ill. 400 (assault with intent to secure sexual intercourse); *Miller v. Balthasser* (1875) 78 Ill. 302 (assault to rape); *Wolff v. Van Housen* (1894) 55 Ill. App. 295 (assault to rape); *Palmer v. Baum* (1905) 123 Ill. App. 584 (ravishment).

Indiana.—*Ogle v. Brooks* (1882) 87 Ind. 600, 44 Am. Rep. 778 (assault to secure consent to sexual intercourse); *Wolf v. Trinkle* (1885) 103 Ind. 355, 3 N. E. 110 (indecent assault); *Timmons v. Kenrick* (1908) 53 Ind. App. 490, 102 N. E. 52 (assault to secure sexual intercourse); *McGlone v. Hauger* (1913) 56 Ind. App. 243, 104 N. E. 118 (assault to rape).

Iowa.—*Rogers v. Winch* (1889) 76 Iowa, 546, 41 N. W. 214 (indecent assault); *McMurrin v. Rigby* (1890) 80 Iowa, 322, 45 N. W. 877 (ravishment); *Starnes v. Stevenson* (1904) — Iowa, —, 98 N. W. 312; *Garvik v. Burlington, C. R. & N. R. Co.* (1906) 131 Iowa, 415, 117 Am. St. Rep. 482, 108 N. W. 327 (ravishment); *Luttermann v. Romey* (1909) 143 Iowa, 233, 121 N. W. 1040 (assault to secure consent to

sexual intercourse); *Smith v. Hendrix* (1910) 149 Iowa, 255, 128 N. W. 360 (ravishment); *Williams v. Budgett* (1919) — Iowa, —, 172 N. W. 283 (ravishment).

Kentucky.—*Collins v. Wilson* (1897) 18 Ky. L. Rep. 1049, 39 S. W. 33 (indecent assault to secure intercourse); *Ragsdale v. Ezell* (1899) 20 Ky. L. Rep. 1567, 49 S. W. 775 (indecent assault).

Louisiana.—*Gorum v. Henry* (1916) 138 La. 596, 70 So. 526 (indecent assault).

Maine.—*Gore v. Curtis* (1909) 81 Me. 403, 10 Am. St. Rep. 265, 12 Atl. 314.

Massachusetts. — *Morrissey v. Ing-ham* (1872) 111 Mass. 63 (ravishment); *Miller v. Curtis* (1893) 158 Mass. 127, 35 Am. St. Rep. 469, 32 N. E. 1039 (indecent assault).

Michigan. — *Elliott v. Van Buren* (1875) 33 Mich. 49, 20 Am. Rep. 668 (assault and battery with intent to ravish); *Fay v. Swan* (1880) 44 Mich. 544, 7 N. W. 215 (assault with intent to ravish); *Mawich v. Elsey* (1881) 47 Mich. 10, 8 N. W. 587, 10 N. W. 57 (indecent assault); *Derwin v. Parsons* (1884) 52 Mich. 425, 50 Am. Rep. 263, 18 N. W. 200 (assault with intent to ravish); *Schenk v. Dunkelow* (1888) 70 Mich. 89, 37 N. W. 886 (rape); *Harris v. Neal* (1908) 153 Mich. 57, 116 N. W. 535 (rape); *Totten v. Totten* (1912) 172 Mich. 565, 138 N. W. 257 (ravishment); *Hartwig v. Kell* (1917) 199 Mich. 603, 165 N. W. 693 (ravishment).

Minnesota. — *Gardner v. Kellogg* (1877) 23 Minn. 463 (indecent assault); *Bingham v. Bernard* (1886) 36 Minn. 114, 30 N. W. 404 (indecent assault); *Schuek v. Hagar* (1877) 24 Minn. 339 (indecent assault); *Witzka v. Moudry* (1901) 83 Minn. 78, 85 N. W. 911 (indecent assault accompanied by ravishment); *Nyman v. Lynde* (1904) 93 Minn. 257, 101 N. W. 163 (ravishment); *Nickolay v. Orr*, post, 1048 (indecent assault).

Missouri. — *Robinson v. Musser* (1883) 78 Mo. 153 (indecent assault accompanied by rape); *Champagne v. Hamey* (1905) 189 Mo. 709, 88 S. W. 92 (ravishment); *Wessel v. Lavender* (1914) 262 Mo. 421, 171 S. W. 331

(indecent assault and ravishment); *Mohelsky v. Hartmeister* (1897) 68 Mo. App. 818 (assault and ravishment); *Linville v. Green* (1907) 125 Mo. App. 289, 102 S. W. 67 (ravishment); *Koenke v. Bauer* (1912) 162 Mo. App. 718, 145 S. W. 506 (ravishment); *Lemmons v. Robertson* (1912) 164 Mo. App. 85, 148 S. W. 189 (indecent assault); *Booher v. Trainer* (1913) 172 Mo. App. 376, 157 S. W. 548 (indecent assault); *Marts v. Powell* (1913) 176 Mo. App. 124, 161 S. W. 871 (indecent assault); *Williams v. Collins* (1914) 180 Mo. App. 146, 167 S. W. 1189 (rape).

Nebraska. — *Atkins v. Gladwish* (1889) 25 Neb. 390, 41 N. W. 347 (indecent assault); *Kramer v. Weigand* (1912) 91 Neb. 47, 135 N. W. 230 (ravishment).

New York. — *Dean v. Raplee* (1895) 145 N. Y. 319, 39 N. E. 952 (assault and battery with ravishment); *Young v. Johnson* (1890) 123 N. Y. 226, 25 N. E. 363 (ravishment); *Haulish v. Boller* (1902) 72 App. Div. 559, 75 N. Y. Supp. 992 (assault with intent to ravish); *Cholodnicka v. Glonielzek* (1912) 150 App. Div. 206, 134 N. Y. Supp. 650 (assault and battery accompanied with ravishment); *Boyles v. Blankenhorn* (1915) 168 App. Div. 388, 153 N. Y. Supp. 466, affirmed in (1917) 220 N. Y. 624, 115 N. E. 443 (ravishment); *Wright v. Grant* (1887) 6 N. Y. S. R. 362 (assault and rape); *Schaeffer v. Oppenheimer* (1887) 9 N. Y. S. R. 688 (ravishment); *Crossman v. Bradley* (1868) 53 Barb. 125 (ravishment); *Ford v. Jones* (1871) 62 Barb. 484 (indecent assault); *Gulerette v. McKinley* (1882) 27 Hun. 320 (indecent assault); *Koenig v. Nott* (1859) 2 Hilt. 323, 8 Abb. Pr. 384 (ravishment).

North Dakota.—*Kinneberg v. Kinneberg* (1899) 8 N. D. 311, 79 N. W. 337 (assault to commit rape).

Ohio.—*Bormuth v. Beyer* (1895) 6 Ohio C. D. 548 (criminal assault); *Sayen v. Ryan* (1895) 9 Ohio C. C. 631 (indecent assault).

Oklahoma. — *Watson v. Taylor* (1913) 35 Okla. 768, 131 Pac. 922 (ravishment); *Priboth v. Haveron* (1914) 41 Okla. 692, 139 Pac. 973 (ravish-

ment); *Weber v. Weber* (1919) — Okla. —, 179 Pac. 31 (ravishment).

Oregon.—*Hough v. Iderhoff* (1914) 69 Or. 568, 51 L.R.A.(N.S.) 982, 139 Pac. 931, Ann. Cas. 1916A, 247 (ravishment).

Pennsylvania. — *W — v. D —* (1884) 14 W. N. C. 239 (ravishment).

Porto Rico. — *O'Kelley v. Urgal* (1910) 5 Porto Rico Fed. Rep. 520 (ravishment).

Rhode Island. — *Mitchell v. Work* (1882) 13 R. I. 645 (indecent assault); *Eaton v. Thrift* (1908) — R. I. —, 69 Atl. 764 (indecent assault).

Texas.—*Leach v. Leach* (1895) 11 Tex. Civ. App. 699, 33 S. W. 703 (ravishment); *Krause v. Spinn* (1899) 21 Tex. Civ. App. 510, 52 S. W. 91 (indecent assault); *Altman v. Eckermann* (1910) — Tex. Civ. App. —, 132 S. W. 523 (ravishment).

Vermont. — *Alexander v. Blodgett* (1872) 44 Vt. 476 (indecent assault).

Washington.—*Jensen v. Lawrence* (1916) 94 Wash. 148, 162 Pac. 40, Ann. Cas. 1917E, 133 (ravishment); *Eckhart v. Peterson* (1917) 94 Wash. 379, 162 Pac. 551 (ravishment).

Wisconsin.—*Watry v. Ferber* (1864) 18 Wis. 500, 86 Am. Dec. 789 (ravishment); *Bruske v. Neugent* (1903) 116 Wis. 488, 93 N. W. 454 (indecent assault); *Barton v. Bruley* (1903) 119 Wis. 326, 96 N. W. 815 (indecent assault); *Sletten v. Madison* (1904) 122 Wis. 251, 99 N. W. 1020 (indecent assault).

Canada. — *Hopkinson v. Perdue* (1904) 8 Ont. L. Rep. 228, 3 Ont. Week. Rep. 934, 2 Ann. Cas. 230 (indecent assault); *Gross v. Brodrecht* (1897) 24 Ont. App. Rep. 687 (indecent assault).

Ireland.—*Hegarty v. Shine* (1878) 14 Cox, C. C. 145, Ir. L. R. 4 C. L. 288 (ravishment).

b. Matters constituting indecent assault.

The following cases are illustrative of acts which will constitute an indecent assault:

In *Mallett v. Beale* (1885) 66 Iowa, 70, 23 N. W. 269, it was held to constitute assault and battery where the defendant entered the house of the plaintiff, a married woman, seized and pushed her and used considerable violence toward her, with the view of

inducing her to consent to sexual intercourse with him.

In *Atkins v. Gladwish* (1889) 25 Neb. 390, 41 N. W. 347, it is held to constitute an indecent assault for the defendant to tip the plaintiff under the chin and undertake to put his arm around her.

In *Timmons v. Broyles* (1868) 47 Ill. 92, it appeared that the defendant told the plaintiff, a married woman, that she looked mighty sweet, and that he caught her around the body with his right arm, took hold of and raised her clothing with his left hand, and solicited intercourse with her. These matters were held not to show an assault with intent to ravish the plaintiff by force and against her will.

It constitutes an indecent assault for a man to pull, hug, and kiss a woman against her consent and make indecent proposals to her. *Davis v. Richardson* (1905) 76 Ark. 349, 89 S. W. 318.

But it does not constitute an indecent assault merely to make improper and indecent proposals to a woman. *Ibid.*

It has been held that the mere act of laying hands on a married woman may constitute an unlawful assault, and, together with other circumstances, may support a finding that the assault was for the purpose of securing carnal intercourse with her. *Hatchett v. Blacketer* (1915) 162 Ky. 266, 172 S. W. 538.

In *McGlone v. Hauger* (1918) 56 Ind. App. 243, 104 N. E. 118, in answering the contention that the mere preparation to commit an indecent assault does not constitute such an assault, but there must be a threat or offer to do physical injury, the court said that it could not agree with this contention; that while it might be difficult in some instances to determine just where preparation ended and assault began, yet where, as in the instant case, the defendant disrobed and broke into the privacy of the plaintiff's bedroom at an hour of the night when she might be expected to be disrobed and in bed, the assault began when he thus broke into plaintiff's bedroom.

In *Ford v. Schliessman* (1900) 107 Wis. 479, 83 N. W. 761, it appeared that the defendant entered the plaintiff's house during the absence of her husband, although the plaintiff had forbidden his doing so; that he "fussed" with his pants, but made no demonstration toward the plaintiff, and shortly thereafter help arrived and took the defendant away. This evidence was held not to show an assault upon the plaintiff; it was, however, held that the defendant was liable to plaintiff in an action of trespass for entering the house.

c. Effect of consent of female.

1. In general.

Even though undue, improper, or indecent familiarities with a female person, or carnal knowledge of her person, is unlawful, these matters do not constitute an assault and battery, an indecent assault, or a ravishment, if the female consents thereto.

Federal.—*Arnau y O'Kelley v. Urgal* (1910) 5 Porto Rico Fed. Rep. 520.

California.—*Lind v. Closs* (1891) 88 Cal. 6, 25 Pac. 972.

Illinois. — *Dickey v. McDonnell* (1866) 41 Ill. 62; *Beseler v. Stephani* (1874) 71 Ill. 400; *Miller v. Balthasser* (1875) 78 Ill. 302; *Nicholls v. Colwell* (1904) 113 Ill. App. 219.

Missouri.—*Linville v. Green* (1907) 125 Mo. App. 289, 102 S. W. 67.

Nebraska. — *Kramer v. Wiegand* (1912) 91 Neb. 47, 135 N. W. 230.

New York.—*Dean v. Raplee* (1895) 145 N. Y. 319, 39 N. E. 952; *Pillow v. Bushnell* (1849) 5 Barb. 156; *Boyles v. Blankenhorn* (1915) 168 App. Div. 388, 153 N. Y. Supp. 466, affirmed in (1917) 220 N. Y. 624, 115 N. E. 443.

Oklahoma. — *Watson v. Taylor* (1913) 35 Okla. 768, 131 Pac. 922; *Priboth v. Haveron* (1914) 41 Okla. 692, 139 Pac. 973.

Oregon.—*Hough v. Iderhoff* (1914) 69 Or. 568, 51 L.R.A.(N.S.) 982, 139 Pac. 931, Ann. Cas. 1916A, 247.

Texas. — *Altman v. Eckermann* (1910) — Tex. Civ. App. —, 132 S. W. 523.

Ireland. — *Hegarty v. Shine* (1878) 14 Cox, C. C. 145, Ir. L. R. 4 C. L. 288.

In making an indecent assault upon

a woman, what the defendant may suppose are her wishes is immaterial. Unless she directly gives him the right to suppose that she consents to his conduct, he has no right to make any attempt in the direction of violating her person without her express and direct consent, to be first had and obtained. If he proceeds at all without such free and full consent, it is at his own risk. *Alexander v. Blodgett* (1872) 44 Vt. 476.

It must appear that the ravishment was accomplished by the defendant with the intention to effect his purpose in defiance of all resistance, and that it was without the consent of the female assaulted, and that she resisted to the best of her ability under the circumstances. *Dean v. Raplee* (1895) 145 N. Y. 319, 39 N. E. 952.

In *Kramer v. Weigand* (1912) 91 Neb. 47, 135 N. W. 230, it is held that the consent of the plaintiff to the unlawful act of the defendant made her a participant in the wrong and precluded a recovery by her.

In *Hegarty v. Shine* (1878) 14 Cox, C. C. (Ir.) 145, a woman sought to recover damages for an assault based upon the fact that the defendant infected her with a venereal disease, while she was voluntarily engaging with him in sexual intercourse. In holding that these circumstances did not show the defendant to be guilty of an assault, the court said: "In the present case the fraud relied upon to annul the plaintiff's consent is the concealment of a fact which, if known, would have induced her to withhold it. But before this effect is attributed to such a concealment, it seems to me reasonable to demand, what is required in contract, that from the relation between the parties there should have arisen a duty to disclose capable of being enforced. And how can this be when the relation is itself immoral and for the indulgence of immorality, and the supposed duty for the object of aiding its continuance? To support obligation founded upon relation, it appears to me the relation must be one which we can recognize and sanction."

In the reported case (*WRIGHT v. STARR*, ante, 981), it is held that in

an action to recover for an assault presumably to commit rape, the consent of the plaintiff bars any right of action for the act of the defendant, as she claimed, in grabbing her and pressing her throat and neck with his hands, grabbing her wrist and pressing her wrist watch into her flesh, tearing her clothes from her person, etc. This claim of the plaintiff was, however, denied by the defendant, who testified that he merely kissed her with her consent, and when he sought to kiss her good-by, she demurred and he desisted.

In *Nicholls v. Colwell* (1904) 113 Ill. App. 219, it appeared that the defendant entertained toward the plaintiff very friendly feelings, engaged with her in a friendly scuffle, during which he held her wrist with one hand and put his other arm around her and held her tight in his embrace, and gouged and punched her in the side and chest. The court said that the injuries, if any, sustained by the plaintiff, were accidental, and the result of defendant's superior strength and the negligent and reckless manner in which he handled her during the scuffle. Under these circumstances the right of recovery is said to turn upon the question as to whether the acts of the defendant in laying his hands upon the plaintiff and the use of force and violence toward her were unlawful or otherwise. "If they were unlawful, the question of intent to injure her was immaterial, and a right of recovery exists, and not otherwise. Defendant in error clearly had no right to use force toward plaintiff in error except with her consent or acquiescence. If he chose to scuffle or wrestle with her against her will, he is liable for any damages sustained without regard to his intentions. If, on the contrary, she invited, provoked, or encouraged his acts and willingly engaged in the scuffle, the same cannot be considered as unlawful. In *Hilliard on Torts*, vol. 1, p. 183, it is said: 'An action for assault and battery does not lie where an injury is done by unavoidable accident in the course of a friendly wrestling match or other lawful athletic sport, if not dangerous.' Whether or

not the conduct of defendant was invited, encouraged, or acquiesced in by plaintiff, and the subsequent struggle was merely a friendly scuffle in which plaintiff participated willingly and in a friendly or playful spirit, as to which there is a clear conflict of evidence, was a question which should have been submitted to the jury for its determination, in view of the fact that there was evidence tending to prove the contrary. It was therefore error to give the peremptory instruction to find the defendant not guilty."

In *Koenke v. Bauer* (1912) 162 Mo. App. 718, 145 S. W. 506, in an action by the father to recover damages for an assault upon his daughter which resulted in her pregnancy and the subsequent birth of a child, he was held entitled to recover either on the theory of forcible defilement of his daughter, or her defilement with her consent, since in the latter case he would have a cause of action to recover damages resulting from the loss of his daughter's services, and for expenses incurred by him on account of her pregnancy and illness.

2. *Consent through fear or use of drugs.*

It has been held that if the defendant administered to the plaintiff or was privy to administering to her a narcotic or an anesthetic and intoxicating liquor, and by reason thereof she was incapable of giving consent or offering physical resistance to her defilement, such defilement would constitute rape. *Arnau y O'Kelley v. Urgal* (1910) 5 Porto Rico Fed. Rep. 520.

In *Dean v. Raplee* (1895) 145 N. Y. 319, 39 N. E. 952, in considering this point, the court said: "It is not often that such an assault is or can be described by a female with that complete fullness of detail with respect to every word spoken or every fact and circumstance that may enter into the questions of consent or resistance. When the proof is given, as it sometimes is in general terms, the jury must still be satisfied that there was no consent, and that resistance was made to the extent of the woman's ability. What that ability was must in many cases depend not only upon

her strength and power to defend herself or make herself heard, but also upon the element of fear when it exists. The age, strength, and physical appearance of the parties, with the manner in which they testify, are elements of some importance which the jury may consider with all the other facts. The relation which the parties bear to each other, as in this case, may also be considered. Where on one side we find extreme youth, inexperience, and dependence united with the principle of fear and obedience, and, on the other, mature age, great physical power, and dominating influence and control over the movements and will of another, the question of consent and resistance must be determined with reference to these conditions."

In *Miller v. Balthasser* (1875) 78 Ill. 302, the defendant assaulted the plaintiff by laying his hands upon her and threatening to kill her if she did not submit to him. He was held guilty of assault and battery, although the plaintiff freely thereafter submitted to sexual intercourse with him. The court said that if such ultimate consent was not freely given, and it was yielded only as a consequence of the preceding violence, force, or threats, then this intercourse might be regarded as a part of the assault and a ground of exemplary damages; that is, such damages as would compensate the plaintiff for the wrong to her, and also punish the defendant, and furnish an example to deter others from like practices.

3. Where female under age of consent.

Where the female ravished is under the age of consent according to the terms of the statute defining rape as a felony, her consent is no defense to an action at law to recover for assault or for the ravishment. *Watson v. Taylor* (1913) 35 Okla. 768, 131 Pac. 922; *Priboth v. Haveron* (1914) 41 Okla. 692, 139 Pac. 978; *Hough v. Iderhoff* (1914) 69 Or. 568, 51 L.R.A.(N.S.) 982, 139 Pac. 931, Ann. Cas. 1916A, 247; *Boyles v. Blankenhorn* (1915) 168 App. Div. 388, 153 N. Y. Supp. 466, affirmed without opinion in (1917) 220 N. Y. 624, 115 N. E. 443.

4. Consent after partial resistance.

Where consent to carnal intercourse is procured only by a violent and vicious assault upon a female, such intercourse is to be considered as ground for exemplary damages. *Dickey v. McDonnell* (1866) 41 Ill. 62.

In *Beseler v. Stephani* (1874) 71 Ill. 400, the facts were that the plaintiff and defendant had indulged in illicit sexual intercourse on frequent occasions. The plaintiff claimed, however, that such intercourse had its inception in force and violence, while the defendant denied all violence, and claimed that such intercourse was brought about by the lascivious conduct of the plaintiff, and that it was at all times with her consent. Under these circumstances it was held proper for the court to instruct the jury that the plaintiff was not entitled to recover for sexual commerce with the defendant, or its consequences, when had with her consent.

Although consent is a defense to an action of damages for the ravishment of plaintiff, it is not a defense to an action for assault and battery committed during the same transaction. *Altman v. Eckermann* (1910) — Tex. Civ. App. —, 132 S. W. 523.

The fact that the assaulted party, a girl about fifteen years old, finally yielded to sexual intercourse with the defendant following the assault, is no defense to the assault, and hence is no bar to an action to recover damages therefor. *Ibid.*

In *Dickey v. McDonnell* (1866) 41 Ill. 62, the court said: "It matters not how suspicious the plaintiff was or had reason to be, of the intent of the defendant; it matters not whether her resistance was feigned or real, to preserve her purity, or to sell her virtue on her own terms and at her own price; it matters not whether she finally assented to the sexual connection,—still, if that assent was preceded by brutal violence administered for the purpose of overcoming her resistance, then for such violence the defendant must be made to answer. It certainly cannot be contended, because a woman would sell her person for \$100, and would resist with all her

physical force any attempt to take possession of her except upon these terms, that, therefore, violence may be lawfully used to overcome her; and if, after such violence had been sufficiently used, she should yield to her pursuer, that this ultimate assent would condone all previous illegality and outrage. Even the poor prostitute must be shielded by the law from violence, and, however low may be the motive of her refusal, we are not aware that it would be lawful to extort her consent by choking her, or that the violence could be justified on the ground that her refusal sprang from mercenary motives. Neither could the previous violence be justified on the ground of ultimate assent to sexual intercourse. It is true, if such ultimate assent should be freely given, and not induced by any previous violence or threats or fear, then such intercourse should not be made the basis of damages, but the right of action for the previous violence would clearly remain. If, however, the ultimate assent should not be freely given, but yielded only as a consequence of the preceding violence or force, then such sexual intercourse should be regarded by the jury as a part of the assault, and a ground of exemplary damages."

It has been held that although, when a plaintiff in an action of this character went riding with the defendant, she suspected that his object was to have sexual intercourse with her, and she freely alighted from the carriage, and her resistance to his advances was feigned, or made to extort money, and she ultimately consented to such intercourse, nevertheless the defendant may be guilty of assault and battery upon her. *Ibid.*

But in *Linville v. Green* (1907) 125 Mo. App. 29, 102 S. W. 67, the court said that "wrongful as it was for defendant to attempt to have sexual relations with plaintiff, if at any time during the encounter she willingly or even passively surrendered to his embraces, there could be no assault, however strong may have been her resistance to his initial advances."

5. Extent of force by defendant and resistance by female to show want of consent.

In an action to recover damages for an assault and ravishment upon her, the plaintiff must prove resistance upon her part in order to recover aggravated damages. *Cholodnicka v. Gloniczek* (1912) 150 App. Div. 206, 184 N. Y. Supp. 650.

It is not necessary to prove that plaintiff resisted to the limit of her power, provided the act was perpetrated against her will. *Totten v. Totten* (1912) 172 Mich. 565, 138 N. W. 257.

It has been held in an action to recover damages for an assault and battery accompanied by a ravishment of the plaintiff, that it is not necessary for the plaintiff to show that the assault was committed with such force and violence as to constitute the crime of rape. *Schenk v. Dunkelow* (1888) 70 Mich. 89, 37 N. W. 886.

In *Palmer v. Baum* (1905) 123 Ill. App. 584, it is held that it is immaterial that less force was employed in the ravishment of a woman than that required by law to constitute the crime of rape, in so far as concerns her father's right of action for the assault and forcible defilement of his adult daughter.

In *Witzka v. Moudry* (1901) 83 Minn. 78, 85 N. W. 911, the evidence was held sufficient to sustain a judgment against defendant for assault and ravishment, although it did not indicate great resistance on the part of the plaintiff. The court said: "While an actual or suggested invitation by the female, or a familiarity authorized by relationship, might forbid a contention that there was an assault, yet when no such invitation, actual or suggested, is given, or no justification by ties of kindred, the man who lays his hands upon a woman to effect an unlawful carnal purpose is guilty of an imposition upon her sex, and commits an assault upon her for which she may recover damages in a civil action, under any rule or analogy that sustains an action for a battery."

In *Bye v. Isaacson* (N. D.) post, 1067, the plaintiff, a widow, claimed that the defendant grabbed her, pulled

her onto the bed, held her arms, and ravished her. It was held that under such circumstances there was no reason why the court should apply the old rule of criminal prosecution for rape, for the question of rape or no rape was not material to the case; and that so far as it charged common-law rape, the complaint might as well be considered as an exaggeration and as surplusage, since actual rape by force and violence was in no manner essential to the plaintiff's cause of action; it being sufficient in this regard that the defendant grabbed and assaulted the plaintiff, pulled her onto the bed, and with a strong hand overcame her feeble power of will and resistance. The court said that to throw the plaintiff out of court and to deny her any remedy because she did not resist with greater force when all resistance in her power was obviously futile would be a travesty on justice and a reproach to the court.

In *Palmer v. Baum* (1905) 123 Ill. App. 584, the facts were that the force used by the defendant was only such as was necessary for the penetration of the woman complaining, after she had freely permitted herself to be placed in a position with the defendant in which their sexual organs were in close contact; it was nevertheless held that her conduct did not constitute permission to the defendant to penetrate her person without her consent. The court said that penetration of a woman's person without her consent was unlawful, and hence force might be implied.

But: "A woman who leads a man into a trap, or uses meretricious arts with such a design, cannot pretend that there was an attempt to ravish her, or that he attempted such ends by force and against her will and utmost resistance. The offense and the cause of action consist in the attempt to accomplish the end implied by force. It is absurd to impute such design when the conduct of the woman repels all idea of the occasion or necessity for the use of force." *Crossman v. Bradley* (1868) 53 Barb. (N. Y.) 125.

In *Jensen v. Lawrence* (1916) 94 Wash. 148, 162 Pac. 40, Ann. Cas.

1917E, 138, it is held that the trial court did not err in refusing to instruct the jury that if the plaintiff intentionally exposed her person to the defendant, came into his presence attired only in a nightgown and kimono, and by gestures, expression of the eyes, signs and nudges, and otherwise tried to attract and secure his attention, they are to consider these matters in determining whether or not plaintiff acted with design in doing what she did. The court said that the refusal to give the instruction was not prejudicial, for if the jury believed all the testimony to which these instructions applied, they could still reasonably determine from the other evidence in the case that the defendant forcibly and unlawfully ravished the plaintiff against her consent.

In *Robinson v. Musser* (1883) 78 Mo. 153, the plaintiff testified in substance that defendant had made improper proposals to her several times prior to the occasion in question, which she had spurned. That on the occasion complained of she was passing the night at the defendant's home, sleeping with his daughter, but during the night defendant came to her room and carried her to another room, she making no resistance as she did not want to awaken the daughter and raise a scandal, and she not believing the defendant would injure her without her consent. That he, however, suddenly resorted to force, and in spite of resistance by her, ravished her. On appeal the judgment rendered in favor of the plaintiff was reversed, the court remarking that according to the plaintiff's own testimony they felt constrained to say, "*Volenti non fit injuria.*"

6. *Failure to make outcry or complaint.*

When a female is indecently assaulted or ravished, it is expected that she will follow the natural impulse of virtuous women under such circumstances, and make an outcry, and also complain of the wrong done her at the first reasonable opportunity. Hence it is that failure of an assaulted or ravished female to make outcry or complaint is regarded as a significant circumstance bearing upon the ques-

tion of whether or not she actually consented to the act complained of. While her failure in this regard may affect the credibility of her claim, it is but a circumstance to be considered in connection with the other evidence in the case, and is not conclusive against her. The weight to be given the matter is for the jury, in view of all the circumstances of the case.

Illinois. — *Miller v. Balthasser* (1875) 78 Ill. 302.

Iowa.—*McMurrin v. Rigby* (1890) 80 Iowa, 322, 45 N. W. 877; *Garvik v. Burlington, C. R. & N. R. Co.* (1906) 131 Iowa, 415, 117 Am. St. Rep. 432, 108 N. W. 327; *Smith v. Hendrix* (1910) 149 Iowa, 255, 128 N. W. 360; *Starnes v. Stevenson* (1904) — Iowa, —, 98 N. W. 812.

Minnesota. — *Witzka v. Moudry* (1901) 83 Minn. 78, 85 N. W. 911.

Missouri. — *Wessel v. Lavender* (1914) 262 Mo. 421, 171 S. W. 331; *Linville v. Green* (1907) 125 Mo. App. 289, 102 S. W. 67; *Williams v. Collins* (1914) 180 Mo. App. 146, 167 S. W. 1189.

Nebraska. — *Kramer v. Weigand* (1912) 91 Neb. 47, 135 N. W. 230.

Rhode Island. — *Eaton v. Thrift* (1908) — R. I. —, 69 Atl. 764.

Washington. — *Jensen v. Lawrence* (1916) 94 Wash. 148, 162 Pac. 40, Ann. Cas. 1917E, 133.

In *Miller v. Balthasser* (Ill.) supra, it is held that the fact that the plaintiff remained at the home of the defendant for some time subsequently to the assault and rape upon her, and made no complaint for some time after leaving his home, did not necessarily discredit her evidence. But it was properly considered by the jury as bearing upon the weight to be given her evidence as a whole.

In *Eaton v. Thrift* (R. I.) supra, the court said that the only suspicious circumstance in the plaintiff's narration of the facts of an indecent assault upon her was that she made no outcry. This was, however, held not to be conclusive of the circumstance, as it was brought out on cross-examination that the action of the plaintiff's heart was feeble, and she was ren-

dered weak and faint by the sudden attack.

In *McMurrin v. Rigby* (Iowa) supra, it is held that evidence is admissible that the injured woman made complaint of her ravishment soon thereafter, and where her complaint was so soon thereafter as to preclude the element of premeditation, as being a part of the *res gestæ* substance of the complaint may be testified to.

In *Starnes v. Stevenson* (1904) — Iowa, —, 98 N. W. 312, it is said that the question as to how much weight the failure of the female to make complaint of her ravishment shall have in the way of discrediting her testimony is a question for the jury.

In *Wessel v. Laven^{er}* (1914) 262 Mo. 421, 171 S. W. 331, the action was brought by a married woman against a physician for indecent assault and ravishment while she was unconscious from a drug he administered to her, although the plaintiff made no complaint until after the defendant had failed to pay her the amount the plaintiff claimed the parties had agreed upon in settlement of her claim and her agreement not to inform her husband of the offense. The court said that it knew of no law which disqualified the plaintiff as a witness by reason of these circumstances, or which prevented the jury from considering her testimony for what they might think it worth.

In *Smith v. Hendrix* (1910) 149 Iowa, 255, 128 N. W. 360, it is said that the complaint of the injured female, whether made early or late, is a circumstance for the jury to consider, to determine the truth or falsity of the charge. The fact that some time elapsed before she made complaint against the defendant goes to her credibility and the weight of her testimony, rather than to its competency. Silence in this regard may be explained; as, for example, it may be shown that the plaintiff remained silent because of threats of violence by the defendant.

In *Jensen v. Lawrence* (1916) 94 Wash. 148, 162 Pac. 40, Ann. Cas. 1917E, 133, it is held that the failure of the plaintiff to make outcry or to

make complaint for some time after the alleged ravishment is a circumstance to be considered by the jury as bearing upon the credibility of the claim of the plaintiff.

In *Garvik v. Burlington, C. R. & N. R. Co.* (1906) 131 Iowa, 415, 117 Am. St. Rep. 432, 108 N. W. 327, it is held that the absence of complaint is not conclusive upon the jury. They are to consider all the facts and circumstances surrounding and connected with the transaction, including the age and intelligence of the injured party.

The fact that the injured female did not complain of the assault and ravishment does not create a legal presumption against her, although such failure may be considered by the jury as bearing upon the weight of the evidence and inferences to be drawn therefrom. *Witzka v. Moudry* (1901) 83 Minn. 78, 85 N. W. 911.

In *Kramer v. Weigand* (1912) 91 Neb. 47, 135 N. W. 230, it is held that the failure to make outcry when help was at hand, or to make complaint until some time after the alleged offense, is not conclusive against the plaintiff; but these are merely matters affecting the credibility of her claims.

7. Subsequent relations of and conduct of parties to each other as bearing upon consent.

In determining the character of the assault, there is to be considered the conduct of the parties toward each other, both before and after the assault. *Mallett v. Beale* (1885) 66 Iowa, 70, 23 N. W. 269.

In *Linville v. Green* (1907) 125 Mo. App. 289, 102 S. W. 67, the plaintiff not only did not make complaint of the outrage upon her person, but when, as a result thereof, pregnancy resulted, she applied to the defendant for help, and he took her to a hospital at a distant place and procured an abortion to be practised upon her. These facts were held not to be conclusive upon the plaintiff as showing her consent to her defilement.

In *Valencia v. Milliken* (1916) 31 Cal. App. 533, 160 Pac. 1086, it appeared that the plaintiff remained upon friendly relations with the defendant for some time after her al-

leged ravishment, and it also appeared that she made complaint to her parents immediately following such ravishment. It was held that, in explanation of this friendly relation, testimony was admissible that defendant promised to right the wrong he had done the plaintiff so far as he could by marrying her.

In *Lind v. Closs* (1891) 88 Cal. 6, 25 Pac. 972, it appeared that the injured woman did not complain to her husband of the outrage upon her for about ten days thereafter. Defendant testified that, two or three days after the alleged offense, he took the plaintiff to the railroad station, and she invited him to call upon her at the place to which she was about to move. This testimony the plaintiff did not deny. The defendant also admitted the intercourse complained of, but claimed it was with the full consent of the plaintiff. The court said that the circumstances tended to wholly discredit the plaintiff's testimony, and inasmuch as it was not corroborated, and a judgment was rendered for the plaintiff, the ends of justice required a new trial.

In *Williams v. Budgett* (1919) — Iowa, —, 172 N. W. 283, it appeared that the plaintiff was the housekeeper for the defendant, and she continued to live with him and keep house for him for some months after her alleged ravishment by him. These facts and her contradictory and evasive testimony led the court on appeal to reverse the judgment in her favor, on the ground that the jury had no warrant for the finding that the plaintiff had established her case by a preponderance of the evidence.

Upon this point in *Young v. Johnson* (1890) 123 N. Y. 226, 25 N. E. 363, as bearing upon the admissibility of evidence of friendly relations between the plaintiff and defendant for some time after she claimed she was ravished by him, the court said that the common mind does not look for conduct of this kind on the part of a virtuous woman toward a man who had committed such a gross outrage upon her person.

In *Champagne v. Hamey* (1905) 189

Mo. 709, 88 S. W. 92, judgment was reversed for a refusal of the court to instruct the jury that the failure of the plaintiff to make complaint within a reasonable time after she claimed to have been assaulted and ravished by the defendant, and her continuance of friendly relations with him after such time, were circumstances to be taken into consideration by the jury, in determining whether the defendant in fact was guilty of the offense charged. The court said: "An outcry and resistance are important elements of evidence, and a want of these circumstances, where they may reasonably be expected, goes far to disprove the charge of rape . . . and a concealment of the injury, where there is an opportunity for early disclosure, may lead to a like inference. The evidence, as a whole, tends strongly to show that this is one of those cases where there has been a mutual gratification of desires and passions, and that the notion of force on the part of the man, and want of consent on the part of the woman, is an afterthought. No disclosure was made by the woman until discovered to be pregnant, and the first charge of force was made more than a year after the alleged outrage."

In *Linville v. Green* (1907) 125 Mo. App. 289, 102 S. W. 67, it appeared that the plaintiff made no complaint of a forcible assault and ravishment made upon her by the defendant until the fact was discovered by her father, some time after she had permitted an abortion to be performed upon her at the instance of the defendant. Her testimony of the ravishment was, nevertheless, held sufficient to sustain a verdict, in her favor, although the defendant in this case, as in *Champagne v. Hamey*, denied in toto the matters testified to by the plaintiff, including the intercourse with her. In each case the court expressed the opinion that such intercourse had occurred between the parties.

Where the plaintiff claims that the defendant committed upon her several indecent assaults, covering a considerable period of time, it is competent for the defendant to show that, during this period of time, the relation exist-

ing between himself and the plaintiff was of a very friendly character. *Schuek v. Hagar* (1877) 24 Minn. 339.

In *Schuek v. Hagar* (Minn.) supra, there was involved an action by a minor stepdaughter to recover from her stepfather damages for indecent assaults upon her. In such action, evidence was held admissible in defendant's behalf to show the existence of friendly feelings, and the affectionate character of the relation existing between the plaintiff and defendant subsequently to the time of the alleged assault. The court said that such testimony bore directly upon the intrinsic probability of the truth or falsity of the charges contained in the complaint.

IV. Pleading and practice.

a. Matter of pleading.

1. Declaration or complaint.

In an action for an assault upon a woman the petition must allege the facts which constitute the assault. *Reed v. Maley* (1903) 115 Ky. 816, 62 L.R.A. 900, 74 S. W. 1079, 2 Ann. Cas. 453. A very general statement of the facts as to the assault and injury is good as against a general demurrer. *Bormuth v. Beyer* (1895) 6 Ohio C. D. 548.

When ravishment of the plaintiff is claimed, the complaint should show that the ravishment was against the will of the plaintiff. *Koenig v. Nott* (1859) 2 Hilt. (N. Y.) 323, 8 Abb. Pr. 384.

When the facts constituting an assault are made the basis of a civil action, lack of consent to their commission is an essential element in the cause of action. Hence, it is unnecessary affirmatively to plead consent in justification of the acts charged in the complaint which were denied in the answer. *WRIGHT v. STARR* (reported herewith) ante, 981.

It has been held that the intent of the defendant is immaterial if the act was not justifiable or excusable, or was without the consent of the person upon whom the assault was committed. The only intent required is the intent to do a wrongful act; hence the allegation of an assault carries with it

the allegation of illegality; for while the injury must be intentionally inflicted by violence, the law nevertheless presumes a wrongful intent, and it rests with the person inflicting the injury to show the innocence of his intention. *Luttermann v. Romey* (1909) 143 Iowa, 233, 121 N. W. 1040.

Where an indecent assault is claimed, it has been held sufficient if the complaint alleges that the defendant, with force and violence, made an indecent assault upon the plaintiff, and then and there forcibly debauched, ravished, and carnally knew her, and it is not necessary to allege that the plaintiff resisted to the utmost of her ability under the circumstances, although in order to recover she must prove such resistance. *Cholodnicka v. Glonickzek* (1912) 150 App. Div. 206, 134 N. Y. Supp. 650. As against a general demurrer, a complaint is sufficient which contains the allegation that the defendant assaulted the plaintiff by laying his hands upon her, throwing her down, and then and there having carnal knowledge of her, the plaintiff objecting and not consenting thereto. *Altman v. Eckermann* (1910) — Tex. Civ. App. —, 132 S. W. 523.

In *Smith v. Milburn* (1864) 17 Iowa, 30, the complaint was for assaulting, debauching, and criminally knowing plaintiff, and it was held that, in the absence of a demurrer, the complaint would support an action for the seduction of the plaintiff.

After verdict and judgment for plaintiff, an allegation that the defendant lasciviously and licentiously assaulted and injured the plaintiff, and threw her upon the floor, and "otherwise forcibly and wrongfully injured and mistreated her," is sufficient to entitle the plaintiff to recover for her forcible defilement. *Linville v. Green* (1907) 125 Mo. App. 289, 102 S. W. 67.

Where there has been an actual assault and battery committed, it is not necessary to allege and prove pecuniary loss or even actual physical injury in order to entitle plaintiff to recover. *Pye v. Gillis* (1911) 9 Ga. App. 725, 72 S. E. 190.

It is not necessary to aver specially

matters which are the logical and natural consequences of the assault. All of such consequences every man is presumed to anticipate. Therefore, under the usual allegation in a complaint for assault and battery, the plaintiff may give in evidence any facts showing damage that naturally and necessarily resulted from the acts complained of. *Stevenson v. Morris* (1881) 37 Ohio St. 10, 41 Am. Rep. 481.

In *Texas Coal & Fuel Co. v. Arenstein* (1900) 22 Tex. Civ. App. 441, 55 S. W. 127, it is held that where a petition to recover damages for an assault upon the petitioner's wife does not allege facts bringing the defendant within the terms of the criminal statute defining aggravated assault, it is error for the trial court, upon such facts being in evidence, to instruct the jury that the assault was an aggravated one.

Without a direct allegation of loss of social standing as a result of an indecent assault, supported by proof in that regard, this element of injury cannot be considered by the jury in assessing the damage. *Sletten v. Madison* (1904) 122 Wis. 251, 99 N. W. 1020.

Rules of pleading do not require that allegations relative to exemplary damages shall be set out separately from the other averments of the complaint. Special damages may be granted only upon specific allegation, but exemplary damages are so intimately connected with general damages that if the general allegations are sufficient to show the wrong complained of was inflicted with malice or oppression, or other like circumstances, the complaint will be sufficient to authorize infliction of punitive or exemplary damages. *Stark v. Epler* (1911) 59 Or. 262, 117 Pac. 276.

2. Plea or answer.

Even though, under a general denial, justification cannot be shown, evidence is nevertheless admissible that no assault in fact was committed. *Raefeldt v. Koenig* (1913) 152 Wis. 459, L.R.A.1918E, 1052, 140 N. W. 56.

A plea justifying a battery, or asserting self-defense, must be that plaintiff assaulted the defendant and

would have injured him if he had not defended himself, and that hence, the defendant did so defend himself, and in so doing committed the battery complained of. *Smith v. Wickard* (1908) 42 Ind. App. 508, 85 N. E. 1030.

By a plea of son assault demesne, the defendant justifies an assault by asserting that the plaintiff committed an assault upon him and that he merely defended himself. *Ibid*.

It has been held that, under the general issue, the defendant, in mitigation of damages, may give in evidence provocation by the plaintiff, where it is so recent or immediate as to induce the presumption that violence was committed under the immediate influence of the passion thus wrongfully excited by the plaintiff. *Corning v. Corning* (1851) 6 N. Y. 97.

In *W—— v. D——* (1884) 14 W. N. C. (Pa.) 239, involving a civil action to recover damages for the forcible defilement of the plaintiff and the communication to her of a venereal disease, the defendant demurred to the complaint. At the hearing upon demurrer, the court being about to overrule it, the defendant withdrew it by leave of court.

Where the answer to a complaint to recover damages for an assault and battery is a general denial, evidence is not admissible as to matters in justification of the assault. *Barr v. Post* (1898) 56 Neb. 698, 77 N. W. 123.

It has been held that, under a mere general denial, defendant cannot introduce evidence to justify the assault. Evidence of this character is admissible only after it has been specially pleaded, and with particularity and fullness. *Neilsen v. Hovander* (1909) 56 Wash. 93, 105 Pac. 172, 21 Ann. Cas. 113.

In Georgia, justification must be specially pleaded. If the defendant fails to specially plead it, he is held impliedly to admit that if the jury find the assault was committed, it was not done under circumstances amounting to legal justification. *Ratteree v. Chapman* (1887) 79 Ga. 574, 4 S. E. 684.

In *Zwerling v. Annenberg* (1902) 88 Misc. 169, 77 N. Y. Supp. 275, the ac-

tion was to recover damages for an assault and battery committed upon the plaintiff at her home. The answer of the defendant alleged that he entered under authority of a chattel mortgage on goods of the plaintiff, in order to remove such goods, and that he did not assault her. This answer was held not to constitute such a denial of the assault as to raise any issue, hence it did not meet the requirements of the pleading.

b. Matters of practice.

1. Parties.

(a) Plaintiff.

At common law it is necessary to join the husband as a party plaintiff in an action for assault and battery upon the wife. *Everts v. Everts* (1855) 3 Mich. 580; *Wolf v. Bauereis* (1890) 72 Md. 481, 8 L.R.A. 680, 19 Atl. 1045; *Pillow v. Bushnell* (1849) 5 Barb. (N. Y.) 156.

In *Coulter v. Hermitage Cotton Mills* (1919) — S. C. —, 98 S. E. 846, it is held that a right of action to recover damages for an assault upon a married woman is a chose in action belonging exclusively to her. Hence, she may sue to recover for such injury without joining her husband. Her right of action is separate and distinct from that which her husband may maintain for loss of her services and other damages resulting to him by reason of the injury to his wife.

Under the Married Woman's Act, a married woman may maintain an action for assault and battery committed upon her without joining her husband as plaintiff. *Townsdin v. Nutt* (1877) 19 Kan. 282; *Berger v. Jacobs* (1870) 21 Mich. 215; *Stevenson v. Morris* (1881) 37 Ohio St. 10, 41 Am. Rep. 481; *Casteel v. Brooks* (1915) 46 Okla. 189, 148 Pac. 158; *Long v. McWilliams* (1902) 11 Okla. 562, 69 Pac. 882.

Under a code provision that a married woman may sue as to matters concerning her separate property, she is the proper plaintiff in an action to recover damage for an assault and battery upon her. *Rockwell v. Clark* (1877) 44 Conn. 534.

But a statute merely authorizing a married woman to acquire property

and be sued as a feme sole for debts contracted in the conduct of her business, and providing that she may sue in her own name upon any cause of action, does not entitle a married woman to sue for an assault and battery upon her. *Wolf v. Bauereis* (1890) 72 Md. 481, 8 L.R.A. 680, 19 Atl. 1045.

In *Berger v. Jacobs* (1870) 21 Mich. 215, in sustaining the right of a married woman to maintain an action in her own name for an assault and battery upon her, the court said: "At common law all the wife's choses in action, if reduced to possession during the coverture, belonged to the husband, though on the death of the husband before being recovered by him, they survived to the wife. And in an action like the present, the damages, when recovered, would have belonged to him. But this was also the case with reference to bonds and other rights or choses in action due to the wife before marriage, or accruing to her afterwards during coverture. But the wife was required to be joined as a coplaintiff in all cases, both of tort and contract, in which, if the husband should die, the right of action would survive to the wife. And as the damages in the case of an assault and battery would survive to the wife, upon the death of the husband before their recovery, the husband could not sue alone for the personal suffering or injury to the wife, and the declaration was required to conclude to their damage, and not to that of the husband alone. *Chitty*, Pl. 78. In such case, therefore, the action, though it could not be brought in the name of the wife alone, yet was in her right to the same extent, and for the same reason, as in actions for the recovery of mere debts and other choses in action which became due to her before marriage. By the first section of our statute in reference to 'the rights of married women' (Comp. Laws, § 3292), 'the real and personal estate of every female acquired before marriage, and all property, real and personal, to which she may afterwards become entitled by gift, grant, inheritance, devise, or in any other

manner, shall be and remain the estate and property of such female, and shall not be liable for the debts, obligations, and engagements of her husband, and may be contracted, sold, transferred, mortgaged, conveyed, devised, or bequeathed by her in the same manner and with the like effect as if she were unmarried. We think within the fair intention of this section, the right to recover damages for her personal injury and suffering from an assault and battery committed upon herself should be placed upon the same ground as choses in action or pecuniary claims, or rights accruing to her during the coverture; that such damages, when recovered, would, under this statute, constitute a part of her individual property."

The joining of the husband as a party plaintiff with the wife in an action to recover for an assault and battery upon her, after the passage of the Married Woman's Act, is an irregularity not in any way prejudicing or embarrassing the defendant in his defense, or affecting any substantial right of his. Hence, the trial court may either disregard it or correct it at once by striking out the name of the husband. *Colvill v. Langdon* (1876) 22 Minn. 565.

It has been held that to recover damages for an assault and battery upon the wife, the husband and wife may join as plaintiffs and recover the damages jointly. But, under the Married Woman's Act, a married woman may sue in her own name for such an injury, and the money recovered is her separate property. She, however, is not compelled to sue alone, but the husband and wife may join as plaintiffs, notwithstanding this statute. *Hamm v. Romine* (1884) 98 Ind. 77.

It has been held that since the cause of action for an assault and battery to the wife is a chose in action, and by statute community property, and the husband has the management and control of the community property except the earnings of the wife for her personal services, and the profits of her separate estate, the husband is the only necessary party plaintiff to an ac-

tion to recover damages for the assault and battery. He may maintain an action in his own name for the injuries to her and for medical and hospital expenses. *Labonte v. Davidson* (1918) 31 Idaho, 644, 175 Pac. 588.

In *Wolf v. Bauereis* (1890) 72 Md. 481, 8 L.R.A. 680, 19 Atl. 1045, it is held that the Married Woman's Act does not confer upon a married woman a right to sue in her own name for an assault and battery upon her. It is, however, held that where her husband has deserted and abandoned her and left the state, she may maintain such action. The court said that, "if the husband deserts the wife and leaves the state without intention of return, and thus, in a de facto way, rids himself of his marital duties, the wife, from the necessity and humanity of the case, must have the power of supporting and protecting herself, and therefore must have the right to contract and enforce her contracts, and, above all, to invoke the remedies given by the law for the redress of personal wrongs, and this without any reference to what may be claimed to be or set up as the rights of the delinquent husband."

In *Anderson v. Anderson* (1875) 74 Ky. 327, it was held that a statutory provision to the effect that when a married woman is a party to an action, her husband must be joined with her, except that when the action concerns her separate property, she may sue alone, does not authorize a wife to sue alone to recover damages for an assault upon her, and an action of this character cannot be maintained where it is against the wish of the husband.

In *McKinstry v. Collins* (1904) 76 Vt. 221, 56 Atl. 985, an action by a husband to recover for an assault and battery upon his wife, which resulted in her death, was sustained.

Such an action for injuries not resulting in the death of the wife may be maintained to recover damages for loss of the services of the wife, due to the assault upon her. *Burnham v. Webster* (1886) 22 Jones & S. (N. Y.) 30; *Walter v. Kensinger* (1893) 2 Pa. Dist. R. 728. And special damages

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may be recovered if specifically demanded in the complaint. *Uertz v. Singer Mfg. Co.* (1885) 35 Hun, (N. Y.) 116.

In *Krause v. Spinn* (1899) 21 Tex. Civ. App. 510, 52 S. W. 91, an action was sustained in favor of a husband to recover damages for an indecent assault upon his wife.

A father may bring an action to recover for an assault upon his daughter. *Palmer v. Baum* (1905) 123 Ill. App. 584; *Trimble v. Spiller* (1828) 7 T. B. Mon. (Ky.) 395, 18 Am. Dec. 189; *Nyman v. Lynde* (1904) 98 Minn. 257, 101 N. W. 163; *Mohelsky v. Hartmeister* (1897) 68 Mo. App. 818; *Koenke v. Bauer* (1912) 162 Mo. App. 718, 145 S. W. 506.

(b) Defendant.

A minor daughter is not entitled to recover damages from her father for her forcible defilement by him, since a minor child cannot sue a parent for damages arising upon tort, such actions being against public policy and not permitted by law. *Roller v. Roller* (1905) 37 Wash. 242, 68 L.R.A. 893, 107 Am. St. Rep. 805, 79 Pac. 788, 3 Ann. Cas. 1.

2. Joinder of actions.

Where a battery is committed on both the husband and his wife, they cannot join in the action to recover for both batteries. *Chapman v. Hardy* (1807) 4 S. C. L. (2 Brev.) 170. Neither can the husband individually maintain an action to recover damages for an assault and battery upon himself and his wife. *Belew v. Prunty* (1817) Litt. Sel. Cas. (Ky.) 241. And a joint action by the husband and wife to recover damages for an assault and battery upon the wife may only be maintained to recover for the injuries to the wife. *Barnes v. Martin* (1862) 15 Wis. 240, 82 Am. Dec. 670.

An action for assault and battery and an action for slander committed at the same time cannot be joined. *Anderson v. Hill* (1869) 53 Barb. (N. Y.) 238.

*V. Evidence.**a. In plaintiff's behalf.**1. Burden of proof.*

In civil actions to recover damages for assault, assault and battery, or indecent assault or ravishment, the burden of proof is upon the plaintiff. This burden is met when the evidence preponderates in her favor upon the issues necessary for her to establish in order to be entitled to recover judgment.

Federal.—*Arnau y O'Kelley v. Urgal* (1910) 5 Porto Rico Fed. Rep. 520.

Connecticut.—*List v. Miner* (1901) 74 Conn. 50, 49 Atl. 856.

Iowa.—*Williams v. Budgett* (1919) — Iowa, —, 172 N. W. 283.

Louisiana.—*Gorum v. Henry* (1915) 138 La. 596, 70 So. 526.

Michigan.—*Schenk v. Dunkelow* (1898) 70 Mich. 89, 37 N. W. 886.

Missouri.—*Champagne v. Hamey* (1905) 189 Mo. 709, 88 S. W. 92.

Nebraska.—*Clasen v. Pruhs* (1903) 69 Neb. 278, 95 N. W. 640, 5 Ann. Cas. 112; *Kramer v. Weigand* (1912) 91 Neb. 47, 135 N. W. 230.

New York.—*Wright v. Grant* (1887) 6 N. Y. S. R. 862.

Ohio.—*Hendricks v. Fowler* (1898) 16 Ohio, C. C. 597.

Oklahoma.—*Weber v. Weber* (1919) — Okla. —, 179 Pac. 31.

In an action to recover damages for assault and battery with intent to ravish, it is not necessary to prove a felonious intent upon the part of the defendant. *Elliott v. Van Buren* (1875) 33 Mich. 49, 20 Am. Rep. 668.

In an action to recover for an assault upon the plaintiff and her forcible defilement, it is not necessary to establish any fact by more than a preponderance of the evidence. *Miller v. Balthasser* (1875) 78 Ill. 302; *Schenk v. Dunkelow* (Mich.) *supra*.

In *Valencia v. Milliken* (1916) 31 Cal. App. 533, 160 Pac. 1086, it is held that the rule as to the degree of evidence to show the ravishment is less stringent in civil actions than it is in criminal actions, and in the former a preponderance of the evidence is sufficient.

For example, in an action to recover

damages for her forcible defilement, it is not necessary that the testimony of the plaintiff be corroborated. *Starnes v. Stevenson* (1904) — Iowa, —, 98 N. W. 312; *Rogers v. Winch* (1889) 76 Iowa, 546, 41 N. W. 214.

But it has been held that although the plaintiff is not required to prove the basic charge of ravishment beyond a reasonable doubt, she is required to support the charge by substantial evidence—which, if accepted by the triers of fact, would justify the conclusion as a reasonable inference that the rape had been committed as alleged. The charge may be sustained by the testimony of the plaintiff alone, but this testimony will be weighed with care, and if found inconsistent with physical law or human nature, it will be rejected as unworthy of belief. *Williams v. Collins* (1914) 180 Mo. App. 146, 167 S. W. 1189.

In order to recover damages for the different elements which may be taken into consideration by the jury in assessing the same, there must be evidence tending to show that such elements of damage have been suffered by the plaintiff. For example, where the action is to recover damages for an indecent assault, and there is no evidence that, as a result of the assault, the plaintiff lost in reputation, social standing, or honor, these elements cannot be taken into consideration in assessing the damage. *Timmons v. Kenrick* (1913) 53 Ind. App. 490, 102 N. E. 52.

2. Physical condition or appearance of plaintiff or her clothing.

Evidence is admissible as to the appearance of the assaulted female immediately following the assault (*Gardner v. Kellogg* (1877) 23 Minn. 463); or the morning after the assault (*Hannan v. Gross* (1893) 5 Wash. 703, 32 Pac. 787); and also at the time of the trial of the action for the assault (*Stone v. Moore* (1891) 83 Iowa, 186, 49 N. W. 76).

The injured person may testify as to the nature, character, and extent of her injuries. *Hamm v. Romine* (1884) 98 Ind. 77. Evidence by the plaintiff as to her physical condition at the time of the assault complained of and

subsequently thereto is admissible. *Townsdin v. Nutt* (1877) 19 Kan. 282. Evidence is also admissible of a complaint by the plaintiff after the injury, exhibiting natural symptoms and effects of the injury, and that she made no such complaints prior to the injury. *Stevens v. Friedman* (1905) 58 W. Va. 78, 51 S. E. 182.

But evidence of the mere declaration of the plaintiff upon the day following the assault upon her that she was not feeling well is inadmissible. *Moran v. Martinson* (1914) 164 Iowa, 712, 146 N. W. 841.

In *Dimick v. Downs* (1876) 82 Ill. 570, it is held that persons observing plaintiff shortly after the assault complained of may testify as to whether or not the plaintiff at that time appeared to be nervous and excited and under the influence of intoxicating liquors, the defendant claiming that the plaintiff was drunk at the time of the assault.

In *Foot v. Brown* (1866) 46 Barb. (N. Y.) 366, it is held that evidence may be given by plaintiff's attending physician as to his professional opinion of the extent and nature of the plaintiff's injuries and the cause, although based upon statements to him of the plaintiff as well as upon his own observation.

In *Earl v. Tupper* (1873) 45 Vt. 275, evidence is held to be admissible by the physician who attended a woman assaulted, as to her physical condition, and as to her statements with reference to the nature, symptoms, and effects of the injuries from which she had suffered.

Evidence is admissible as to the physical ability of a married woman to perform labor both before and after her injury, although she claimed no damages for loss of employment and her husband none for loss of her services, since such evidence is competent as tending to show the extent of her injury and suffering. *Labonte v. Davidson* (1918) 81 Idaho, 644, 175 Pac. 588.

Evidence is admissible of exclamations of present pain made at the time the injuries of the assaulted person were being examined the day follow-

ing the assault, although the witness was not a physician. *Sturgeon v. Sturgeon* (1891) 4 Ind. App. 232, 30 N. E. 805. In *Elliott v. Van Buren* (1875) 33 Mich. 49, 20 Am. Rep. 668, in sustaining the admissibility of evidence of nonexperts as to the character of the injuries of the plaintiff and her appearance following the assault, the court said: "There is no rule which can prevent ordinary witnesses from describing what they see, or from testifying concerning the kind of injury or sickness of others whom they have had occasion to consort with, unless it is something out of the common course of general information and experience, or unless the question presented involves medical knowledge beyond that of ordinary unprofessional persons. It would be ridiculous to shut out testimony of what any jurymen would understand well enough for all the exigencies of the case before him, simply because no physician has seen or examined the party. It would lead to a denial of justice in all cases of bodily injuries and sickness which did not occur within range of medical help, and which were not regarded as so difficult of treatment as to demand it. There is no danger that the introduction of common testimony on matters of common knowledge will do any more mischief, when open to cross-examination before a court and jury, than would arise from the want of any legal means of selecting witnesses from the numerous class of professional men, who differ as much in their relative merits as many of them do from laymen."

In *Singer Sewing Mach. Co. v. Methvin* (1913) 184 Ala. 554, 63 So. 997, it is held that where the plaintiff claimed as an element of damage that she suffered a miscarriage by reason of the assault complained of, evidence is competent to show her physical condition when she had a miscarriage about nine months prior to the alleged assault. The court said that this evidence would have a tendency to prove that the miscarriage was due to causes other than the wrongs alleged.

Evidence by a woman assaulted when pregnant is not admissible to

show that the child subsequently born to her was poor, small, nervous, and had grown but little; at least where there is no evidence tending to show that this condition of the child is the result of the assault. *Haupt v. Swenson* (1904) 125 Iowa, 694, 101 N. W. 520.

The torn underclothing of the plaintiff is admissible in evidence if it is in substantially the same condition that it was in after the assault complained of. The fact that it had been washed, however, does not affect its admissibility. *McMurrin v. Rigby* (1890) 80 Iowa, 322, 45 N. W. 877.

3. Prior or subsequent conduct of the parties.

In *Morely v. Dunbar* (1869) 24 Wis. 183, referring to the rule sustaining the admissibility of evidence as to other matters between the parties at about the time in question in order to increase or mitigate the damages, the court said that the admissibility of such testimony was the logical result of the rule which permitted exemplary damages to be recovered. "Where motive constitutes a basis for increasing the damages of the plaintiff above those actually sustained, there it should, under proper circumstances, constitute the basis for reducing them below the same standard. If malice in the defendant is to be punished by the imposition of additional damages, or smart money, then malice on the part of the plaintiff, by which he provoked the injury complained of, should be subject to like punishment, which, in his case, can only be inflicted by withholding the damages to which he would otherwise be entitled. The law is not so one-sided as to scrutinize the motives and punish one party to the transaction for his malicious conduct, and not to punish the other for the same thing; nor so unwise as not to make allowance for the infirmities of men, when smarting under the sting of gross and immediate provocation. If it were, then, as has been well said, it would frequently happen that the plaintiff would get full compensation for damages occasioned by himself,—a result which would be con-

trary to every principle of reason and justice."

In *Mawich v. Elsey* (1881) 47 Mich. 10, 10 N. W. 57, it is held that in an action to recover for an indecent assault, evidence is admissible that, prior to the occasion complained of, the defendant had addressed the plaintiff in unchaste language and had solicited sexual indulgence. The court said that, "in view of the nature of the injuries charged and of the issue, it was competent to show, if it were true, that his previous manner towards her had been lascivious and such as to imply that he was coveting her person. It would not have been the giving of proof of an independent and collateral cause of action, for the offer was not to show any conduct amounting to a cause of action; nor would it have been proof of matters indicative of general depravity or wickedness as a ground of argument that he was hence more likely to commit the acts imputed. But it would have been a submission of evidence to explain surrounding circumstances and show that the defendant's antecedent manner and state of mind towards the plaintiff had tended in the direction of the particular acts complained of, and that the different incidents were but parts of the same line of conduct, and the evidence, if believed, would naturally have lent credence to the plaintiff's case."

But in an action to recover damages for an indecent assault, evidence is not admissible of slanderous statements against the plaintiff's moral character, uttered by the defendant either prior or subsequently to the alleged assault. *Atkins v. Gladwish* (1889) 25 Neb. 390, 41 N. W. 347.

As corroboratory of the plaintiff's claim, evidence is admissible of the prior or subsequent conduct of the defendant, or of other prior or subsequent matters which may have a legitimate tendency to corroborate plaintiff.

Thus, in *Parker v. Couture* (1891) 63 Vt. 449, 21 Atl. 1102, the defendant denied being present at the place where the plaintiff claimed to have been assaulted by him, and it was held

that evidence was competent in plaintiff's behalf that at the same time and place the defendant assaulted her sister, and upon a prosecution therefor he pleaded guilty to such assault. Evidence that missiles were thrown at the house in which the plaintiff lived at a time when she was in the house and was assaulted therein is admissible as tending to sustain the claim of an assault by putting her in fear of bodily harm. *Dubois v. Roby* (1911) 84 Vt. 465, 80 Atl. 150.

In *Flint v. Bruce* (1878) 68 Me. 183, it is held that where the assault complained of was made upon the plaintiff while she was attempting to aid her father, whom the defendant was holding down and beating, evidence of this fact is admissible; but evidence is not admissible as to the physical injuries to the father, although offered to meet the denial of the defendant that he did not strike the father during the controversy.

The plaintiff is entitled to relate the transaction with reference to the assault as a whole, thereby making the narrative intelligible, although in so doing she refers to assaults upon others who came to her aid, and damage to the house in which she lived. *Dubois v. Roby* (Vt.) *supra*.

But in *Dornsife v. Ralston* (1910) 55 Or. 254, 97 Pac. 713, 106 Pac. 13, it is held that in an action for assault and battery, evidence is inadmissible of an assault at another time upon the plaintiff by the son of the defendant, acting independently of the defendant.

In this connection the question has arisen as to whether or not the claim of the plaintiff that the defendant ravished her may be corroborated by an exhibit to the jury of the child born to plaintiff as a result of the alleged ravishment. It has been held that a child born as a result of the ravishment of the plaintiff by the defendant cannot be made an exhibit upon the trial of a civil action to recover damages for the ravishment. The resemblance of the child to its alleged father is too indistinct and uncertain to be admissible as having any probative value. *Eckhart v. Peterson* (1917) 94 Wash. 379, 162 Pac. 551. In *Valencia*

v. Milliken (1916) 31 Cal. App. 533, 160 Pac. 1086, the court considered the question as to the right to exhibit a child as evidence to show resemblance to its alleged father, but held that it was not necessary to pass upon it, since, in the action under consideration, it did not appear that the child actually resembled the defendant; hence, prejudicial error was not shown to have resulted from permitting the comparison to be made of the child and the defendant.

4. *Complaint of plaintiff.*

Evidence is admissible that the girl complained to her parents of the assault upon her shortly thereafter. *Collins v. Wilson* (1897) 18 Ky. L. Rep. 1049, 39 S. W. 33; *Gardner v. Kellogg* (1877) 23 Minn. 468. But such proof must be confined to the principal fact, and is not to be extended to any of the details of the transaction. *Gardner v. Kellogg* (Minn.) *supra*. Evidence is admissible that the assaulted party complained to her husband on the evening of the day of the assault, when he returned from work. *Hopkinson v. Perdue* (1904) 8 Ont. L. Rep. 228, 3 Ont. Week. Rep. 984, 2 Ann. Cas. 280.

Statements of the assaulted child, a girl seven years old, with reference to her injury, and as to the person who committed the assault upon her, made shortly thereafter, are admissible in evidence. To be admissible, such declarations need not be expressly concurrent in point of time with the principal transaction: if they are so near to it as to afford reliable information as to the truth of the transaction, that is sufficient. *Smith v. Dawley* (1894) 92 Iowa, 312, 60 N. W. 625.

In *Stratton v. Nichols* (1850) 20 Conn. 327, it is held that evidence is admissible by a third person who was near the place of assault, unobserved by the parties, to the effect that he heard the plaintiff crying to defendant, "Let go of me, keep your hands off me, keep your distance."

b. *In defendant's behalf.*

Circumstances of provocation attending the transaction, or so recent, with reference to it, as to constitute

a part of the *res gestæ*, even if not sufficient entirely to justify the act done, may constitute an excuse which will mitigate the actual damage, and where the provocation is great and calculated to excite strong feelings of resentment, may reduce them to a sum which is merely nominal. *Morely v. Dunbar* (1869) 24 Wis. 183.

In a joint action by the husband and wife to recover damages for assault upon the wife, evidence is not admissible as to the language of the husband, in order to mitigate the damages. *Everts v. Everts* (1855) 3 Mich. 580.

Evidence is admissible as to the familiar relations existing between the plaintiff and defendant following the alleged assault, and which continued for some time thereafter. *Young v. Johnson* (1890) 123 N. Y. 226, 25 N. E. 363.

In an action to recover damages for an indecent assault, evidence is admissible of statements made by the plaintiff's husband, tending to prove that the action was baseless and malicious, and was brought to carry out a scheme between the husband and wife to extort money from the defendant, providing there is competent evidence tending to prove the conspiracy. *Mawich v. Elsey* (1881) 47 Mich. 10, 8 N. W. 587, 10 N. W. 57.

In *Young v. Johnson* (N. Y.) *supra*, it is held that evidence of a doctor is admissible to the effect that, in his opinion, pregnancy would not result from first intercourse between parties, where the female was forcibly defiled and the act was accomplished against her will.

Evidence is admissible that the plaintiff was afflicted with a particular disease which, as shown by experts, resulted frequently in hallucinations by women suffering therefrom as to the conduct of men towards them. *Derwin v. Parsons* (1884) 52 Mich. 425, 50 Am. Rep. 262, 18 N. W. 200.

VI. Instruction to jury.

It is error for the court to instruct the jury that the plaintiff must show that the defendant intended to have sexual intercourse with her, in order to be entitled to recover damages in

an action for assault and battery based upon the act of the defendant in taking improper familiarities with the person of the plaintiff, since such intent is immaterial. *Luttermann v. Romey* (1909) 143 Iowa, 233, 121 N. W. 1040.

In *Wolff v. Van Housen* (1894) 55 Ill. App. 295, it was held that where an action was based upon the assault and ravishment of the plaintiff, it is error for the court to instruct the jury that, in order for the plaintiff to recover, they must be satisfied from a preponderance of the evidence that the defendant had criminal knowledge of the plaintiff forcibly and against her will, since the defendant might be guilty of an assault, even if the plaintiff was found not entitled to recover for her ravishment.

In an action to recover damages for assault and battery to secure the plaintiff's consent to sexual intercourse, it is improper to instruct the jury as to the offense of rape, and to submit the special question as to whether or not the defendant was guilty of rape upon the plaintiff. *Beseler v. Stephani* (1874) 71 Ill. 400.

In an action to recover damages for an assault and battery resulting in a miscarriage of the plaintiff, it is error for the court to instruct the jury that, in order to find for the plaintiff, they must find that she suffered a miscarriage as the result of the assault and battery complained of, since the defendant would be guilty without reference to the consequences to the plaintiff, if he committed the assault complained of. *Frederickson v. Nelson* (1903) 135 Mich. 246, 97 N. W. 678.

In *Valencia v. Milliken* (1916) 31 Cal. App. 533, 160 Pac. 1086, the defense was an alibi and the denial of any sexual relations with the plaintiff. Under these circumstances it was held not prejudicial error for the court to instruct the jury that the chastity of the plaintiff was material only upon the question of damages.

Although the court improperly refused to instruct that they had the right to award the plaintiff punitive damages if they found in her favor,

such refusal does not constitute reversible error where the verdict is for the defendant. *Rittfeldt v. Young* (1912) 170 Ill. App. 228.

In *Ratteree v. Chapman* (1887) 79 Ga. 574, 4 S. E. 684, an instruction was held to be erroneous where it in effect authorized the jury to award punitive damages to punish the defendant if they found the assault was malicious, aggravated, and wanton, and that justice and public good required the award of such damages.

In *Bingham v. Bernard* (1886) 36 Minn. 114, 30 N. W. 404, it is held to be error for the court to instruct the jury that the testimony of the defendant's witnesses, that they had never heard anything against the defendant's reputation for chastity, is prop-

er evidence as to a person's character, and, indeed, it is the very best evidence that could be given, especially on this question of chastity.

It is not error for the court to instruct the jury that "the simple fact that the plaintiff is a young woman is no reason why the jury should be taken off their feet, lose their heads, and return a verdict for a lady on general principles. I do not think you will do it, and don't think juries of this county are made up of that class of men." *Ibid*.

It is improper to instruct the jury to award such damages as they may think the plaintiff sustained as a direct result of the defendant's conduct. *Timmons v. Kenrick* (1913) 53 Ind. App. 490, 102 N. E. 52. A. G. S.

J. K. JOHNSON, Appt.,

v.

IDA JOHNSON.

Alabama Supreme Court—December 20, 1917.

(— Ala. —, 77 So. 335.)

Husband and wife — right to sue for assault.

1. A woman may sue her husband for assault, under statutes abrogating the fiction of legal identity and permitting her to sue alone for injuries to her person.

[See note on this question beginning on page 1088.]

Witness — permission to answer question in writing.

2. The court may, in its discretion, permit a female witness to write the answer to a question as to an epithet applied to her, for the consideration of the jury in her absence, if the epithet is shocking to modesty.

Husband and wife — assault — justification.

3. An assault by husband on wife is not justified by the facts that she refused to allow his father to sit at table with her, that she removed from the home articles purchased by him, and interfered with his business by advising persons not to patronize him and refusing to inform him of business telephone calls.

Damages — from assault — mitigation.

4. Refusal of a wife to permit her

husband's father to sit at table with her, her removal of articles purchased by the husband from the home, and her interference with his business by advising people not to patronize him and refusing to inform him of business telephone calls, is not ground for mitigation of damages for his assault upon her, if they were not closely connected in point of time with the assault.

[See 2 R. C. L. 588.]

— mean disposition.

5. A man cannot show in mitigation of damages for assault upon his wife that she was of a mean and fussy disposition.

Appeal — rejection of questions — argument.

6. Refusal to permit a witness to answer a question involving an argument is not reversible error.

Evidence — refusal of warrant.

7. In an action by a wife against her husband for assault, evidence is not admissible of her application to a magistrate for a warrant, which was refused, and of the reasons for the refusal.

— pending suit.

8. To show motive for assault by husband on wife, evidence is admissible that she had a suit pending against him.

— acts of wife after assault.

9. Evidence as to what a wife assaulted by her husband did after the assault, and what neighbors and relatives did for her, is not admissible in an action by her for the assault, if they have no tendency to show the nature and extent of the injury.

Appeal — inadmissible evidence.

10. The admission of inadmissible evidence, tending to arouse the sympathy of the jury, which is not cured by instructions, is reversible error.

[See 2 R. C. L. 252.]

Damages — assault by husband — separation from wife.

11. Damages for the resulting separation of a wife from her husband cannot be allowed in her action against him for assault.

Appeal — refusal of instructions.

12. Refusal of a request for a proper charge is not reversible error if it is covered by instructions given.

[See 2 R. C. L. 261.]

— abstract instruction.

13. Refusal of an abstract instruction not required by the tendencies of the evidence is not error.

[See 2 R. C. L. 261.]

Trial — instruction — justification for assault.

14. Requested instructions are properly refused which are misleading, argumentative, and invasive of the province of the jury, such as instructions in an action by a wife against her husband for assault, which deal with questions of provocation of assault by her upon him.

[See 14 R. C. L. 730, 773, 775.]

(Somerville, Gardner, and Thomas, JJ., dissent.)

APPEAL by defendant from a judgment of the Circuit Court for Marshall County (Haralson, J.) in favor of plaintiff in an action brought to recover damages for alleged assault and battery. *Reversed.*

The facts are stated in the opinion of the court.

The assignments and charges mentioned in the opinion are as follows:

The third assignment of error is as follows: The circuit court erred, to the injury of the appellant, in overruling defendant's objection to the court's permitting the witness to write on a piece of paper the words, "damn bitch, damn yellow bitch," and permitting these words, when written on the paper, to be read to the jury in the absence of the witness. Assignment 14: The court erred, to the injury of appellant, in refusing to permit defendant to show by plaintiff on cross-examination that in October before this difficulty she had gotten mad and had left home, and did not come back until after the automobile accident. 22. The court erred, to the injury of appellant, in excluding the statement of defendant (speaking of

plaintiff) that she was not crying.

23. In excluding statement of defendant (speaking of plaintiff) that she was not hysterical—it was just meanness. 24. In refusing to allow defendant to show that plaintiff had assaulted him on a previous occasion with a broom. 27. In refusing to allow appellant to prove by the witness that he had purchased meal of the witness to be delivered to his house, and that he delivered the meal, and plaintiff was the only one there, and that she declared she would not cook it, that he need not bring it, that she was not going to cook it. 25. The court erred in refusing to allow defendant to show that plaintiff's disposition was that of a fussy, quarrelsome, and contentious person. 26. Same as to another witness. 28. In refusing to allow defendant to show by a witness that he knew plaintiff's tem-

per and disposition, and that it was quarrelsome and fussy. Charge 3, refused to defendant, is as follows: "The court charges the jury that if the parties are husband and wife, you may look to this in connection with all the other evidence, and if you find that the conduct and demeanor of plaintiff toward defendant was such as to irritate, annoy, and provoke defendant into hasty or unthoughted act towards plaintiff, you may consider such condition and conduct in mitigation of such acts on his part, though you should not find him blameless." Assignment 13: The court erred in refusing to allow defendant to ask plaintiff on cross-examination this question: "Your feelings towards your husband at that time were such that you would not notify him that you had been in an accident?" 15. In refusing to permit defendant to ask plaintiff on cross-examination this question with reference to her interview with Dr. Morton: "He told you that you and Dr. Johnson had been quarreling so much that he would not give you a warrant?" 16. Question to plaintiff on cross-examination: "Didn't Dr. Morton tell you that your relations with Dr. Johnson were such, and that you had been talking in such a way, he could not give you a warrant?" 17. Question to plaintiff on cross-examination, speaking of Dr. Morton: "He did not give you a warrant, did he?" 18. Just after plaintiff as a witness had testified, "I just asked him for protection," the court refused to permit defendant on cross-examination to ask her if Dr. Morton did not tell her that she did not need protection. Assignment of error 4: The court erred in permitting plaintiff as a witness to testify that Mrs. Polk assisted her up the steps and into the house. 5. Permitting plaintiff to testify that she was in Mrs. Polk's house an hour or so. 6. Permitting plaintiff to testify that she remained at Mrs. Snellgrove's until the middle of the afternoon. 7. Permitting plaintiff to testify as a witness that she was carried there

not long before night and remained there. 8. Permitting witness to testify: "I do not know just exactly how long it was, but just as I would suffer. I do not know that it was applied every day, but was for a while." The following charges were refused to defendant: 4. The court charges the jury that defendant was under no duty to hold plaintiff to keep her from assaulting him. 7. Under the law defendant had the right to inquire of plaintiff about household articles, or their disposition, and such inquiry would not be provocation which would justify a wife in assaulting him. 9. Inquiry by the husband as to the management or government of the house, made of the wife, do not justify an assault by her upon him, nor would such inquiry put him at fault in provoking or bringing on the difficulty. 10. The use of words of remonstrance or rebuke or reproach by the husband to the wife do not constitute a fault on his part as a justification for an assault by her upon him, whether such remonstrance, rebuke, or reproach were well or ill founded. 11. Practically the same as 10.

Messrs. A. E. Hawkins and John A. Lusk & Son, for appellant:

The wife cannot maintain an action against the husband for an assault and battery committed during the marriage.

Lillienkamp v. Rippetoe, 133 Tenn. 57, L.R.A.1916B, 881, 179 S. W. 628; Ann. Cas. 1917C, 901; Thompson v. Thompson, 218 U. S. 611, 54 L. ed. 1180, 30 L.R.A.(N.S.) 1153, 31 Sup. Ct. Rep. 111, 21 Ann. Cas. 921; Strom v. Strom, 98 Minn. 427, 6 L.R.A.(N.S.) 191, 116 Am. St. Rep. 387, 107 N. W. 1047.

If the question is held material and relevant by the court, the witness must answer.

5 Jones, Ev. p. 23, ¶ 800.

On cross-examination, any fact may be elicited which tends to show bias, prejudice, hostility, hatred, ill will, etc.

Louisville & N. R. Co. v. Tegner, 125 Ala. 593, 28 So. 510; Drum v. Harrison, 83 Ala. 384, 3 So. 715; Linnehan v. State, 120 Ala. 293, 25 So. 6; Underhill, Crim. Ev. 248.

Malice on the part of the plaintiff, inducing her to provoke an assault, should be considered to enable the jury to properly assess the damages.

1 Sutherland, Damages, § 151, p. 386.

When one party offers any part of a conversation, the other party may call for all of, or any part of, the conversation.

Jones, Ev. ¶¶ 822, 872.

Aggravating conduct and language of the plaintiff is admissible in mitigation of damages.

Jones v. Bynum, 189 Ala. 677, 66 So. 639; Chambers v. Porter, 5 Coldw. 273; Yeager v. Berry, 82 Mo. App. 534.

Messrs. Street & Bradford, for appellee:

An express statutory declaration is not necessary to enable the wife to sue the husband either in contract or in tort, and the language of the statutes is broad enough to entitle her to sue him in contract, in detinue, and in ejectment.

Bruce v. Bruce, 95 Ala. 563, 11 So. 197; Cook v. Cook, 125 Ala. 583, 82 Am. St. Rep. 264, 27 So. 918; Bolling v. State, 98 Ala. 80, 12 So. 782.

The disability of the husband and wife to sue each other at common law grew out of the fiction of their legal identity, an identity which has been completely destroyed in Alabama so far as concerns their rights to property and the right to sue for it and for injuries to person or reputation.

21 Cyc. 1144, 1302; 1 Bl. Com. 442; Lathrop-Hatten Lumber Co. v. Bessemer Sav. Bank, 96 Ala. 351, 11 So. 418; Thompson v. Thompson, 218 U. S. 611, 54 L. ed. 1180, 30 L.R.A.(N.S.) 1153, 31 Sup. Ct. Rep. 111, 21 Ann. Cas. 921; Fiedler v. Fiedler, 42 Okla. 124, 52 L.R.A.(N.S.) 189, 140 Pac. 1022; Brown v. Brown, 88 Conn. 42, 52 L.R.A.(N.S.) 185, 89 Atl. 889, Ann. Cas. 1915D, 70.

The court may decline to compel a witness to use the identical language if it is indecent, and may permit the use of words of equivalent import.

14 Enc. Ev. 219; 40 Cyc. 2408, 2412; Skaggs v. State, 108 Ind. 53, 8 N. E. 695.

The movements and whereabouts of plaintiff immediately following the assault were clearly competent. So was the fact that liniments were applied to her bruises.

Jordan v. Rice, 165 Ala. 650, 51 So. 517.

To what extent cross-examination shall go is largely discretionary with

the court, and a clear case of error must be shown to justify a reversal.

3 Enc. Ev. pp. 856, 880; Ingram v. State, 67 Ala. 67; Tobias v. Treist, 103 Ala. 664, 15 So. 914; A. G. Rhoades Furniture Co. v. Weeden, 108 Ala. 252, 19 So. 318.

Plaintiff was entitled to recover for her own support and maintenance during the time she was separated from her husband.

Jones v. Jones, 95 Ala. 443, 18 L.R.A. 95, 11 So. 11; Morris v. Morris, 20 Ala. 168; Hanberry v. Hanberry, 29 Ala. 719; Kinsey v. Kinsey, 37 Ala. 393; Mobile & O. R. Co. v. George, 94 Ala. 199, 10 So. 145, 18 Am. Neg. Cas. 29; Birmingham R. & Electric Co. v. Ward, 124 Ala. 409, 27 So. 471.

If defendant was the aggressor, it would be his duty in law to resort to other methods of freeing himself than that of blows.

3 Cyc. 1073-1075; Bynum v. Jones, 177 Ala. 431, 59 So. 65; Murphy v. Coleman, 9 Ala. App. 625, 64 So. 185.

Sayre, J., delivered the opinion of the court:

This appeal raises the question whether, under our system of law, a wife may maintain an action to recover damages for an assault and battery committed upon her person by the husband.

It is conceded, of course, that at the common law no such action could be maintained. That law regarded the husband and wife, for judicial purposes, as but one person, and, we may add, the husband was that person. Hence the rule to which we have referred, and one result, that husband and wife could not contract with or sue each other. While much of that law has disappeared under the pressure of a public opinion steadily growing in enlightenment, it must still be conceded that it is not for the courts by sudden strokes of policy to make deep innovations upon the established law. We think, then, that the question now before us may be appropriately stated in the following form: Have our statutes on the subject of the rights of married women left unchanged the theory of legal identity, of old the foundation of the marital status, merely providing exceptions to the

necessary consequences of that theory, or has that foundation been so substantially changed that, except as disabilities have been retained, each has against the other all the rights of persons not so related? Under our statutory system, our opinion is that the latter alternative may and should be adopted.

Section 4492 of the Code provides that "the wife has full legal capacity to contract as if she were sole, except as otherwise provided by law." "The husband and wife may contract with each other," etc. Section 4497. "All damages which the wife may be entitled to recover for injuries to her person or reputation are her separate property." Section 4489. "The wife must sue alone . . . for injuries to such property, . . . or for all injuries to her person or reputation," etc. Section 4493. There are other sections bearing more or less remotely upon this subject. It may be said that the last-quoted section was not enacted with a view to precisely the case here presented; but these sections, the last included, have the effect of abrogating the fiction of legal identity, and seem thereby, except as otherwise prescribed, to destroy the foundation of the common law in its application to questions touching the rights of husband and wife inter se.

In *Bruce v. Bruce*, 95 Ala. 563, 11 So. 197, where the wife sued the husband in detinue, the court said: "Our conclusion is that, if the suit is one which the statute requires to be brought in the name of the wife alone, it may be prosecuted against her husband, if he is the party responsible for the violation of the right to be vindicated by the suit. The effect of the statute is that the legal rights of the wife as against her husband may be enforced by legal remedies."

In *Cook v. Cook*, 125 Ala. 533, 82 Am. St. Rep. 264, 27 So. 918, the court, after referring to the decision in *Bruce v. Bruce*, said that the right to sue her husband to recover from him possession of her realty rests upon the same statutory provi-

sion and the same principles declared in the case cited as to her personalty, and can no more be denied in respect of one class of property than in respect of the other. . . . To hold otherwise would be to give the husband rights and estates in the wife's lands which our statutes not only do not provide for, but expressly provide against."

The ancient common law of England, which gave the husband, at least among the "lower rank of the people," the right to restrain the wife of her liberty and to chastise her (1 Bl. Com. 444), was never in this state the law for any rank or condition of people. *Fulgham v. State*, 46 Ala. 143. The legislature, as we have seen, has given the wife an action against the husband for injuries to her property rights, and we can hardly conceive that the legislature intended to deny her the right to sue him separately, in tort, for damages arising from assaults upon her person. The language of the statute covers the one form of injury as well as the other, and we hold that the wife was properly allowed to proceed

Husband and wife—right to sue for assault.

with her suit, defendant's pleas and special charges requested to the contrary notwithstanding. The wife's remedies, by a criminal prosecution or an action for divorce and alimony, which in some jurisdictions are allowed to stand as her adequate remedies for wrongs of the sort described in this complaint, so far from being adequate remedies, appear to us to be illusory and inadequate, while, as for the policy which would avoid the public airing of family troubles, we see no reason why it should weigh more heavily against this action than against those which the courts universally allow.

Every court has the power to preserve the common decencies of life. In the exercise of this power, the constitutional rights of parties and witnesses duly observed, the courts exercise a large discretion in respect to the mode of examining witnesses.

They may permit a female witness to answer questions shocking to modesty—and such questions are sometimes necessary—in the way least offensive to a proper sense of decency. Probably in this case the witness balked too readily, but there is no evidence that the defendant's right of cross-examination was in any way limited, nor that in any other respect defendant was injured by that ruling of the court which

Witness—
permission to
answer question
in writing.

permitted the plaintiff to answer in writing the question made the subject of the third assignment of error.

The fact, if it was a fact, that plaintiff had refused to allow defendant's father to sit at table with her; that she had carried away from the home carpets and rugs furnished by defendant; that she had advised the defendant's patients against having his services as a physician; that she had complained about defendant's absence from home at night; that she would not cook his meals; that she would not inform him of telephone calls for him in his professional capacity as a physician; and other like examples and evidences of plaintiff's failure to observe the duties of a faithful wife, though doubtless well calculated to embitter and exasperate the ordinary husband, furnished no sufficient excuse for the alleged assault, nor

Husband and
wife—assault—
justification.

was evidence of these things admissible in mitigation of damages; this last for the reason that the occurrences sought to be proved were not shown to have had anything like an intimate or

Damages—
from assault—
mitigation.

close connection in point of time with the assault of which the plaintiff was complaining. *Keiser v. Smith*, 71 Ala. 481, 46 Am. Rep. 342; *Lovlace v. Miller*, 150 Ala. 422, 11 L.R.A. (N.S.) 670, 43 So. 734, 14 Ann. Cas. 1139; 7 Mayfield's Dig. p. 44. These authorities answer also assignments of error numbered 14, 22, 23, 24, and 27. And it is clear that the court cor-

rectly ruled in not allowing the defendant husband to show, by way of justification or mitigation, that plaintiff was of a mean and fussy disposition, as appears in those rulings made the subject of assignments numbered 25, 26, and 28. And so of charge 3 refused to the defendant.

—mean
disposition.

The question shown by the thirteenth assignment of error included an argument, as the trial court observed, and for that reason, if none other, error cannot be affirmed of the court's ruling against it.

Appeal—
rejection of
questions—
argument.

Assignments 15, 16, 17, and 18. The court committed no error in sustaining the plaintiff's objections to questions by which the defendant sought to elicit evidence to the effect that plaintiff complained to a magistrate, after the assault alleged, that the magistrate refused to issue a warrant for defendant, and the reasons assigned for such refusal. What the magistrate said or did at that time was clearly incompetent and inadmissible.

Evidence—
refusal of
warrant.

Plaintiff was properly allowed to show that she had a pending suit against the defendant at the time of the assault and battery alleged as going to show a motive.

—pending suit.

Evidence as to where plaintiff went and how long she stayed at sundry places, and what was done for her by some of her neighbors and relatives during a good many hours after the assault and battery complained of, could only have been competent and relevant on the theory that these things tended to show the nature

—acts of wife
after assault.

and extent of her injuries. But the court thinks these things had no legitimate tendency in that direction. There was no element of spontaneity in these subsequent transactions. They may have been calculated, and must have rested, upon inferences drawn from the dec-

larations or conduct of the plaintiff hours after the wrong of which she was complaining. And yet the circumstances shown by the testimony against which the fourth, fifth, sixth, seventh, and eighth assignments of error are laid may have had much to do with enlisting the sympathy of the jury and influencing their judgment of the nature and extent of the injuries suffered by the plaintiff. Moreover, several items of the testimony so admitted tended to produce in the minds of the jury the impression that for plaintiff's separation from her husband and home she was entitled to damages in this action. As we shall see, damages on that account could not be awarded in this cause, and the rulings to which we now refer necessitated requests for instructions to that effect. It is doubtful that such instructions cured the improper influence of this evidence in any of its bearings upon the question of damages. Maryland Casualty Co. v. McCallum, — Ala. —, 75 So. 902. We think it reasonably certain that the general tendency of the evidence to arouse the sympathy of the jury upon an improper consideration was not cured. The rulings here shown are therefore held for reversible error.

Appeal—
inadmissible
evidence.

sympathy of the
jury upon an im-
proper considera-

"There is no law to compel a wife to live with her husband on her land or on his. There is no legal prohibition upon her separating from him and living apart." Cook v. Cook, supra. The like may be said of the husband, though he must support and maintain the wife as long as she does not abandon him without just cause. This consideration entered into the argument for the conclusion that the wife might maintain this action. Damages for separation imply support and maintenance pending separation. Relief of that sort is awarded in the courts of

equity upon considerations which have no place in an action for assault and battery. The two remedies cover entirely different fields, and one may not be made to serve the purpose of the other.

Damages—
assault by
husband—
separation
from wife.

Charge 1, requested by the defendant, was a proper charge; but the court holds there was no reversible error in its refusal, for the reason that it was covered substantially by charge 2, given at defendant's request.

Appeal—refusal
of instructions.

We find in the evidence, as reported in the bill of exceptions, no reason why the court should have given the fourth charge requested by defendant. It seems to be an abstraction, its consideration not being required by any tendencies of the evidence.

—abstract
instruction.

Charges 7, 9, 10, and 11, requested by defendant, were properly refused. These charges were misleading, argumentative, and invasive of the province of the jury. The issue to be determined was not whether the facts justified an assault by plaintiff on the defendant, but, whether there were any circumstances to justify or mitigate defend-

Trial—
instruction—
justification
for assault.

ant's confessed assault upon the plaintiff. These charges directed attention to this immaterial issue, solved it for the jury, and tended to produce the impression that it should conclude the case against the plaintiff.

We have said enough to indicate the opinion of the court on all the questions reserved and argued.

Reversed and remanded.

Anderson, Ch. J., and McClellan, and Mayfield, JJ., concur.

Somerville, Gardner, and Thomas, JJ., dissent.

ANNOTATION.

Right of one spouse to maintain an action against the other for assault and battery, under the Married Women's Acts.

- I. General rule as to right of wife:
 - a. Majority rule, 1038.
 - b. Minority rule, 1041.
- II. Grounds for rule:
 - a. Public policy, 1044.
 - b. Other remedies by wife, 1046.
 - c. Equality of husband and wife as to remedy, 1046.
- III. Effect of divorce, 1047.
- IV. Right of husband to sue wife,

*I. General rule as to right of wife.**a. Majority rule.*

It is clear that at common law neither spouse could maintain an action against the other for an assault and battery committed during coverture. Among the cases so holding are *Thompson v. Thompson* (1910) 218 U. S. 611, 54 L. ed. 1180, 30 L.R.A. (N.S.) 1153, 31 Sup. Ct. Rep. 111, 21 Ann. Cas. 921; *JOHNSON v. JOHNSON* (reported herewith) ante, 1031; *Abbott v. Abbott* (1877) 67 Me. 304, 24 Am. Rep. 27; *Butterfield v. Butterfield* (1916) 195 Mo. App. 37, 187 S. W. 295, 197 S. W. 374; *Longendyke v. Longendyke* (1863) 44 Barb. (N. Y.) 369; *Lillienkamp v. Rippetoe* (1915) 133 Tenn. 57, L.R.A.1916B, 881, 179 S. W. 628, Ann. Cas. 1917C, 901; *Schultz v. Christopher* (1911) 65 Wash. 496, 38 L.R.A.(N.S.) 780, 118 Pac. 629; *Phillips v. Barnet* (1876) L. R. 1 Q. B. Div. (Eng.) 436, 45 L. J. Q. B. N. S. 277, 34 L. T. N. S. 177, 24 Week. Rep. 345.

The question as to the right of a married woman to maintain an action against her husband for an assault and battery committed upon her by him during coverture is now very generally controlled by so-called Married Women's Acts. Of course, the effect of these statutes depends very largely upon their language. This fact explains in part, although not wholly, the apparent differences of opinion among the courts as to the effect of statutes on the rights of married women in this regard. In general there is one character of statute which apparently leaves unchanged the mar-

riage status, except that in effect it merely removes the common-law impediment resulting from the marital relation. Under statutes of this character, by the great weight of authority, a married woman cannot maintain an action against her husband for an assault and battery committed by him upon her during coverture.

United States. — *Thompson v. Thompson* (1910) 218 U. S. 611, 54 L. ed. 1180, 30 L.R.A.(N.S.) 1153, 31 Sup. Ct. Rep. 111, 21 Ann. Cas. 921.

District of Columbia. — *Thompson v. Thompson* (1908) 31 App. D. C. 557, 14 Ann. Cas. 879, affirmed in (1910) 218 U. S. 611, 54 L. ed. 1180, 30 L.R.A. (N.S.) 1153, 31 Sup. Ct. Rep. 111, 21 Ann. Cas. 921.

Iowa. — *Peters v. Peters* (1875) 42 Iowa, 182.

Maine. — *Abbott v. Abbott* (1877) 67 Me. 304, 24 Am. Rep. 27; *Libby v. Berry* (1882) 74 Me. 286, 43 Am. Rep. 289.

Michigan. — *Bandfield v. Bandfield* (1898) 117 Mich. 80, 40 L.R.A. 757, 72 Am. St. Rep. 550, 75 N. W. 287.

Minnesota. — *Strom v. Strom* (1906) 98 Minn. 427, 6 L.R.A.(N.S.) 191, 116 Am. St. Rep. 387, 107 N. W. 1047.

Missouri. — *Rogers v. Rogers* (1915) 265 Mo. 200, 177 S. W. 382; *Butterfield v. Butterfield* (1916) 195 Mo. App. 37, 187 S. W. 295, 197 S. W. 374.

New York. — *Schultz v. Schultz* (1882) 89 N. Y. 644, reversing (1882) 27 Hun, 26; *Abbe v. Abbe* (1897) 22 App. Div. 483, 48 N. Y. Supp. 25; *Longendyke v. Longendyke* (1863) 44 Barb. 367.

Tennessee. — *Lillienkamp v. Rippetoe* (1915) 133 Tenn. 57, L.R.A.1916B, 881, 179 S. W. 628, Ann. Cas. 1917C, 901.

Texas. — *Nickerson v. Nickerson* (1888) 65 Tex. 281; *Sykes v. Speer* (1908) — Tex. Civ. App. —, 112 S. W. 422; *Wilson v. Brown* (1913) — Tex. Civ. App. —, 154 S. W. 322.

Washington. — *Schultz v. Christopher* (1911) 65 Wash. 496, 38 L.R.A. (N.S.) 780, 118 Pac. 629.

England.—*Phillips v. Barnet* (1876) L. R. 1 Q. B. Div. 436, 45 L. J. Q. B. N. S. 277, 34 L. T. N. S. 177, 24 Week. Rep. 345.

In *Thompson v. Thompson*, reported in the Federal Supreme Court, the statute construed provided in effect that married women shall have the power to sue separately for the recovery, security, or protection of their property, and for torts committed against them, as fully and freely as if they were unmarried. In holding that this statute did not entitle a wife to maintain an action against her husband for an assault and battery committed upon her by him, the court said that, “in construing the statute, the courts are to have in mind the old law and the change intended to be effected by the passage of the new. Reading this section, it is apparent that its purposes, among others, were to enable a married woman to engage in business and to make contracts free from the intervention or control of the husband, and to maintain actions separately for the recovery, security, and protection of her property. . . . By this District of Columbia statute the common law was changed, and, in view of the additional rights conferred upon married women in § 1155 and other sections of the Code, she is given the right to sue separately for redress of wrongs concerning the same. That this was the purpose of the statute, when attention is given to the very question under consideration, is apparent from the consideration of its terms. Married women are authorized to sue separately for ‘the recovery, security, or protection of their property, and for torts committed against them, as fully and freely as if they were unmarried.’ That is, the limitation upon her right of action imposed in the requirement of the common law, that the husband should join her, was removed by the statute, and she was permitted to recover separately for such torts, as freely as if she were still unmarried. The statute was not intended to give a right of action against the husband, but to allow the wife, in her own name,

to maintain actions of tort which, at common law, must be brought in the joint names of herself and husband. This construction, we think, is obvious from a reading of the statute in the light of the purpose sought to be accomplished. It gives a reasonable effect to the terms used, and accomplishes, as we believe, the legislative intent, which is the primary object of all construction of statutes.”

In *Peters v. Peters* (1875) 42 Iowa, 182, *supra*, the statute in effect authorized a married woman to prosecute or defend all actions in law or equity for the protection of her rights in property, as if unmarried. This provision was construed to refer to actions against parties other than the husband, in view of the express provision authorizing either husband or wife to maintain an action against the other for property or rights growing out of property.

In *Bandfield v. Bandfield* (1898) 117 Mich. 80, 40 L.R.A. 757, 72 Am. St. Rep. 550, 75 N. W. 287, *supra*, the statute provided that the real and personal estate of every female, acquired before marriage, and all property, real and personal, to which she may afterwards become entitled by gift, grant, etc., shall be and remain her estate and property, and that actions may be brought by and against a married woman in relation to her sole property in the same manner as if she were unmarried. The court, without specifying the character of the tort, said that this statute did not convey the right upon a married woman to maintain an action against her husband for assault and battery unless it was by implication and “that the legislature should speak in no uncertain manner when it seeks to abrogate the plain and long-established rules of the common law. Courts should not be left to construction to sustain such bold innovations.”

In *Libby v. Berry* (1882) 74 Me. 286, 43 Am. Rep. 289, *supra*, the statute is said merely to authorize married women to maintain alone such actions as previously could be sustained when brought by the husband alone, or by the husband and wife jointly,

and that in an action by the wife against the husband for an assault, the husband could not be a party plaintiff with the wife, for he was the principal as well as the defendant; hence the statute could not be construed to authorize such an action.

In *Longendyke v. Longendyke* (1863) 44 Barb. (N. Y.) 367, supra, it is held that a provision in the Code declaring that married women may sue and be sued in all matters relating to their property, which may be their sole and separate property or come to them from any person except their husbands, and they may bring actions to recover damages for injuries to their person or character against any person or body corporate, which damages when so recovered shall be their sole and separate property, does not entitle married women to maintain actions against their husbands for assault and battery. The court said that the right of a married woman to sue her husband in such an action may perhaps be covered under the literal language of this section, but that such was not the meaning and intent of the legislature, and such should not be the construction given the act, since such a construction was contrary not only to the rule of the common law, but to the spirit and intent of the Married Women's Acts, the object of which was to add to her property rights as feme sole, and to distinguish her property from her husband's, and not to confer rights of action upon her, against him. The doctrine of this case is affirmed in *Schultz v. Schultz* (1882) 89 N. Y. 644, where, without opinion, the court of appeals reversed the decision of the appellate court as reported in (1882) 27 Hun, 26.

In *Schultz v. Christopher* (1911) 65 Wash. 496, 38 L.R.A. (N.S.) 780, 118 Pac. 629, supra, the statute provided that "all laws which impose or recognize civil disabilities upon a wife, which are not imposed or recognized as existing as to the husband, are hereby abolished, and for any unjust usurpation of her natural or property rights she shall have the same right to appeal in her own individual name to the court of law or equity for re-

dress and protection that the husband has." The court held that construing this statute with a view to effectuate a legislative purpose, it could not be construed to confer upon the wife a right to maintain an action against the husband for assault and battery. Upon this point it was said that the legislative object in this enactment "was to place the wife and husband upon the same footing so far as their legal rights were concerned, and this is set forth so plainly in the statute that it is scarcely susceptible of construction. It will be noted that the statute does not intend to emancipate the wife from all civil disabilities, but the express language is that all civil disabilities which are not imposed or recognized as existing as to the husband are abolished, and that for any usurpation of her natural or property rights, she shall have the same right to appeal and the same protection and redress that the husband has. The only object that the statute had was the commendable one of abolishing the tyranny of sex, and the placing of the husband and wife upon an equal footing. It does not go further than this, and when it is conceded that the husband has not the right under this statute, and did not have at common law, to sue the wife for a tort, it is plain that no such right is conferred upon the wife."

In *Rogers v. Rogers* (1915) 265 Mo. 200, 177 S. W. 382, supra, the action was for false imprisonment. This was, of course, regarded as a tort, but it is not clear that it was regarded as an assault, although the court treated the cases involving the right of a wife to sue her husband for an assault as applicable. The statute construed provided, in effect, that a married woman may in her own name sue and be sued with the same force and effect as if she were a feme sole. While the court construed this statute as intending by its terms to give a married woman the right to sue and be sued as if she were a feme sole, it held that nevertheless the statute did not attempt to confer greater rights of action upon a married woman than are possessed by her husband, and it is pointed

out that a husband cannot maintain an action against his wife for an assault and battery. In *Butterfield v. Butterfield*, supra, this case was followed as authority for holding that the wife could not maintain an action against her husband to recover for an assault and battery committed by him upon her.

In *Lillienkamp v. Rippetoe* (1915) 133 Tenn. 57, L.R.A.1916B, 881, 117 S. W. 628, Ann. Cas. 1917C, 901, supra, the provisions which were held not to authorize an action for assault and battery by a wife against the husband were those of a general statute to the effect that if any person commits an assault and battery upon his wife, he is guilty of a misdemeanor, and punishable accordingly, and of another statute to the effect that married women are thereby fully emancipated from all disabilities on account of coverture; and the common law as to the disabilities of married women, and its effect on the rights of property of the wife, is totally abrogated, and marriage shall not impose any disability or incapacity on a woman as to the ownership of property, etc. Referring to the later act, the court said it does not purport "by any express provision to abrogate that fundamental principle of the common law under which, by virtue of the marriage, husband and wife became a legal unit during the existence of coverture; nor does it purport to absolve the wife from the duties to the husband which the common law, by reason of their relationship, imposed upon her; nor does it purport to deprive her of the benefits, protection, and support which her husband was at common law held bound to afford her. It does not in express terms confer upon her the right to sue her husband for torts committed upon her during coverture, nor does it purport by such terms to confer upon him the right to sue her for such torts committed by her. By no express terms of this act are the respective rights and duties of the husband and wife toward each other involved in the marriage relation disturbed or affected, except as such a result must necessarily flow from the exercise by

her of the powers and capacities in respect of her property rights in the act set out."

In *Keister v. Keister* (1918) 123 Va. 157, 1 A.L.R. 439, 96 S. E. 315, the question involved was the right to maintain an action in behalf of the representatives of the wife against the husband for an assault upon her which resulted in her death. The court considered the question as to whether or not the Married Women's Statute of Virginia conferred upon married women during coverture the substantive civil right essential to support a cause of action in a suit at law for damages, instituted during the coverture by a wife against her husband, for an assault upon her committed by the husband during coverture. It was held that such a right of action was not given by the Code of Virginia, which, in effect, provided that a married woman may contract and be contracted with, and sue in the same manner and with the same consequences as if she were unmarried.

b. Minority rule.

As heretofore pointed out, the cases are not in accord upon the question of the right of the wife to maintain an action against the husband for an assault and battery committed upon her by him during coverture. The language of the different statutes, in part at least, explains these differences of opinion, although all of the cases can hardly be reconciled on that ground. Of course, where the statute expressly changes the legal status of the husband and wife, so that marriage does not in any way affect the rights of either as to causes of action, and the control and management of their property, there is ground for reconciling a case construing such a statute to entitle the wife to maintain an action against the husband for assault and battery, with the class of cases already considered. Even where a statute is construed to make this violent change in the relation of husband and wife, the language of the statute itself will be found to be very similar in its provisions and apparent

purpose to the class of statutes already commented upon.

Thus, in *Brown v. Brown* (1914) 88 Conn. 42, 52 L.R.A. (N.S.) 185, 89 Atl. 89, Ann. Cas. 1915D, 70, it is held that a married woman is given a right to sue her husband for an assault upon her committed by him during coverture, the action being brought apparently while the plaintiff remained the wife of the defendant. The holding was based upon the ground that the Married Women's Statute of that state entirely changed the foundation of the marriage status. This case declared that equality in legal identity and in the ownership of property shall replace the unity of all rights in the husband as the legal status effected by intermarriage. It is declared that intermarriage shall not affect this equality, and that by force of the marriage neither husband nor wife shall acquire any right to or interest in any property held by the other before the marriage or acquired after marriage. Another section declares their equality, and obligations incurred by each, and equality in the subjection of the property of each to liability for the performance of the duties of support and assistance, each assumes by the intermarriage. (For form of statute, see *Mathewson v. Mathewson* (1906) 79 Conn. 23, 5 L.R.A. (N.S.) 611, 63 Atl. 285, 6 Ann. Cas. 1027.) The court in the *Brown Case* undertakes to distinguish the line of cases already referred to which hold the contrary rule, on the ground that the statute construed in these cases "leaves the foundation of the marriage status unchanged, and merely provides exceptions to the necessary consequences of that status." It is argued that "if the legislative intent in such an enactment is not to change the foundation upon which the status of married persons was based at common law, namely, their legal identity, but its purpose is to empower the wife, while that status exists, to contract and sue in her own name like a feme sole, it might well be held that language bestowing this right could not be so extended as to permit her to contract with her husband or to sue him for a

tort, because the statute intends that her identity shall still be merged in that of her husband. In the two cases above cited we have already held that the legislative intent in the Act of 1877 was to change the foundation of the legal status of husband and wife, and that the statute effects that change. In marriages which have occurred since the act took effect, the parties retain their legal identity, and their civil rights are to be determined in accordance with the status thus established. These rights, except so far as they are modified by the statute itself or by other statutes, or are necessarily affected by the reciprocal rights and obligations which are inherent in the relation of husband and wife, are the same as they were before marriage. The statute leaves nothing to implication. The right to contract with the husband and to sue him for breach of contract, and to sue for torts, is not given to the wife by the statute. These are rights which belonged to her before marriage, and, because of the new marriage status created by the statute, are not lost by the fact of marriage as they were under the common-law status. The status of the parties after marriage being fixed, there was no occasion for providing in express terms what the consequences would be. They followed logically."

In *Gilman v. Gilman* (1915) 78 N. H. 4, L.R.A. 1916B, 907, 95 Atl. 657, it is held that a married woman may sue her husband for an assault under a statute which provides that a married woman may sue and be sued in all matters in law and equity and upon any contract by her made or for any wrong by her done as if she were unmarried. The court said: "If this language is given its ordinary meaning, she can maintain this action, provided she could maintain it if she were a single woman; for the statute provides in terms that, with certain exceptions, not material here, she may sue and be sued in all matters as though she were unmarried. In other words, when the legislature enacted this section, it intended to remove all the disabilities the common law imposed on married

women in so far as the right to sue was concerned, and, with certain exceptions, to put husband and wife on an equality in respect to property, torts, and contracts. . . . Therefore the test to determine whether the plaintiff can maintain this action is to inquire whether she could maintain it if she were unmarried, and not to inquire who the defendant is, nor whether she is seeking to enforce a property right. In a word, if a married woman is either injured or damaged by another's illegal act, the statute gives her a remedy, even though that other is her husband; and it is, and was at the time the statute was enacted, illegal for a husband to assault his wife."

In *Fiedler v. Fiedler* (1914) 42 Okla. 124, 52 L.R.A.(N.S.) 189, 140 Pac. 1022, the right of a married woman to maintain an action against her husband for assault committed during coverture is also sustained. In this case a divorce had been granted the wife, but had been appealed from and the appeal had not yet been determined. The right of the wife to maintain an action was based upon a statute which provided that a woman shall retain the same legal existence and legal personality after marriage as before marriage, and shall receive the same protection of all her rights as a woman that her husband does as a man, and for any injuries sustained to her reputation, person, or character, or any natural right, she shall have the same right to appeal in her own name alone to the courts of law or equity for redress and protection that her husband has to appeal in his own name alone.

In *Fitzpatrick v. Owens* (1916) 124 Ark. 167, L.R.A.1917B, 774, 186 S. W. 832, 187 S. W. 460, Ann. Cas. 1918C, 772, the question presented was as to the liability of the husband for a felonious assault upon his wife, resulting in her death. The husband was held liable on the ground that such right of action was conferred by a statute which, in effect, provided that every married woman shall have all the rights to contract and be contracted with, to sue and be sued, and

in law and equity shall enjoy all rights and be subjected to all the laws of this state as though she were a feme sole. The court said: "It is difficult to find authority bearing upon the construction of this statute; for there are no statutes in other states in precisely the same language, or enacted under the same circumstances as this statute was passed. The disposition of all the courts in the construction of statutes relating to the rights of married women is to hold tenaciously to the rule that statutes in derogation of the common law must be strictly construed. This court has announced that rule in many cases, and has given it effect in confining within the narrowest possible limits statutes passed by the legislature to emancipate married women from their common-law disabilities. There are many cases cited on the brief construing statutes of this kind, and in most of the decisions the statutes were held not to give a married woman the right to maintain an action against her husband for tort. But, as before stated, none of the statutes are similar to ours, nor were they passed under the same circumstances. . . . The inquiry arises whether the language of the statute giving her only such rights and remedies as she would enjoy if she were a feme sole necessarily excludes the right to maintain a suit against her husband for the reason that, if she were a feme sole, she would have no husband to sue, and therefore it is not intended to give her any greater right than she would have if she were a feme sole. We scarcely think that the lawmakers had that in mind; for they were dealing entirely with enlarged rights and remedies of a married woman, and it was evidently meant to confer upon her the enjoyment of those rights and remedies, even against her husband, the same as if she were unmarried." There was a strong dissenting opinion by Hart, J., concurred in by Wood, J.

In the reported case (*JOHNSON v. JOHNSON*, ante, 1031), the statutes construed provided in effect that the wife has full legal capacity to contract as if she were sole, except as otherwise provided by law, and that all damages

which the wife may be entitled to recover for injuries to her person or reputation are her separate property; and another section of the Code provided that the wife must sue alone for injuries to such property. In construing these provisions of the Code to entitle the wife to sue the husband for an assault and battery, the court said that these sections had the effect of abrogating the fiction of legal identity, and seemed thereby, except as otherwise prescribed, to destroy the foundation of the common law in its application to questions touching the rights of husband and wife inter se.

II. *Grounds for rule.*

a. *Public policy.*

The courts are not agreed as to what, if any, effect public policy should have in influencing the constructions in this regard of so-called Married Women's Acts. In the jurisdiction denying the right of married women to sue their husbands for assault and battery, it is clear that the view the courts took of the effect of permitting actions of this character influenced the decision.

Upon the advisability of construing statutes of this character so as to confer a right upon the wife to sue her husband, in *Thompson v. Thompson* (1910) 218 U. S. 611, 54 L. ed. 1180, 30 L.R.A. (N.S.) 1153, 31 Sup. Ct. Rep. 111, 21 Ann. Cas. 921, supra, it is said that "it must be presumed that the legislators who enacted this statute were familiar with the long-established policy of the common law, and were not unmindful of the radical changes in the policy of centuries which such legislation as is here suggested would bring about. Conceding it to be within the power of the legislature to make this alteration in the law if it saw fit to do so, nevertheless, such radical and far-reaching changes should only be wrought by language so clear and plain as to be unmistakable evidence of the legislative intention. Had it been the legislative purpose not only to permit the wife to bring suits free from her husband's participation and control, but to bring actions against him also for injuries to person or prop-

erty as though they were strangers, thus emphasizing and publishing differences which otherwise might not be serious, it would have been easy to have expressed that intent in terms of irresistible clearness."

Upon this point in *Bandfield v. Bandfield* (1898) 117 Mich. 80, 40 L.R.A. 757, 72 Am. St. Rep. 550, 75 N. W. 287, supra, the court said that "the result of plaintiff's contention would be another step to destroy the sacred relation of man and wife, and to open the door to lawsuits between them for every real and fancied wrong,—suits which the common law has refused on the ground of public policy. This court has gone no further than to support the wife, under the Married Woman's Act, in protecting her in the management and control of her property. It has sustained her right to an action for assault and battery, for slander, and for alienation of her husband's affections, against others than her husband."

To permit a wife to sue her husband for an assault and battery committed upon her by him is also said, in *Longendyke v. Longendyke* (1863) 44 Barb. (N. Y.) 367, supra, to be contrary to public policy and destructive of that conjugal union and tranquillity, which it has always been the object of the law to guard and protect, "for the following among other reasons: It is contrary not only to the rule of the common law, but to the spirit and intent of the Married Women's Acts, the object of which was to add to her property rights as a feme sole, and to distinguish her property from her husband's and not to confer rights of action upon her against him. It is contrary to the policy of the law, and destructive of that conjugal union and tranquillity which it has always been the object of the law to guard and protect."

In *Lillienkamp v. Rippetoe* (1915) 133 Tenn. 57, L.R.A. 1916B, 881, 179 S. W. 628, Ann. Cas. 1917C, 901, supra, it was said on this point that the court was not warranted in ascribing to the legislature "a purpose to empower a wife to bring an action against her husband for injuries to her person

occurring during the coverture, thereby making public scandal of family discord, to the hurt of the reputation of husband and wife, their families and connections, unless such purpose clearly appears by the express terms of the act."

Upon this point, in *Thompson v. Thompson* (U. S.) *supra*, the court said that whether the exercise of jurisdiction to redress a wrong of this character would be promotive of the public welfare and domestic harmony is, at least, a debatable question. The possible evils of such legislation might well make the lawmaking power hesitate to enact it.

In the jurisdictions sustaining the right of a married woman to maintain against her husband an action to recover damages for an assault and battery upon her, the courts did not regard the maintenance of such actions as inimical to public policy.

Upon this point in *Fiedler v. Fiedler* (1914) 42 Okla. 124, 52 L.R.A.(N.S.) 189, 140 Pac. 1022, *supra*, the court said that "the reason for which the stronger of the more modern decisions have denied one spouse the right to maintain an action for tort against the other during coverture has been, in the main, based upon public policy, reasoning that to maintain such an action would tend to invade the holy sanctity of the home and shatter the sacred relations between husband and wife, and that therefore, for public policy's sake, such actions should not be maintained; and yet those very decisions, in support of their philosophy, hold that the civil courts are open to parties seeking divorce and alimony, and that the criminal courts are open for the prosecution of either husband or wife for assault and battery, cudgelings, or for shooting each other with shotguns. We fail to feel the force of such philosophy. We fail to comprehend wherein public policy sustains a greater injury by allowing a wife compensation for being disabled for life by the brutal assault of a man with whom she has been unfortunately linked for life, than it would by allowing her to go into a criminal court and prosecute him and send him

to the penitentiary for such assault. Nor are we able to perceive wherein the sensitive nerves of society are worse jarred by such a proceeding than they would be by allowing the parties to go into a divorce court and lay bare every act of their marriage relations in order to obtain alimony."

In the reported case (*JOHNSON v. JOHNSON*, ante, 1031) the court said that, as for the policy which would avoid the public airing of family troubles by denying this right of action unless expressly given, no reason is apparent why public policy should weigh more heavily against these actions than against those which the courts uniformly allow.

In asserting the contrary rule in *Brown v. Brown* (1914) 88 Conn. 42, 52 L.R.A.(N.S.) 185, 89 Atl. 889, Ann. Cas. 1915D, 70, *supra*, the court argues: "In the fact that the wife has a cause of action against her husband for wrongful injuries to her person or property committed by him, we see nothing which is injurious to the public or against the public good or against good morals. This is the usual test for determining whether a statute or a contract is against public policy. When a wife is allowed to possess and deal with her own property and carry on business in her own name like a feme sole, she ought to have the same right to contract and enforce her contracts, and the same remedies for injuries to her person and property, which others have, and to be liable upon her contracts and for her torts the same as others are. This is the position in which she now stands. The danger that the domestic tranquillity may be disturbed if husband and wife have rights of action against each other for torts, and the courts will be filled with actions brought by them against each other for assault, slander and libel, as suggested in some of the cases cited in behalf of the defendant, we think, is not serious. So long as there remains to the parties domestic tranquillity, while a remnant is left of that affection and respect without which there cannot have been a true marriage, such action will be impossible. When the purposes of the

marriage relation have wholly failed by reason of the misconduct of one or both of the parties, there is no reason why the husband or wife should not have the same remedies for injuries inflicted by the other spouse which the courts would give them against other persons. Courts are established and maintained to enforce remedies for every wrong, upon the theory that it is for the public interest that personal differences should thus be adjusted, rather than that the parties should be left to settle them according to the law of nature. No greater public inconvenience and scandal can thus arise than would arise if they were left to answer one assault with another, and one slander with another slander, until the public peace is broken and the criminal law invoked against them. We find nothing to warrant the claim that public policy is opposed to the existence of a cause of action for a personal tort in favor of husband or wife against the other spouse, where the wife's identity is not merged in that of her husband."

b. Other remedies by wife.

One of the grounds for denying to a married woman the right to maintain an action against the husband for an assault and battery committed upon her is that she now has adequate remedies for such an injury.

In *Thompson v. Thompson* (1910) 218 U. S. 611, 54 L. ed. 1180, 30 L.R.A. (N.S.) 1153, 31 Sup. Ct. Rep. 111, 21 Ann. Cas. 921, supra, it is said that the wife is not left without remedy for such wrongs. She may resort to the criminal courts, which, it is to be presumed, will inflict punishment commensurate with the offenses committed. She may sue for divorce or separation or for alimony. The court, in protecting her rights and awarding relief in such cases, may consider, and so far as possible redress, her wrongs, and protect her rights.

To the same point in *Bandfield v. Bandfield* (1898) 117 Mich. 80, 40 L.R.A. 757, 72 Am. St. Rep. 550, 75 N. W. 287, supra, the court, speaking of torts generally, said: "Personal wrongs inflicted upon her give her the

right to a decree of separation or divorce from her husband, and our statutes have given the court of chancery exclusive jurisdiction over that subject. This court, clothed with the broad powers of equity, can do justice to her for the wrongs of her husband, so far as courts can do justice, and, in providing for her, will give her such amount of her husband's property as the circumstances of both will justify, and, in so doing, may take into account the cruel and outrageous conduct inflicted upon her by him, and its effect upon her health and ability to labor. . . . In the absence of an express statute, there is no right to maintain an action at law for such wrong. We are cited to no authority holding the contrary."

But in referring to the remedies of a wife for an assault and battery upon her by the husband, by a criminal prosecution or an action for divorce and alimony, in the reported case (*JOHNSON v. JOHNSON*, ante, 1031) the court said that so far from these remedies being adequate, they appear to be illusory and inadequate. And see to the same effect *Fiedler v. Fiedler* (1914) 42 Okla. 124, 52 L.R.A. (N.S.) 189, 140 Pac. 1022, supra.

c. Equality of husband and wife as to remedy.

It is to be noted that the express object of the acts construed in the *Brown Case* (1914) 88 Conn. 42, 52 L.R.A. (N.S.) 185, 89 Atl. 889, Ann. Cas. 1915D, 70, supra, and in the *Fiedler Case* (Okla.) supra, was to place a married woman on equality with her husband. Nowhere is there any language used in the statutes construed in either of these cases, so far as the opinions disclose, which expresses any intent to confer upon the wife rights not possessed by the husband. Indeed, the express language of the statute is to the contrary. Equality is the apparent basis and purpose of the statute, hence, in all respects the statutes are in their express purpose similar to the statutes construed in *Strom v. Strom* (1906) 98 Minn. 427, 6 L.R.A. (N.S.) 191, 116 Am. St. Rep. 387, 107 N. W. 1047; *Schultz v. Schultz* (1882) 89 N. Y. 644, reversing (1882) 27 Hun,

26; and *Rogers v. Rogers* (1915) 265 Mo. 200, 177 S. W. 382, *supra*.

In *Fitzpatrick v. Owens* (1916) 124 Ark. 167, L.R.A.1917B, 774, 186 S. W. 832, 187 S. W. 460, Ann. Cas. 1918C, 772, *supra*, reference is made to statutes which have for their purpose the granting to married women of the same rights as are possessed by married men, and it is said that these statutes have uniformly been construed to give no greater rights than the husband had, and therefore the right to maintain an action for tort is not conferred for the reason that the husband had no such right.

In *Schultz v. Christopher* (1911) 65 Wash. 496, 38 L.R.A.(N.S.) 780, 118 Pac. 629, *supra*, denying the right of a married woman, even after divorce, to maintain an action against the husband for assault committed during coverture, it is said that the idea of the Married Women's Statute was to place the husband and wife upon the same legal footing, and not to give the wife rights against the husband which the husband did not possess against the wife.

In *Strom v. Strom* (Minn.) *supra*, it is also asserted that a husband could not, and never could, bring an action against his wife for an assault and battery.

In *Fitzpatrick v. Owens* (1916) 124 Ark. 167, L.R.A.1917B, 774, 186 S. W. 832, Ann. Cas. 1918C, 772, *supra*, the contention is made that to allow the wife to maintain an action against the husband for an assault and battery was to confer a greater right upon her than was possessed by the husband. The court replied that "that may be true, and still the statute is in accord with previous legislation on the subject which gives the wife greater rights than the husband. It was within the power of the legislature to give the wife new rights without conferring reciprocal rights upon the husband, and that view of it does not militate against the validity of the statute, nor does it prevent that construction being placed upon it."

III. Effect of divorce.

The courts are agreed that where a married woman could not, during the

existence of the marital relation, maintain an action against her husband for assault and battery, the divorce of the parties subsequently to the assault and battery does not authorize such an action. *Abbott v. Abbott* (1877) 67 Me. 304, 24 Am. Rep. 27; *Libby v. Berry* (1882) 74 Me. 286, 43 Am. Rep. 289; *Schultz v. Christopher* (1911) 65 Wash. 496, 38 L.R.A.(N.S.) 780, 118 Pac. 629; *Sykes v. Speer* (1908) — Tex. Civ. App. —, 112 S. W. 422; *Strom v. Strom* (1906) 98 Minn. 427, 6 L.R.A.(N.S.) 191, 116 Am. St. Rep. 387, 107 N. W. 1047; *Phillips v. Barnet* (1876) L. R. 1 Q. B. Div. (Eng.) 436, 45 L. J. Q. B. N. S. 277, 34 L. T. N. S. 177, 24 Week. Rep. 345, *supra*. But see *Fiedler v. Fiedler* (1914) 42 Okla. 124, 52 L.R.A.(N.S.) 189, 140 Pac. 1022, *supra*, sustaining right of wife to sue husband for assault. In this case a divorce had been granted the wife, but an appeal by the husband was still pending. The fact of the divorce did not apparently influence the decision.

In *Schultz v. Christopher* (1911) 65 Wash. 496, 38 L.R.A.(N.S.) 780, 118 Pac. 629, *supra*, a conclusive ground for denying the wife a right to maintain an action for assault and battery against the husband, committed during coverture, is held to be the fact that the parties have since been divorced, and that in such case the presumption must obtain that all their rights were determined in the divorce proceeding, and this alleged assault was the proper subject of investigation by the court in determining the distribution of property.

In *Sykes v. Speer* (1908) — Tex. Civ. App. —, 112 S. W. 422, upon this point the court said: Even if the wife "should be divorced on the next day after the injuries were inflicted, and even if the result of the injuries should be perpetuated long after the time of their infliction and after her rights as a feme sole had been fully restored, still she would not be allowed a recovery for such injuries."

In *Phillips v. Barnet* (1876) L. R. 1 Q. B. Div. (Eng.) 436, 45 L. J. Q. B. N. S. 277, 34 L. T. N. S. 177, 24 Week. Rep. 345, *supra*, it is held that the dissolution of the marriage by divorce

does not give the wife a cause of action against her husband to recover for an assault upon her, where such cause of action did not exist prior thereto.

In *Libby v. Berry* (1882) 74 Me. 286, 43 Am. Rep. 289, supra, it is held that the divorce of the parties does not confer upon the wife a cause of action which did not exist prior thereto, and that hence it did not confer upon the wife the right to sue her husband for an assault and battery committed by him upon her during coverture.

In *Strom v. Strom* (1906) 98 Minn. 427, 6 L.R.A.(N.S.) 191, 116 Am. St. Rep. 387, 107 N. W. 1047, supra, it is held that even after divorce the wife cannot maintain an action against her husband for an assault and battery committed upon her by him during coverture. The statute construed in this case in effect provided that a woman shall retain the same legal existence and legal personality after as before marriage, and shall retain the same protection as to all her rights

as a woman, as does a man, and for any injury sustained to her reputation, person, property, character, or any natural right, she shall have the same right to appeal in her own name alone to the courts of law or equity for redress or protection as her husband has to appear in his name alone.

IV. Right of husband to sue wife.

Where the question has been directly presented as to the right of the husband to maintain an action against his wife to recover damage for an assault and battery committed by her upon him, such right has been denied. *Peters v. Peters* (1909) 156 Cal. 32, 23 L.R.A.(N.S.) 699, 103 Pac. 219.

In *Strom v. Strom* (1906) 98 Minn. 427, 6 L.R.A.(N.S.) 191, 116 Am. St. Rep. 387, 107 N. W. 1047, supra, it is pointed out that the husband cannot, and never could, bring an action against his wife for a personal tort committed by her against him during coverture. A. G. S.

AGNES B. NICKOLAY, Appt.,

v.

ROBERT ORR, Respt.

Minnesota Supreme Court — May 9, 1919.

(— Minn. —, 172 N. W. 222.)

Evidence — indecent assault — evidence of character.

1. In an action for indecent assault, plaintiff may not, before offering proof of the attack upon her, inquire of defendant, when called for cross-examination under the statute, as to his conduct towards others; and the offer, then made, to show defendant's bad character, was properly rejected. In such an action, while a defendant may give proof of his good character, his character is not an issue and not subject to direct attack, unless defendant introduces proof of good character.

[See note on this question beginning on page 1051.]

— sufficiency.

2. The evidence sustains the verdict.

Trial — instructions — correctness.

3. The instruction in respect to complaints made by the plaintiff of the alleged mistreatment was proper.

[See 2 R. C. L. 548.]

— omission of evidence.

4. So also was the charge in relation

to defendant's omission to offer evidence of good character.

[See 2 R. C. L. 567.]

Appeal — exclusion of punitive damages.

5. The verdict being for defendant, no reversible error could result from the refusal to permit the jury to consider punitive damages.

[See 2 R. C. L. 261; 14 R. C. L. 815.]

Headnotes by HOLT, J.

APPEAL by plaintiff from an order of the District Court for Scott County (Tift, J.) denying new trial of an action brought to recover damages for alleged indecent assault. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. H. A. Loughran, for appellant:
The verdict was contrary to law.

2 R. C. L. § 26, p. 547; Beardmore v. Barton, 108 Minn. 28, 121 N. W. 228.

It was prejudicial to refuse to instruct the jury on the question of exemplary or punitive damages.

Anderson v. International Harvester Co. 104 Minn. 49, 16 L.R.A.(N.S.) 440, 116 N. W. 101.

Plaintiff had the right to attack the character and credibility of the defendant in the community in which he lived.

Schuek v. Hagar, 24 Minn. 344; Hein v. Holdridge, 78 Minn. 468, 81 N. W. 522; Campbell v. Aarstad, 124 Minn. 284, 144 N. W. 956; Stone v. Hawkeye Ins. Co. 68 Iowa, 737, 56 Am. Rep. 870, 28 N. W. 47, 10 R. C. L. 118; 3 Enc. Ev. 14; Koch v. State, 115 Ala. 99, 22 So. 471; Milton v. State, 40 Fla. 251, 24 So. 60; Hoffman v. State, 93 Md. 388, 49 Atl. 658; Roach v. State, 41 Tex. 261; De Kalb County v. Smith, 47 Ala. 407; Alkire Grocer Co. v. Taggart, 78 Mo. App. 166; Wright v. Hanna, 98 Ind. 217; Foster v. Newbrough, 58 N. Y. 481; Goodrich v. Warner, 21 Conn. 432; Gardner v. Kellogg, 23 Minn. 463.

Messrs. George F. Sullivan, W. C. Odell, and W. F. Odell, for respondent:

The court did not err in refusing to instruct the jury that plaintiff was entitled to recover punitive damages, and the refusal to give such instruction in no way prejudiced appellant.

Berg v. St. Paul City R. Co. 96 Minn. 513, 105 N. W. 191; Anderson v. International Harvester Co. 104 Minn. 51, 16 L.R.A.(N.S.) 440, 116 N. W. 101; Sneve v. Lunder, 100 Minn. 5, 110 N. W. 99.

Evidence of the general character of parties to civil actions, where the general character is not a part of the issue, is not admissible.

Hein v. Holdridge, 78 Minn. 472, 81 N. W. 522; Campbell v. Aarstad, 124 Minn. 286, 144 N. W. 956.

Evidence of specific acts of wrongdoing is not admissible for the purpose of proving general character or reputation.

Lydiard v. Daily News Co. 110 Minn. 141, 124 N. W. 985, 19 Ann. Cas. 985;

Krulic v. Petcoff, 122 Minn. 517, 142 N. W. 897, Ann. Cas. 1914D, 1056.

Good reputation is in general presumed, so that no evidence of it in the first instance is ordinarily necessary.

Lotto v. Davenport, 50 Minn. 100, 52 N. W. 130; Jones, Ev. 158.

Holt, J., delivered the opinion of the court:

Action for indecent assault, in which defendant had a verdict. Plaintiff appeals from the order denying a new trial.

Plaintiff testified to matters which, if true, would warrant awarding both compensatory and punitive damages. Defendant denied all wrongdoing. Circumstances corroborated defendant's testimony and discredited plaintiff's. No useful purpose will be served by detailing the evidence. A perusal thereof creates no doubt of the justice of the verdict. It remains to determine whether any errors were committed that will necessitate a new trial.

*Evidence—
sufficiency.*

The assignments of error as to rulings during the trial call for the consideration of one matter only. The first witness called by plaintiff was defendant. Cross-examined under the statute, he was asked whether he had any difficulty or trouble in New Prague, and whether he knew Pauline Novotny. Objections thereto were sustained. Thereupon plaintiff's counsel said: "We offer to show by competent witnesses that defendant has not a good reputation in that community and has on other occasions attempted to assault other girls and women."

The court sustained the objection to the offer. So far as the questions and offer relate to specific occurrences, wholly disconnected with the one charged, there can be no doubt of the correctness of the ruling. In Dennis v. Johnson, 47 Minn. 56, 49 N. W. 383, where dishonesty of plaintiff was a direct issue, it was

held that specific acts of dishonesty, not pleaded, are not admissible in evidence as proof of a general reputation for dishonesty. *Miller v. Curtis*, 158 Mass. 127, 35 Am. St. Rep. 469, 32 N. E. 1039; *Gore v. Curtis*, 81 Me. 403, 10 Am. St. Rep. 265, 17 Atl. 314. We have been referred to no authority, and have found none, that holds or intimates it proper in a civil case to attack the character or reputation of one accused of wrongdoing by proof of prior acts of like wrongs to others. And certainly the mere attempt to inquire about

—indecent
assault—
evidence of
character.

wrongful conduct
towards others, be-
fore plaintiff has of-
fered the slightest

proof of the wrong upon which she
sues, must be regarded as highly
prejudicial to defendant's right to
a fair trial.

This court, by the rule of *stare decisis*, is committed to the doctrine that in actions involving moral turpitude a defendant may prove his good character. *Schuek v. Hagar*, 24 Minn. 339; *Hein v. Holdridge*, 78 Minn. 468, 81 N. W. 522; *Campbell v. Aarstad*, 124 Minn. 284, 144 N. W. 956. The general rule is that evidence as to the standing and character of the parties to a civil action is not admissible, and there should be no attempt to extend the exceptions referred to in the *Schuek Case*. It is to be noted that the cases cited went no further than to hold that, when a defendant in a civil action is charged with a wrong involving moral turpitude, he may in defense offer evidence of his good character. In other words, when the plaintiff introduces evidence to prove a cause of action growing out of a depraved act of the defendant, he may prove good character in corroboration of the denial of the act. But we know of no case where one party has been permitted to attack his adversary's character before introducing proof of his cause of action or defense, unless character be a direct issue, as, for instance, the character of a plaintiff in a seduction case brought by the seduced, or like the instant

case, or a libel or slander case like *Dennis v. Johnson*, *supra*, in which cases the defendant may prove the bad character of the plaintiff in mitigation of damages. 10 R. C. L. Evidence, §§ 117 and 118, pp. 947-949. We have noticed but one case where character was attacked in the manner here attempted, and it did not meet with success. In *Croze v. Rutledge*, 81 Ill. 266, an action for criminal conversation, it was held error to permit plaintiff to "give in evidence the general character of the defendant for chastity, as evidence in chief and in the first instance." That a plaintiff, in a civil action grounded upon a defendant's depraved or criminal act, cannot, as part of his case in chief, offer evidence of defendant's bad reputation, was also held in *Townsend v. Graves*, 3 Paige, 453. Plaintiff cites *Stone v. Hawkeye Ins. Co.* 68 Iowa, 737, 56 Am. Rep. 870, 28 N. W. 47, as authority for the proposition that in actions for damages for criminal conversation and seduction the character of the party is the very matter in issue. However, as above stated, the character of the plaintiff is a direct issue in such actions on the question of damages, and in mitigation thereof defendant may in the first instance attack plaintiff's character. But in such cases defendant's character is not an issue, and is not subject to attack from plaintiff, unless defendant first offers evidence thereof to rebut the inference of guilt made by plaintiff's proof. The calling of a defendant for cross-examination, and his denial, when interrogated by plaintiff, of the act laid at his door, is not an offer of evidence by him of good character so as to open the way for plaintiff to attack it. The statute giving a party the right to call his adversary for cross-examination was never intended for so unfair a use.

Exception is taken to an instruction relating to the bearing of the testimony touching plaintiff's complaint to others of defendant's al-

leged assault. The first part of the instruction is somewhat general and refers, in an illustrative manner, to the reasons for the rule the court was about to give, and must have been so understood by the jury. The pith of the instruction as applied to the case in hand is found in this sentence: "So that the fact whether or not plaintiff made complaint to her husband and others to whom she might be expected to make complaint, within such time as would under the circumstances be reasonable, is important for your consideration in determining whether or not her story is true."

Considering that evidence upon this phase of the case is admissible and to be treated the same as if the charge were criminal, as held in *Gardner v. Kellogg*, 23 Minn. 463, we think the instruction proper.

Defendant did not call any witness as to his own good reputation, as he might have done under the rule in *Schuek v. Hagar*, 24 Minn. 339. Plaintiff evidently made the

most of defendant's omission in this respect, for the court said to the jury: "I desire to call your attention to the fact that the law presumes the defendant to be of good reputation and character, and the defendant has the right to rest and rely upon such presumption of law, and is not obliged to fortify such pre-
—omission of evidence.
sumption by the testimony of any witness."

The instruction was pertinent, and we think correct.

Conceding it error to refuse to let the jury pass upon plaintiff's right to punitive damages, the error was without prejudice; for, the jury having found for defendant, there was no occasion to consider any sort of damages.

The charge upon the burden of proof appears to us clear and sufficiently amplified. But if plaintiff desired more in that line, a request should have been made before the jury retired.

Order affirmed.

ANNOTATION.

Admissibility of evidence of the bad moral character of the parties to a civil action for an indecent assault upon a female.

- I. General reputation of plaintiff for chastity, 1051.
- II. Evidence of specific acts of unchastity, 1053.
- III. Evidence of similar charges by plaintiff against others, 1055.
- IV. Reputation of defendant:
 - a. In general, 1055.
 - b. Evidence of similar assaults upon other women, 1056.

Scope.

In a note appended to *Wright v. Starr*, ante, 985, the general question is considered as to civil actions for assaults upon female persons. In a note appended to *Austin v. Metropolitan L. Ins. Co.* post, 1062, the question is discussed as to the measure of damages for assaults upon female persons. The question as to whether or not a cause of action for an assault upon a

married woman is community property is the subject of a note appended to *Schneider v. Biberger*, post, 1059. In a note appended to *Johnson v. Johnson*, ante, 1038, the question is discussed as to the right of a wife to maintain an action against her husband for an assault and battery committed upon her by him. The amount of the verdict in actions for assault upon females, whether excessive or adequate, is covered in a note appended to *Bye v. Isaacson*, post, 1074.

I. General reputation of plaintiff for chastity.

In actions for indecent assault or ravishment, by the great weight of authority, evidence is admissible as to the general bad reputation of the plaintiff for chastity. The general

ground advanced for the admissibility of such testimony is that it aids in determining the question of consent by the plaintiff for the alleged assault, and that it also bears upon the measure of damages, since the disgrace, humiliation, sense of shame, and mental suffering are naturally of a different degree if the plaintiff is a virtuous woman than they are if she is a woman of bad character.

By the great weight of authority in actions by females to recover damages for indecent assault upon them or for their ravishment, the character of the plaintiff for chastity is in issue, and evidence is admissible as to her general bad reputation in this regard, in so far at least as it bears upon the amount of damages recoverable.

California.—*Valencia v. Milliken* (1916) 31 Cal. App. 533, 160 Pac. 1086.

Maine.—*Gore v. Curtis* (1889) 81 Me. 403, 10 Am. St. Rep. 265, 17 Atl. 314.

Massachusetts.—*Miller v. Curtis* (1893) 158 Mass. 127, 35 Am. St. Rep. 469, 32 N. E. 1039.

Minnesota.—*NICKOLAY v. ORR* (reported herewith) ante, 1048.

New York.—*Ford v. Jones* (1871) 62 Barb. 484; *Gulerette v. McKinley* (1882) 27 Hun, 320.

Rhode Island.—*Mitchell v. Work* (1882) 13 R. I. 645.

Wisconsin.—*Watry v. Ferber* (1864) 18 Wis. 501, 86 Am. Dec. 789; *Barton v. Bruley* (1903) 119 Wis. 326, 96 N. W. 815.

Canada.—*Gross v. Brodrecht* (1897) 24 Ont. App. Rep. 687.

And some of the cases also hold or intimate that such evidence is also admissible as bearing upon the question of the consent of the female to the act complained of. *Valencia v. Milliken* (Cal.); *Ford v. Jones* (N. Y.); *Watry v. Ferber* and *Barton v. Bruley* (Wis.) supra.

But it has been held that evidence is inadmissible of the bad reputation for chastity of the plaintiff in an action for assault and rape upon her, although the defendant contended that the testimony was "material as bearing upon the probability of plaintiff's testimony." *Harris v. Neal* (1908) 153

Mich. 57, 116 N. W. 535. The court conceded that the evidence would be admissible for such purpose in a criminal case.

In *Sayen v. Ryan* (1895) 9 Ohio C. C. 681, 6 Ohio C. D. 782, it is held that in an action to recover damages for an indecent assault evidence is inadmissible as to the good reputation of the defendant as a good and law-abiding citizen, or as to the bad reputation of the plaintiff as to chastity.

In the reported case (*NICKOLAY v. ORR*, ante, 1048), it is said that in an action for indecent assault the character of the plaintiff is in direct issue, and the defendant may prove the bad character of the plaintiff in mitigation of damages.

It has been held that where, in an action for indecent assault, plaintiff seeks to recover for injury to her feelings growing out of the indecency of defendant's conduct, her character for chastity is in issue, and her damages depend somewhat on the question whether she was a virtuous woman, who would be greatly shocked by the peculiar nature of the assault, or whether she was a woman accustomed to yield herself to illicit intercourse. *Miller v. Curtis* (1893) 158 Mass. 127, 35 Am. St. Rep. 469, 32 N. E. 1039.

In *Dimick v. Downs* (1876) 82 Ill. 570, an action to recover damages for an assault and battery, the rule is stated that in prosecutions for rape, assault with intent to commit rape, and indecent assault, the character of the plaintiff for chastity may be inquired into.

In *Gross v. Brodrecht* (1897) 24 Ont. App. Rep. 687, it is held that evidence is admissible as to the general reputation of the plaintiff as to chastity, but not as to specific acts of unchastity.

In *Wood v. Gale* (1839) 10 N. H. 247, 34 Am. Dec. 150, it was held that where the justification of a guardian for removing from the premises of his ward a woman of bad repute was her bad character, her chastity is in issue, and evidence of her bad reputation in this regard is admissible.

Evidence of the plaintiff's good character is not admissible, although evidence has been received in behalf

of the defendant that the plaintiff had been unchaste with other men for some time prior to the alleged assault. *Schaeffer v. Oppenheimer* (1887) 9 N. Y. S. R. 688. And see *Noonan v. Luther* (1912) 206 N. Y. 105, 41 L.R.A. (N.S.) 761, 99 N. E. 178, Ann. Cas. 1914A, 1038.

II. Evidence of specific acts of unchastity.

There is less harmony in the decisions relative to the admissibility of evidence of specific acts of unchastity by the plaintiff, in an action for indecent assault or ravishment. The authorities upon this point are quite evenly balanced. By a small margin, perhaps, the weight of authority holds that such evidence is inadmissible, although holding or recognizing that evidence is admissible as to plaintiff's general reputation. *Gore v. Curtis* (1889) 81 Me. 403, 10 Am. St. Rep. 265, 17 Atl. 314; *Miller v. Curtis* (1893) 158 Mass. 127, 35 Am. St. Rep. 469, 32 N. E. 1039; *Gross v. Brodrecht* (1897) 24 Ont. App. Rep. 687.

In *Gross v. Brodrecht* (Ont.) supra, the court urged as an objection to the admissibility of evidence of specific acts of unchastity, first, that the effect was to throw upon the plaintiff the burden of showing uniform propriety of conduct during her whole life, and that such evidence would give rise to interminable issues, which could have but a slight bearing upon the question in dispute. The court added, that, moreover, it ought not to be open to a defendant to urge that a woman he had insulted had formerly made a slip in her conduct.

In *Gore v. Curtis* (1889) 81 Me. 403, 10 Am. St. Rep. 265, 17 Atl. 314, it is held that evidence is inadmissible that the plaintiff had been unchaste with other men. The court said that "persons seeking damages in actions of this sort must be prepared to defend their general character; but are not required to come ready to explain the various specific questionable acts of their lives, and to rebut false accusations, of which they can have no premonition. It would be a hard rule that would compel a plaintiff to defend

every act of his life as the price of justice."

In an action to recover damages for assault and battery, evidence is not admissible of specific acts of adultery by the plaintiff (*Ratteree v. Chapman* (1887) 79 Ga. 574, 4 S. E. 684), or of unchastity or lewdness (*Dimick v. Downs* (1876) 82 Ill. 570; *Corning v. Corning* (1851) 6 N. Y. 104).

In *Dimick v. Downs* (Ill.) supra, it is held that evidence is inadmissible to show that the plaintiff at various times and places had committed adultery, and had been guilty of selling intoxicating liquors in violation of the law.

In some jurisdictions the rule obtains that evidence of specific acts of unchastity is admissible as bearing upon the measure of damages to the plaintiff, or the likelihood of her having assented to the assault upon her, or to her ravishment. *Ford v. Jones* (1871) 62 Barb. (N. Y.) 484; *Gulerette v. McKinley* (1882) 27 Hun (N. Y.) 320; *Mitchell v. Work* (1882) 13 R. I. 645; *Watry v. Ferber* (1864) 18 Wis. 501, 86 Am. Dec. 789; *Barton v. Bruley* (1903) 119 Wis. 326, 96 N. W. 815.

In *Mitchell v. Work* (1882) 13 R. I. 645, it is held that where the bodily injuries resulting from an indecent assault were insignificant, and the amount of the damages claimed therefor is large, it is clear that the principal element of recovery is the mental suffering of the plaintiff. Hence evidence is admissible tending to show that the plaintiff was a woman of immodest and unchaste character and conduct, and this might be shown both by evidence of specific acts of unchastity and also by evidence of her bad reputation.

In *Watry v. Ferber* (1864) 18 Wis. 501, 86 Am. Dec. 789, it is held that evidence is admissible to show that at about the time of the alleged ravishment the plaintiff had been guilty of unchastity with other men. The court said that "whatever may be the true rule in regard to the admission of such testimony in criminal prosecutions, it appears to us that in a civil action of trespass, where the plaintiff has alleged, as a matter of aggrava-

tion, that the defendant had connection with her against her will, the defendant should be permitted to show that the plaintiff has been previously criminal with other persons, as a circumstance tending to disprove the probability of the use of force. . . . Would not proof that the plaintiff was criminally intimate with other men, about the period referred to in the complaint, when the alleged ravishment took place, tend to disprove the allegation of force? It might be a slight circumstance bearing upon that point; nevertheless, it has a tendency to overcome the probability that force was used. For there is no mind which does not require a higher degree of proof to convince it that force has been used to compel a woman who has once fallen from virtue to submit to the embraces of the opposite sex, than in case of a virtuous female. The fact that the plaintiff had yielded her person to others would raise an inference that she might have yielded to the entreaties of the defendant without much force. At all events, we think it a circumstance which might be submitted to the jury upon that question."

Barton v. Bruley (1903) 119 Wis. 326, 96 N. W. 815, also holds that evidence is admissible as to the general reputation of the plaintiff for chastity and as to specific acts of unchastity or lewd conduct, but evidence is not admissible that upon certain occasions she purchased beer.

In *Ford v. Jones* (1871) 62 Barb. (N. Y.) 484, it is held that evidence is admissible of specific acts of unchastity upon the part of the plaintiff where, as an element of damage, she claims compensation for the shock to her moral susceptibilities and to feelings of shame, etc. The court said that, "as the fact of a chaste character is as much at issue in this case as in those, they must be considered authorities. The shock to the plaintiff's feelings, it is natural to suppose, is proportioned to the sacred regard she entertained for her personal virtue; and the damages she would be entitled to recover ought to be regulated by the nature and extent of the

injury received. Unless a distinction is permitted by the admission of evidence to this point, the lascivious wanton is put upon an equality with her of personal chastity and virtue, in her action for damages. Assault and battery is an action in which vindictive damages are allowed, depending upon the aggravation. How is this aggravation to be measured, but by the degree of suffering? And how is the suffering to the feelings to be measured, but by the moral sensibilities? Does the chaste and pure suffer no more, in this respect, than the prostitute? The rule would otherwise be unjust."

In *Crossman v. Bradley* (1868) 53 Barb. (N. Y.) 125, however, it is held that while evidence is admissible of previous acts of immodesty or lewdness of the plaintiff toward or in the presence of the defendant, yet evidence is not admissible of acts of indecency by the plaintiff out of the defendant's presence. And in *Corning v. Corning* (1851) 6 N. Y. 105, it is held that where the plaintiff had sued her uncle for damages for assault and battery upon her, evidence is inadmissible of previous acts of misconduct between the plaintiff and a certain man to whose association with the plaintiff the defendant had objected, it being the uncle's claim that he struck the plaintiff by mistake in attempting to strike this man.

Where one element of damage is the pregnancy of the plaintiff as a result of the ravishment complained of, evidence is admissible of acts between plaintiff and other men, of incontinence on her part at about the time of the alleged ravishment, as bearing upon the apparent parentage of the child. *Eckhart v. Peterson* (1917) 94 Wash. 379, 162 Pac. 551.

So, where, as a result of the alleged ravishment, the plaintiff gave birth to a child, evidence is admissible on behalf of the defendant that at about the time of the alleged assault, the plaintiff was guilty of acts of indecent familiarities with other young men. *Young v. Johnson* (1890) 123 N. Y. 226, 25 N. E. 363.

It has been held that where the

plaintiff claimed to have been seriously injured by her alleged ravishment by the defendant, evidence is admissible of various acts of incontinence of the plaintiff with other men, very soon after her alleged ravishment, as tending to rebut the plaintiff's claim that she had suffered serious physical injury. *Eckhart v. Peterson* (Wash.) *supra*.

Of course, to repel the allegation of force, to show consent or that no violence was done or designed against the will of the female, evidence is admissible that the assaulted female had previously submitted to the carnal embraces of the defendant, or that she had been guilty of previous lascivious conduct with him or in his presence, or that her conduct was designed or adapted to excite or invite him to take liberties with her person or to induce him to believe advances on his part would not be unacceptable to her. *Crossman v. Bradley* (N. Y.) *supra*.

In *Parker v. Coture* (1890) 63 Vt. 155, 25 Am. St. Rep. 750, 21 Atl. 494, it is held that, as bearing upon the amount of recovery for assault with intent to ravish, evidence is admissible that plaintiff was in the habit of making indecent exposures of her person and using improper language in the presence of men.

III. Evidence of similar charges by plaintiff against others.

In an action to recover damages for an assault and battery upon a married woman to induce her to submit to sexual intercourse with the defendant, evidence is not admissible in behalf of the defendant that some years prior to the time in question, the plaintiff made a similar charge against another man, who settled the matter by paying her a sum of money. *Ogle v. Brooks* (1882) 87 Ind. 600, 44 Am. Rep. 778.

But in *Derwin v. Parsons* (1884) 52 Mich. 425, 50 Am. Rep. 252, 18 N. W. 200, an action for assault and attempt to ravish, evidence is held admissible as to the fact that the plaintiff had made charges of a similar nature against other persons. As to the admissibility of such evidence, the court reasoned that "the plaintiff was

cross-examined at great length on her previous history, and seems to have been willing to make full explanations on most subjects. To questions whether she had not made charges similar in nature against two other persons objection was made, but we have no doubt it was proper to allow them, and also to prove the facts if she denied having made the charges. The probability that a woman who conducts herself properly will be frequently assaulted is very small, and every new complaint therefore tends to cast doubt upon those which preceded it. It was also proper to ask the plaintiff whether she did not within a few hours after the alleged offense tell a confidant of a similar case, but make no mention of this; and then when she denied it, to allow her to be contradicted. The jury would be very likely to infer that an outrage just committed and not mentioned under such circumstances was not committed at all."

Evidence is inadmissible as to transactions and conversations between the plaintiff and other parties some years before the assault in question, although such testimony tended to show that the plaintiff had repeatedly made similar false charges of indecent assault upon her for the purpose of extorting money from an innocent man. *Miller v. Curtis* (1893) 158 Mass. 127, 35 Am. St. Rep. 469, 32 N. E. 1039.

IV. Reputation of defendant.

a. In general.

Evidence of defendant's reputation for chastity is not admissible in his behalf. *Kinneberg v. Kinneberg* (1899) 8 N. D. 311, 79 N. W. 337.

In *Rothschild v. Weingreen* (1910) 121 N. Y. Supp. 234, the action was to recover damages for an assault and battery committed in attempting to kiss the plaintiff, and it was held error to require the defendant to answer upon cross-examination questions as to whether or not he had ever been divorced and as to whether or not he had been named as a correspondent in a divorce case.

In *Schuek v. Hagar* (1877) 24 Minn. 339, it is held that evidence is admis-

sible of the good moral character of the defendant.

Under the Iowa Code, evidence of the bad moral character of the defendant is admissible in evidence, but proof thereof does not necessarily mean that defendant's evidence is to be discredited where not corroborated. *McMurrin v. Rigby* (1890) 80 Iowa, 322, 45 N. W. 877.

Evidence that the defendant some months before the alleged assault had slept one night in a house of ill fame is properly excluded as immaterial. *Morrissey v. Ingham* (1872) 111 Mass. 63.

Evidence is inadmissible of the admission by defendant of having had illicit intercourse with other women than the plaintiff. *Sutton v. Johnson* (1871) 62 Ill. 209.

As bearing upon the credibility of defendant as a witness in his own behalf, evidence is admissible of his conviction in a criminal prosecution for the same assault, under a statute providing that records of conviction shall be admissible as bearing upon the credibility of a witness. *Quigley v. Turner* (1889) 150 Mass. 108, 22 N. E. 586.

b. Evidence of similar assaults upon other women.

In action to recover damages for an indecent assault upon a married woman, evidence is not admissible that defendant had committed similar assaults upon other women. *Ogle v.*

Brooks (1882) 87 Ind. 600, 44 Am. Rep. 778.

In the reported case (*NICKOLAY v. ORR*, ante, 1048), the plaintiff, before offering evidence to sustain her charge that the defendant indecently assaulted her, called the latter for cross-examination, and undertook to question him in regard to indecent assaults claimed to have been committed by him upon other women. This procedure was held to be improper, and hence objection thereto was properly sustained.

And in *Barton v. Bruley* (1903) 119 Wis. 326, 96 N. W. 815, it is held that, in an action to recover damages for taking improper familiarities with the plaintiff, the character of the defendant is not in issue, and hence it is not proper upon cross-examination of the defendant to inquire of him as to similar advances he has committed against other women.

In *Fay v. Swan* (1880) 44 Mich. 544, 7 N. W. 215, there was testimony that the plaintiff was inveigled into a room on some pretense, and the defendant told her that it was useless to cry for help as he was in the habit of taking women to this room, and this was known to the other occupants of the house. In corroboration of this testimony evidence was held admissible to show that the defendant had attempted to inveigle another woman to the same house, and that he had told her that he was in the habit of taking girls there.

A. G. S.

MARY SCHNEIDER, Respt.,

v.

JOHN BIBERGER, Appt.

Washington Supreme Court (Dept. No. 2)—December 8, 1918.

(76 Wash. 504, 136 Pac. 701.)

Husband and wife — community — action for assault on wife.

1. A cause of action for an indecent assault upon a married woman resulting in a miscarriage is community property, which is not affected by a decree of divorce unless expressly disposed of thereby.

[See note on this question beginning on page 1059.]

Parties — action for injury to married woman — joinder of husband.

2. The husband is a necessary party to an action for an indecent assault on his wife, resulting in a miscarriage, under a statute providing that he must be joined with her except in actions concerning her separate property or when the action is between husband and wife.

[See 13 R. C. L. 1433.]

— living apart from husband.

3. That at the time of an assault upon her a married woman had been living for about two weeks with her parents does not entitle her to sue for the

assault without joining her husband, under a statute providing such course where she is living separate and apart from him, if a week subsequent to the assault she returns to her husband's home where, except for a time spent at a hospital, she remains until she begins a suit for divorce against him.

[See 13 R. C. L. 1432.]

Husband and wife — effect of divorce on community property.

4. A cause of action in favor of husband and wife which is community property when a divorce separates them, becomes, if not disposed of by the decree, common property.

(Fullerton, J., dissents.)

APPEAL by defendant from a judgment of the Superior Court for Chehalis County (Sheeks, J.) in plaintiff's favor in an action brought to recover damages for an alleged assault. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Morgan & Brewer, for appellant:

The husband was a necessary party to the proceeding.

Barkley v. American Sav. Bank & T. Co. 61 Wash. 415, 112 Pac. 495; Ambrose v. Moore, 46 Wash. 468, 11 L.R.A. (N.S.) 103, 90 Pac. 588; O'Toole v. Faulkner, 34 Wash. 371, 75 Pac. 975.

Messrs. George D. Abel and W. H. Abel also for appellant.

Messrs. Conway & Snider and Taggart & Phillips, for respondent:

The damages alleged are because of personal injuries received by the plaintiff. Her right to recover injuries to herself would survive the dissolution of the community, and she could sue in her own name.

21 Cyc. 1686; Griffen v. Lewiston, 6 Idaho, 231, 55 Pac. 545; O'Toole v. Faulkner, 34 Wash. 371, 75 Pac. 975; Horton v. Seattle, 53 Wash. 316, 101 Pac. 1091; Baldwin v. Second Street Cable R. Co. 77 Cal. 390, 19 Pac. 644; Katterhagen v. Meister, 75 Wash. 112, 134 Pac. 673; Hawkins v. Front Street Cable R. Co. 3 Wash. 592, 16 L.R.A. 808, 28 Am. St. Rep. 72, 28 Pac. 1021; Harris v. Puget Sound Electric R. Co. 52 Wash. 299, 100 Pac. 841; Hedrick v. Ilwaco R. & Nav. Co. 4 Wash. 400, 30 Pac. 714; Donald v. Ballard, 34 Wash. 576, 76 Pac. 80.

Morris, J., delivered the opinion of the court:

The amended complaint in this action sought to set up a cause of

action based upon an indecent assault by appellant upon respondent, resulting in a miscarriage. The first paragraph of the amended complaint alleged "that on or about June 15, 1911, plaintiff was a married woman residing at the home of her parents. . . ." To this complaint a demurrer was interposed, pleading a defect of parties plaintiff and insufficiency of facts to constitute a cause of action. The demurrer was overruled, to which ruling exception was taken. The trial resulted in verdict and judgment for respondent, from which this appeal was taken.

The error upon which appellant most strongly relies is the ruling of the court below upon the demurrer. It seems clear to us that this ruling was erroneous. The amended complaint alleging that plaintiff was a married woman at the time of the assault, the cause of action arising therefrom, and the damages recoverable therefor were

Parties—action for injury to married woman—joinder of husband.

clearly such as to make the husband a necessary party to the action. Hawkins v. Front Street Cable R. Co. 3 Wash. 592, 16 L.R.A. 808, 28 Am. St. Rep. 72, 28 Pac. 1021; Davis v Seattle, 37 Wash. 223, 79

Pac. 784; *Matthews v. Spokane*, 50 Wash. 107, 96 Pac. 827; *Maynard v. Jefferson County*, 54 Wash. 351, 103 Pac. 418; *Magnuson v. O'Dea*, 75 Wash. 574, 48 L.R.A. (N.S.) 327, 135 Pac. 640, Ann. Cas. 1915B, 1280.

Section 181, Rem. & Bal. Code, provides that when a married woman is a party, her husband must be joined with her, except (1) in actions concerning her separate property, (2) when the action is between husband and wife, and (3) when the wife is living separate and apart from the husband. No allegation of the amended complaint brought the cause of action within these exceptions. Respondent contends that the complaint should be regarded as amended to comply with the proof, and that the proof shows that at the time the cause of action arose respondent was living separate and apart from her husband, and hence could maintain the action in her own name. It might be answered, first, that this is not a suit in equity, and hence equitable rules should not obtain. Seeking, however, to avoid rather than to assert any technical ruling, we have read the evidence, and hold that respondent there fails to show that she was living separate and apart from her husband. She testifies that on June 15, 1911, the time of the alleged assault, she had been residing with her parents for about two weeks, and that a week subsequent to the assault she returned to her husband's home, where she remained until she went to a hospital for an operation; that she returned to her husband's home from the hospital, and remained with him until she commenced an action for divorce, the complaint in which ^{-living apart from husband.} was verified August

19, 1911. These facts do not establish a living "separate and apart" within the meaning of the statute. How can it be said that on June 15th the wife was living separate and apart from her husband, when, within a few days thereafter,

she returns to him and resumes marital relations? The return within a few days shows that the absence from the husband was of a temporary nature. Such an absence does not constitute a "living separate and apart." Such a situation can only arise where there is an abandonment or desertion by the husband or wife, or a separation which was intended to be final. *Tobin v. Galvin*, 49 Cal. 34; *Lamb v. Harbaugh*, 105 Cal. 680, 39 Pac. 56; *Humphrey v. Pope*, 122 Cal. 253, 54 Pac. 847. The return to the husband's home and remaining there until the commencement of the divorce proceedings negatives the requirement of the statute, and clearly establishes that on June 15th there had been no abandonment by either husband or wife, and no intention on the part of the wife to permanently live apart from the husband.

It is suggested by respondent that, as the community had been dissolved by the divorce decree prior to the commencement of this action, the respondent had no husband to join in the action. The divorce did not change the situation so far as property rights were concerned. The cause of action having arisen during the existence of the community, the damages would be community property. ^{Husband and wife—community—action for assault on wife.}

as the community status of property is determined and fixed at the time the property is acquired. *Katterhagen v. Meister*, 75 Wash. 112, 134 Pac. 673. Respondent did not possess this right of action at the time of her marriage; neither did she acquire it by gift, devise, or inheritance; and as all other property acquired by a married woman, except the issues and profits of separate property, is community property, it follows that the right of action and the damages recoverable were community property. *Abbott v. Wetherby*, 6 Wash. 507, 36 Am. St. Rep. 176, 33 Pac. 1070.

The respondent could have had this cause of action awarded to her in the divorce decree had she submitted it to the court; but, not having done so, its character is not disturbed by the decree. The community having been dissolved, there can now, of course, be no community property, strictly speaking; but such property as was community property prior to the decree and not disposed of thereby would become common property, in which husband and wife would retain all the interest vested in them prior to the decree.

—effect of
divorce on
community
property.

Ambrose v. Moore, 46 Wash. 463,
11 L.R.A. (N.S.) 103, 90 Pac. 588;
Barkley v. American Sav. Bank, 61

Wash. 415, 112 Pac. 495. So that, whether the cause of action and the damages recoverable be now regarded as community or common property, the necessity for joining the husband in the action would be the same.

For these reasons, we hold the complaint cannot sustain the judgment, and the judgment is reversed.

Crow, Ch. J., and Mount and Parker, JJ., concur.

Fullerton, J., dissenting:

The wrong here committed, if any, was an "unjust usurpation of the wife's natural rights," and, in my opinion, she may maintain an action therefor in her individual name, under § 5926 of the Code (Rem. & Bal.).

ANNOTATION.

Cause of action for assault and battery upon wife as community property.

The general question as to civil actions for assault and battery upon female persons is covered in a note appended to Wright v. Starr, ante, 985, which refers to various other notes on related subjects.

The cases of Labonte v. Davidson (1918) 31 Idaho, 644, 175 Pac. 588; and Ezell v. Dodson (1883) 60 Tex. 331, which appear to be the only cases other than the reported case (SCHNEIDER v. BIBERGER, ante, 1056) to have passed upon the specific question, agree with that case in holding that a cause of action for assault and battery upon the wife is community property, assuming the continued existence of the community.

In Ezell v. Dodson (Tex.) supra, the court said: "Whilst at common law all choses in action accruing to the wife during coverture by contract belonged to the husband. Such as she derived by reason of a tort remained her individual property. As under that system the husband was compelled to join the wife with himself in all suits to recover her separate estate, he made her plaintiff in an action for damages for a postnuptial tort, whereas, in a suit to recover upon a note or bond

acquired by her during marriage, he sued alone, as it was his own property. Many of the American states have made all property acquired by the wife during coverture, in any manner whatever, her separate estate. Hence in those states, upon the above principle, she is held a necessary party to a suit upon a chose in action acquired by a tort to her person or property; and, when under the laws and decisions of such states she is allowed to maintain alone an action to recover her separate estate, she can sue for damages in tort without joining her husband. . . . Our statute prescribes who shall be parties plaintiff in suits to recover the separate property of the wife; and if the right to sue for injuries to the wife, caused by an assault and battery committed upon her person, was by our law her separate estate, as at common law, the proper parties plaintiff would, under the statute, be the husband and wife jointly, or, if he refused to join, the wife could sue alone. But of the property which a wife may acquire during marriage, none becomes her separate estate except such as is derived by gift, devise, or descent; all acquired

in any other manner is community property. Of course such property as is derived by reason of a personal trespass committed upon her falls under neither of these heads of gift, devise, or descent, and necessarily forms part of the acquits and gains of the marital partnership. Our statute does not expressly give to the wife the right to sue alone for the community estate in any case whatever, but decisions of this court heretofore made have allowed her in certain exceptional cases to exercise that privilege, or at least to control the community estate, which would imply a right to sue for its recovery. These exceptions have thus far been confined to cases where the husband has abandoned the wife for a considerable period of time, and she was destitute of the means of support unless she resorted to the community property, in which she had an equal interest with himself. . . .

On the other hand, when the desertion is on her part, so far from the law allowing her any control of the community estate by reason of the separation, it deprives her of all right to an interest even in the homestead, to which she would otherwise be entitled under the Constitution. In such an event the husband may dispose of it without her consent expressed in any manner whatever. . . . Hence, the right of the wife to exercise such acts of control over the community estate whilst living apart from her husband depends in a great measure upon the circumstances under which the separation took place. If he has abandoned her and refused her a support, she must be allowed to derive that support from their common property. If she has wantonly deserted him and he has not refused to provide for her maintenance, she should not, by her own wrong, acquire a privilege which she could not enjoy when faithfully performing the duties of a wife."

In *Labonte v. Davidson* (1918) 81 Idaho, 644, 175 Pac. 588, the court construed a statute providing that all property of the wife owned by her before marriage, and that acquired afterwards by gift, bequest, or descent, or that which she shall acquire

with the proceeds of her separate property, shall remain her sole and separate property, and that all other property acquired after marriage is community property. The court said that the right to sue for personal injuries upon the wife after an assault and battery upon her was a chose in action, and, by these statutory provisions, were made community property, and that since the husband has the management and control of the community property, except the earnings of the wife for her personal services, and the rents and profits of her separate estate, he is the only necessary party plaintiff to recover damages to her for an assault and battery, and he may, in his own name, without joining his wife, sue to recover the same, including damages for her personal injuries and for expenses incurred for medical attendance and hospital fees.

Upon this point it is to be noted that the reported case (*SCHNEIDER v. BIBERGER*, ante, 1056) holds that the husband is a necessary party to an action to recover damages for an indecent assault upon the wife.

In *Ezell v. Dodson* (1883) 60 Tex. 331, supra, it is held that a married woman living separate from her husband cannot recover damages for an assault and battery upon her without joining the husband as a coplaintiff, although the husband refuses to join in the suit and the parties are separated; it not appearing that the husband had abandoned the wife for a considerable period of time, and that she was destitute of the means for support unless she resorted to the community property. The court said a mere separation of the husband and wife, and his refusal to join her in the action, are not sufficient to authorize the wife to prosecute alone a suit for an assault and battery committed upon her during coverture.

It has also been held that the wife cannot sue her husband for damages for an assault and battery committed upon her by him. *Sykes v. Speer* (1908) — Tex. Civ. App. —, 112 S. W. 422. And where, as a result of the in-

juries inflicted by the husband, the wife dies, her personal representative cannot recover damages from the husband for the assault and battery. *Wilson v. Brown* (1913) — *Tex. Civ. App.* —, 154 S. W. 822. A. G. S.

LULA AUSTIN, Respt.,

v.

METROPOLITAN LIFE INSURANCE COMPANY OF NEW YORK
et al., Appts.

Washington Supreme Court (Dept. No. 1) — April 4, 1919.

(— Wash. —, 180 Pac. 184.)

Damages — for assault on woman.

The damages to be awarded against the manager of a business office for forcibly removing therefrom a woman who charged him with thieving from her are those only which are due to use of excessive force.

[See note on this question beginning on page 1062.]

APPEAL by defendants from a judgment of the Superior Court for Spokane County (Hurn, J.) in favor of plaintiff in an action brought to recover damages for alleged assault and battery. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Cannon & Ferris, for appellants:

The judgment is excessive.

Guterson v. Jensen, 100 Wash. 118, 170 Pac. 352; *Backlund v. Puget Sound Traction, Light & P. Co.* 86 Wash. 257, 150 Pac. 3; *Godley v. Gowen*, 89 Wash. 124, 154 Pac. 141; *Wiles v. Northern P. R. Co.* 66 Wash. 337, 119 Pac. 810; *Schmitz v. Kirchan*, 32 Wash. 546, 73 Pac. 678; *Bartolini v. Grays Harbor R. & Light Co.* 88 Wash. 341, 153 Pac. 4.

Messrs. Charles A. Stevens and J. P. Perkins for respondent.

Main, J., delivered the opinion of the court:

The purpose of this action was to recover damages for an alleged assault and battery. The cause was tried to a jury, and resulted in a verdict for \$1,000. Upon motion for a new trial an order was entered, requiring the plaintiff to remit from the verdict the sum of \$500, otherwise a new trial would be granted. The plaintiff elected to accept a judgment for the reduced amount. Judgment was entered for the sum of \$500, and the defendants appeal.

The appellant Metropolitan Life

Insurance Company of New York is a corporation with an office in the city of Spokane. The appellant F. A. Laurendine was the superintendent in charge of this office. On or about February 18, 1918, the respondent went to the office of the company for the purpose of transacting some business relating to payments upon a policy which she held in the company. Some controversy arose between the respondent and those in charge of the office relative to the matter, the respondent apparently claiming that her payments entitled her to be placed upon what was known as the "office account," the books of the company showing that she was not entitled to be carried on this particular account.

In the course of the conversation, the respondent, according to her own testimony, charged Laurendine with treating her "dirty," characterized a statement that he made as a "lie," and charged him with "thieving" from her. These statements were made in the presence of other customers in the office, as well

as the employees. Thereupon Laurendine directed respondent to leave the office. This she declined to do, and he took her by the left arm and conducted her to the door, and she passed out. This is the assault for which damages were sought.

In submitting the case to the jury it was stated in the instructions that if Laurendine did at the time and place in question make an assault upon the respondent substantially as she claims, then both defendants are liable in damages for "any injuries" which respondent may have sustained. Error is predicated upon the giving of this instruction, it being claimed that it states to the jury an incorrect measure of damages. The objection to the instruction is well founded. Under the plaintiff's own evidence Laurendine was justified in directing her to leave the office, and when she failed to do so had a right to use such force as was reasonably necessary to eject

her therefrom. Under this state of facts, the respondent, if she was entitled to recover at all, could recover not for "any injuries" that she may have sustained, but only such injuries as may have been due to the use of excessive force; if there were such, in removing

Damages—for assault on woman.

her from the office. *Guterson v. Jensen*, 100 Wash. 113, 170 Pac. 352.

It is also claimed that the verdict, even as reduced, was grossly excessive. It is unnecessary to pass upon this objection, since a new trial must be directed on account of the error in the instructions. It may be said, however, that it is doubtful whether the evidence in the record would sustain a verdict and judgment in the sum of \$500.

The judgment will be reversed, and the cause remanded for a new trial.

Chadwick, Ch. J., and Mackintosh, Tolman, and Mitchell, JJ., concur.

ANNOTATION.

Measure of damages in action by female for assault upon her.

I. In general, 1062.

II. Compensatory damages:

a. In general, 1062.

b. For indecent assault or ravishment, 1064.

III. Punitive damages, 1066.

The general question of civil actions for assault upon female persons is covered in a note appended to *Wright v. Starr*, ante, 985, and see that note for references to notes on related questions.

I. In general.

While, of course, the same general principles govern in assessing damages to a female for assault and battery upon her, or indecent assault, or ravishment, as are applied in other cases of assault and battery, yet many of the elements to be taken into consideration in assessing damages to a female for an assault and battery, indecent assault, or ravishment are peculiar to her sex.

Upon this point in *Kast v. Link*

(1911) 90 Neb. 25, 132 N. W. 717, the court remarked: "We are not aware of any distinction in law with reference to the measure of damages in cases where the assaulted persons happens to be a woman. It may be true that a gallant jury may naturally be inclined to award heavier damages where the assailant is a man and the injured person is a member of the gentler sex; but, if the evidence sustains the recovery, a reviewing court can take no account of this tendency."

II. Compensatory damages.

a. In general.

It is clear that for an assault and battery committed upon her a female is entitled to recover at least compensatory damages, that is, such damages as will compensate her for the actual injury she has or will suffer for the wrong done her by the unlawful act of the defendant.

Georgia.—*Pye v. Gillis* (1911) 9 Ga. App. 725, 72 S. E. 190.

Indiana.—*Kline v. Kline* (1902) 153 Ind. 602, 58 L.R.A. 397, 64 N. E. 9.

Iowa.—*Keller v. Lewis* (1902) 116 Iowa, 369, 89 N. W. 1102; *Haupt v. Swenson* (1904) 125 Iowa, 694, 101 N. W. 520.

Kansas.—*Allen v. Lizer* (1899) 9 Kan. App. 548, 58 Pac. 238.

Kentucky.—*Chesapeake & O. R. Co. v. Robinett* (1918) 151 Ky. 778, 45 L.R.A.(N.S.) 433, 152 S. W. 976.

Missouri.—*Stuppy v. Hof* (1900) 82 Mo. App. 272.

Nebraska.—*Kast v. Link* (1911) 90 Kan. App. 182 N. W. 717.

New York.—*Corning v. Corning* (1851) 6 N. Y. 97.

Texas.—*Texas Coal & Fuel Co. v. Arenstein* (1900) 22 Tex. Civ. App. 441, 55 S. W. 127.

Wisconsin.—*Barnes v. Martin* (1862) 15 Wis. 240, 82 Am. Dec. 670.

The measure of damages includes pecuniary loss, compensation for actual physical injuries and for all pain and suffering, whether physical or mental, and it may also include punitive damages. *Pye v. Gillis* (Ga.) *supra*. In *Prince v. Ridge* (1900) 32 Misc. 686, 66 N. Y. Supp. 454, it is said that in an action of mere negligence the law does not permit the recovery of damages for mere fright or mental suffering unless accompanied by a physical injury; but in the case of wanton or intentional wrong against a person, the rule is different.

Some damage is implied as a result of an unlawful assault upon a woman, and, where the evidence justifies the same, she is entitled to recover full compensation. This may include compensation for her mental suffering, even though there is no unlawful touching of the body and no physical injury to her. *Kline v. Kline* (Ind.) *supra*.

The damage recoverable must be for the injury directly flowing from the assault or battery complained of; indirect injuries to the woman assaulted cannot be taken into account.

For example, although, in assaulting the plaintiff's father while they were passengers upon the defendant's train, trainmen were also guilty of an assault upon the plaintiff, she can-

not include in her damages compensation for any mental suffering due entirely to the assault upon her father. *Chesapeake & O. R. Co. v. Robinett* (Ky.) *supra*. So, the damages recoverable by a pregnant woman for mental suffering occasioned by an assault and battery upon her are such only as are the direct result of the assault, apart from any alleged injury to the child. *Haupt v. Swenson* (Iowa) *supra*.

Likewise, where the assault and battery are due to the use of excessive force, the defendant is liable only for the injuries necessarily flowing from such excessive violence, and not for aggravation thereof resulting from the voluntary acts of the plaintiff. *Geissler v. Geissler* (1917) 96 Wash. 150, 164 Pac. 746, 166 Pac. 1119. In this regard it is to be noted that, while the defendant is liable for any injuries attributable to the unlawful act, his liability is limited to the injuries resulting from that portion of the conduct which was unlawful. For example, where he is entitled to use force, the use of necessary force is not unlawful, and does not constitute an assault. If the force used, however, is excessive, his act constitutes an assault and battery, but he is liable only for the injury caused by the excessive force. *AUSTIN v. METROPOLITAN L. INS. Co.* (reported herewith) ante, 1061; *Taylor v. Adams* (1885) 58 Mich. 187, 24 N. W. 864; *Fredericksen v. Singer Mfg. Co.* (1888) 38 Minn. 356, 37 N. W. 453. In the latter case it is said that while authority to retake property conditionally sold, for the payment of which the buyer is in default, if not justifying assault and battery upon the buyer in retaking the property, may nevertheless be relied upon in mitigation of damages. In *Geissler v. Geissler* (Wash.) *supra*, it appeared that defendant undertook to remove an automobile he had sold the husband of the plaintiff upon conditional sale, the husband having made default in paying the purchase price. In removing the car the defendant used force to prevent the plaintiff from getting into the front seat of the machine. The injuries she

complained of, however, were due largely to her own conduct in getting into the back seat and remaining in it while the defendant took the car away and took it to his garage, where she stayed in the car in the cold for some time. For these injuries it was held that the plaintiff was not entitled to recover damages.

In *Galvin v. Starin* (1909) 182 App. Div. 577, 116 N. Y. Supp. 919, defendant was held guilty of committing an assault and battery upon plaintiff by wrongfully pushing or thrusting her against the side of a porch, and seizing her by the shoulders and shaking her, at the same time using toward her profane and abusive language. It was held, however, that the words could not properly be made a subject of damage. The court said that "the plaintiff undoubtedly had a right to give in evidence every word spoken by the defendant at the time of the assault, and to have his language considered by the jury as bearing on the question of his malice. . . . The words used, however, could not be made an independent basis for damages. They might properly tend to show malice, or the degree of the malice, and if such malice existed the jury might properly award punitive damages, in addition to the actual damages. Such punitive damages, however, should be for the existence of the malicious or evil disposition on the part of the defendant, of which malicious disposition the language used was evidence. There is quite a distinction between considering words incidentally spoken in connection with an assault as bearing on the question of malice, for which malice punitive damages, in addition to actual damages for the assault, may be awarded in the discretion of the jury, and considering the same words as in and of themselves a proper subject for damages. The refusal of the court to charge as requested, taken in connection with what he did charge, left the jury to infer that if an assault was committed they might compensate the plaintiff, not only for the assault, but also for the words uttered in connection therewith. Instead of con-

sidering the words as bearing merely on the question of malice, the jury may have concluded that they were at liberty to compensate her for actual damages by reason of the language used by defendant."

It has been held that in fixing the damages of a married woman for an assault upon her, her medical expenses are not to be taken into consideration, although she is jointly liable with her husband therefor. *Keller v. Lewis* (1902) 116 Iowa, 369, 89 N. W. 1102. In *Allen v. Lizer* (1898) 9 Kan. App. 548, 58 Pac. 238, there was evidence that the wife intended to pay the medical expenses due to the assault upon her from her separate property. This was held to entitle her to have such expenses included in the amount of her recovery.

It has been held that loss of time cannot be considered as an element of damages to a married woman for an assault and battery upon her, since her time and services belong to her husband. *Barnes v. Martin* (1862) 15 Wis. 240, 82 Am. Dec. 670.

In *Beitel v. Beitel* (1915) 196 Ill. App. 399, it is held that, even though a defendant was guilty of committing an assault and battery upon the plaintiff, he was not liable to compensate plaintiff for the loss of her husband's support, society, assistance, and affection, due to such assault.

Damages for assault and battery cannot be mitigated by evidence that plaintiff was dissolute in her conduct. She is entitled to the same measure of damages for the trespass as she would have been if she had sustained a good character for virtue. *Corning v. Corning* (1851) 6 N. Y. 97.

b. For indecent assault or ravishment.

Where a female is indecently assaulted or ravished, she is entitled to recover at least compensatory damages for the wrongful act. In such a case, damages necessarily include many elements not ordinarily or at all included in assessing the damage for a common assault, or assault and battery. In either case, however, the governing rule is compensation for the actual wrong done.

California.—*Valencia v. Milliken* (1916) 31 Cal. App. 533, 160 Pac. 1086.

Illinois.—*Palmer v. Baum* (1905) 123 Ill. App. 584.

Indiana.—*Kepler v. Hyer* (1874) 48 Ind. 499; *Wolf v. Trinkle* (1885) 103 Ind. 355, 3 N. E. 110; *Sturgeon v. Sturgeon* (1891) 4 Ind. App. 232, 30 N. E. 805; *Timmons v. Kenrick* (1913) 53 Ind. App. 490, 102 N. E. 52.

Kentucky.—*Trimble v. Spiller* (1828) 7 T. B. Mon. 395, 18 Am. Dec. 189.

Michigan.—*Fay v. Swan* (1880) 44 Mich. 544, 7 N. W. 215; *Henderson v. Agon* (1907) 148 Mich. 252, 111 N. W. 778; *Totten v. Totten* (1912) 172 Mich. 565, 138 N. W. 257.

Nebraska.—*Atkins v. Gladwish* (1889) 25 Neb. 390, 41 N. W. 347; *Kurpgewit v. Kirby* (1910) 88 Neb. 72, 33 L.R.A. (N.S.) 98, 129 N. W. 177.

New York.—*Ford v. Jones* (1871) 62 Barb. 484.

Vermont.—*Newell v. Whitcher* (1880) 53 Vt. 589, 38 Am. Rep. 703.

Wisconsin.—*Barnes v. Martin* (1862) 15 Wis. 240, 82 Am. Dec. 670; *Nichols v. Brabazon* (1896) 94 Wis. 549, 69 N. W. 342.

For an indecent assault, the plaintiff is entitled to recover actual and exemplary damages, and the actual damages may include damages for fright and shock. *Newell v. Whitcher* (Vt.) supra. Also for mental suffering due to shock to her moral sensibilities. *Ford v. Jones* (N. Y.) supra.

That the plaintiff had been compelled to employ counsel and spend time and money to vindicate her rights are not matters to be taken into consideration in assessing her damages for an indecent assault. *Atkins v. Gladwish* (Neb.) supra.

The damages are not necessarily limited to the actual loss in money, time, or expense which the plaintiff incurs. Full compensation is to be given for the mental pain, anguish, shame, and humiliation she suffered as a direct result of the injury inflicted. *Sturgeon v. Sturgeon* (1891) 4 Ind. App. 232, 30 N. E. 805.

The measure of damages for an indecent assault upon a married woman is such sum as will compensate her for

her physical and mental suffering, anguish of mind, sense of shame or humiliation, and loss of honor and good name. Damages for these elements are compensatory, not exemplary or punitive. *Wolf v. Trinkle* (1885) 103 Ind. 355, 3 N. E. 110.

The disgrace to the plaintiff, as well as physical injuries to her, may be taken into consideration in assessing the damages. *Fay v. Swan* (Mich.) supra.

The measure of damages may include injury to the plaintiff's good repute, her social standing, and loss of honor. *Timmons v. Kenrick* (1913) 53 Ind. App. 490, 102 N. E. 52.

Circumstances of outrage, insult to plaintiff, her wounded feelings, and the tendency to lower her in the estimation of her fellow citizens are elements of damage. *Barnes v. Martin* (Wis.) supra.

In *Henderson v. Agon* (1907) 148 Mich. 252, 111 N. W. 778, it was held that the damages are to be compensatory, and where the assault was committed under circumstances of peculiar indignity and humiliation, the jury may take into consideration the wounded feelings, humiliation, and disgrace of the plaintiff.

In *Kurpgewit v. Kirby* (1910) 88 Neb. 72, 33 L.R.A. (N.S.) 98, 129 N. W. 177, it is held that the plaintiff is entitled to recover damages for injury to her reputation and the humiliation which she has suffered from the act of the defendant, although the latter did not come into physical contact with her, except to take hold of her arm. He was guilty, however, of fraud and misrepresentation to induce the plaintiff, a married woman, to accompany him on a drive late at night, which caused some scandal.

It has been held that the measure of damages for an assault and battery upon a married woman to induce her to submit to sexual intercourse cannot include injury to reputation. *Kepler v. Hyer* (1874) 48 Ind. 499. Especially in the absence of allegation or proof that plaintiff suffered any loss of reputation by reason of the assault. *Sletten v. Madison* (1904) 122 Wis. 251, 99 N. W. 1020.

Damages for assault and battery, accompanied by ravishment, include not only physical injury and suffering to the plaintiff, but also damages to the good name, and compensation for mental suffering, humiliation, and mortification. *Totten v. Totten* (1912) 172 Mich. 565, 138 N. W. 257.

In *Valencia v. Milliken* (1916) 31 Cal. App. 533, 160 Pac. 1086, it is held that the damages should be such an amount as shall fairly compensate the plaintiff for the injuries she has received by reason of the act complained of, taking into consideration her physical suffering and disability during pregnancy and childbirth, also her mental suffering, shame, and disgrace, the loss of social standing and all other harm the jury might find she has suffered as a result of the wrong.

In *Totten v. Totten* (Mich.) *supra*, it is held that where there is no positive evidence of injury to the good name of the plaintiff from the assault and battery, accompanied by ravishment, it is error to submit to the jury that element of damages. The court said that "there was no evidence in the case of damage to her good name, but the court stated to them that it was an element of damages. Injury to reputation or good name was neither alleged nor proven. There was not a scintilla of proof as to loss of social standing, that she had been shunned, slighted, or slurred by her friends and neighbors, or that anyone regarded her with less respect. This transaction, as she related it, was absolutely unknown to her friends and neighbors, or the public, until she and her husband advertised it. That the circumstances of the assault did not make it public, and that she was not compelled to disclose it by reason of her physical condition, are shown by her own testimony. . . . There is no proof of loss of good name, or circumstances beyond her control making the matter public or a known disgrace. This court has more than once held that damages in case of tort must be proven before they can be recovered."

The plaintiff is entitled to recover for such mental suffering as she has

endured in the past by reason of the insult, wrong, and indignity done her, and by reason of her consequent physical impairment, and for mental suffering in the future. *Nichols v. Brabazon* (1896) 94 Wis. 549, 69 N. W. 342.

As to the right to recover for future mental suffering in *Nichols v. Brabazon* (Wis.) *supra*, the court said: "The law has no standard or gauge by which to make precise measurement or estimation of such damages. Being projected into the future, their exact extent and measure cannot be accurately foreseen. In the nature of the case, there enters into the estimation of such damages some element of speculation. But it is too well established by a long line of decisions in this state and elsewhere that such damages are nevertheless recoverable in a proper case, to be now questioned. A proper case is made where it is established to a reasonable certainty that damages will be endured in the future."

III. Punitive damages.

In addition to compensatory damages, punitive damages may be awarded, both for assault and battery on a female, or for indecent assault upon her, or her ravishment. Such damages are to be awarded where the assault is of a wanton, gross, or outrageous character.

Alabama.—*Kress v. Lawrence* (1908) 158 Ala. 652, 47 So. 574.

Arkansas.—*Pine Bluff & A. R. R. Co. v. Washington* (1915) 116 Ark. 179, 172 S. W. 872.

Illinois.—*Palmer v. Baum* (1905) 123 Ill. App. 584; *Chicago Consol. Traction Co. v. Mahoney* (1907) 230 Ill. 562, 82 N. E. 868, affirming (1907) 131 Ill. App. 591.

Indiana.—*Wolf v. Trinkle* (1885) 103 Ind. 355, 3 N. E. 110.

Kentucky.—*Ragsdale v. Ezell* (1899) 20 Ky. L. Rep. 1567, 49 S. W. 775; *Wood v. Young* (1899) 20 Ky. L. Rep. 1931, 50 S. W. 541.

Maryland.—*Thilman v. Neal* (1898) 88 Md. 525, 42 Atl. 242.

Michigan.—Ellicott v. Van Buren (1875) 33 Mich. 49, 20 Am. Rep. 668.

Minnesota.—Gardner v. Kellogg (1877) 23 Minn. 463.

Missouri.—Mohelsky v. Hartmeister (1897) 68 Mo. App. 318.

New York.—Galvin v. Starin (1909) 132 App. Div. 577, 116 N. Y. Supp. 919.

North Dakota.—Selland v. Nelson (1911) 22 N. D. 14, 132 N. W. 220.

Vermont.—Newell v. Whitcher (1880) 53 Vt. 589, 38 Am. Rep. 708.

Wisconsin.—Nichols v. Brabazon (1896) 94 Wis. 549, 69 N. W. 342.

Exemplary damages may be awarded against a carrier for an assault by its employees in unlawfully removing a female passenger from a car, where the assault was wanton, gross, or outrageous, although there was considerable provocation and the parties acted without malice. Chicago Consol. Traction Co. v. Mahoney (Ill.) supra.

In Pine Bluff & A. R. R. Co. v. Washington (Ark.) supra, a carrier was held liable for compensatory and punitive damages, for the act of a

brakeman in shooting a female passenger.

In Kress v. Lawrence (Ala.) supra, it was held that punitive damages may be recovered from the owner of a store for the wrongful act of his manager, in publicly searching a clerk's pocket for money he claimed she had received from a customer.

It has been held that punitive damages cannot be awarded unless the complaint alleges that the assault complained of was wilful and malicious, or malice is necessarily inferred from the acts charged. It is not sufficient in this regard to allege that the acts were wrongful or unlawful. Selland v. Nelson (N. D.) supra.

Where, in removing a trespasser, the owner uses more force than is reasonably necessary, usually only compensatory damages may be recovered. Punitive damages are not ordinarily to be awarded in favor of the trespasser under such circumstances. Maloney v. McAlpin (1914) 147 N. Y. Supp. 453. A. G. S.

THEA BYE, Respt.,

v.

JOHN ISAACSON, Appt.

North Dakota Supreme Court—June 27, 1919.

(— N. D. —, 173 N. W. 754.)

Rape — civil liability.

In this case actual rape by extreme force and violence is in no way essential to the plaintiff's cause of action. The complaint does charge, the evidence does show, and the jury has found that the defendant grabbed and assaulted the plaintiff, pulled her onto the bed, and with a strong hand overcame her feeble power of will and resistance; that he thrust his seed upon her, caused her to suffer the pains of childbirth, and to bring into the world a fatherless child without any support for it. That is a cause of action. The judgment of \$1,500 is righteous, just, and moderate, and it is affirmed.

[See note on this question beginning on page 1074.]

Headnote by ROBINSON, J.

APPEAL by defendant from a judgment of the District Court for Williams County (Fisk, J.) in favor of plaintiff and from an order denying a new trial in an action brought to recover damages for alleged wrongful and unlawful assault and rape. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Palmer, Craven, & Converse, for appellant:

The evidence failed to show rape and defendant is entitled to judgment.

Dean v. Raplee, 75 Hun, 389, 27 N. Y. Supp. 438, 145 N. Y. 319, 39 N. E. 952; Koenig v. Nott, 2 Hilt. 323, 8 Abb. Pr. 384; Lind v. Closs, 88 Cal. 6, 25 Pac. 972; Champagne v. Hamey, 189 Mo. 709, 88 S. W. 92; Dickey v. McDonnell, 41 Ill. 62; Beseler v. Stephani, 71 Ill. 400; Robinson v. Musser, 78 Mo. 153; Linville v. Green, 125 Mo. App. 289, 102 S. W. 67; Breon v. Henkle, 14 Or. 494, 13 Pac. 280; People v. Benson, 6 Cal. 221, 65 Am. Dec. 506; People v. Brown, 47 Cal. 447; People v. Hulse, 8 Hill, 309; 23 Am. & Eng. Enc. Law, 887; Kramer v. Weigand, 91 Neb. 47, 135 N. W. 230; State v. Rhoades, 17 N. D. 579, 118 N. W. 233; Stoudt v. Shepherd, 73 Mich. 588, 41 N. W. 696.

Messrs. McGee & Goss and Ray O. Miller, for respondent:

A verdict based upon conflicting evidence cannot be set aside as unsupported by the evidence, by the appellate court.

Montana Eastern R. Co. v. Lebeck, 32 N. D. 162, 155 N. W. 648; Northern Trust Co. v. Bruegger, 35 N. D. 150, 159 N. W. 859, Ann. Cas. 1917E, 447; Skogness v. Seger, 35 N. D. 366, 160 N. W. 508; Clark v. Ellingson, 35 N. D. 546, 161 N. W. 199; Senn v. Steffan, 37 N. D. 491, 164 N. W. 102; Huber v. Zeiszler, 37 N. D. 556, 164 N. W. 131.

In a civil action for rape plaintiff is not required to prove the charge beyond a reasonable doubt; a preponderance of evidence is sufficient.

Elliott v. Van Buren, 33 Mich. 49, 20 Am. Rep. 668, 22 R. C. L. 1238; Watkins v. Wallace, 19 Mich. 57; 4 Wigmore, Ev. § 2498; 2 Enc. Ev. 781; Elliott v. Van Buren, 33 Mich. 49, 20 Am. Rep. 668; Munson v. Atwood, 30 Conn. 102.

Robinson, J., delivered the opinion of the court:

This is an appeal from a judgment on a verdict in favor of the plaintiff for \$1,500. It is a civil action to recover actual damages against the defendant on the ground that by force and a strong arm he assaulted her, pulled her onto a bed, overcame her feeble powers of resistance, forced his seed upon her, causing her to endure the pains of childbirth and to have a bastard

child, with no means of supporting it. At the time of the assault the plaintiff was a domestic in the employ of defendant, and to some extent she was under his care and guardianship. He was bound to protect her from abuse and outrage. On July 7, 1915, he grabbed her while she was clearing the table after supper, pulled her into the bedroom, held her over the arms, saying he wanted to have intercourse with her. She said she would not allow it. He lifted her onto the bed.

Q. Why did you not get away from him?

A. I could not; he held me so tight and strong.

Then he lifted her clothes with his hands and shoved his hand between her limbs. He used a hand and foot to pry her legs apart. She tried all she could to get away from him, but he forced himself onto her, forced his way, and accomplished his purpose. She tried to get away from him, to wriggle away from him, but he held her so fast she could not. She tried to get loose, but she could not.

Q. What did you do while he was doing it?

A. I tried to get away from him.

Such is the testimony which the jury found to be true. There was no fondling, no love-making, no kissing and caressing. He just grabbed her, pulled her onto the bed, held her arms, and quickly accomplished his purpose. It was no Julia and Don Juan affair. It was simply an act of brutal force. A very whore would not consent to such treatment.

In such a case there is no reason why the court should apply the old rules of criminal prosecution for rape. The question of rape or no rape is in no way material to this case. So far as the complaint charges a common-law rape it may well be considered as an exaggeration and as surplusage. Actual rape by force and violence is in no manner essential to the plaintiff's cause of action. The complaint does

charge, and the evidence does show, and the jury has found that the defendant grabbed and assaulted the plaintiff, pulled her onto the bed, and with a strong hand overcame her feeble power of will and resistance; that he thrust his seed upon her, caused her to suffer the pains of childbirth, and to bring into the world a fatherless child, without any means of supporting it. Manifestly the plaintiff has suffered a great wrong for which she has a legal and constitutional right to remedy by due process of law. To throw her out of court and to deny her any remedy because she did not resist with greater force, when all resistance in her power was obviously futile, that were a travesty on justice and a reproach to the courts.

**Rape—civil
liability.**

The verdict is manifestly righteous, just, and moderate.

It is only for actual damages occasioned by a great wrong. Hence the judgment is affirmed.

Christianson, Ch. J., and Bronson and Birdzell, JJ., concur.

Grace, J., specially concurring:

An appeal from a judgment of the district court of Williams county and from an order overruling motion for verdict for defendant or for a new trial.

This action is one wherein the defendant seeks to recover from the plaintiff damages upon three causes of action, two of which are for \$5,000 each and one for \$300. The plaintiff's two main causes of action are based upon the claim that defendant damaged her, in that he caused her to be sick and in great distress of body and mind for a period of nine months, caused by the defendant wilfully and unlawfully making a felonious assault upon the person of plaintiff against her will and without her consent, and by the use and means of great force and violence overcame her and her utmost resistance, and did unlawfully rape, ravish, criminally know, and have unlawful sexual intercourse with the plaintiff, whereby she became pregnant with

child by the defendant. The \$300 is claimed for medical care, attention, and medicines which plaintiff was required to purchase and use, and for her loss of time during her sickness. The answer is a general denial.

The material facts are as follows: The plaintiff was thirty-seven years of age. She had been a married woman, but her husband had died a considerable period of time prior to the time of the alleged acts of rape. She was the mother of two children prior to the time of the alleged acts of rape in question. She claims to have been first raped in June, 1915, the date being indefinite. The second time on July 7th of the same year, and again on July 11th, and on the 15th. The causes of action are based upon the acts of rape, if any, which were alleged to have occurred on the 7th and 11th of July. This case was twice tried to a jury. The plaintiff in the last trial recovered a judgment for \$1,500. In this appeal the appellant makes numerous assignments of errors of law. In addition thereto he assigns errors alleged to have occurred by the court giving certain instructions, and finally assigns as error the insufficiency of the evidence to sustain the verdict. We have with great care examined each error of law assigned. They consist principally in motions to strike out certain evidence offered by plaintiff, or in overruling defendant's objections to certain evidence offered. We are very clear that the court committed no reversible error in this regard. If there was any error it was without prejudice. The court gave the following instruction, which is assigned as error: "The plaintiff insists that she did not voluntarily consent, but that she resisted to the full extent of her ability, and only yielded when her will was overpowered, and that, after she finally submitted to her fate, it was against her will and for fear of more serious consequences."

Certainly there was no error in giving this instruction. It merely

set forth what plaintiff claimed, that is, that she did not voluntarily consent; that she resisted to the full extent of her ability, etc. The next instruction, the giving of which is assigned as error, is as follows: "If you believe from the evidence that at the time of the alleged rape other people were at the same time in the same house who might easily have heard her had she made an outcry, and that she in fact made no outcry at the time the defendant was attempting to have connection with her, then you should consider such fact in connection with the question of whether she did everything within her power under the circumstances, to prevent the defendant from accomplishing his purpose."

There was no error in giving this instruction. It was as favorable to defendant as to plaintiff. Whether the plaintiff resisted the defendant to the extent of her ability was a question of fact under all the evidence for the jury. Whether or not there were other people in the house at the time the alleged rape was committed upon plaintiff she should have cried aloud for assistance unless she was prevented from doing so by reason of threats of great bodily harm, accompanied by apparent power of execution. The next assignment of error is as follows: "Evidence has been admitted touching alleged attempts of the defendant to have sexual intercourse with the plaintiff at times other than the times and instances set forth in plaintiff's first and second causes of action. Evidence of such attempts has been received, and may be considered by you for the bearing it may have and the light it might throw upon your minds and what did occur, if anything, at the alleged instances, on July 7th and July 11th, of alleged rape set forth in plaintiff's first and second causes of action."

We think this instruction was not prejudicial. The only effect of it was to show that attempts by the defendant to have sexual intercourse with the plaintiff at other

times would lend color to the probability that he committed the actions of rape complained of, which are alleged to have occurred on July 7th and 11th. In this particular kind of a case we are of the opinion that such testimony is admissible for that purpose. This action is a civil and not a criminal action, and for the purpose for which such evidence might be introduced it certainly was not prejudicial to give the instruction, with the limitation of its application as defined by the court in the instruction. There was no error in any of the other instructions assigned as error.

The appellant has assigned as a reason for setting aside the verdict and reversing the judgment that the evidence is insufficient to sustain the verdict. To determine this question necessitates a thorough examination of the evidence. Before doing so, however, it is necessary to determine what the character of the evidence must be and what degree of proof is required in order to hold the defendant in damages arising from the alleged rape of the plaintiff. It is well settled that if the defendant were being tried on a criminal charge of rape, before the jury could convict, it would be necessary for it to find that the act was committed by force and against the will of the plaintiff, and that she resisted the commission of the act to the extent of her ability, and that her resistance was overcome by force or violence, unless she is prevented from resisting by threats of immediate and great bodily harm, accompanied by apparent power of execution, or unless prevented from resisting by the administration to her of an intoxicating, narcotic, or anesthetic agent. If the charge were a criminal one, all such matters would have to be proved by the state of competent evidence, beyond a reasonable doubt. In a civil action for damages for rape, the same character of proof is required as in the criminal case, but in a different degree; in other words, by a preponderance of the evidence only. If

the plaintiff in this case has proved by a clear preponderance of the evidence that the defendant by force and violence actually raped her, and that she resisted such act to the extent of her ability, that her resistance was overcome, or, if by reason of any threats she was put in great fear of immediate bodily injury, the means of executing the threat being accompanied by apparent power of execution, then she has a cause of action against the defendant, and the verdict should be sustained; otherwise, she would have no cause of action, and there would not be sufficient evidence to sustain the verdict.

We will first examine the alleged rape of July 11th. The only testimony to sustain plaintiff's claim is her own. Her testimony with reference to the alleged rape of July 11th is substantially as follows: "On the 11th of July, early Sunday morning, I didn't know before he was right there by my side, taking hold of me, and shoved me over into the corner near the entrance to the basement. He shoved me against the door—side of the door—and wanted intercourse. Took up my clothes and put his organ into mine at that time. While he was doing that I tried to get away from him. He did get his organ into mine at that time, not very long, a few minutes. I said to him he shouldn't do it. I didn't make any noise. I didn't dare to. I was afraid of him since the first time, afraid he would hurt me in some way."

This was substantially all the testimony on behalf of the plaintiff as to this act. That it is insufficient to prove a rape must be conceded. There is practically no showing of force or violence used by the defendant, and her testimony shows absolutely no effort to resist him. There is no evidence in the record that he had ever made any threat that he would do her any great bodily harm. There is no evidence that she made any outcry or called for any help or made any noise of any kind or character to attract anyone's attention

that might have been in the house, and, as we shall see, there is other testimony showing there were other people in the house at that time. Testimony that she tried to get away from him is of no value. It is a mere conclusion. It shows no act of resistance. There was nothing in her testimony with reference to this act that in any material degree tends to prove the commission of rape.

In connection with the alleged rape of July 11th, it is also well to examine the testimony of other witnesses. The defendant testified that from the evening of the 9th until the evening of July 11th he was absent from his dwelling in Tioga, and at no time during that period did he return until the evening of the 11th; that on the evening of July 9th he went out to Halvor Davidson's, a brother-in-law, and from there he went to the place of another brother-in-law; that on the evening of the 9th they stayed at Davidson's, and on the night of the 10th they stayed at Herfindahl's. His wife was with him these two nights. He denies all of the plaintiff's testimony with regard to the alleged rape of July 11th. Herfindahl, who lived $7\frac{1}{2}$ miles south of Tioga, testified that he was home on July 10th, and he first saw John Isaacson on the morning of the 10th, in the forenoon, at his place; that Mrs. Isaacson was with him; that they stayed there all that day and that night until the next morning about 10 o'clock on the 11th; that they were not absent from his place any time in the meantime; that they came to his place from Halvor Davidson's; that they said they were going from his place to Olaus Herfindahl's. Olaus Herfindahl testified that he lived 6 miles south of Tioga on a farm; that he is a brother of Mrs. Isaacson; that he saw Mr. Isaacson on the 11th of July at his place, and on the night of the 9th he talked with him over the phone from his place to Davidson's about 10 o'clock in the evening, but that he did not see him until the fore-

noon of the 11th; that they stayed until evening; that they came to his place from Julius Herfindahl's place; that from his place they went to town. Mrs. John Isaacson, wife of defendant, testified that on the evening of the 9th they were at Mr. Davidson's, and remained there all that night; that her husband was with her and slept with her at Davidson's place; that on the forenoon of the 10th they left Davidson's place and got to Julius Herfindahl's place, got there in the forenoon, and stayed there until the next forenoon on the 11th; that her husband was there during all the time that she was there; that on the night of the 11th her husband slept with her; that on the 11th they visited Olaus Herfindahl until the evening of the 11th and got back home on the evening of the 11th; that she was positive that her husband was not in Tioga at any time from the time she left Tioga on the 9th of July until the evening of July 11th. This testimony is entirely undisputed; its truthfulness is in no manner questioned nor contradicted. It would appear to prove conclusively that John Isaacson was not home from the evening of July 9th until the evening of July 11th. If this is true, and we believe the testimony shows it to be, it would have been impossible for him to have committed the act of July 11th, as claimed by the plaintiff. We are of the opinion that there is no evidence showing that Isaacson did commit the alleged rape of July 11th.

We will now consider the alleged rape of July 7th. Plaintiff testifies substantially as follows: "On the 7th of July, 1915, he grabbed me while I was clearing the table after supper. He was then in the dining room; held me over the arms. He pulled me into the bedroom, from the dining room into the front room and then the bedroom. He said he wanted intercourse with her. She said it was not permissible either for you or me. He said people do a great deal that they are not permitted to do; you will have to live

the best you can. It was not probable there was any light after this. She said she would not allow it. He lifted her into the bed, one arm around the shoulders and the other under the hips. She couldn't get away from him; he held her so tight and strong. He lifted the clothes with his hands and shoved his hand up between her limbs. He used a hand and foot to pry her legs apart; that she tried all she could to get away from him, but he forced himself to her, forced his way to accomplish it; that he succeeded in having intercourse with her; that she did not consent. She testified that she tried to get away from him, wriggle away from him, but that he held her so fast she couldn't. As to the length of time that she was trying to get away from him before he had sexual intercourse with her, she testified she was not quite sure, but that it must have been about five minutes, because he was so strong, it didn't help any the way she struggled. She testified that he did not say anything during that time. She testified that she was scared, and that he finally succeeded in having intercourse with her; that it was only a few minutes, not very long. She also testified that during the act of intercourse she tried to get loose, but couldn't; that the alleged rape happened between 6 and 7 in the evening.

The following question was asked her:

Q. Do you know where the rest of the Isaacson family was at that time?

A. The oldest daughter hurried up and ate her meal and went to town, and the other children left also right away after they had eaten, and Mrs. Isaacson and the baby were not at home for supper.

She testified that she stayed at the house after that, and, asked why she stayed there, she answered she was afraid he might do her some harm; besides, she had to work somewhere, had to live. The evidence given by the plaintiff tends to show there was some force used by

the defendant upon this occasion, but we believe, however, there is practically no evidence on the part of plaintiff to show any resistance to any force used by the defendant. There is no showing of any outcry, the making of any noise to attract anyone's attention to her relief, though her own testimony tends to show some of the children were in the house at that time. There is absolutely no showing that any threats were made against her, or that any threat of violence or great bodily harm was made against her person unless she consented to have sexual intercourse with the defendant, nor anything of this nature which might relieve the plaintiff from crying aloud for help in some manner showing actual resistance. There is no testimony by her showing any facts which would put her in fear.

Mrs. Isaacson testified she knew Thea Bye about three years; that she began to work for them on the 7th of April; that she (Mrs. Isaacson) left for Minneapolis April 20th for medical treatment and an operation, and remained there until June 30th; that the first place she went on a visit after she got home was to Watford, which was on the 4th of July; her husband and daughter accompanied her; that they returned from Watford city on the evening of July 6th; that on the next day, July 7th, she was at home all that day, that she was positive of that; that Mrs. Bye's testimony that she went away from home that afternoon and was not home at the supper meal is not so; that Mrs. Evjen was present at the supper meal; that there was not anybody else there, just the family; that on the evening of the 7th she occupied her usual bedroom in the house; that it was the bedroom on the first floor; that after July 7th, the next time she left her home was on the evening of July 9th, as before stated; that on the evening of July 7th the condition of her bed from supper time until the time she went to that bed to sleep was that it was made up and in good shape; that she saw

no evidence of the bed being mussed up at that time until they went to bed the evening of the 7th.

Bertha Evjen testified that she had lived in Tioga fourteen years; that she knew the Isaacson family; that she was no relation to them; that she was over at the Isaacson place on the evening of July 7th; that she went there about supper time; that she was present when the family was eating supper a little after 6; that Mrs. Isaacson was home that evening for supper; that she had supper that evening with the family; that the oldest daughter was home, and she also had supper with the rest of the family; that she (Bertha Evjen) stayed there until about 9.

Myrtle Fredrickson testified that she was the daughter of Mr. and Mrs. Isaacson; that she was twenty years old; that in 1915 she was home at her father's place and was going to school that year; that on the 30th of June her mother returned from Minneapolis, and that all the other children that were going to school always came home for the noon meal; that she spent the 4th of July at Watford city with her mother and father and brother; that they returned home on the 6th in the evening; that she was home on the 7th of July, and, so far as she could remember, was home on that day, and was home for supper that evening; that after her mother came from Watford on the 6th of July, the next time she left home for any visit was on the 9th of July; that on the evening of July 7th Mrs. F. Evjen was at their place for supper; the whole family was there; that she had a good memory; that Mrs. Evjen was present for supper the evening of July 7, 1915; that she, the witness, remained home that evening for supper; that she roomed, boarded, and lived at home during the month of July; that she never saw any familiarities between her father and Mrs. Bye.

If this were a criminal prosecution for rape there could not be the least doubt that there is no competent evidence by which a conviction

could be sustained, for the reason that there is no competent proof that there was any resistance to the acts of alleged rape. This is an exceedingly important element in the crime of rape, and if it is wholly absent there is no crime of rape. Resistance must be established as a fact by competent testimony, that is, the acts which constitute the resistance must be detailed and must show that resistance to the full extent of ability was made, unless it was prevented by threats of great bodily harm as defined by the statute. The statement of conclusions is not evidence of resistance. As, for instance, such statements as are contained in plaintiff's testimony that during the act of sexual intercourse she tried to get loose but could not, that he held her so tight and strong that she could not get away, that she tried all she could to get away from him, but he forced himself to her, that she tried to wriggle away from him, but that he held her so fast she could not, and all similar testimony are the merest conclusions, and are not statements of fact. There is absolutely no testimony in the record showing any threat of bodily harm by the defendant against the plaintiff. She never at any of the times of alleged rape made a single outcry of any kind or character to attract the attention of anyone who might be in the house, or any passer-by. With the element of resistance wholly lacking, there is no evidence of rape.

The plaintiff in two trials in the lower court and in the appeal to this court tried her case upon the theory that she was entitled to damages by

reason of the alleged rape committed upon her. The question that presents itself for our consideration is, she having failed to establish a cause of action for rape for the reasons above stated, may she recover upon a cause of action upon which she did not rely in the trial court or in this court? The opinion as written by Justice Robinson in effect holds that she may. If she may recover upon other grounds than those upon which the action was maintained, what are those grounds? As I understand the theory, in the opinion of the court, it is upon the ground of assault. In such an assault there would no doubt exist as a basis for damages the injured feelings of the plaintiff and the mental suffering and anguish to which she was subjected by reason of the assault; that would probably be a sufficient basis to support the judgment in question. If all the consequences which followed from such assault, accompanied by sexual intercourse, resulting in the plaintiff's becoming pregnant and being delivered of a child, are to be considered in connection with the assault, and as a part or consequence of it, the judgment may be sustained upon that theory. Under the theory laid down in the case of *Ingwaldson v. Skrivseth*, 7 N. D. 388, 75 N. W. 772, no recovery can be had by an unmarried female for her own seduction. Assuming that to be the law of this state, the judgment can be sustained only upon the theory that it is damages for an assault. I concur in the result arrived at in the opinion of Justice Robinson.

ANNOTATION.

Excessive or inadequate damages for an assault or assault and battery upon a female.

- I. In general, 1074.
- II. Not excessive, 1075.
- III. Excessive, 1078.
- IV. Adequate, 1079.
- V. Amounts not attacked, 1079.

J. In general.

The question as to civil actions in

general to recover damages for assaults upon female persons is treated in the note to *Wright v. Starr*, ante, 985; and the measure of damages in such actions in the note to *Austin v. Metropolitan L. Ins. Co.* ante, 1062.

As pointed out in the latter note,

the measure of damages recoverable for an assault upon a female is based upon compensation for the actual injury suffered by her, and the sense of shame, humiliation, disgrace, mortification, etc., she suffers by reason of the assault; and in some circumstances she is entitled to exemplary or punitive damages.

In *Riffel v. Letts* (1916) 31 Cal. App. 426, 160 Pac. 845, the court, in sustaining a verdict in an action of this kind against an attack that it was excessive, stated a principle of general application to the effect that, "in considering an attack upon a verdict as excessive, the appellate court must treat every conflict of the evidence as resolved in favor of the respondent, and must give him the benefit of every inference that can reasonably be drawn in support of his claim."

This annotation, besides showing the damages allowed in this class of action which have been upheld against attacks that they were excessive, or have been held vulnerable to such attacks, and those which have been upheld as against attacks that they were inadequate, has collected in the last division the amounts allowed in cases in which judgments for the plaintiff were affirmed, there being, so far as the reports show, no specific attack upon them as excessive or inadequate.

II. Not excessive.

The following amounts have been held by appellate courts not excessive:

—\$6,500 to a girl for an assault by the wife of her employer, who claimed that the plaintiff was guilty of improper relations with her husband and that it alienated his affections. It did not appear that the plaintiff suffered any serious physical injury from the assault, *Hageman v. Vanderdoes* (1914) 15 Ariz. 312, L.R.A.1915A, 491, 138 Pac. 1053, Ann. Cas.1915D, 1197;

—\$5,000 for the forcible ravishment of the plaintiff, *Jensen v. Lawrence* (1916) 94 Wash. 148, 162 Pac. 40, Ann. Cas. 1917E, 183;

—\$5,000 (\$3,000 compensatory, and \$2,000 punitive) for an assault upon a female by shooting her through the arm, where she suffered great pain therefrom, and was entirely helpless and could not move for three weeks, and was confined to her home two and one-half months, and six months later, at the time of the trial, was unable to do any work, while prior to her injuries she earned \$10 to \$15 per week, *Pine Bluff & A. R. R. Co. v. Washington* (1915) 116 Ark. 179, 172 S. W. 372;

—\$5,000 for assault and battery upon a married woman, resulting in physical injuries which are permanent and progressive, *Labonte v. Davidson* (1918) 31 Idaho, 644, 175 Pac. 588;

—\$3,000 (reduced from \$6,000 by remittitur) for assault upon a woman by carrying her from apartments out on the public street in a bed which she was occupying, and removing the cover sufficiently to expose her to observation, *Fitch v. Huff* (1914) 134 C. C. A. 81, 218 Fed. 17;

—\$2,750 for assault and battery committed upon a woman in a public place, by striking and swearing at her and calling her names, *Crosby v. Bradley* (1890) 11 Ky. L. Rep. 954;

—\$2,700 (reduced from \$3,200 by trial court) to a wife in an action against the husband for assault and battery, there being evidence that the husband assaulted the wife upon catching her in the act of adultery with a man whom he procured to commit the act, *Kelley v. Kelley* (1898) 8 Ind. App. 606, 34 N. E. 1009;

—\$2,500 for injuries resulting from striking the plaintiff and causing her to fall into a stream of water and rendering her unconscious; she was confined to her bed for a week, and had not since entirely recovered, *Clark v. Aldenhoven* (1914) 26 Colo. App. 501, 143 Pac. 267;

—\$2,500 for an assault and battery upon a woman by violently assaulting her and pulling her about the yard, and finally putting her into a cage and keeping her there about an hour, ex-

posed to public view, *Riffel v. Letts* (1916) 31 Cal. App. 426, 160 Pac. 845;

—\$2,500 for assaulting and ravishing a girl between fifteen and sixteen years old, *Hartwig v. Kell* (1917) 199 Mich. 603, 165 N. W. 693;

—\$2,000 (\$1,500 actual and \$500 exemplary) for assault upon and attempt to forcibly ravish a married woman, *Weber v. Weber* (1919) — Okla. —, 179 Pac. 31;

—\$2,000 (\$1,000 compensatory, and \$1,000 punitive) for an indecent assault, *Booher v. Trainer* (1913) 172 Mo. App. 376, 157 S. W. 848;

—\$2,000 for an assault upon a woman by pointing a pistol at her, causing shock and fright, from which she did not recover for about two months, *Winston v. Terrace* (1914) 78 Wash. 146, 138 Pac. 673;

—\$2,000 for an assault by striking a woman on the head, causing injuries to the right side of her head and right shoulder, causing extreme pain and a prostrated condition which developed neuritis and inflammation of the nerves, from which plaintiff was still suffering at the time of the trial, *Kast v. Link* (1911) 90 Neb. 25, 132 N. W. 717;

—\$2,000 for assault resulting in the miscarriage of the plaintiff and physical injuries not clearly shown to be permanent in character. She was, however, confined to her bed for a week or ten days, during part of which time she vomited blood and suffered pain, and after her miscarriage she was in bed most of the time for two years, *Barr v. Post* (1898) 56 Neb. 698, 77 N. W. 123;

—\$1,600 (\$600 actual, and \$1,000 exemplary damages) for assault committed by a father-in-law of the plaintiff in ejecting her from premises occupied by her and her husband, although owned by the defendant, where he assaulted, beat, and pushed her, and caused her serious physical injury, *Redfield v. Redfield* (1888) 75 Iowa, 435, 39 N. W. 688;

—\$1,500 held to be manifestly righteous, just, and moderate for forcible ravishment of the plaintiff, resulting in her pregnancy and subsequent birth of a child, although the evidence

did not show great resistance on the part of the plaintiff, *BYE v. ISAACSON* (reported herewith) ante, 1067;

—\$1,500 for an assault upon a woman by her divorced husband, although she apparently did not suffer serious physical injury, *Bartlett v. Bartlett* (1918) 40 S. D. 544, 168 N. W. 633;

—\$1,250 for an assault making the plaintiff's arm black and blue, and rendering her hysterical for some days, although she was able to be about the day following the assault, *Chicago Consol. Traction Co. v. Mahoney* (1907) 230 Ill. 562, 82 N. E. 868, affirming (1907) 131 Ill. App. 591;

—\$1,225 for an indecent assault upon a girl nineteen years old, resulting in a severe shock to her nervous system, exciting her, causing her to be under the doctor's care for many months. She also suffered a couple of months from an injury to her back, *Eaton v. Thrift* (1908) — R. I. —, 69 Atl. 764;

—\$1,200 for spitting in a woman's face, *Draper v. Baker* (1884) 61 Wis. 450, 50 Am. Rep. 143, 21 N. W. 527;

—\$1,000 for an assault by threatening a woman in her own home, although the defendant did not come in physical contact with her, she claiming that the fright resulted in her miscarriage, *Austin v. Moffett* (1911) 113 Minn. 290, 129 N. W. 388;

—\$1,000 for a wilful and wanton assault upon a married woman in her bedroom in the nighttime, *Hidden v. Baker* (1914) 190 Ill. App. 561;

—\$1,000 for an assault by choking and pushing a woman, causing her to fall into a well, thereby bruising and injuring her, *Sturgeon v. Sturgeon* (1891) 4 Ind. App. 232, 30 N. E. 805;

—\$1,000 for taking indecent familiarities with a girl seventeen years old, *Collins v. Wilson* (1897) 18 Ky. L. Rep. 1049, 39 S. W. 33;

—\$1,000 for an assault and battery on an old woman sixty-eight years of age by jerking her from her cot, knocking her to the floor, dragging her over the room, choking her, breaking two ribs, caving in her breast, and causing shock to her nervous system to the extent of producing diabetes, from

which she died shortly after the trial in the trial court, *Weatherly v. Manatt* (1919) — Okla. —, 179 Pac. 470;

—\$1,000 for an assault and battery upon the plaintiff, resulting in some physical injury, the extent of which, however, was not clear, *Stevens v. Friedman* (1905) 58 W. Va. 78, 51 S. E. 132;

—\$900 actual damages (after remitting \$500 exemplary damages) for wanton assault by the defendant upon the plaintiff by throwing her to the ground, resulting in her physical injuries, the extent of which were not clear, although the plaintiff claimed to be still suffering therefrom at the time of the trial, *Williams v. Williams* (1908) 132 Mo. App. 266, 111 S. W. 837;

—\$800, where the defendants, in unlawfully ejecting a school-teacher from the school room, acted in a rude, insolent, and angry manner, even though they did not seriously injure her, *Johnson v. Putnam* (1884) 95 Ind. 57;

—\$800 for an assault upon a female clerk by the manager of a store, in publicly and forcibly searching her pocket for money he claimed the clerk had received from a customer and had appropriated, *Kress v. Lawrence* (1908) 158 Ala. 652, 47 So. 574;

—\$750 for a violent and vicious assault accompanied by language of scandalous and profane character, tending to defame and vilify the plaintiff, *Neilsen v. Hovander* (1909) 56 Wash. 93, 105 Pac. 172, 21 Ann. Cas. 113;

—\$700 for hugging and kissing a married woman against her will, *Ragsdale v. Ezell* (1899) 20 Ky. L. Rep. 1567, 49 S. W. 775;

—\$500 for an indecent assault upon a woman, although the physical injury to her is insignificant, *Bruske v. Nugent* (1903) 116 Wis. 488, 93 N. W. 454;

—\$500 for the act of an employer in violently taking a servant girl from her bed and kicking her, although no permanent injury resulted, *Tinkle v. Dunivant* (1886) 16 Lea (Tenn.) 503;

—\$500 for an assault upon a woman by seizing her, throwing her down,

and kicking her, *Peddie v. Gally* (1905) 109 App. Div. 178, 95 N. Y. Supp. 652;

—\$500 to a father, for an assault upon and criminal abuse of his infant daughter, *Nyman v. Lynde* (1904) 93 Minn. 257, 101 N. W. 163;

—\$500 for an indecent assault by the defendant, tipping plaintiff under the chin, and undertaking to put his arm around her, *Atkins v. Gladwish* (1889) 25 Neb. 390, 41 N. W. 347.

—\$500 for an indecent assault upon a married woman, causing her physical and mental suffering, *Wolf v. Trinkle* (1885) 103 Ind. 355, 8 N. E. 110;

—\$500 for assault by ejecting the plaintiff from the house of assembly, although no serious physical injury was suffered by her, *Hubert v. Payson* (1908) 36 N. S. 211;

—\$500 damages to the husband, for an indecent assault upon his wife, *Krause v. Spinn* (1899) 21 Tex. Civ. App. 510, 52 S. W. 91;

—\$500 (reduced by the trial court from \$1,200) for an assault by the defendant by shaking his fist in the plaintiff's face and using toward her vile and opprobrious language, *Howell v. Winters* (1910) 58 Wash. 436, 108 Pac. 1077;

—\$450 (compensatory and punitive) for an assault and battery on a sixteen-year-old girl, by throwing her down a flight of stairs, *August v. Finnerty* (1908) 30 Ohio C. C. 380;

—\$400 (after being reduced by remittitur from \$1,000) for indecent assault with an attempt to commit rape, *Rogers v. Winch* (1889) 76 Iowa, 546, 41 N. W. 214;

—\$400, for assault and battery committed upon the plaintiff, by attempting to smoke her out of the house while she was lying sick in bed, *Wood v. Young* (1899) 20 Ky. L. Rep. 1931, 50 S. W. 541;

—\$400 for assault by a woman outrageously kicking another and beating her with a barrel stave, *Faulkner v. Davis* (1897) 18 Ky. L. Rep. 1004, 38 S. W. 1049;

—\$385.25 for injuries resulting to a woman from being kicked in her side, the injury being severe, but not se-

rious, *Rogers v. Foote* (1912) 109 Me. 564, 84 Atl. 648;

—\$300 (reduced from \$500 by trial court) for an assault upon a young girl by the act of the defendant in rushing from a place of business and grabbing plaintiff by the arm and cursing and shoving her, although the plaintiff was not physically injured except that her arm was sore and she felt humiliated, *Johnson v. Lamm* (1910) 156 Ill. App. 287;

—\$350 for assault upon plaintiff in a public place, although no physical injury was inflicted, *Parriconi v. Greco* (1905) 115 La. 558, 39 So. 599;

—\$300 for injury caused by striking the plaintiff on the arm with a cane, partially disabling her for six weeks, *Long v. McWilliams* (1902) 11 Okla. 562, 69 Pac. 882;

—\$250 for an assault and battery upon a pregnant woman, resulting in a miscarriage and permanent physical injuries, *Goracke v. Hintz* (1882) 13 Neb. 390, 14 N. W. 379;

—\$150 (reduced by the trial court from \$250) for an assault by a woman employer upon her domestic servant by striking her and pulling her hair, *Gungrich v. Anderson* (1915) 189 Mich. 144, 155 N. W. 379.

III. Excessive.

The following amounts have been held by appellate courts to be excessive and reversed or reduced to the amounts indicated:

—\$10,500, reduced to \$5,000, damage to plaintiff for an assault upon her by her mother-in-law, which apparently did not result in any serious physical injury to her, *Smith v. Smith* (1915) 185 Mich. 172, 151 N. W. 647;

—\$8,000 for ravishment, resulting in the birth of a child, held excessive and reduced to \$3,000, *Garvick v. Burlington, C. R. & N. R. Co.* (1906) 131 Iowa, 415, 117 Am. St. Rep. 432, 108 N. W. 327;

—\$3,500 for assault with an intent to produce an abortion, where no permanent injury was shown and the plaintiff voluntarily submitted to an operation by some of the defendants, and took medicine given by one of them, *Courtney v. Clinton* (1897) 18 Ind. App. 620, 48 N. E. 799;

—\$2,500, reduced to \$1,000, for an assault upon the plaintiff by taking from her possession a box and, after examining the contents, returning it to her, she having suffered no physical injury, although she did suffer humiliation, shame, and mortification, *Lonergan v. Small* (1909) 81 Kan. 48, 25 L.R.A.(N.S.) 976, 105 Pac. 27;

—\$2,500 held excessive damages for merely assaulting a woman by holding her and undertaking to raise her clothing, and soliciting intercourse with her, *Timmons v. Broyles* (1868) 47 Ill. 92;

—\$2,000 (reduced by the trial court from \$3,000) held excessive and reduced to \$750, for an assault and battery upon a woman in attempting to prevent her from getting into the front seat of an automobile which the defendant was about to remove from the garage of the plaintiff's husband, on the ground that it had been sold to the husband on conditional sale and he had failed to pay for it, *Geissler v. Geissler* (1917) 96 Wash. 150, 164 Pac. 746, 166 Pac. 1119;

—\$2,500 reduced to \$1,000, for an assault committed by the defendant in jerking a package from plaintiff when she was in his store and, after examining the contents and ascertaining that it was purchased at another store, ordering her from his store, *Lonergan v. Small* (Kan.) supra;

—\$1,700 for an assault in striking the plaintiff with a hammer or hatchet, although no serious injury was inflicted, is so excessive as to require a reversal of the action, *Hennies v. Vogel* (1877) 87 Ill. 242;

—\$1,700 for assault with intent to commit a rape was held excessive in view of prejudicial testimony against defendant; the court said that, judging from the amount of the verdict, and in view of the whole testimony when taken together, the jury would seem to have been led to their verdict by the consideration of something else than the legitimate testimony in the case, *Sutton v. Johnson* (1871) 62 Ill. 209;

—\$1,000 (\$800 actual, and \$200 punitive) reduced to \$800, for an assault by a woman standing toward

the plaintiff in the character of loco parentis; the defendant whipped the plaintiff upon her bare back with some article, causing severe although not serious physical injuries, *Dix v. Martin* (1913) 171 Mo. App. 266, 157 S. W. 133.

IV. Adequate.

Fifty dollars was held not inadequate damages, where it did not appear that the plaintiff was seriously injured, and she was largely to blame for the assault: *Keller v. Lewis* (1902) 116 Iowa, 369, 89 N. W. 1102.

V. Amounts not attacked.

The following amounts have been allowed in cases in which judgments for the plaintiff were affirmed, there having been, so far as the reports show, no specific attack made upon them as excessive or inadequate:

—\$5,000 awarded as damages for fright to a woman, caused by pointing a pistol at her and threatening her and frightening her; *Casteel v. Brooks* (1915) 46 Okla. 189, 148 Pac. 158;

—\$5,000 for assault with intent to ravish, resulting in bodily damage, with bruises and injuries creating bodily weakness, and the aggravation of a malady accompanied with fits, *Elliott v. Van Buren* (1875) 33 Mich. 49, 20 Am. Rep. 668;

—\$5,000 (\$3,000 actual, and \$2,000 punitive) damages for the ravishment complained of, *Williams v. Collins* (1914) 180 Mo. App. 146, 167 S. W. 1189;

—\$4,500 for an assault and battery without justification, although it resulted in only minor physical injuries, *Stark v. Epler* (1911) 59 Or. 262, 117 Pac. 276;

—\$4,375 for the rape of a female under the age of consent, which resulted in the birth of a child, the act being with the consent of the plaintiff, *Priboth v. Haveron* (1914) 41 Okla. 692, 139 Pac. 973;

—\$3,000 (\$1,300 actual, and \$1,700 exemplary) for the forcible defilement of the plaintiff, resulting in her pregnancy, *Linville v. Green* (1907) 125 Mo. App. 289, 102 S. W. 67;

—\$2,000 for cruelly whipping a child by a person standing in loco par-

entis, *Clasen v. Pruhs* (1903) 69 Neb. 278, 95 N. W. 640, 5 Ann. Cas. 112;

—\$2,000 for an assault by striking plaintiff with a whip, although not apparently doing her any serious physical injury, *Corning v. Corning* (1851) 6 N. Y. 97;

—\$1,500 for an indecent assault upon a woman by entering her bedroom at night when she was in bed, the defendant having practically disrobed himself, *McGlone v. Hauger* (1913) 56 Ind. App. 243, 104 N. E. 118;

—\$1,500 for an assault upon the plaintiff and her forcible defilement, *Schenk v. Dunkelow* (1888) 70 Mich. 89, 37 N. W. 886;

—\$1,200 for the rape of a female under the age of consent, although she consented thereto, *Boyles v. Blankenhorn* (1915) 168 App. Div. 388, 153 N. Y. Supp. 466, affirmed in (1919) 220 N. Y. 624, 115 N. E. 443;

—\$1,000 for an assault and battery upon plaintiff by her brother. No serious or permanent injury was suffered by her, and no claim was made for exemplary damage, *Linnan v. Linnan* (1912) 181 La. 535, 59 So. 981;

—\$1,000 (\$400 actual, and \$600 punitive) damages to a father, for the forcible defilement of his daughter, resulting in physical injury to her, *Mohelsky v. Hartmeister* (1897) 68 Mo. App. 818;

—\$1,000 for assault and battery committed by ravishment, followed by the birth of a child, *List v. Miner* (1901) 74 Conn. 50, 49 Atl. 856;

—\$1,000 to a married woman by being ejected from premises by the sheriff, where the latter was unable to justify the ejection. The opinion does not indicate that the plaintiff suffered any physical injury, *Isley v. Huber* (1873) 45 Ind. 421;

—\$976 for an assault upon a woman by threatening her, causing her to suffer a miscarriage, *Barbee v. Reese* (1883) 60 Miss. 906;

—\$900 (\$400 actual, and \$500 punitive) for an indecent assault by a man's breaking into the plaintiff's home in the nighttime, and while she was lying in bed placing his hand upon her person, *Lemmons v. Robertson* (1912) 164 Mo. App. 85, 148 S. W. 189;

—\$800 for assault with a poker and a whip, breaking the metacarpal bone of the plaintiff's left hand, and bruising her considerably about the head, shoulders, and sides, *Dimick v. Downs* (1876) 82 Ill. 570;

—\$750 actual damages for assault by grabbing the plaintiff and holding her tightly and trying to throw her upon the couch and pulling up her clothing, although, upon the plaintiff getting loose from the defendant and telling him to go, he went, *Marts v. Powell* (1913) 176 Mo. App. 124, 161 S. W. 871;

—\$700 (reduced by trial court from \$1,200) for an assault and battery which did not result in any serious physical injury, *Howell v. Winters* (1910) 58 Wash. 436, 108 Pac. 1077;

—\$683 for an assault and battery committed upon plaintiff by taking from her a clock in her possession. It does not appear that she suffered any permanent physical injury, *Gerstein v. Adams Co.* (1919) — Wis. —, 173 N. W. 209;

—\$600 for assault and battery committed by the occupant of the leased premises, although no serious physical injury was inflicted, *Hubbard v. Perlie* (1905) 25 App. D. C. 477;

—\$500 awarded for an assault made with a whip, resulting in plaintiff's suffering a miscarriage and such injury to her health as to prevent her performing hard work, *Stone v. Moore* (1891) 83 Iowa, 186, 49 N. W. 76;

—\$500 for the act of the defendant in laying his hand upon a woman's face and permitting it to drop to her breast, and squeezing her breast, *Hatchett v. Blacketer* (1915) 162 Ky. 266, 172 S. W. 538;

—\$500 for assault upon a married woman, temporarily disabling her, *Hamm v. Romine* (1884) 98 Ind. 77;

—\$500 for an assault with attempt to commit rape, *Kinneberg v. Kinneberg* (1899) 8 N. D. 311, 79 N. W. 337;

—\$350 for an assault upon a woman in her place of business in the presence of a number of people, where the defendant also grossly insulted the plaintiff, *Parriconi v. Greco* (1905) 115 La. 558, 39 So. 599;

—\$345 for an assault by a landlord in forcibly removing the plaintiff from the premises occupied by a tenant, upon whom the plaintiff was calling, *Suggs v. Anderson* (1853) 12 Ga. 461;

—\$300 for assault with attempt to secure illicit intercourse with the plaintiff, *Stratton v. Nichols* (1850) 20 Conn. 327;

—\$300 for an assault, by the act of one woman in threatening to strike another and calling her poor white trash, *Western U. Teleg. Co. v. Bowdoin* (1914) — Tex. Civ. App. —, 168 S. W. 1;

—\$300 for an assault by inducing a feeble old woman to leave her house, and then locking her out and forcibly preventing her re-entry, *Jacobs v. Hoover* (1864) 9 Minn. 204, Gil. 189;

—\$300 for an assault by frightening the plaintiff and threatening to strike her, *Plonty v. Murphy* (1901) 82 Minn. 268, 84 N. W. 1005;

—£60 for an assault in forcibly cutting off the plaintiff's hair, *Forde v. Skinner* (1890) 4 Car. & P. (Eng.) 239;

—\$250 for an assault and battery claimed to have resulted in the miscarriage of the plaintiff, *Jones v. Parker* (1908) 81 S. C. 214, 62 S. E. 261;

—\$200 for an assault upon the clerk of the defendant, by his publicly laying hands upon her, and leading her to the basement of his store and searching her, and taking from her money found upon her person, *Henderson v. Agon* (1907) 148 Mich. 252, 111 N. W. 778;

—£40 for an assault by throwing water upon plaintiff, *Simpson v. Morris* (1813) 4 Taunt. 821, 128 Eng. Reprint, 555;

—\$150 for an assault upon a married woman in taking property from her which had been sold to her husband upon conditional sale. It does not appear that the plaintiff's wife suffered any injury from the assault, *Silverstein v. Kohler* (1919) — Cal. —, 183 Pac. 451;

—\$100 for assault and battery upon plaintiff by drawing a pistol upon her, and cursing and threatening to

kick her, Pagan v. Drake Furniture Co. (1906) 73 S. C. 364, 53 S. E. 542; blow in the face, Deppeart v. Rombotis (1905) 115 La. 49, 38 So. 890.
— \$100 for striking a woman a light A. G. S.

DES ARC OIL MILL, Appt.,
v.
WESTERN UNION TELEGRAPH COMPANY.

Arkansas Supreme Court—January 28, 1918.

(132 Ark. 335, 201 S. W. 273.)

Telegraph — injury — duty to minimize damages — breaking contract.

1. The rule that one injured by the negligence of a telegraph company must adopt every available method of minimizing the damages does not require him to break his own contract, which grows out of a message negligently changed in transmission, in order to protect the telegraph company from the consequences of its negligence.

[See note on this question beginning on page 1090.]

Contract — offer by telegraph — responsibility for correct delivery of message.

2. One making an offer by telegraph is responsible for the correct transmission of the message, and is bound by it in the terms in which it is delivered to the party addressed.

[See 6 R. C. L. 601.]

Principal and agent — carrier of telegraph message.

3. The carrier of a telegraph message is the agent of the sender.

[See 6 R. C. L. 601.]

Telegraph — provision against liability for unrepeatd message — validity.

4. A provision in a contract for transmitting a telegram, relieving the company from liability for mistake in an unrepeatd message, is void.

Carrier — exemption from liability — validity.

5. A public carrier's contract exempting it from liability for negligence of its own servants is void.

[See 5 R. C. L. 8.]

Telegraph — unrepeatd message — effect of statute.

6. A provision in a contract for transmitting a telegram, relieving the company from liability for mistake in unrepeatd messages, is not validated by the act of Congress providing that all charges shall be reasonable and permitting classification of messages inter alia into repeated and unrepeatd messages.

Damages — stipulation in telegram to fix — validity.

7. A stipulation in a contract for transmitting a telegram, fixing the maximum liability for mistake in transmission, cannot be sustained as a stipulation for value, since the damages which may follow from breach of a contract to transmit a telegram cannot be known in advance.

Commerce — interference — imposing liability on telegraph company.

8. Adherence to the common-law principle which invalidates a contract by a telegraph company limiting its liability for negligently transmitting a message does not unconstitutionally burden or interfere with interstate commerce.

(Wood and Smith, JJ., dissent.)

APPEAL by plaintiff from a judgment of the Pulaski Circuit Court (Hendricks, J.) in favor of defendant in an action brought to recover damages for allege dneGLIGENCE of its servants in failing to correctly transmit and deliver a telegram. *Reversed.*

The facts are stated in the opinion of the court.

Mr. Richard M. Mann, for appellant:

Defendant is liable to plaintiff for its negligence in changing the word "completely," meaning \$64, to the word "completely," meaning \$63, in the original offer to sell 850 tons of cotton seed.

Kansas City Southern R. Co. v. C. H. Albers Commission Co. 223 U. S. 573, 56 L. ed. 556, 32 Sup. Ct. Rep. 316; Western U. Teleg. Co. v. Piper, — Tex. Civ. App. —, 191 S. W. 817; Western U. Teleg. Co. v. Bailey, 108 Tex. 427, 196 S. W. 516.

Defendant became liable to the plaintiff for negligently and falsely assuring it that the offer had been delivered correctly, on which assurance it relied to its damage.

Oak Leaf Mill Co. v. Cooper Co. 103 Ark. 79, 146 S. W. 130; Leake v. Sutherland, 25 Ark. 219, 16 Cyc. 1003; Shields v. Smith, 37 Ark. 47; Campbell v. Hastings, 29 Ark. 512; 29 Cyc. 425, and note; Depue v. Flatau, 100 Minn. 299, 8 L.R.A. (N.S.) 485, 111 N. W. 1; Edwards v. Lamb, 69 N. H. 599, 50 L.R.A. 160, 45 Atl. 480; Harriott v. Plimpton, 166 Mass. 585, 44 N. E. 992; Carpenter v. Blake, 75 N. Y. 12; Peck v. Hutchinson, 88 Iowa, 320, 55 N. W. 511; McNeveins v. Lowe, 40 Ill. 209; Mann-Tankersly Drug Co. v. Cheairs, 75 Ark. 596, 88 S. W. 873; Attleboro Mfg. Co. v. Frankfort Marine Acci. & Plate Glass Ins. Co. 202 Fed. 295; Getchell & M. Lumber & Mfg. Co. v. Employers Liability Assur. Corp. 117 Iowa, 180, 62 L.R.A. 617, 90 N. W. 616.

Defendant by reason of its negligence in carrying out its undertaking to find out for the plaintiff whether or not the message had been delivered correctly, and by negligently assuring it that the message had been delivered correctly (when it had not), knowing at the time that plaintiff was relying and acting on this assurance to its damage, became liable to it for its loss.

Western U. Teleg. Co. v. Weniski, 84 Ark. 457, 106 S. W. 486; Western U. Teleg. Co. v. Askew, 92 Ark. 183, 122 S. W. 107; Western U. Teleg. Co. v. Love Banks Co. 73 Ark. 205, 88 S. W. 949, 3 Ann. Cas. 712; Carlon v. Western U. Teleg. Co. 35 S. D. 554, 153 N. W. 375.

Messrs. Albert T. Benedict and Rose, Hemingway, Cantrell, Loughborough, & Miles, for appellee:

Under the terms and conditions found on the blank, there could be no

recovery beyond the charge for sending it, because the message was not repeated, and no recovery at all, because it was in cipher.

Primrose v. Western U. Teleg. Co. 154 U. S. 1, 38 L. ed 883, 14 Sup. Ct. Rep. 1098.

The conditions limiting liability are authorized by the interstate act of Congress.

Gardner v. Western U. Teleg. Co. 145 C. C. A. 399, 231 Fed. 405; Western U. Teleg. Co. v. Bank of Spencer, 53 Okla. 398, 156 Pac. 1175; Boyce v. Western U. Teleg. Co. 119 Va. 14, 89 S. E. 106; Western U. Teleg. Co. v. Dant, 42 App. D. C. 398, L.R.A. 1915B, 685, Ann. Cas. 1916A, 1132; Williams v. Western U. Teleg. Co. 203 Fed. 140.

If plaintiff sustained a loss it alone was to blame.

1 Sedgw. Damages, 201; Bunch v. Potts, 57 Ark. 257, 21 S. W. 437; Western U. Teleg. Co. v. Crain, 118 Ark. 13, 175 S. W. 393; Postal Teleg. Cable Co. v. Schaefer, 110 Ky. 907, 62 S. W. 1119; Weeks v. Western U. Teleg. Co. 169 N. C. 702, 86 S. E. 631; Maddux v. Western U. Teleg. Co. 92 Kan. 619, 141 Pac. 585; Western U. Teleg. Co. v. Peter, — Tex. Civ. App. —, 160 S. W. 991.

The telegraph company is not the agent of the sender.

Shingleur v. Western U. Teleg. Co. 72 Miss. 1030, 30 L.R.A. 444, 48 Am. St. Rep. 604, 18 So. 425; Pepper v. Western U. Teleg. Co. 87 Tenn. 554, 4 L.R.A. 660, 10 Am. St. Rep. 699, 11 S. W. 783; Pegram v. Western U. Teleg. Co. 100 N. C. 28, 6 Am. St. Rep. 557, 6 S. E. 770; Postal Teleg. Cable Co. v. Schaefer, 110 Ky. 907, 62 S. W. 1119; McKee v. Western U. Teleg. Co. 158 Ky. 143, 51 L.R.A. (N.S.) 439, 164 S. W. 348; Germain Fruit Co. v. Western U. Teleg. Co. 137 Cal. 598, 59 L.R.A. 576, 70 Pac. 658.

McCulloch, Ch. J., delivered the opinion of the court:

This is an action instituted by appellant against appellee Telegraph Company to recover damages for alleged negligence of appellee's servants in failing to correctly transmit and deliver a telegraphic message. Appellee did not introduce any testimony concerning the transaction, and appellant's testimony is undisputed. The trial court decided that no liability on the part of the Telegraph Company was shown, and gave a peremptory instruction to

the jury to return a verdict in appellee's favor.

Appellant operated an oil mill in Arkansas and maintained an office in the city of Little Rock. On October 27, 1916, appellant held an option from another mill concern at Searcy, Arkansas, for the purchase of 1,000 tons of cotton seed, and on that day sent a code message by telegraph to the East St. Louis Cotton Oil Company of East St. Louis, Illinois, offering to sell 850 tons of seed at the price of \$64 per ton, the word "completely" being used in the code to indicate those figures. In the transmission of the message the word "completely" was used by the operator, which, according to the interpretation of the code, indicated the price of \$63 per ton for the seed, and the message was delivered to the sendee in that form. Immediately upon the receipt of the message the manager of the East St. Louis mill called up appellant's agents at Little Rock by telephone and accepted the offer without either of the parties restating the price, appellant's agent understanding at the time that his message had been correctly transmitted indicating the price of \$64 per ton, and the manager of the other concern supposing at the time that he received the message correctly and that the price was \$63 per ton, as indicated by the code word used in the message. There was a custom among dealers in the commodity mentioned to confirm trades made over the telephone, by telegram or letter, and so, within an hour after the telephone conversation, the manager of the East St. Louis mill sent to appellant's manager a telegram confirming the acceptance of the order at \$63 per ton. As soon as appellant's manager observed this discrepancy between the offer and that contained in the acceptance, he instituted an inquiry with the Telegraph Company, and, after due investigation by the operator, the manager reported to appellant's manager that the message had been

correctly transmitted and delivered as written. Resting upon this assurance, appellant's manager insisted upon the purchaser taking the seed at the price contained in the offer; but when he ascertained finally that the message had been incorrectly transmitted, and that in the form delivered to the purchaser the price was indicated at \$63 per ton, he yielded to the contention of the purchaser and delivered the seed at that price. The difference of \$1 per ton is claimed as damages resulting from the incorrect transmission of the message. Cotton seed was worth in the market the full price stated in appellant's offer for several days after the offer was made, but subsequently declined in price. Immediately after the telephone message between appellant's manager and the East St. Louis purchaser, appellant closed the option with the Searcy mill for the purchase of 1,000 tons of seed. The evidence shows that, although the telegraphic message sent by appellant was in code language and unintelligible to those who were not familiar with the code, appellant's manager informed the operator of the contents and importance of the message.

The first contention of learned counsel for appellee in support of the court's peremptory charge to the jury is that the damage to appellant was avoidable in that its manager was apprised of a mistake in the transmission of the message in time to have sold the cotton seed at the full price named therein, and appellant should have broken its contract with the purchaser and sold the seed for the best obtainable price which was sufficient to cover the damages resulting from the breach of the contract. This reasoning is, we think, entirely unsound. While we have announced the rule in this class of cases that it is the duty of one suffering damage by reason of the negligence of a telegraph company to adopt every available method of minimizing the damage (Western U. Teleg. Co. v.

Crain, 118 Ark. 13, 175 S. W. 393), yet this rule does not require a party to break his own contract in order to protect the tele-

Telegraph—
injury—
duty to mini-
mise damages—
breaking
contract.

graph company from the consequences of the negligence of its own servants. The rule stated does not go that far. It is conceded that the servants of the Telegraph Company were guilty of negligence, and that as a result of that negligence a valid contract was imposed on appellant to sell the seed at a lower price than was proposed in the message as written and delivered to the agent of the Telegraph Company for transmission. The authorities announce the rule that "a party making an offer by telegraph is respon-

Contract—offer
by telegraph—
responsibility
for correct
delivery of
message.

sible for the correct transmission of his message and is bound by it in the terms in which it is delivered to the party addressed."

This is on the theory that the carrier of the message is the agent of the sender. 9 Cyc. 294; Ayer v. Western U.

Teleg. Co. 79 Me. 493, 1 Am. St. Rep. 353, 10 Atl. 495; Western U. Teleg. Co. v. Shotter, 71 Ga. 760; Durkee v. Vermont C. R. Co. 29 Vt. 127; Saveland v. Green, 40 Wis. 431; New York & W. Printing Teleg. Co. v. Dryburg, 35 Pa. 298, 78 Am. Dec. 338; Sherrerd v. Western U. Teleg. Co. 146 Wis. 197, 131 N. W. 341; Younger v. Western U. Teleg. Co. 146 Iowa, 499, 125 N. W. 577; Eureka Cotton Mills v. Western U. Teleg. Co. 88 S. C. 498, 70 S. E. 1040, Ann. Cas. 1912C, 1273. There are decisions to the contrary. McKee v. Western U. Teleg. Co. 158 Ky. 143, 51 L.R.A. (N.S.) 439, 164 S. W. 348; Shingleur v. Western U. Teleg. Co. 72 Miss. 1030, 30 L.R.A. 444, 48 Am. St. Rep. 604, 18 So. 425; Pepper v. Western U. Teleg. Co. 87 Tenn. 554, 4 L.R.A. 660, 10 Am. St. Rep. 699, 11 S. W. 783. The true rule is, we think, that announced in the majority of the cases, that as between

the sender and sendee the telegraph company is the agent of the former, who is bound by any mistake made in transmission of a message, though the sendee may, under proper circumstances, maintain an action against the telegraph company for damages resulting in violation of the public duty, which it owes as a carrier to the sendee as well as to the sender.

The offer contained in the telegram was accepted by the purchaser in a telephone message, and later was confirmed in a telegraph message sent in accordance with the custom of that trade. The message was strictly one in confirmation of the acceptance of the price contained in appellant's offer, and was not a counter proposition for purchase at a different price.

It is next contended that there was no liability because the printed telegraph blank contained stipulations exempting the company from liability. Those stipulations read as follows:

"To guard against mistakes or delays, the sender of a telegram should order it repeated; that is, telegraphed back to the originating office for comparison. For this, one half the unrepeatd telegram rate is charged in addition. Unless otherwise indicated on its face, this is an unrepeatd telegram and paid for as such, in consideration whereof it is agreed between the sender of the telegram and this company as follows:

"1. The company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any unrepeatd telegram, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for nondelivery of any repeated telegram, beyond fifty times the sum received for sending same, unless 'specially valued,' nor in any case for delays arising from unavoidable interruptions in the working of its lines; nor for errors in cipher or obscure telegrams.

"2. In any event the company

shall not be liable for damages for any mistakes or delays in the transmission or delivery, or for the non-delivery, of this telegram, whether caused by the negligence of its servants or otherwise, beyond the sum of \$50, at which amount this telegram is hereby valued, unless a greater value is stated in writing hereon at the time the telegram is offered to the company for transmission, at an additional sum paid or agreed to be paid based on such value equal to one tenth of 1 per cent thereof."

The stipulation in question constitutes an attempt on the part of the Telegraph Company to exempt itself from liability for damages resulting from the negligence of its own servants. According to the very great weight of authority such a provision in the contract of a public carrier is void,

Telegraph—
provision
against liability
for unrepeat-
ed messages—
validity.

and this is true as to the particular stipulation before us concerning re-

peated and unrepeat messages. Jones, Teleg. & Teleph. Cos. § 377. It was so held in the case of Western U. Teleg. Co. v. Short, 53 Ark. 434, 9 L.R.A. 744, 14 S. W. 649, and the same rule was announced in the case of Western U. Teleg. Co. v. Compton, 114 Ark. 193, 169 S. W. 946, except that the stipulation dealt with in that case was not the one concerning unrepeat messages. The syllabus in that case erroneously states the contrary rule, but the opinion shows clearly the holding of the court following the rule announced in the Short Case, supra, that such stipulation is void. We granted a rehearing in the Compton Case on the ground that the Supreme Court of the United States had decided that the imposition by the state statute of liability for mental anguish was an interference with interstate commerce. Western U. Teleg. Co. v. Brown, 234 U. S. 542, 58 L. ed. 1457, 34 Sup. Ct. Rep. 955, 5 N. C. C. A. 1024. The effect of the original opinion, that the contract for exemption from liability

for negligence is void, was not modified in the opinion on rehearing. We allowed the judgment to stand for the sum of \$50, the sum named in the stipulation, merely for the reason that that was the extent of defendant's defense, as it had offered in the pleadings to pay damages in that sum. The opinion on rehearing did not deal with the question of exemption from negligence, but was based entirely upon the decision of the Supreme Court of the United States, that the state statute was inapplicable to an interstate message. The effect of the Compton Case has been misinterpreted in other quarters. Gardner v. Western U. Teleg. Co. 145 C. C. A. 399, 231 Fed. 405; Western U. Teleg. Co. v. Bailey, — Tax. Civ. App. —, 184 S. W. 519; Western U. Teleg. Co. v. Bailey, 108 Tex. 427, 196 S. W. 516; Western U. Teleg. Co. v. Bank of Spencer, 53 Okla. 398, 156 Pac. 1175. But an examination of the opinion shows clearly that the court meant to array itself, as it had already done, with those courts that had steadily adhered to the rule that a public carrier's contract exempting itself from liability for negligence of its own servants is void. Other cases decided later by this court merely followed the Compton Case in yielding to what we conceived to be the ruling of the Supreme Court of the United States in the case of Western U. Teleg. Co. v. Brown, supra. Western U. Teleg. Co. v. Holder, 117 Ark. 210, 174 S. W. 552; Western U. Teleg. Co. v. Johnson, 115 Ark. 564, 171 S. W. 859.

Carrier—
exemption from
liability—
validity.

There are certain expressions in the opinion in the Holder Case, 117 Ark. 210, 174 S. W. 552, which might be interpreted to mean that this court intended to recede from its position on the question of invalidity of a contract exempting a carrier from liability for negligence, but the language must be read in the light of the particular question under consideration, and when so understood it is clear that we only

meant to yield to the superior authority of the Supreme Court of the United States in holding that the statute imposing liability for mental anguish is a burden on interstate commerce.

Is such a stipulation rendered valid by the statute enacted by Congress in the year 1910 (Act of June 18, 1910, 36 Stat. at L. 544, chap. 309, 4 Fed. Stat. Anno. 2d ed. p. 355), giving the Interstate Commerce Commission authority to regulate rates and practices of telegraph companies? We discover no good reason for holding that such a contract, if void under the general principles of the common law prior to the enactment of that statute, has become valid under the statute. The controlling clause of the statute in question reads as follows: "All charges made for any service rendered or to be rendered in the transportation of passengers or property and for the transmission of messages by telegraph, telephone or cable, as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful; provided, that messages by telegraph, telephone, or cable, subject to the provisions of this act, may be classified into day, night, repeated, unrepeat- ed, letter, commercial, press, gov- ernment, and such other classes as are just and reasonable, and differ- ent rates may be charged for the different classes of messages."

It was clearly the intention of Congress in enacting this statute to confer authority on the Commis- sion merely to regulate rates and classifications of messages, and not to confer authority to declare the principles of law af- fecting the liability of a carrier for its wrongful acts or omissions. *Western U. Teleg. Co. v. Bailey*, *supra*. The classification of repeated and unrepeat- ed messages and the fixing of rates for the differ- ent classes of messages is quite a

different thing from a contract ab- solving the carrier from liability for its own negligence. If it had been intended to confer power upon the Interstate Commerce Commis- sion to change the law in that re- spect by the mere approval of classi- fication of rates, doubtless the fram- ers of the statute would have used different language. The Supreme Court of the United States has giv- en a very clear intimation that no such power is conferred by the vari- ous statutes with reference to the regulation of interstate rates by the Commission. In *Adams Exp. Co. v. Croninger*, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A. (N.S.) 257, 33 Sup. Ct. Rep. 148, the court said: "That a common carrier cannot ex- empt himself from liability for his own negligence or that of his serv- ants is elementary. *York Mfg. Co. v. Illinois C. R. Co.* 3 Wall. 107, 18 L. ed. 170; *New York C. R. Co. v. Lockwood*, 17 Wall. 357, 21 L. ed. 627, 10 Am. Neg. Cas. 624; *Bank of Kentucky v. Adams Exp. Co.* 93 U. S. 174, 23 L. ed. 872; *Hart v. Penn- sylvania R. Co.* 112 U. S. 331, 338, 28 L. ed. 717, 720, 5 Sup. Ct. Rep. 151. The rule of the common law did not limit his liability to loss and damage due to his own negligence, or that of his servants. That rule went beyond this, and he was liable for any loss or damage which re- sulted from human agency, or any cause not the act of God or the pub- lic enemy. But the rigor of this li- ability might be modified through any fair, reasonable, and just agree- ment with the shipper which did not include exemption against the negli- gence of the carrier or his servants. The inherent right to receive a com- pensation commensurate with the risk involved the right to protect himself from fraud and imposition by reasonable rules and regulations, and the right to agree upon a rate proportionate to the value of the property transported."

Similar language was used by the same court in the later case of *Kan- sas City Southern R. Co. v. Carl*, 227 U. S. 639, 57 L. ed. 683, 33 Sup.

Telegraph—
unrepeat-
ed message—effect
of statute.

Ct. Rep. 391, which was a case which went up on a writ of error from this court. 91 Ark. 97, 134 Am. St. Rep. 56, 121 S. W. 932. In that case the court said: "Is the contract here involved one for exemption from liability for negligence and therefore forbidden? An agreement to release such a carrier for part of a loss due to negligence is no more valid than one whereby there is complete exemption. Neither is such a contract any more valid because it rests upon a consideration than if it was without consideration." In each of those cases, however, the court upheld the stipulation as a special contract as to the value of the commodity shipped. The stipulation with respect to the

Damages—
stipulation in
telegram to fix—
validity.

telegraph message cannot be sustained as a stipulation for value, because in the very nature of the case a telegram or the damages which may flow from its breach cannot be estimated in advance. Western U. Teleg. Co. v. Compton, 114 Ark. 193, 169 S. W. 946. Nor can adherence to the common-law principle which invalidated such a stipulation be viewed as a burden upon or interference

Commerce—
interference—
imposing
liability on
telegraph
company.

with interstate commerce, or as being in conflict with the authority of the Interstate Commerce

Commission over that subject, for, as before stated, the exemption does not come within the scope of the regulation of rates or of classification of messages, but is purely an attempt to contract against the general law of the land with respect to liability for negligence.

Learned counsel for appellee press upon our attention the recent case of Gardner v. Western U. Teleg. Co. 145 C. C. A. 399, 231 Fed. 405, decided by the United States circuit court of appeals for the eighth circuit, as sustaining their contention that such a stipulation is rendered valid by the act of Congress assuming jurisdiction over the regulation of telegraph compa-

nies. We do not think that the decision in that case has any such bearing on the present case. That decision dealt entirely with the stipulation providing that there should be no liability unless notice should be given within sixty days,—a provision the validity of which has been frequently upheld by this court, and is valid according to the weight of authority. A clause in the Oklahoma Constitution attempted to render void such a provision in any contract or agreement, and the question before the court in that case was whether or not the provision of the Oklahoma Constitution, in its application to an interstate carrier, was an attempted interference with interstate commerce, and the court of appeals held that it was. We fail to see the application of that decision to the question now before us. Many other cases cited on the brief of counsel held, as we did, that the right to recover mental anguish under local statutes and decisions has been abrogated by the assumption of power by Congress over the subject of interstate carriers of messages. The only decision by a court of last resort brought to our attention holding that the Interstate Commerce Commission has, under the Federal statute, the power to approve and legalize a regulation exempting a telegraph company from its own negligence is the case of Haskell Implement & Seed Co. v. Postal Teleg.-Cable Co. 114 Me. 277, 96 Atl. 219. Some of the decisions cited seem to confuse this question with the right to recover mental anguish under local statutes, but the two questions are different, as we have attempted to show. At any rate we are convinced that it is no interference with interstate commerce for the courts of this state to adhere to its former decisions in declaring the general law on the subject, that a stipulation of a public carrier attempting to exempt itself from liability for negligence is void. That conclusion is in entire accord with

the views expressed in our former decisions, and we now adhere to them.

It follows, therefore, that the circuit court erred in holding the stipulation to be valid and in giving a peremptory instruction to the jury in appellee's favor. Reversed and remanded for a new trial.

Smith, J., dissenting:

No useful purpose would be served by reviewing the cases cited in the majority opinion, or the briefs of counsel; and this dissent is written chiefly to express my regret that I cannot assent to the view of the majority.

The stipulations printed on the back of the telegraph blank are set out in the majority opinion; and in the briefs it is said that these stipulations have been in use, with only inconsequential changes, since telegraphy, as an aid to commerce, was in its infancy. From the beginning courts have differed as to the validity of these stipulations. They were upheld by the Supreme Court of the United States in the case of *Primrose v. Western U. Teleg. Co.* 154 U. S. 1, 38 L. ed. 883, 14 Sup. Ct. Rep. 1098, and a number of courts concurred in that view. But this court, with others, and perhaps the larger number, took the opposite view. In the case of *Western U. Teleg. Co. v. Short*, 53 Ark. 434, 9 L.R.A. 744, 14 S. W. 649, this court refused to give effect to the limitations of liability there contained, upon the ground that they were stipulations for immunity from liability for negligence in the transmission of a message,—an un-repeated message there, as here. The majority now assign here the same reason which was assigned there for refusing to give effect to the stipulations above referred to.

But the perspective has changed since the decision of this court in the *Short Case*, supra. Since the passage of the Act of Congress of June 18, 1910, referred to in the majority opinion, telegraph companies are given the right to class-

ify their messages and to make a charge dependent upon the classification to which the message belongs. The subject is one of which the Federal government has exclusive control, when it elects to exercise that control, and we cannot refuse to give effect to any classification approved by the Interstate Commerce Commission—the agency constituted by Congress to pass upon the classification of messages—by saying that a classification which has been approved is void as a contract against liability for negligence. The power of review is, in the last analysis, the power of control; and, if we are to give effect only to such regulations or classifications as meet our approval, then we ourselves, and not the Interstate Commerce Commission, have the right of approval, and it cannot be material upon what ground we give or withhold our approval. Other courts would have an equal right to approve or disapprove, and the same contrariety of views would, no doubt, then be found as did in fact exist before Congress delegated to the Interstate Commerce Commission the duty of classifying messages. There can be no doubt but that the desire for uniformity was one of the controlling purposes moving Congress to take control of interstate telegraph and telephone messages, and in delegating to an agency already existing, and which had been created for the purpose of regulating other forms of commerce between the states, the right to approve the classification of such messages. This purpose of uniformity is at once defeated if the courts of the various states may decide which, if any, of such regulations shall be enforced when they are called upon to enforce them.

A case which appears to me to be decisive of the point at issue is that of *Cultra v. Western U. Teleg. Co.* 44 Inters. Com. Rep. 670. It was submitted to the Commission on April 12, 1917, and decided on May 17, 1917. That case originated in the

circuit court of Jackson county in the state of Missouri, and was brought to recover damages sustained through the erroneous transmission of an unrepeatd message. The case is not distinguishable from the case at bar on the facts. The opinion of the Commission reflects the fact that the trial court held the case in abeyance pending a ruling by the Commission upon the validity of the stipulations above referred to; and the opinion also reflects the fact that the Commission treated the case as one of first impression with it and as one of the highest importance. The opinion puts the question at rest, in so far as it is in the power of the Commission to do, and concludes with the following statement: "Our conclusion upon the record is that the Congress, by the language used in the amendatory act of 1910, has manifested a definite intention to place under the jurisdiction and control of this Commission the rates and practices of interstate telegraph companies, as well as the rules, regulations, conditions, and restrictions affecting their interstate rates; that the rate voluntarily used by the senders of the message in question was an unrepeatd rate to which was lawfully attached, as a fundamental feature of it, the restricted liability insisted upon here by the defendant; that the Congress has expressly authorized such rates with a restricted liability attached; that such rates are not therefore contrary to public policy, but on the contrary are binding upon all until lawfully changed; and that neither the interstate rates of the defendant nor the rules, practices, conditions, and restrictions affecting those rates have been shown in this proceeding to be unreasonable or otherwise unlawful. The complaint must therefore be dismissed, and it will be so ordered."

The facts of the instant case may be summarized as follows: Appellant was offered the choice of three

classifications under which to send its message, and the choice made governed both the rate to be charged for the service and the liability of the Telegraph Company for mistakes or delays in the transmission or delivery of the message. Both the charge to the sender and the liability of the company depended upon the classification selected by the sender for this message, and it was the sender's right and privilege to select the classification to which its message should be assigned. The message could have been sent as a repeated one, or as an unrepeatd message, or it could have been sent as a valued message by paying one tenth of 1 per cent of the value assigned.

In the opinion of the Interstate Commerce Commission cited, it is stated that the basis of any charge made by the Telegraph Company is that of an unrepeatd message; and it is pointed out that the right to classify messages and to base the charge upon the classification made is wholly nullified, if the rate charged and collected for an unrepeatd message carries with it the same protection to the sender, or recipient, and imposes upon the Telegraph Company the same liability and degree of care, as a repeated or a valued message. No one would pay the higher rate, if he were entitled to the same service at the lower rate.

So that, whatever we may think of the merit of the classifications, or of the possible results from their approval, by the Interstate Commerce Commission, it is our duty to give effect to the ruling of that Commission; and it is likewise our duty to give effect to the numerous recent decisions of the Supreme Court of the United States, which hold that carriers may graduate their charges according to the value of the service performed. The doctrine of those cases is applicable here.

In my view, therefore, the appellant should have judgment for the

sum tendered by the Telegraph Company, which sum is based upon liability for the negligent transmission of an unrepeatd message.

I am authorized to say that Mr. Justice Wood concurs in the views here expressed.

Petition for rehearing denied.

ANNOTATION.

Duty to breach contract in order to minimize damages from error in transmission of telegram.

The rule that it is the duty of one suffering damage by reason of the negligence of a telegraph company in transmitting a message to adopt every available method of minimizing the damage is recognized by the reported case (*DES ARC OIL MILL v. WESTERN U. TELEG. Co.* ante, 1081). But that case also holds that the rule does not require a person to break his own contract in order to protect the telegraph company from the consequences of the negligence of its servants in committing an error in the transmission of a message. There is apparently only one other case which passes directly on that point, and that is a later case from the same jurisdiction as the reported case (*DES ARC OIL MILL v. WESTERN U. TELEG. Co.*) and follows the rule laid down therein. *Western U. Teleg. Co. v. Osborn* (1918) 186 Ark. 68, 206 S. W. 54. The following cases, however, are closely analogous and would seem to support the same rule: *Hasbrouck v. Western U. Teleg. Co.* (1899) 107 Iowa, 160, 70 Am. St. Rep. 181, 77 N. W. 1034; *Reed v. Western U. Teleg. Co.* (1896) 135 Mo. 661, 34 L.R.A. 492, 58 Am. St. Rep. 609, 37 S. W. 904; *Bentley v. Western U. Teleg. Co.* (1917) 98 Wash. 431, L.R.A.1918B, 965, 167 Pac. 1127. *Compare, Miller v. Western U. Teleg. Co.* (1911) 157 Mo. App. 580, 138 S. W. 887.

In *Western U. Teleg. Co. v. Southwick* (1919) — Tex. Civ. App. —, 214 S. W. 987, however, the plaintiff's brokers, in consequence of a mistake in a telegram understating the price at which the plaintiff was willing to sell, having made a contract which provided that the plaintiff should deposit \$500 with a bank, to be returned to his agents if he faithfully performed the contract, but in case of de-

fault on his part to be paid to the buyer as the latter's damages, it was held that the damages recoverable by plaintiff against the telegraph company on account of the mistake were merely the \$500, although that was less than the difference between the real asking price and the price fixed by the contract, which he performed. The decision, however, was not upon the ground that it was the plaintiff's duty to minimize his damages by breaching the contract, but rested upon a construction of the provision referred to as giving the plaintiff an option either to proceed with the performance of the contract or to pay the damages stipulated, and as precluding, in case of election to pursue the latter course, the enforcement of specific performance by the other party. In other words, as the court said, the contract bound the plaintiff only in the alternative; and the plaintiff could not under the circumstances voluntarily proceed with the contract, but was bound to take reasonable action to mitigate his damages.

In *Western U. Teleg. Co. v. Osborn* (Ark.) supra, it appeared that the plaintiff had a contract with a telegraph company whereby the latter was to furnish him daily market reports of cotton on the New York Cotton Exchange. The company made a mistake in one of the reports, showing the price of cotton to be 1 cent higher than it actually was, and the plaintiff on that day bought some cotton by a verbal contract at the price shown by the report. In an action brought by the plaintiff against the telegraph company to recover the difference between the price paid by him and the actual market price, it was contended by the company that the plaintiff should have avoided the con-

tract to purchase because it was a verbal one and unenforceable by the seller. Answering this contention, the court said: "While it was his duty to minimize his damages, this rule did not require him to break his own contract in order to protect the telegraph company from the consequences of the negligence of its own servants. *DES ARC OIL MILL v. WESTERN U. TELEG. CO.* (reported herewith) ante, 1081."

In *Bentley v. Western U. Teleg. Co.* 98 Wash. 431, 167 Pac. 1127, it appeared that the plaintiff shipped a carload of apples and sent with the bill of lading a draft on the consignee for the price of the apples at \$2 per box. The consignee refused to accept the apples at the price offered, but telegraphed an offer of \$1.75 per box. In answer the plaintiff sent a telegram to the bank holding the draft for collection, directing it to accept \$1.80 per box. By mistake of the telegraph company, the telegram was made to read as if the bank were directed to accept \$1.08 per box, and it delivered the bill of lading and accepted payment for the apples at that price. On discovery of the error the telegraph company endeavored to persuade the consignee to pay the difference between \$1.08 and the price offered by him, and the latter agreed to settle on the basis of \$1.50 per box. The plaintiff rather than receive that price, elected to accept the payment of \$1.08 per box and bring his action against the defendant for the difference. It was held that the plaintiff was not obliged to bring a suit to disaffirm the contract in order to save the company from liability, but that it was his duty to have minimized the damages arising from the conduct of the telegraph company by accepting the offer for increased payment from the consignee.

In *Reed v. Western U. Teleg. Co.* (1896) 135 Mo. 661, 34 L.R.A. 492, 53 Am. St. Rep. 609, 37 S. W. 904, it appeared that the plaintiff's agent delivered to a telegraph company a message addressed to the plaintiff and reading as follows: "Offered thirteen hundred cash, lot two houses near planing mill. Must hear immediately. Can't get more." The telegram when

delivered read as follows: "Offered nineteen hundred cash, lot two houses near planing mill. Must hear immediately. Can't get more." The plaintiff in answer to the telegram she received sent one reading as follows: "Sell property for amount offered. Will send deed by Monday, 27th." On receipt of the latter telegram the agent made a contract of sale for the property and received part of the purchase money therefor. When the agent received the deed he thought there was a mistake because of the insertion of \$1,900 as the purchase price, instead of \$1,300, and suggested to the purchaser that they wait until he could write to the plaintiff. The purchaser, however, threatened to sue, whereupon the agent delivered the deed and accepted \$1,300 for the property. An action being brought by the plaintiff against the telegraph company to recover the difference between the amount which she actually received for the property and the amount which she was led to believe she was to receive for the sale of the property, it was held that the plaintiff was not required to enter into a doubtful litigation to rescind her contract with the purchaser, which was fully executed.

In *Hasbrouck v. Western U. Teleg. Co.* (1899) 107 Iowa, 160, 70 Am. St. Rep. 181, 77 N. W. 1034, it appeared that the plaintiff, a banker, held a note for \$3,600 against another, and sent his agent to settle the claim. The agent delivered to a telegraph company a message addressed to the plaintiff and reading as follows: "Has stock twelve hundred dollars. Mortgage on for fifteen hundred dollars. Am offered note, with Harkness as surety, for twenty-five hundred dollars due in eighteen months, in full settlement. Shall I accept?" The telegram as delivered to the addressee read as follows: "Have secured twelve hundred dollar mortgage on fifteen hundred dollars and offered note, with Harkness as surety, for twenty-four hundred dollars, due in eighteen months, in full settlement. Shall I accept?" The plaintiff replied by a telegram reading as follows: "If twelve hundred dollar mortgage is on

fifteen hundred dollar property accepted." On receipt of the telegram the agent settled with the debtor, taking his note for \$2,500 with Harkness as surety. The plaintiff brought an action against the telegraph company, alleging that the telegram which he received meant "a mortgage to plaintiff for \$1,200 on Henderson's stock, and also a note of said Henderson for \$2,400 more, with said Harkness as surety on the said note," instead of which the agent settled for a sum which caused a loss to the plaintiff of \$1,100, for which he asked judgment. It was held that the plaintiff was not obliged, after he knew of the mistake, to take steps to rescind the contract of settlement.

In *Miller v. Western U. Teleg. Co.* (1911) 157 Mo. App. 580, 138 S. W. 887, the question involved was similar to that in *Western U. Teleg. Co. v. Osborn* (1918) 136 Ark. 68, 206 S. W. 54, *supra*, but the court reached a contrary conclusion. The decisions, however, are probably distinguishable in that the terms of the Statute of Frauds, the construction of which was involved in both decisions, appear to be different. It appeared in the former case that the plaintiff received a telegram reading as follows: "Offer fifty-three one to five cars bulk mixed corn. White cent over." The telegram as delivered by the sender to the telegraph company read as follows: "Offer fifty there one to five cars bulk

mixed corn. White cent over." On receiving the telegram the plaintiff made a contract by telephone with a third person whereby the latter agreed to furnish 5,000 bushels of corn at 53 cents and then accepted by telegraph to the extent of five cars the offer which had been made him. Two days later he received a letter from the sender of the telegram in which the offer as delivered to the telegraph company was confirmed, thus informing the plaintiff of the mistake. At the time of the receipt of the letter nothing had been done towards filling the oral order for the corn. The plaintiff then filled the order at the price named in the letter and brought an action against the telegraph company to recover for the loss sustained by the error in the telegram. The contract by telephone for the purchase of corn by the plaintiff was made in Oklahoma, and the statute in that state declared invalid an oral contract for the sale of goods at price of \$50 or more. It was held that the plaintiff could have avoided any loss resulting from the negligence of the defendant by refusing to perform the oral contract for the purchase of the corn, and as the statute governing the contract declared such contracts invalid he could not elect to perform the contract and place the burden for the consequent loss on the defendant.

R. J. B.

MARTIN H. BREDE et al., Appts.,

v.

MINNESOTA CRUSHED STONE COMPANY, Respt.

Minnesota Supreme Court — August 1, 1919.

(— Minn. —, 173 N. W. 805.)

Laches — refraining from interference with quarry.

1. The defense of laches is not available where for about two years plaintiffs have refrained from taking any action to restrain defendant from continuing to operate its quarry in the manner complained of, and it has expended a large sum of money in making permanent improvements on the property where it conducts its business.

[See note on this question beginning on page 1098.]

Headnotes by LEES, C.

Injunction — nuisance — stone quarry.

2. When the undisputed evidence shows substantial interference with the comfort of residents in the vicinity of a stone quarry, caused by blasting and dust, they are entitled to some relief in an action brought to restrain the defendant from operating the quarry in such a manner as to constitute a nuisance.

[See 11 R. C. L. 675, 20 R. C. L. 407.]

— interference with comfort.

3. If a lawful business is conducted in such a manner as to interfere materially with the physical comfort of persons of ordinary sensibilities and habits, who live near by, an injunction should be granted, permanently restraining its operation in such manner. A comparison of the injury defendant will suffer if an injunction is granted with the injury plaintiffs will suffer if it is denied does not furnish the test by which the action of the court should be controlled.

[See 20 R. C. L. 480.]

License — request to use certain part of quarry.

4. A request that defendant quarry upon a certain portion of its premises is at most a license from those signing it, and is subject to revocation.

[See 17 R. C. L. 576, 20 R. C. L. 503.]

Injunction — nuisance — distinction between movable and fixed enterprise.

5. A distinction may properly be

drawn between cases involving a nuisance, caused by a factory or business which may be removed to another location, and those involving one caused by the operation of mines, quarries, and other enterprises for the development of the natural resources of land, which must be conducted at a fixed place. An injunction should not be granted as readily in the latter as in the former class of cases.

Nuisance — effect of coming to.

6. No great weight should be given to the fact that a person complaining of a nuisance came to it, or that others may be guilty of maintaining a similar nuisance in the same neighborhood.

[See 20 R. C. L. 440, 492.]

— lawful business.

7. A landowner may be liable for maintaining a nuisance by reason of his mode of carrying on a lawful business, even though the annoyances complained of are ordinary incidents of such a business when properly conducted.

[See 20 R. C. L. 438.]

Evidence — necessity of move.

8. Further testimony should be taken to determine whether defendant may not remove or mitigate the annoyances complained of without seriously interfering with the prosecution of its business, and such relief afforded to plaintiffs as may be justified by the additional evidence produced.

APPEAL by plaintiffs from a judgment of the District Court for Hennepin County (Fish, J.) in favor of defendant, and from an order denying a motion for new trial in an action brought to enjoin defendant from operating its quarry in such a manner as to create a private nuisance. *Reversed.*

The facts are stated in the Commissioner's opinion.

Mr. A. B. Jackson for appellants.

Messrs. Cohen, Atwater, & Shaw, for respondent:

There is in fact no showing of a nuisance at all, and the injury, instead of being material, substantial, and irreparable, is so slight as not to interfere with plaintiffs' health or comfort, or with their free use and enjoyment of their property.

Bristol v. Palmer, 83 Vt. 54, 31 L.R.A. (N.S.) 894, 74 Atl. 332; Gilbert v. Showerman, 23 Mich. 448; Demarest v. Hardham, 34 N. J. Eq. 469; Powell v. Bentley & G. Furniture Co. 34 W.

Va. 804, 12 L.R.A. 53, 12 S. E. 1085; Tuttle v. Church, 53 Fed. 422.

Plaintiffs, both the earlier residents and later comers, have acquiesced in the quarry operations, and have been so dilatory in seeking an injunction that they are now barred of that relief.

Schmitt v. Hager, 88 Minn. 413, 93 N. W. 110; Brockman v. Brockman, 133 Minn. 148 157 N. W. 1086; Mueller v. Fruen, 36 Minn. 273, 30 N. W. 886; Tuttle v. Church, 53 Fed. 422; Barth v. Christian Psychopathic Hospital Asso. 196 Mich. 642, 163 N. W. 62.

Every owner has the right to develop

and use the natural resources of his land,—coal, brick, clay, oil, and stone,—and in the absence of negligence is not liable for consequences incident to such development and use.

Lynch v. Shiely, 131 Minn. 348, 155 N. W. 390; *Stuhl v. Great Northern R. Co.* 136 Minn. 158, L.R.A.1917D, 317, 161 N. W. 501; *Huckenstine's Appeal*, 70 Pa. 102, 10 Am. Rep. 669; *Phillips v. Lawrence Vitrified Brick & Tile Co.* 72 Kan. 643, 2 L.R.A. (N.S.) 92, 82 Pac. 787; *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. 126, 57 Am. Rep. 445, 6 Atl. 453; *Robb v. Carnegie Bros.* 145 Pa. 324, 14 L.R.A. 329, 27 Am. St. Rep. 694, 22 Atl. 649; *Alexander v. Wilkes-Barre Anthracite Coal Co.* 254 Pa. 1, L.R.A.1917B, 310, 98 Atl. 794; *Helms v. Eastern Kansas Oil Co.* 102 Kan. 164, L.R.A.1918C, 227, 169 Pac. 208.

Lees, C., filed the following opinion:

Alleging that defendant was operating a quarry in such a manner as to create a private nuisance as to them, plaintiffs brought this action to enjoin the alleged nuisance. There was a trial without a jury, findings in favor of defendant, a motion for a new trial, which was denied, and the case comes here on appeal from the order denying the motion.

In substance these were the facts as found by the trial court:

In 1904 defendant acquired the right to quarry and crush limestone underlying 40 acres of land in Lowry's East Side addition to Minneapolis. Johnson street was its west boundary. The tract had been platted into lots and blocks, but was then wholly unoccupied. Defendant began quarrying operations thereon in 1904, which were continued until the summer of 1916. Later it acquired 9 acres adjoining the 40 on the north. This is referred to as the "Kletzin" tract.

In quarrying, the defendant proceeds as follows: The earth and a stratum of shale are removed or stripped from the layers of limestone in which holes are drilled with steam drills, and the stone is then blasted with dynamite. Fragments too large to handle conveniently are broken up by light charges of dynamite,

and the stone is then loaded by a steam shovel into small cars and conveyed to a crusher on Johnson street. There the stone is crushed and separated into various sizes and sold for commercial uses. Railway trackage connects the property with the railways in Minneapolis.

When these operations were commenced there were few dwellings in the neighborhood, and no street car lines in the region. Now the region north and west of the quarry is fairly well settled, thirty-two of the plaintiffs residing within distances varying from 200 to 1,800 feet. They acquired their property for homes. A street car line on Johnson street runs out beyond the quarry. In the region south and east of the quarry there are hardly any dwellings. It is devoted in the main to industrial uses and traversed by railroad tracks. West of defendant's quarry, and within 300 feet of Johnson street, there is another quarry operated by another company substantially as defendant's is operated. Defendant's land is mainly valuable for the underlying limestone.

In the three years immediately following 1904, several actions were brought against defendant by property owners in the vicinity of the quarry, who claimed to be damaged by defendant's operations. These actions were settled in October, 1907, by the payment of damages. Embodied in each settlement was a release of future damages which might accrue from quarrying operations in Lowry's East Side addition. Three of the plaintiffs in the present action and the predecessors in title of two of them made such settlements and gave such releases.

In the spring of 1915, defendant began to quarry on the Kletzin tract. Objections were made by a number of the residents on Johnson street, and the operations there were discontinued and resumed in Lowry's East Side addition.

In the spring of 1916, a written request addressed to defendant was

circulated among the residents in the neighborhood of the quarry, and was signed by or in behalf of fourteen of the present plaintiffs. Defendant was thereby requested "to quarry the stone from the foregoing property (the Kletzin tract), using the utmost care in blasting, and refill same as soon as possible." On receiving this request in 1916, defendant again began and has since continued to quarry stone on the Kletzin tract, thus bringing its operations farther north and nearer to the dwellings of many of the plaintiffs.

In 1914, defendant began to grind the screenings from its quarry for use as a filler for asphalt paving. In 1915 and 1916, it installed and has since operated a pulverizing plant, known as a "dust mill," to grind part of the product of its quarry to such fineness that it may be sprinkled on fields having an acid soil to neutralize the acids.

By the spring of 1916, defendant had invested in its buildings and equipments about \$100,000. In November, 1917, its crusher was destroyed by fire. In January, 1918, it began to rebuild it, and had half completed it at the time of the commencement of this action, and had expended for that purpose and for machinery over \$44,000. In order to rebuild, it was necessary that defendant should obtain a permit from the building inspector of Minneapolis. Plaintiffs and others, on learning that defendant intended to rebuild, petitioned the city council to deny a permit, but the council refused to interfere, and the permit was issued by the inspector.

The decision of the trial court turned upon the twelfth finding of fact, which, in substance, is as follows: Defendant's operations caused some discomfort and annoyance to the plaintiffs residing nearest to the quarry, from the noises and vibrations created by the drills and steam shovels, by blasting, and from some increase of dust emanating from the dust mill. The consequences of the noise and dust are

greatly exaggerated by the testimony, and are naturally an incident to defendant's development and use of its property. An injunction against the operation of the quarry would destroy defendant's business, and make its investment in buildings and equipment largely worthless, but the situation and surroundings are such that the cessation of its business would not add materially to the health or comfort of plaintiffs or to the free use and enjoyment of their property. In a memorandum appended to the findings, the court remarked that the injunction must be either wholly given or wholly denied, no middle course being open, and that "there is enough merit in plaintiffs' contention to require on defendant's part the utmost care to avoid unnecessary harm to neighboring property."

1. We have examined the voluminous record with care to ascertain whether this finding is sustained by the evidence. There is but little real conflict in the evidence. A host of witnesses, most of them parties plaintiff or members of their families, testified to substantial interference with the comfort of residents in the vicinity of the quarry, caused chiefly by blasting and by dust from the dust mill. After making due allowance for many evident exaggerations in the testimony, the fact remains and is recognized in the findings, that defendant's operations do cause appreciable annoyance and discomfort to plaintiffs. That there was noise and dust is not disputed. The testimony of defendant's witnesses who resided near the quarry was that they did not find the noise and dust objectionable; some of them, because they had become accustomed to it. The explosions of dynamite and consequent jarring of plaintiffs' dwellings of necessity disturbed the comfort and repose of persons living near the quarry, especially when they were accompanied, as was sometimes the case, by a shower of falling stones, which

reached the premises of some of the plaintiffs. Limetone dust is acrid and sticky, and much more annoying than ordinary street dust. The interference with plaintiffs' enjoyment of life and property was not of the sort to which city dwellers must submit as an inevitable accompaniment of urban life. It was shown to be offensive to the senses, and injurious to the health of many of the plaintiffs. Some forty witnesses testified to conditions created by defendant, which would unfailingly cause substantial discomfort to ordinary individuals, while about one third as many testified that the same conditions did not personally inconvenience them. We take notice of the fact that the sensibilities of individuals vary, some being more and others less annoyed by noises and dust than the average person, but see no escape from the conclusion that the manner in which defendant is conducting its operations would necessarily cause material discomfort to ordinary people of average feelings and habits. We cannot give our approval to the twelfth finding of fact in its entirety, hence plaintiffs are entitled to some relief if not precluded from it on grounds now to be considered.

2. Counsel for defendant cite cases holding in effect that if the injury complained of is caused by the operation of a lawful business, carried on in a district given over to kindred classes of business, and the injury is only such as naturally flows from the operation of a business of that character, an injunction will not be granted if it would entail a serious injury to the defendant or to the public as compared to the injury complained of by the plaintiff. This is commonly referred to as the "comparative injury doctrine." The cases in which this doctrine has been given effect are collected in a note to *Bristol v. Palmer*, 31 L.R.A.(N.S.) 881-893, and in 20 R. C. L. 480.

Other authorities adopt the an-

cient doctrine that the rights of habitation are superior to the rights of trade, and, whenever they conflict, the rights of trade must yield to the primary or natural right. They hold that if a lawful business is conducted in such a manner as to offend or interfere materially with ordinary physical comfort, measured, not by the standards of persons of delicate sensibility and fastidious habits, but by the standards of ordinary people, a permanent injunction should be granted. The cases so holding are also collected in the note to *Bristol v. Palmer*, supra (31 L.R.A.(N.S.) 888), and it is said that this doctrine is supported by the greater weight of authority. We are of the opinion that the latter is the better doctrine, and that ordinarily it should be applied in determining whether an injunction should be granted or denied in cases such as this.

3. Defendant began to operate its quarry in 1904, and no one sought to restrain its operations until this action was begun. Only a few of the plaintiffs have ever made any claim for damages. It is contended that they have therefore been guilty of laches or have at least acquiesced in the maintenance of the alleged nuisance, and hence are now barred from relief. We

are of the opinion that this is not a good defense. *Matthews v. Stillwater Gas & E. L. Co.* 63 Minn. 493, 65 N. W. 947. If defendant were engaged in quarrying on the 40-acre tract only, and not operating its dust mill, the situation would be materially different; but the operations on the Kletz tract and in the dust mill were begun only about two years prior to the commencement of this action. Defendant is now blasting nearer to plaintiffs' premises than ever before, and is creating dust of a new character and in increased quantities. The period over which these conditions

Injunction—
nuisance—
stone quarry.

—interference
with comfort.

Laches—
refraining from
interference
with quarry.

have extended is comparatively short, and no claim of laches can be made successfully.

4. The effect of the request that defendant quarry on the Kletzin tract, which was signed by several of the plaintiffs, is next to be considered. Possibly those who signed it may not be entitled to relief by injunction, but, of course, their action is not binding on the plaintiffs

License—
request to use
certain part of
quarry.

who did not sign.
At most the request
amounted to a li-
cense to defendant

to carry on its operations as it is doing, and, like other licenses, is subject to revocation. *Dwight v. Hayes*, 150 Ill. 273, 41 Am. St. Rep. 367, 87 N. E. 218.

5. It has been held that every landowner has the right to develop and use the natural resources of his land, and in the absence of negligence is not liable for consequences incidental to such development and use. This is the doctrine in Pennsylvania and Kansas, and it is greatly relied on by the defendant here. *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. 126, 57 Am. Rep. 445, 6 Atl. 453; *Robb v. Carnegie Bros.* 145 Pa. 324, 14 L.R.A. 329, 27 Am. St. Rep. 694, 22 Atl. 649; *Alexander v. Wilkes-Barre Anthracite Coal Co.* 254 Pa. 1, L.R.A. 1917B, 310, 98 Atl. 794; *Phillips v. Lawrence Vitrified Brick & Tile Co.* 72 Kan. 643, 2 L.R.A. (N.S.) 92, 82 Pac. 787; *Helms v. Eastern Kansas, Oil Co.* 102 Kan. 164, L.R.A. 1918C, 227, 169 Pac. 208. On the one hand, it is said that these cases disregard the fundamental principle of the common law, that one must so use his own as not to injure another; and, on the other, that a coal mine, oil well, or stone quarry must be operated at a fixed place, and cannot be moved like a factory, and

Injunction—
nuisance—
distinction
between mov-
able and fixed
enterprise.

hence is not within
the application of
the principle. We
are inclined to
think there is a

distinction, but, as was pointed out in *Czarnecki v. Bolen-Darnell Coal*

Co. 91 Ark. 58, 120 S. W. 376, the distinction is sound only in so far as it relates to things which are reasonably essential to the proper operation of a mine or quarry. In a well-considered case (*Pwllbach Colliery Co. v. Woodman* [1915] A. C. 634, 84 L. J. K. B. N. S. 874, 113 L. T. N. S. 10, 31 Times L. R. 271, Ann. Cas. 1915D, 833) it was said that permission to carry on a business is quite a different thing from permission to carry it on in such a manner as to create a nuisance. It ought not to be held that, because a landowner has a deposit of limestone on his land, he may quarry and fit it for commercial uses in any way he chooses, provided he is not negligent in what he does. He may be liable for maintaining a nuisance by reason of the manner in which he carries on his business, even though evil odors, noise, dust, and the like are ordinary incidents of such a business when properly conducted. *O. C. Lead v. Inch*, 116 Minn. 467, 39 L.R.A. (N.S.) 234, 134 N. W. 218, Ann. Cas. 1913B, 891; *Matthias v. Minneapolis, St. P. & S. Ste. M. R. Co.* 125 Minn. 224, 51 L.R.A. (N.S.) 1017, 146 N. W. 353; *Lynch v. Shiely*, 131 Minn. 346, 155 N. W. 390; *Stuhl v. Great Northern R. Co.* 136 Minn. 158, L.R.A. 1917D, 317, 161 N. W. 501

We are not disposed to adopt any rule which will hamper the development of the natural resources of the state, but in their development reasonable regard must be had for the health and comfort of people living in the neighborhood.

In *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273, Mr. Justice Harlan remarked that all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community, and in *State ex rel. Robertson v. New England Furniture & Carpet Co.* (State ex rel. Robertson v. Lane) 126 Minn. 78, 52 L.R.A. (N.S.) 932, 147 N. W. 951, Ann. Cas. 1915D, 549, this court, quoting the remark, said "that no vested right . . . exists

to use property for purposes injurious to either public health or morals."

6. The fact that many of the plaintiffs acquired their property after defendant began to operate

*Nuisance—
effect of
coming to.*

its quarry is of no particular importance. But little is now left of the doctrine under which a person coming to a nuisance had no right to complain of it. 20 R. C. L. 495, 2 Wood, Nuisances, 802; Campbell v. Seaman, 63 N. Y. 568, 20 Am. Rep. 567; Oehler v. Levy, 234 Ill. 595, 17 L.R.A.(N.S.) 1025, 85 N. E. 271, 14 Ann. Cas. 891; Bushnell v. Robeson, 62 Iowa, 540, 17 N. W. 888; Van Fossen v. Clark, 113 Iowa, 86, 52 L.R.A. 279, 84 N. W. 989. Neither is much weight to be given to the fact that another quarry near plaintiffs' dwellings is operated similarly and with like effect upon the neighborhood. 1 Wood, Nuisances, 558, 20 R. C. L. 492.

7. Under the undisputed evidence plaintiffs are entitled to some relief. We are unable to agree with the learned trial judge that either relief must be wholly denied or defendant's business destroyed. We think there is middle ground upon which the court's decision should be planted, and that by altering its mode of operations defendant may continue to carry on its business successfully without creating a nuisance. If, by adopting improved methods and appliances, the injuries complained of can be avoided or at least so diminished that plaintiffs will suffer discomforts no greater than those ordinarily inci-

dent to life in many sections of every city, defendant should be re-^{—lawful business.} quired to adopt them. Joyce, Nuisances, § 90; Harvey v. Susquehanna Coal Co. 201 Pa. 63, 88 Am. St. Rep. 800, 50 Atl. 770.

The case is one in which relief should be given under the rule that an injunction should never go beyond the requirements of the particular case, nor should it close an industrial plant if it is possible to avoid doing so while giving plaintiff the relief to which he is entitled. Little or no evidence was introduced to show whether the noise of blasting can or cannot be smothered, or whether its jarring effects may or may not be reduced by using smaller charges of dynamite without seriously interfering with defendant's quarrying operations. The court was not advised as to the possibility of controlling the escape of lime dust from defendant's crusher and dust mill. We should suppose that it is feasible to confine the dust very largely to defendant's own premises, and so remove or substantially mitigate the annoyance to plaintiffs from that source. *Evidence—
necessity of
move.* Further testimony

should be taken on these features of the case only, in order that the trial court may be in a position to act intelligently in affording plaintiffs relief, without destroying defendant's business.

The order denying a new trial is reversed, and the case remanded for further proceedings in accordance herewith.

ANNOTATION.

Effect of delay in seeking equitable relief against nuisance.

- I. Introductory, 1098.
- II. Relief sought with reasonable promptness, 1099.
- III. Relief not sought with reasonable promptness, 1106.

I. Introductory.

This note discusses the effect on

the right of a party to relief against a nuisance, of his delay in seeking the aid of the courts. The rule is laid down generally that the relief must be sought with reasonable promptness; but what is a reasonable length of time varies with each case, and

rests largely within the discretion of the judge before whom the action is brought. The note does not include the effect of the gaining of a prescriptive right to maintain a nuisance, or of the running of the Statute of Limitations against the action, except in those few cases wherein these matters have been treated by the court in connection with the question of laches.

II. Relief sought with reasonable promptness.

While an action for damages against those creating or maintaining a nuisance is not affected by delay short of the period fixed by the Statute of Limitations (see 20 R. C. L. p. 467), a suit in equity for injunctive relief must be brought with reasonable promptness. Courts of equity follow the equitable maxim that "equity aids the vigilant," and a party being cognizant of his rights, who delays in asserting and enforcing such rights, will be left to pursue his ordinary legal remedy. In each of the following cases relief was held to have been sought in due time:

United States.—Woodruff v. North Bloomfield Gravel Min. Co. (1884) 9 Sawy. 441, 18 Fed. 753; United States v. Luce (1905) 141 Fed. 385.

Illinois.—Thornley v. Shey (1913) 184 Ill. App. 166.

Iowa.—Smith v. Jefferson (1913) 161 Iowa, 245, 45 L.R.A.(N.S.) 792, 142 N. W. 220, Ann. Cas. 1916A, 97.

Michigan.—Robinson v. Baugh (1875) 31 Mich. 290.

Minnesota.—Mueller v. Fruen (1886) 36 Minn. 273, 30 N. W. 886; Eastman v. St. Anthony Falls Water Power Co. (1866) 12 Minn. 187, Gil. 77; Matthews v. Stillwater Gas & E. L. Co. (1896) 63 Minn. 493, 65 N. W. 947. See the reported case (*BREDE v. MINNESOTA CRUSHED STONE Co.* ante, 1092).

Missouri.—State ex rel. Hopkins v. Excelsior Powder Mfg. Co. (1914) 259 Mo. 254, L.R.A.1915A, 615, 169 S. W. 267; Desberger v. University Heights Realty & Development Co. (1907) 126 Mo. App. 206, 102 S. W. 1060; Black-

ford v. Heman Constr. Co. (1908) 132 Mo. App. 157, 112 S. W. 287.

Nebraska.—Bischof v. Merchants' Nat. Bank (1906) 75 Neb. 838, 5 L.R.A.(N.S.) 486, 106 N. W. 996.

New Jersey.—Carlise v. Cooper (1870) 21 N. J. Eq. 576; O'Hara v. Nelson (1906) 71 N. J. Eq. 161, 63 Atl. 836; Laird v. Atlantic Coast Sanitary Co. (1907) 73 N. J. Eq. 49, 67 Atl. 387.

New York.—Campbell v. Seaman (1876) 63 N. Y. 568, 20 Am. Rep. 567.

Tennessee.—Madison v. Ducktown Sulphur, Copper & I. Co. (1904) 113 Tenn. 331, 83 S. W. 658.

Texas.—Faulkenbury v. Wells (1902) 28 Tex. Civ. App. 621, 68 S. W. 327; Austin & N. W. R. Co. v. Anderson (1891) 79 Tex. 427, 23 Am. St. Rep. 350, 15 S. W. 484.

Virginia.—Face v. Cherry (1915) 117 Va. 41, 84 S. E. 10, Ann. Cas. 1917E, 418.

Washington.—Ingersoll v. Rousseau (1904) 35 Wash. 92, 76 Pac. 513, 1 Ann. Cas. 85.

England.—Atty.-Gen. v. Birmingham (1858) 4 Kay & J. 528, 70 Eng. Reprint, 220, 6 Week. Rep. 811; Gullick v. Tremlett (1872) 20 Week. Rep. 358.

Canada.—Radenhurst v. Coate (1857) 6 Grant, Ch. (U. C.) 139; Francklyn v. People's Heat & Light Co. (1899) 32 N. S. 44.

In Woodruff v. North Bloomfield Gravel Min. Co. (1884) 9 Sawy. 441, 18 Fed. 753, landowners sought to restrain the defendants from so operating their mines that débris would be discharged into a river, which injured the navigation of the river. The débris accumulated not alone through the defendants' mining operations, but from that of many companies situate throughout the vicinity. During a period of nearly ten years various experiments had been made to prevent débris from accumulating, and at different times suits had been brought attempting to restrain other mining companies from maintaining a nuisance. It was held that the plaintiffs should not be denied relief because of their failure to institute sooner

proceedings to have the nuisance abated. The court said: "These facts, showing the early, continued, and persistent action of the people affected, both in a public and private capacity, by common efforts to secure common relief from a common nuisance, and the difficulties encountered, may properly be considered as bearing upon the question of acquiescence. In view of all the circumstances surrounding this case, there certainly was no want of anxious vigilance on the part of complainant and his co-sufferers in their attempts to guard against and protect themselves in some form, and for a considerable time in a form most favorable to the interests of the defendants themselves. Having failed in their milder and more peaceful efforts, it would now be to the last degree inequitable to hold that they have lost their rights to all effective compulsory remedies by acquiescence and prescription, and that defendants, by their long-continued trespasses, have established a legal right in their lands to continue and augment the nuisance."

In *United States v. Luce* (1905) 141 Fed. 385, the Federal authorities sought to restrain the defendants from maintaining certain fish fertilizer factories as nuisances. The government quarantine station was so situated that, the wind being in the right direction, offensive odors were carried to the station. The defendants claimed that the nuisance was a private one, and as such a prescriptive right to maintain it was acquired by the lapse of time. The court said: "The defendants, even on the assumption that the government is proceeding in this suit in a quasi private or proprietary character, have not acquired a prescriptive right as against it to continue or contribute to the continuance of the nuisance complained of, nor has there been any such acquiescence, act, or conduct on the part of the government as to estop or preclude it from complaining of such nuisance. Mere lapse of time short of the prescriptive period cannot operate as a bar."

In *Thornley v. Shey* (1913) 134 Ill. App. 166, the plaintiff sought to have

a nuisance restrained. The defendants operated a brick kiln in such a manner that black smoke, noxious gases, and offensive odors were emitted from the smokestacks of the plant, damaging the plaintiff's property. The defendants claimed that the plaintiff was guilty of delay in instituting proceedings asking relief. The court said: "Instead of being guilty of laches, the appellant seems to have been active and persistent in his efforts to rid himself of what he terms a nuisance, almost from the beginning, and having failed by the usual and ordinary means resorted to by men, he appealed to the courts to secure what he thought to be his legal rights."

In *Smith v. Jefferson* (1913) 161 Iowa, 245, 45 L.R.A.(N.S.) 792, 142 N. W. 220, Ann. Cas. 1916A, 97, it appeared that the defendant city maintained hitching posts in front of the plaintiff's house, and they were so used as to become a nuisance. The plaintiff had been the owner of the property for about eight years, and had not complained of the nuisance to the time of bringing suit. The court held that the nuisance being a continuing one, mere delay in bringing suit to enjoin it is not necessarily such laches or acquiescence as to constitute an estoppel.

In *Robinson v. Baugh* (1875) 31 Mich. 290, it appeared that the defendant, in his business of forging, used large quantities of coal, the dust from which settled upon plaintiff's houses, and otherwise injured and annoyed the plaintiffs in such manner as to be a nuisance. The operations complained of had been commenced about two years before the suit was instituted. The court, in holding that the delay was not unreasonable, said: "The facts as to time and circumstance are strong to show that there was no acquiescence, either in the sense of conferring a right on him to continue, or in the sense of depriving complainants of the right to seek and obtain equitable interference."

In *Eastman v. St. Anthony Falls Water Power Co.* (1866) 12 Minn. 137, Gil. 77, the plaintiff sought an injunc-

tion to compel the defendants to remove a dam which was an alleged nuisance in causing water to flow on the plaintiff's property. The limitation on actions of this nature was placed at ten years by the statute. The complaint showed that part of the dam was erected more and part less than ten years before the action was commenced. The court held that the Statute of Limitations had not run, as there was no affirmative proof that the part erected more than ten years previous was that part which caused the damage complained of. The court said: "It is obvious that it does not clearly appear from the allegations above quoted from the complaint that the statute had run against the plaintiffs by the lapse of ten years after the cause of action accrued, and before the commencement of the present proceeding."

In *Mueller v. Fruen* (1886) 36 Minn. 273, 30 N. W. 886, it was sought to abate a nuisance in the form of a dam which the defendant had built on a stream of water on his own lands, and in so doing overflowed the plaintiff's lands above. The defendant had so maintained the dam for a period of twelve years, and claimed the plaintiff should be denied relief because of his unreasonable delay. The court held that delay short of the period of twenty years necessary to give the defendants a right by prescription would not bar the plaintiff's right of action. Continuing, the court said: "And in cases where the equitable relief asked for is of such a nature that the party is not entitled to it as a matter of right, but the granting or refusing it is a matter within the judicial discretion of the court, long delay or laches on part of the plaintiff in asserting his rights might sometimes constitute an important consideration in determining the action of the court. But no mere delay or even acquiescence (unless under circumstances that would create an equitable estoppel) short of the period of twenty years necessary to give defendant a right by prescription to flow plaintiff's land will bar plaintiff's right of action

to abate this dam as an existing nuisance."

In *Matthews v. Stillwater Gas & E. L. Co.* (1896) 63 Minn. 473, 65 N. W. 947, it appeared that the defendant had constructed and was operating a gas and electric light plant on its premises adjacent to the premises of the plaintiff. The alleged nuisance consisted in so operating the plant as to permit noxious and offensive gases to escape from the defendant's premises into and on the premises of the plaintiff. The gas plant had been operated for more than fifteen years, and the electric light plant for about eight years. The court held that defendant could not obtain a prescriptive right so to operate its plant, since the nuisance was a public one. The court added that if the nuisance was not a public, but a private, one, it would be necessary for the defendant to show that the injury had been continued in the same way and with equally injurious results for the entire statutory period in order to invoke the doctrine of laches, and this defendant had failed to do.

In *State ex rel. Hopkins v. Excelsior Powder Mfg. Co.* (1914) 259 Mo. 254, L.R.A.1915A, 615, 169 S. W. 267, it appeared that the defendant built a powder mill near a village, and for some time the community was in doubt as to its purpose. It had been in operation but a few months when a series of explosions occurred, and this suit was immediately instituted to abate the nuisance. The court held that there had been no laches or unreasonable delay under the circumstances.

In *Desberger v. University Heights Realty & Development Co.* (1907) 126 Mo. App. 206, 102 S. W. 1060, it appeared that the defendants dug a new channel for a river carrying off filth, offal, and sewage, and so diverted the stream that a large portion of the plaintiff's lands became uninhabitable. The evidence showed that within a few days after learning of the proposed change of the river, the plaintiff instituted this action. It was held that the stream so diverted was a nuisance, and that the plaintiff was not guilty of laches in bringing his action.

In *Blackford v. Heman Constr. Co.* (1908) 132 Mo. App. 157, 112 S. W. 287, it appeared that the defendant was the owner of a quarry, and, in blasting, stones were thrown on the plaintiff's property, greatly damaging it and the property of others in the near vicinity. It was held that such use of its property by the defendant constituted a nuisance. The quarry had been in operation for about ten years, and the defendant claimed that the plaintiff was guilty of laches in not bringing his action before. The evidence showed that the acts constituting the nuisance increased for about two years next before the institution of the suit. The court said: "And, indeed, it has been determined that where the fact of nuisance is clearly established, as in this case, and nothing appears tending to show the defendant has changed his conduct or increased his expenditures on account of apparent condonation arising from plaintiff's conduct, the court will not adjudge laches or acquiescence to arise from a short period of delay."

In *Bischof v. Merchants' Nat. Bank* (1906) 75 Neb. 838, 5 L.R.A. (N.S.) 486, 106 N. W. 996, it appeared that the defendants, in rebuilding, so placed certain pillars that they extended into the public street. The plaintiffs gave notice to defendants that the placement of the pillars would not be permitted in that manner. The defendants continued with the work, and a few days after its completion an action was commenced. The court said: "Mere delay in asserting a right will not necessarily preclude relief; there must also be shown a change in the situation of the parties, whereby the one has been put in a worse condition by the delay of the other. . . . We find nothing in the record to justify a finding that the defendants were influenced in the slightest degree by any statement or delay of the plaintiff. On the contrary, we think the most reasonable inference from the evidence is that they proceeded with the work over his protest. After he had lodged his protest, a delay of ten days in bringing his suit was not unreasonable and does not constitute laches."

In *Carlisle v. Cooper* (1870) 21 N. J. Eq. 576, an injunction was sought to prevent the defendants from maintaining their dam at its present height, as the water backed on and flooded the plaintiff's lands. The dam had been maintained at that height for several years, and the defendants claimed that the plaintiffs were estopped from bringing suit. The court said: "The position was also taken that the complainants had lost their right to relief by long delay. Mere delay in applying to the court is frequently a ground for denying a preliminary injunction, and is also a reason for courts of equity refusing to take cognizance of a case, where there is a remedy at law. But where the legal right is settled, and the more efficacious remedy of a court of equity is necessary to complete relief, delay is no ground for a denial of its aid, unless it is coupled with such acquiescence as deprives the party of all right to equitable relief."

In *O'Hara v. Nelson* (1906) 71 N. J. Eq. 161, 63 Atl. 836, it appeared that the defendants owned and conducted a garage in which was stored several cars and a supply of gasoline. The plaintiff sought to have the defendants restrained from keeping gasoline in or about the building. The defendants raised the point that the plaintiffs had not acted promptly in bringing their suit. The evidence showed that the garage building was commenced some time in October, and the bill was filed in November. It was held that the delay was not unreasonable, and the plaintiffs were entitled to have the nuisance enjoined.

In *Laird v. Atlantic Coast Sanitary Co.* (1907) 73 N. J. Eq. 49, 67 Atl. 387, it was sought to enjoin the defendants from maintaining a crematory on their premises, as it was alleged to be a nuisance. It was alleged that the defendants collected garbage and other refuse and subjected it to a burning process, the ashes being used as a fertilizer. The plaintiffs claimed to be annoyed by the noxious odors escaping from such plant. The evidence showed that the plant had been in operation about six years, the amount of offensive matter dealt with at first

being very small, but subsequently the business was increased, causing greater offense to the surrounding inhabitants. It was held that the plaintiffs were not guilty of unreasonable delay, and were entitled to the relief sought. The court said: "It was argued by the defendant that the complainants had been guilty of laches in preferring their complaint. I am unable to perceive the least ground for this defense. Palpably, if they had filed their bill while the crematory was being constructed, they would have been met, precisely as they are here, by the assertion that the works would not result in any nuisance, and the court would not have interfered. The amount of offensive matter dealt with by the defendant was naturally, at first, very small, and the resultant nuisance correspondingly slight. In fact, the complainants were willing to give the defendant a chance to demonstrate the harmless character of its works. They first applied to the board of health, and, failing to get relief there, came to this court. It does not appear that the defendant took any irretrievable steps in reliance upon complainant's acquiescence. There is not the least ground for estoppel."

In *Campbell v. Seaman* (1876) 63 N. Y. 568, 20 Am. Rep. 567, a suit was brought to enjoin the defendants from maintaining a nuisance in the form of a brick kiln. The court from the facts found that it was so operated as to be a nuisance. The defendants claimed that the plaintiff had acquiesced in the nuisance. In holding to the contrary, the court said: "It is claimed that the plaintiffs so far acquiesced in this nuisance as to bar them from any equitable relief. I do not perceive how any acquiescence short of twenty years can bar one from complaining of a nuisance, unless his conduct has been such as to estop him. There is no proof that plaintiffs, when they bought their lands, knew that anyone intended to burn any bricks upon the land now owned by defendant. . . . Before suit brought, plaintiffs objected to the brick burning. No act or omission of theirs induced the defendant to in-

cur large expenses or to take any action which could be the basis of an estoppel against them, and therefore there was no acquiescence or laches which should bar the plaintiffs, within any rule laid down in any reported case. . . . The defendant claims a prescriptive right to burn bricks upon his land and to cause the poisonous vapors to flow over plaintiffs' lands. Assuming that defendant could acquire by lapse of time and continuous user the prescriptive right which he claims, there has not here been a continuous use and exercise of the right for twenty consecutive years."

In *Madison v. Ducktown Sulphur, Copper & I. Co.* (1904) 118 Tenn. 331, 83 S. W. 658, suits were maintained by three individuals to secure permanent injunctions against the defendants because of an alleged nuisance in allowing large volumes of smoke to issue from their roast piles, to the injury of complainants' property. The defendants claimed the plaintiffs were guilty of laches and unreasonable delay in maintaining their actions. The plaintiffs had come into possession of their properties at various times, so that some had been subject to the nuisance longer than others. The court in considering the case presented by each complainant, held that those who had sued within two years after becoming subject to the nuisance were not guilty of unreasonable delay, but that the others were. The court said: "Upon laches appearing, a court of equity will be justified in withholding relief and leaving the party to his rights at law. 'A party may by laches,' says Wood, 'deprive himself of an equitable remedy against a nuisance. Thus, if a party sleeps on his rights and allows a nuisance to go on without remonstrance, or rather, without taking measures either by suit at law or in equity to protect his rights, and allows the party to go on making large expenditures about the business which constitutes the nuisance, he will be regarded as guilty of such laches as to deprive him of equitable relief, particularly until the right is first settled at law. And when the delay is also

coupled with an acquiescence, he will be deprived of all equitable relief, and may be placed in a position where the court will enjoin him from proceeding against the nuisance at law, or even to prevent the recovery of a judgment obtained therefor in a court of law.' Wood, Nuisances, § 804."

In *Austin & N. W. R. Co. v. Anderson* (1891) 79 Tex. 427, 23 Am. St. Rep. 350, 15 S. W. 484, it appeared that certain culverts were built by a railroad company in such a manner that at frequent intervals the water overflowing such culverts ran on the plaintiff's lands, greatly damaging them. The defendant claimed that a two-year Statute of Limitations barred a recovery. The rule in Texas is to the effect that where a nuisance is permanent, all damages must be included in one suit; but where the nuisance is not permanent, successive actions may be brought. It was held that it was not the culvert which was the nuisance, but the overflow of water; and therefore the Statute of Limitations would not bar a recovery until the statutory period had run against the special injury before the suit.

In *Faulkenbury v. Wells* (1902) 28 Tex. Civ. App. 621, 68 S. W. 327, the plaintiff sought to enjoin the operation of a cotton gin which was an alleged nuisance. The court held that the plaintiff's failure to protest against the erection of the gin, and his failure to complain for a period of two years, was not an unreasonable delay. The court said: "Wells knew that Sweeney was building the gin, and made no protest. He first began complaining of the gin as a nuisance soon after the purchase by appellants, and, after fruitless negotiations, finally instituted this suit. Sweeney never consulted Wells in regard to building the gin. Appellants did not confer with him about their purchase, and the evidence fails to show that he knew that they contemplated buying the property. It is not shown that Wells knew, when the gin was being built, what conditions or results would attend or follow from the operation of the gin. He did

nothing whatever to encourage the construction of the plant by Sweeney, or the purchase thereof by appellants. The doctrine of acquiescence, invoked by appellants, is stated by Mr. High in this language: 'Long-continued acquiescence in the erection of works which it is afterwards sought to enjoin as a nuisance may constitute a bar to relief in equity. And it may be asserted as a rule that long delay upon the part of plaintiff who seeks to enjoin a nuisance will afford sufficient reason for refusing him relief in equity. The rule is extended even further, and it is held that one party may so encourage another in the erection of what he afterwards complains of as a nuisance, as to give the adverse party a right to invoke the aid of equity to restrain proceedings at law for the recovery of damages resulting from the alleged nuisance.' High, *Inj.* § 756. And in § 786 he says: 'He who seeks relief against a nuisance must show due diligence in the assertion of his rights; and when complainant has been guilty of great laches, or has allowed defendant for a long period to continue in the erection of his obnoxious structure at great expense and without molestation, equity will not interfere. . . . It is difficult to fix any precise period of delay as fatal to complainant's right to relief against the nuisance, but when defendant has for more than twenty years carried on his trade without molestation, and proves a good prima facie title by prescription, equity will not interfere, but will leave the parties to seek their remedy at law. It has been frequently held that when the works complained of had been allowed to stand three years and upward, it was such laches as would prevent relief in equity. But it is held that no acquiescence short of twenty years' adverse user will bar plaintiff from his right to relief by injunction against a nuisance, unless he is estopped by some act or conduct which has induced defendant to incur expense or take action upon the strength of such conduct.'"

In *Face v. Cherry* (1915) 117 Va. 41, 84 S. E. 10, Ann. Cas. 1917E, 418,

the plaintiffs filed a bill seeking a permanent injunction to restrain defendants from operating their brick plant on the ground that it constituted a nuisance. The defendants claimed that the plaintiffs lived adjacent to the objectionable plant for eighteen years without protest, and should be denied relief on the ground of laches. In disposing of this question the court said: "We do not deem it necessary to review the testimony in detail. It is sufficient to say that the evidence sustains the allegations of the bill, that the soot and smoke thrown out by appellants' kilns constitute such a nuisance as entitles appellees to injunctive relief. Nor do we think that appellees' right to relief is barred by laches. The conditions creating the nuisance cover the period from the spring of 1897 to the present time, and have been gradual and cumulative in their character. In fact, the evidence makes out a case of continuing nuisance, to which the doctrine of laches does not apply."

In *Ingersoll v. Rousseau* (1904) 35 Wash. 92, 76 Pac. 513, 1 Ann. Cas. 35, an injunction was sought to compel the discontinuance of certain premises as houses of ill fame. The defendants claimed that the plaintiffs had been guilty of unreasonable delay in instituting their action. The court held that the nuisance, being a continuing one, was not affected by the lapse of time.

In *Atty. Gen. v. Birmingham* (1858) 4 Kay & J. 528, 70 Eng. Reprint, 220, 6 Week. Rep. 811, it appeared that a defect existed in the sewerage system of the city of Birmingham, which the plaintiff alleged to be a nuisance, and sought to have enjoined. Complaint was made to the city council, who informed the plaintiff that a new sewerage system was being constructed. The plaintiff thereupon waited four years before instituting this action. It was held that he was not guilty of unreasonable delay in instituting his action under the circumstances.

In *Gullick v. Tremlett* (1872) 20 Week. Rep. (Eng.) 358, a bill was filed to restrain a nuisance arising from noxious effluvia and noise. It was

shown that this state of affairs had existed for upwards of six years, though not to the same degree. The injunction was granted, the court holding that the delay was not unreasonable.

In *Radenhurst v. Coate* (1857) 6 Grant, Ch. (U. C.) 139, it appeared that the defendants were soap manufacturers, and the fumes from their plant were disagreeable to the plaintiffs. It appeared that the plant had been in operation several years before the suit was brought. The court held that the mere fact of delay did not prevent the plaintiffs from bringing their action, since it is necessary to acquiesce in the pollution of the air for a period of twenty years to bar a right of action.

In *Francklyn v. People's Heat & Light Co.* (1899) 32 N. S. 44, it appeared that the defendant gas company caused smoke and gas to spread over the plaintiff's premises, damaging his property. The plant had been in operation for about two years before this suit was instituted, but the plaintiff had warned the defendant company, and had protested from time to time against the maintenance of such a nuisance. It was held that the delay was not for such a period as to bar an action. The court said: "In this case, the plaintiff did not, in any way, acquiesce in the defendants' operations; he warned them from the first, before any works were erected, that they would be an injury and nuisance to him, and was assured that no nuisance would be created thereby; and plaintiff also swears that, on different occasions, he protested to the officers and employees of defendants at the way he had been treated, but without obtaining any redress or change in the mode of operating the works. This is not denied by defendants. The plaintiff's action is not for the nuisance alone, it involves much more serious matters; and, in my opinion, the plaintiff was not, under the circumstances above mentioned, obliged to commence his action until he thought he was fully prepared to prove his case, and the damages he had sustained, and I cannot say that

the delay was so unreasonable as to be prejudicial to his rights."

III. Relief not sought with reasonable promptness.

There are numerous cases where a plaintiff has been denied equitable relief by reason of his delay. The courts are generally prompt in denying such relief where the defendant has expended large sums improving property or acquiring more territory, and plaintiff has stood passively by and taken no action until after such expenditures have been made. Relief is also denied where the damage to plaintiff's property is not serious, or where it is such that an action at law would give him adequate relief. The measure of plaintiff's duty in such cases is that of reasonable diligence in the assertion of his rights and invoking the aid of equity to enforce them. Where the action is not so taken a party will be left to seek relief in a court of law for any damage he may have sustained. In each of the following cases injunctive relief was refused because of the delay:

Alabama.—Clifton Iron Co. v. Dye (1888) 87 Ala. 468, 6 So. 192.

Iowa.—Baldwin v. Oskaloosa Gaslight Co. (1881) 57 Iowa, 51, 10 N. W. 317.

Kansas.—Thomas v. Woodman (1879) 23 Kan. 217, 33 Am. Rep. 156.

Maine.—Whitmore v. Brown (1906) 102 Me. 47, 9 L.R.A.(N.S.) 868, 120 Am. St. Rep. 454, 65 Atl. 516.

Michigan.—Washington Lodge v. Frelinghuysen (1904) 138 Mich 350, 101 N. W. 569.

Missouri.—Bradbury Marble Co. v. Laclede Gaslight Co. (1907) 128 Mo. App. 96, 106 S. W. 594.

New Hampshire.—Bassett v. Salisbury Mfg. Co. (1867) 47 N. H. 426.

New Jersey.—Tichenor v. Wilson (1849) 8 N. J. Eq. 197.

New York.—Reid v. Gifford (1822) 6 Johns. Ch. 19.

Ohio.—Mondle v. Toledo Plow Co. (1899) 6 Ohio N. P. 294, 9 Ohio S. & C. P. Dec. 281; Goodall v. Crofton (1877) 33 Ohio St. 271, 31 Am. Rep. 535.

Pennsylvania.—Warren v. Hunter (1853) 1 Phila. 414; Powers's Appeal (1889) 125 Pa. 175, 11 Am. St. Rep.

882, 17 Atl. 254; Stewart Wire Co. v. Lehigh Coal & Nav. Co. (1902) 203 Pa. 479, 53 Atl. 1127.

Rhode Island.—Sprague v. Steere (1849) 1 R. I. 247.

Tennessee.—Caldwell v. Knott (1836) 10 Yerg. 209; Madison v. Ducktown Sulphur, Copper & I. Co. (1904) 113 Tenn. 331, 83 S. W. 658; Weidner v. Friedman (1912) 126 Tenn. 677, 42 L.R.A.(N.S.) 1041, 151 S. W. 56.

Texas.—Simon v. Nance (1911) — Tex. Civ. App. —, 142 S. W. 661.

England.—Weller v. Smeaton (1784) 1 Cox, Ch. Cas. 103, 29 Eng. Reprint, 1081; Gaunt v. Fynney (1878) L. R. 8 Ch. 8, 42 L. J. Ch. N. S. 122, 27 L. T. N. S. 569, 21 Week. Rep. 129.

In Clifton Iron Co. v. Dye (1888) 87 Ala. 468, 6 So. 192, the complainant sought to enjoin the maintenance of certain washers in connection with the defendant's smelting furnace. The complainant delayed bringing suit for three years after learning of the injuries resulting from such operations. It was held that he could not recover after such a long delay. The court said: "Reasonable diligence in the assertion of his rights was the measure of complainant's duty in this case; and failing in this, he must now seek relief in a court of law for any damage he may have sustained."

In Baldwin v. Oskaloosa Gaslight Co. (1881) 57 Iowa, 51, 10 N. W. 317, an action was brought for damages for the erection and use of a gas works which were claimed by the plaintiff to be a nuisance. A period of six years passed between the completion of the gas works and the institution of this action. The jury found that the works were permanent, and more than five years had elapsed, which was the period fixed by the Statute of Limitations for the bringing of actions of this nature.

In Thomas v. Woodman (1879) 23 Kan. 217, 33 Am. Rep. 156, it appeared that the defendants diverted water from a river for manufacturing purposes. The result of the diversion was a lessening of the amount of water in the river, which caused sand bars to form, and allowed weeds to grow, which, on decaying, gave out

a foul odor. The plaintiff brought an action, four years after the water was first diverted from the river, to restrain defendant from further diverting the water in this manner. It was held that the plaintiff had unreasonably delayed in bringing his suit.

In *Whitmore v. Brown* (1906) 102 Me. 47, 9 L.R.A. (N.S.) 868, 120 Am. St. Rep. 454, 65 Atl. 516, it appeared that certain wharfs had been erected by the defendant some ten years prior to the institution of this suit. No complaint was made by the plaintiff during that period. The court held that the delay had been unreasonable, saying: "The bill would also need to be dismissed under the general principle of equity jurisprudence that an equity court will not intervene where the plaintiff has long tolerated the alleged nuisance, but will leave him to establish his claim at law. These present structures had been tolerated for ten years, during all which time they were as much nuisance as now, having the same effect on persons and property at Gilpatrick's Cove. The danger of future hurt from them is no more imminent now than at first. After ten years the claim of the plaintiff for their removal is much too stale for the court to enforce by decrees in equity."

In *Washington Lodge v. Frelinghuysen* (1904) 188 Mich. 350, 101 N. W. 569, the complainant sought to have removed a certain passageway beside the kitchen in the defendant's hotel, which it was claimed was a nuisance, as disagreeable odors from the hotel kitchen passed into complainant's rooms. This condition had existed for about twelve years. The court, in denying relief on the ground of unreasonable delay, said: "A court of equity, which is never active in relief against conscience or public convenience, has always refused its aid to stale demands where the party has slept upon his right and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence. Where these are wanting, the court is passive and does nothing. The complainant's claim is

that the defendant must now tear down her passageway, ruin her property for the purpose for which it was constructed, and cause her irreparable damage, in order that it may obtain a little light and air. The proposition does not appeal with any force to a court of equity and conscience. Complainant should have spoken sooner. It will not be heard to now invoke the conscience of a court of equity, but will be left to its remedy, if it has one, in a court of law."

In *Bradbury Marble Co. v. Laclede Gaslight Co.* (1907) 128 Mo. App. 96, 106 S. W. 594, it appeared that the dust from the defendant's plant settled on the marble in the plaintiff's yards, and when the marble was wet, it damaged it. The defendant had maintained the plant in the same manner for more than ten years, and claimed a right by prescription so to operate it. The court said: "While the right to maintain a public nuisance cannot be acquired by prescription, the right to maintain or continue a private nuisance may be; that is, by adverse and exclusive enjoyment for the length of time prescribed by the Statute of Limitations for the acquisition of title to land by adverse possession. 21 Am. & Eng. Enc. Law, 2d ed. 734, 735. There is evidence from which a jury might have drawn the inference that plaintiff could have maintained an action against defendant for maintaining the nuisance charged in the petition at any time within ten years next before it commenced this suit," and held it error for the trial court to refuse to charge that defendant might have obtained a right to continue the nuisance after the lapse of the statutory period.

In *Bassett v. Salisbury Mfg. Co.* (1867) 47 N. H. 426, it appeared that the plaintiff was the owner of certain swamp lands which had been flooded, caused by the height of the defendant's dam. An injunction was sought six years after the dam was completed. The court held that the plaintiff had delayed an unreasonable length of time before bringing suit, and therefore was not entitled to relief.

In *Tichenor v. Wilson* (1849) 8 N. J. Eq. 197, the plaintiff sought to have defendant's chemical factory enjoined from continuing operations on the ground that it was a nuisance by reason of the gases and vapors proceeding from the factory. It was shown that the factory had been in operation for nearly four years before the action was commenced. The court, in holding this to be an unreasonable delay, said: "A sufficient reason for denying the summary action of this court by injunction is found in the fact that the works had been in operation three and a half years before the bill was exhibited. It would seem that no very serious consequences to the complainant or his property are to be apprehended from the little further delay which will be caused by leaving him to the ordinary proceedings at law in cases of alleged nuisances. And this course is the more proper in this case from the consideration that the neighborhood, the public, have so long permitted the works to be continued without complaint in the usual way."

In *Mondle v. Toledo Plow Co.* (1899) 6 Ohio N. P. 294, 9 Ohio S. & C. P. Dec. 281, a suit was instituted to compel the defendant to remove a certain fence which was alleged to be a nuisance. It appeared that the plaintiff, on purchasing the property, was aware of the fence being there, and, after purchasing, the plaintiff delayed about one year before instituting his action. In denying relief, the court said: "For five years after her purchase—one year of which she occupied it as her residence—this fence remained and this adverse possession continued without any action being taken on her part as against the defendant's right to so maintain the same, and until the defendant company had commenced the erection of this building, and until it was nearly completed. The building itself cut off no access that had been at any time available to her grantor from the building of the fence, or to the plaintiff from the time of her purchase down to the time of the erection of this building, and to stop the erection

of this addition to the building, or to cause it to be destroyed, could not avail her anything so long as this fence remained. Its erection made no change in the possession held by the defendants except in so far as it made more permanent the occupation by defendants, and would enhance the damage which would accrue to defendants in case they should be required to remove all obstructions upon the alley. The construction of the building, however, was not sought to be done in any way or manner that would have precluded plaintiff from taking action to prevent the building being erected immediately upon the erection being commenced. It is not like a case where a party, apprehending that an effort would be made to enjoin the doing of a certain work, commenced it upon Sunday, or at some other time when process to prevent it could not be obtained, and where the process is promptly obtained at the earliest moment possible. In such a case, the defendant may be required by order of the court not only to discontinue the work, but to remove that which he has already accomplished; but the utmost diligence and promptness is required on the part of the party seeking such relief. No such case is here made."

In *Goodall v. Crofton* (1877) 33 Ohio St. 271, 31 Am. Rep. 535, the plaintiff sought to restrain the defendants from maintaining an alleged nuisance in so conducting their factory as to cause the plaintiff's buildings to vibrate. The defendant claimed that the plaintiff had delayed an unreasonable time before seeking relief. In disposing of the question the court said: "There is another ground upon which the party should be required to establish his right at law before resorting to equity. Plaintiff admits the business carried on by defendant, of which he complains, is not a nuisance per se: Plaintiff stood by and saw defendant erect his business house, place his steam power and other machinery therein, knowing the use to which it was to be applied, and for seven or more years, without objection, saw the business carried on

during the same hours and to the same degree. This delay and apparent acquiescence will not, perhaps, jeopardize his legal rights, but are circumstances justifying the chancellor in sending plaintiff to a court of law, to establish his right and seek compensation, before equity will interfere by injunction."

In *Warren v. Hunter* (1858) 1 Phila. (Pa.) 414, it appeared that the plaintiffs were manufacturers of paper and required a pure supply of water. They sought an injunction to restrain defendants from discharging dyestuff and other refuse in the stream above their mill. The plaintiffs had been in possession about two years before bringing suit. The court said: "The fact also that the complainants have been in possession of their premises since April, 1851, during all which time the alleged tortious use of the creek has been made by the respondents, without complaint, until the month of October last, would cause us to hesitate in granting an injunction, unless upon very clear proof of an irreparable and serious injury, directly caused by the acts of the respondents."

In *Powers's Appeal* (1889) 125 Pa. 175, 11 Am. St. Rep. 882, 17 Atl. 254, it appeared that the defendants had built and maintained a boom in connection with their mills. The plaintiffs brought suit, claiming that such booms and extensions were built without right, and asked that the defendants be ordered to remove the illegal structures and be prevented from replacing them. The court, in considering the question of delay on the part of the plaintiffs, said: "This denial of the right of the boom company, coming after so many years of acquiescence, after the boom has become a necessity to the mills that have grown up in its neighborhood, and after the damages sustained by the plaintiffs in consequence of the construction of both the original boom and the enlargement in 1869 have been assessed at their instance and paid by the boom company, comes too late to be conscionable. There is no equity in the plaintiffs' case, and the

court below would have been fully justified in dismissing the bill for that reason."

In *Stewart Wire Co. v. Lehigh Coal & Nav. Co.* (1902) 208 Pa. 479, 53 Atl. 1127, the plaintiff sought to restrain the defendant from diverting from a canal water which plaintiff had a right to use. The court held that the bill should be dismissed for the laches of the plaintiff in asserting its rights, saying: "Relief by injunction is not controlled by arbitrary or technical rules, but the application for its exercise is addressed to the conscience and sound discretion of the court. Where a party seeks the intervention of a court of equity to protect his rights by injunction, the application must be seasonably made, or the rights may be lost, at least so far as equitable intervention is concerned. It is a rule practically without exception that a court of equity will not grant relief by injunction where the party seeking it, being cognizant of his rights, does not take those steps to assert them which are open to him, but lies by and suffers his adversary to incur expenses and enter into burdensome engagements which would render the granting of an injunction against the completion of his undertaking, or the use thereof when completed, a great injury to him. A suitor who by laches has made it impossible for a court to enjoin his adversary without inflicting great injury upon him will be left to pursue his ordinary legal remedy. This rule is especially applicable where the object of the injunction is to restrain the completion or use of public works, and where the granting of the injunction would operate injuriously to the public as well as to the party against whom the injunction is sought."

In *Sprague v. Steere* (1849) 1 R. I. 247, the plaintiff sought an injunction to compel the defendant to lower his dam to prevent the water from overflowing the plaintiff's land. The evidence showed that among several other acts of positive acquiescence he delayed nearly three years before applying for his injunction. The court said: "After the plaintiff has per-

mitted Aldrich & Wilkinson to occupy this dam, at its present height, for two and a half or three years,—after having himself advertised it for sale, as it then stood and now stands, giving the head and fall as they now are, and permitted the defendant to repair the dam, keeping it at the same height, and erect his mills adjusted to that height,—we think it too late for him to apply for an injunction.”

In *Caldwell v. Knott* (1836) 10 Yerg (Tenn.) 209, it was held that a delay of ten years precluded the granting of equitable relief against the maintenance of a milldam so constructed as to back water upon the plaintiff's land, destroying a spring thereon.

In *Madison v. Ducktown Sulphur, Copper & I. Co.* (1904) 113 Tenn. 331, 83 S. W. 658, it was held that a delay of two years barred a suit to enjoin a nuisance consisting of roast piles which emitted a large volume of smoke in reducing copper ore.

In *Weidner v. Friedman* (1912) 126 Tenn. 677, 42 L.R.A.(N.S.) 1041, 151 S. W. 56, a suit was brought to enjoin the maintenance of certain disorderly houses. The defendants claimed that the complainants were not entitled to relief on the ground of laches. In disposing of this question the court said: “This ‘red light district’ has been in operation in Chattanooga twenty-five or twenty-six years, according to the witnesses for complainants themselves; some witnesses say, from thirty to forty years. Parties who apply to a court of chancery for injunctive relief must apply promptly, on the penalty of refusal to entertain the bill because of laches. In *Caldwell v. Knott* (1836) 10 Yerg. (Tenn.) 212, where the nuisance complained of was a milldam, the court held that a delay of ten years, without more, was too much, and the court referred with approval to the case of *Weller v. Smeaton* (Eng.) *supra*, and *Reid v. Gifford* (1822) 6 Johns. Ch. (N. Y.) 19, wherein it was held that three years’ delay was too long. These cases were referred to and approved in the case of *Madison v. Ducktown Sulphur, Copper & I. Co.* (1904) 113 Tenn. 331, 83 S. W. 658, in which many

other cases were cited, showing that even a much shorter time would serve to bar relief in equity under peculiar facts; and it was said in that case (p. 355) that, although the defense of laches had not been raised in the lower court by the parties, this court could itself raise it when it appeared on the record. In the present case there was a delay of, not three years, or of ten years merely, but for more than a quarter of a century. The result is that the original, amended, and supplemental bills must be dismissed as to the complainants still remaining before the court.”

In *Simon v. Nance* (1911) — Tex. Civ. App. —, 142 S. W. 661, it appeared that the tracts of land of the parties adjoined the plaintiffs, being the higher. About twenty-one years prior to the institution of this suit the defendant built a ditch so that the water running from the higher adjoining tract would drain off into a creek. Some fourteen years subsequent to the digging of the ditch the plaintiff purchased his tract with knowledge of the ditch, but from the construction and erosion not more than an acre of plaintiff's land had been damaged. In determining the question of laches the court said: “A suit to abate or restrain a nuisance must be brought promptly, or the right to equitable relief may be lost. A suit to abate a private nuisance cannot be brought after the expiration of the time limited by statute for such proceeding. . . . The mere lapse of time, independent of the Statute of Limitation, may be a sufficient ground for denying an injunction, unless legal excuse is shown for such delay. . . . Long and continued acquiescence will defeat the right to injunctive relief. . . . In addition to this, it seems that appellant has stood by for many years without complaint and without taking any affirmative action. And the testimony shows that, if appellee were required to fill up the ditch and restore the land to its original condition, he would be at great expense, to wit, from \$400 to \$1,000; whereas, the resulting injury to appellant is slight in comparison. Now, while we do not assert the law

to be that an injunction should be refused where a right has been invaded and substantial injury done, alone on the ground that it would entail great expense on the defendant to comply with its mandates, still, where the complainant for a long time has stood by and acquiesced in the performance of the act complained of, it being shown that it would entail great hardships and expense upon the defendant to comply with the writ, the granting of which would be of but slight advantage to the complainant, we think the chancellor might take into consideration the relative rights, benefits, and hardships that would accrue from its issuance, and be justified in refusing the relief asked. In 22 Cyc. 779, it is said: 'Where the plaintiff, with knowledge of all the facts, has delayed so long in seeking equitable relief without sufficient excuse that the injury to the defendant, if the injunction is granted, will be much greater by reason of expend-

itures than that suffered by plaintiff, an injunction will be refused.'"

In *Weller v. Smeaton* (1784) 1 Cox, Ch. Cas. 103, 29 Eng. Reprint, 1081, it was held that a delay of three years was unreasonable, and a mandatory injunction would not be granted compelling the defendant to abolish the alleged nuisance until the right was established at law.

In *Gaunt v. Fynney* (1878) L. R. 8 Ch. (Eng.) 8, 42 L. J. Ch. N. S. 122, 27 L. T. N. S. 569, 21 Week. Rep. 129, a suit was instituted to restrain defendants from so operating their plant as to cause the noise therefrom to be a nuisance. The plant had been in operation five years and no injunctive relief had been sought. The court held that the delay was unreasonable and no relief in equity should be granted, since it was not shown that the character of the nuisance had changed during the five-year period.

E. C. B.

WILLIAM P. JEFFERY, Trustee, etc., of All-Star Feature Corporation,
Bankrupt, Respt.,

v.

ARCHIBALD SELWYN, Appt.

New York Court of Appeals—February 6, 1917.

(220 N. Y. 77, 115 N. E. 275.)

Corporation — insolvency — liability on stock subscription — failure to comply with statutory requirement.

1. A subscriber to stock in a corporation which subsequently becomes bankrupt cannot defeat liability to pay for the stock upon the ground that he did not comply with the statutory requirement that no subscription for stock should be taken unless 10 per cent of it is paid at the time of subscription, if he acted as director, received dividends, and sold the stock for a valuable consideration.

[See note on this question beginning on page 1116.]

Pleading — action for stock subscription — necessity of payment.

2. A trustee in bankruptcy suing to enforce the subscription agreement of a stockholder of the bankrupt corpora-

tion need not allege that full payment by him is necessary to pay the debts of the corporation.

[See 3 R. C. L. 265.]

APPEAL by defendant from an order of the Appellate Division of the Supreme Court, First Department, affirming an order of a Special Term,

Part III., for New York County, granting plaintiff's motion for judgment on the pleadings, in an action brought to recover the amount of defendant's subscription to stock in the bankrupt corporation. *Affirmed.*

The facts sufficiently appear in the opinion of the court.

Messrs. Ernst & Cane, for appellant:

The complaint is fatally defective in that it fails to allege the making of an assessment showing the right and need of the trustee to sue for the entire \$10,000.

Scovill v. Thayer, 105 U. S. 143, 26 L. ed. 968; Southworth v. Morgan, 205 N. Y. 293, 51 L.R.A. (N.S.) 56, 98 N. E. 490; Stevens v. Episcopal Church History Co. 140 App. Div. 582, 125 N. Y. Supp. 573; Rathbone v. Ayer, 84 App. Div. 186, 82 N. Y. Supp. 235; Kiskadden v. Steinle, 121 C. C. A. 559, 203 Fed. 381; Rosoff v. Gilbert Transp. Co. 204 Fed. 349, 221 Fed. 972; Re Crystal Spring Bottling Co. 96 Fed. 945; Hunt v. Sharkey, 31 Am. Bankr. Rep. 894; Re Newfoundland Syndicate, 28 Am. Bankr. Rep. 119; Chandler v. Keith, 42 Iowa, 99; Simmons v. Taylor, 106 Tenn. 729, 63 S. W. 1123; Cumberland Lumber Co. v. Clinton Hill Lumber Mfg. Co. 57 N. J. Eq. 627, 42 Atl. 585; Black, Bankr. 363; Remington, Bankr. § 977.

Defendant's failure to pay 10 per cent in cash on his subscription made the transaction void ab initio.

Excelsior Grain Binder Co. v. Stayner, 25 Hun, 93; Hapgoods v. Lusch, 123 App. Div. 23, 107 N. Y. Supp. 331; Van Schaick v. Mackin, 129 App. Div. 335, 113 N. Y. Supp. 408; Sanders v. Proctor, 172 App. Div. 713, 158 N. Y. Supp. 433; United Growers Co. v. Eisner, 22 App. Div. 1, 47 N. Y. Supp. 906; May v. Charlouis, 128 App. Div. 127, 112 N. Y. Supp. 554, affirmed in 195 N. Y. 607, 89 N. E. 1105; Wood v. Coosa & C. River R. Co. 32 Ga. 273; Napier v. Poe, 12 Ga. 182; Hibernia Turnp. Road v. Henderson, 8 Serg. & R. 219, 11 Am. Dec. 593.

Mr. John L. Lockwood, for respondent:

The relation between the defendant and the corporation was such as to create an obligation for the amount unpaid upon the stock in favor of creditors.

Lamphere v. Lang, 157 App. Div. 306, 141 N. Y. Supp. 967, reversed in 213 N. Y. 585, 108 N. E. 82; Chubb v. Upton, 95 U. S. 665, 24 L. ed. 523; Sanger v. Upton, 91 U. S. 56, 23 L. ed. 220; Dayton v. Borst, 31 N. Y. 437; Clevenger v. Moore, 71 N. J. L. 148, 58

Atl. 88; Avon Springs Sanitarium Co. v. Kellogg, 125 App. Div. 51, 109 N. Y. Supp. 153, affirmed in 194 N. Y. 567, 88 N. E. 1132; Handley v. Stutz, 139 U. S. 417, 35 L. ed. 227, 11 Sup. Ct. Rep. 530; Sawyer v. Hoag, 17 Wall. 620, 21 L. ed. 735; Scovill v. Thayer, 105 U. S. 143, 26 L. ed. 968; Stoddard v. Lum, 159 N. Y. 265, 45 L.R.A. 551, 70 Am. St. Rep. 541, 53 N. E. 1108.

The amended complaint sets forth an order of the bankruptcy court, duly made, requiring the defendant to pay the amount due upon his subscription. Such an order is an assessment and cannot be collaterally attacked.

Sanger v. Upton, 91 U. S. 56, 23 L. ed. 220; Kennedy v. Gibson, 8 Wall. 505, 19 L. ed. 478; Pullman v. Upton, 96 U. S. 328-330, 24 L. ed. 818, 819; Great Western Teleg. Co. v. Purdy, 162 U. S. 329, 336, 337, 40 L. ed. 986, 990, 991, 16 Sup. Ct. Rep. 810; Babbitt v. Read, 173 Fed. 712, 23 Am. Bankr. Rep. 254; Clevenger v. Moore, 71 N. J. L. 148, 58 Atl. 88; Covell v. Fowler, 144 Fed. 535.

Section 53 of the Stock Corporation Law forbids only the enforcement of executory contracts of subscription. It has never been held to prevent the enforcement of an executed subscription contract.

Black River & U. R. Co. v. Clarke, 25 N. Y. 208; New York & O. Midland R. Co. v. Van Horn, 57 N. Y. 473; Ogdensburgh, C. & R. R. Co. v. Wolley, 1 Keyes, 118; Buffalo & J. R. Co. v. Gifford, 87 N. Y. 294; Wheeler v. Millar, 90 N. Y. 353; Perry v. Hoadley, 19 Abb. N. C. 76; Excelsior Grain Binder Co. v. Stayner, 25 Hun, 91; Syracuse, P. & O. R. Co. v. Gere, 4 Hun, 392; South Buffalo National Gas Co. v. Bain, 9 Misc. 425, 30 N. Y. Supp. 264; General Electric Co. v. Wightman, 3 App. Div. 118, 39 N. Y. Supp. 420; Yonkers Gazette Co. v. Taylor, 30 App. Div. 334, 51 N. Y. Supp. 969; Van Schaick v. Mackin, 129 App. Div. 335, 113 N. Y. Supp. 408; Ford v. Chase, 118 App. Div. 605, 103 N. Y. Supp. 30, affirmed in 189 N. Y. 504, 81 N. E. 1164; Hapgoods v. Lusch, 123 App. Div. 23, 107 N. Y. Supp. 331.

Defendant is estopped to deny the validity of any agreement by which he took and contracted to pay for his stock.

Scovill v. Thayer, 105 U. S. 143, 26 L. ed. 968; Sawyer v. Hoag, 17 Wall. 610, 21 L. ed. 731; Upton v. Englehart, 3 Dill. 496, Fed. Cas. No. 16,800; Ellis v. Schmoeck, 5 Bing. 521, 130 Eng. Reprint, 1163; Doubleday v. Musket, 7 Bing. 110, 131 Eng. Reprint, 43, 4 Moore & P. 750, 9 L. J. C. P. 35; Eaton v. Aspinwall, 19 N. Y. 119; Abbott v. Aspinwall, 26 Barb. 202; Aspinwall v. Sacchi, 57 N. Y. 338; Ruggles v. Brock, 6 Hun, 164; Perry v. Hoadley, 19 Abb. N. C. 76; Wheeler v. Millar, 90 N. Y. 353; Re New Zealand Bkg. Corp. L. R. 3 Ch. 131; Veeder v. Mudgett, 95 N. Y. 295; Henry v. Vermillion & A. R. Co. 17 Ohio, 187; Vicksburg, S. & T. Co. v. McKean, 12 La. Ann. 638; Erie & W. Pl. Road Co. v. Brown, 25 Pa. 160; Boyd v. Peach Bottom R. Co. 90 Pa. 169; Whitney Arms Co. v. Barlow, 63 N. Y. 62, 20 Am. Rep. 504; First Nat. Bank v. Cornell, 8 App. Div. 427, 40 N. Y. Supp. 850.

Pound, J., delivered the opinion of the court:

The action was brought by the plaintiff, as trustee of a bankrupt corporation, to recover the sum of \$10,000, being the total amount unpaid on defendant's subscription to 100 shares of the stock in the bankrupt company.

The complaint alleges the bankruptcy of the All-Star Feature Corporation on February 16, 1915; the subsequent appointment of the plaintiff as trustee; the incorporation of the bankrupt on or about the 30th day of June, 1913; the first meeting of incorporators, including the defendant, on July 9, 1913, and on the same day the making of an agreement between the defendant and the corporation, by which the corporation agreed to issue to the defendant 102 shares of its capital stock for the sum of \$10,200.

The complaint further alleges that certificates for 102 shares were then delivered to the defendant, who continued to be a stockholder until December 21, 1914; that the defendant paid on account of said subscription only \$200, which was "accepted by said All-Star Feature Corporation as payment in full for two shares only of said 102 shares;" that between the 9th day of July,

1913, and the 21st day of December, 1914, the defendant was a director and vice president of the corporation and acted as such; that during said period the defendant received dividends on the 102 shares of stock in question, and on or about December 21, 1914, sold his stock for \$3,500.

The complaint finally alleges the insolvency of the corporation; that there has not come into the hands of the plaintiff assets and property sufficient to pay its debts as proved and allowed; that the plaintiff obtained an order from the United States district court authorizing him, as trustee, to issue a call on defendant for such sum as might be due on his subscription; that plaintiff then issued a call on defendant for \$10,000, which is the amount sued for.

The defendant demurred to the amended complaint on the ground that it failed to state facts sufficient to constitute a cause of action, and contended that the complaint was fatally defective because it did not allege that the defendant had paid 10 per cent of the amount of his subscription (Stock Corporation Law, § 53), and also because it did not allege facts showing that the amount of liabilities over assets made it necessary to collect \$10,000 or any other sum.

The courts below have granted judgment on the pleadings in favor of plaintiff, but the appellate division, first department, has granted leave to the defendant to have this court consider the question whether the complaint states a cause of action.

Section 53 of the Stock Corporation Law (Laws 1909, chap. 61, Consol. Laws, chap. 59) provides: "§ 53. Subscriptions to Stock.—If the whole capital stock shall not have been subscribed at the time of filing the certificate of incorporation, the directors named in the certificate may open books of subscription to fill up the capital stock in such places and after giving such notices as they may deem expedient,

and may continue to receive subscriptions until the whole capital stock is subscribed. At the time of subscribing, every subscriber, whose subscription is payable in money, shall pay to the directors ten per centum upon the amount subscribed by him in cash, and no such subscription shall be received or taken without such payment."

Defendant's contention is that the terms of the statute are explicit and exclusive; that no other contract of subscription is valid; that if requisite payment is not made the subscription is not binding upon the subscriber; that the statute cannot be evaded by estoppel or waiver or ratification, and that, therefore, the subscription of the defendant to the stock of the bankrupt corporation cannot be enforced.

If it were not for the provisions of the statute the question of defendant's liability on his subscription would present no difficulty. A stock subscription on credit is, at common law, enough to pass title to the stock and make the subscriber a stockholder when, as in this case, he has acted as such and been recognized as such by the corporation. *Wheeler v. Millar*, 90 N. Y. 353. "There is no difference between a contract to take shares and any other contract." *Chitty, J.*, in *Nicol's Case*, L. R. 29 Ch. Div. 421, 426, 52 L. T. N. S. 933. The defense interposed is technical, but it has found recognition in the courts of this state where nothing but the bare fact of a subscription, without the equivalent of a cash payment, is shown, and the corporation seeks to enforce the subscription. *New York & O. Midland R. Co. v. Van Horn*, 57 N. Y. 473; *Hapgood v. Lusch*, 123 App. Div. 23, 107 N. Y. Supp. 331; *Van Schaick v. Mackin*, 129 App. Div. 335, 113 N. Y. Supp. 408; *Sanders v. Proctor*, 172 App. Div. 713, 158 N. Y. Supp. 433.

Subscriptions not accompanied by immediate cash payments have not, however, been held void. A subsequent payment will suffice, even though it is made through the me-

dium of services rendered the corporation. *Beach v. Smith*, 30 N. Y. 116. The statute does not prohibit or forbid any other mode of subscription, and this court said in *Buffalo & J. R. Co. v. Gifford*, 87 N. Y. 294, 300, that "we are inclined to the opinion that it was not intended by this section to prescribe a fixed statutory mode of making a subscription, and that any contract of subscription good and valid at common law is still valid, notwithstanding this section." On the other hand, it has been said (*Van Schaick v. Mackin*, 129 App. Div. 335, 337, 113 N. Y. Supp. 408), that the subscription is void unless the 10 per centum is paid in cash.

Carefully distinguishing things said from things decided, the conclusion that the subscription, if invalid for want of such payment may become enforceable not only by a subsequent cash payment, but by a course of dealing between corporation and stockholder, is entirely reasonable and consistent with the reported cases. To justify a conclusion that defendant was not a stockholder although he had taken the stock and agreed to pay for it, acted as a director of the corporation, received dividends, and sold the stock, we must resort to legal subtleties rather than to natural inferences, and it would clash with our established ideas of equity if one in prosperity thus dealt with by the corporation as a stockholder should, in bankruptcy, be able to escape liability on the ground that a statutory provision, useful, if for any purpose, to provide a fund for creditors and to prevent fictitious subscriptions, had not been complied with. On similar facts liability under a similar statute has been enforced in Pennsylvania. *Erie & W. Pl. Road Co. v. Brown*, 25 Pa. 156; *Boyd v. Peach Bottom R. Co.* 90 Pa. 169. The required statutory payment is one form of establishing the relationship, and it may be the only sufficient form, except when the stockholder has received the full benefit

of the contract and a legal wrong would be accomplished if he were permitted to plead noncompliance with the statute. The doctrine of estoppel is not available to sustain this theory of liability for the reason that both sides were aware of all the facts. *Shapley v. Abbott*, 42 N. Y. 443, 1 Am. Rep. 548. It is upheld rather by analogy upon the principle that defeats the defense of *ultra vires* when interposed to an action against a corporation in cases where, if that defense were to prevail, it would work injustice and accomplish a legal wrong (*Whitney Arms Co. v. Barlow*, 63 N. Y. 62, 20 Am. Rep. 504; *First Nat. Bank v. Cornell*, 8 App. Div. 427, 40 N. Y. Supp. 850), or that forbids a stockholder of a corporation *de facto* to raise the objection that its organization is not strictly *de jure* (*Buffalo & A. R. Co. v. Cary*, 26 N. Y. 75). For want of a more definite classification of the grounds of liability we may say that a sound public policy

Corporation—
insolvency—
liability on
stock subscrip-
tion—failure to
comply with
statutory
requirements.

and the plain rules of good faith dictate that defendant should not escape liability on the facts pleaded. On au-

thority the proposition is inapplicable to bare subscriptions, but that is not the question before us.

The second ground of objection to the complaint is not tenable. It is urged that the complaint does not show on its face that it is necessary to collect the full amount of defend-

Pleading—
action for stock
subscription—
necessity of
payment.

ant's stock subscription in order to pay creditors of the corporation. This action is brought on

the subscription agreement in the right of the corporation by the trustee in bankruptcy. *Myers v. Sturgis*, 123 App. Div. 470, 108 N. Y. Supp. 528, affirmed in 197 N. Y. 526, 90 N. E. 1162. The stockholder is primarily liable on his contract for the full amount he agreed to pay, and as the bankruptcy court has directed the trustee to issue a call or demand therefor, the propriety or

validity of this order of a court of competent jurisdiction cannot be questioned collaterally. *Clevenger v. Moore*, 71 N. J. L. 148, 58 Atl. 88. The presumption is that the necessary determination has been made that the entire amount unpaid is required to pay the debts of the corporation. If this presumption is overcome, recovery will be limited to the necessary sum (*Johnston v. Allis*, 71 Conn. 207-219, 41 Atl. 816), or the bankruptcy court will see that no wrong is done (*Kennedy v. Gibson*, 8 Wall. 498, 505, 19 L. ed. 476, 478). But the order is conclusive upon the right of the trustee in bankruptcy to maintain this action. *Sanger v. Upton*, 91 U. S. 56, 23 L. ed. 220.

When the so-called trust-fund doctrine is invoked to impress a stockholder's liability to creditors, the cause of action does not arise upon the contract of subscription, nor in the right of the corporation.

In *Scoville v. Thayer*, 105 U. S. 143, 26 L. ed. 968, full-paid shares were issued for 20 per centum of their face value. The company became bankrupt. It was held that the agreement with stockholders was void as to creditors because they had a right to presume that the stock would be paid in full. "Such a contract, though binding on the company, is a fraud in law on its creditors, which they can set aside." *Scovill v. Thayer*, 105 U. S. 154, 26 L. ed. 973. The action was based on fraud, and it was, therefore, necessary to plead and prove the facts which entitled the plaintiff to the relief sought. Allegation and proof were necessary that the indebtedness of the corporation had been ascertained and the liability of each share of stock fixed, because creditors were entitled to collect from the stockholders only so far as is necessary to pay the debts. "They were authorized to collect no more. . . . For if in a bankruptcy proceeding any surplus remained after payment of debts, it would go to the company and not to the stockholders. And we have

seen that the company in this case would have no right to any surplus." *Scovill v. Thayer*, 105 U. S. 155, 26 L. ed. 973. The trust-fund doctrine as applied to stock subscriptions is not recognized in New York and the contractual liability for stock subscriptions alone is enforced; that is, except for statutory liabilities, creditors can collect no more from the stockholder than he agreed to pay the corporation for his stock. *Southworth v. Morgan*, 205 N. Y. 293, 51 L.R.A. (N.S.) 56, 98 N. E. 490.

Actions to collect unpaid subscriptions of bankrupt corporations have been held to be maintainable only on like allegations and proof as required in *Scovill v. Thayer*, *supra*. *Stevens v. Episcopal Church History Co.* 140 App. Div. 570, 125 N. Y. Supp. 573; *Hunt v. Sharkey*, 31 Am. Bankr. Rep. 894; *Rosoff v. Gilbert Transp. Co.* 204 Fed. 349; *Cumberland Lumber Co. v. Clinton Hill Lumber Mfg. Co.* 57 N. J. Eq. 627, 42 Atl. 585; *Re Newfoundland Syndicate*, 28 Am. Bankr. Rep. 119; *Chandler v. Keith*, 42 Iowa, 99. These decisions are, for the greater part, based on the supposed authority of *Scovill v. Thayer*, *supra*, and they fail to distinguish between unpaid subscriptions and the so-called

trust-fund liability; between the action on the stock subscription contract and the action which ignores that contract and assesses the stockholders in direct conflict with its terms. We may well agree with the reasoning of these cases, however, that payment in full of the stockholder's liability upon unpaid subscriptions for capital stock in a bankrupt corporation should not be unnecessarily insisted upon, and that the trustee should recover only such amounts as are determined to be necessary to pay the debts and expenses; but the plaintiff herein has the authority of the bankruptcy court to demand and collect of the defendant the full amount due, and the defendant will not be heard to say that the complaint must allege in terms that such court has determined by a preliminary investigation and assessment that the whole amount is necessary to pay debts and expenses.

The order appealed from should be affirmed, with costs, and the question certified answered in the affirmative.

Hiscock, Ch. J., Collin, Cuddeback, Hogan, and Cardozo, JJ., concur.

Chase, J., absent.

ANNOTATION.

Effect upon the validity of subscription to corporate stock, of failure to comply with statutory requirement of payment at the time of subscribing.

- I. Introductory, 1116.
- II. Rule that subscription is invalid unless payment is made, 1118.
- III. Rule that subscription is valid although payment is not made, 1122.
- IV. Subscriptions of commissioners, 1128.
- V. Effect of giving note or check in lieu of cash, 1128.
- VI. Effect of subsequent payment, 1131.
- VII. Estoppel by subsequent acts, 1132.

I. Introductory.

Many statutes relating to stock subscriptions require payment by the subscriber at the time of subscription of a per cent of his subscription, or a specified number of dollars for each

share subscribed for by him. The statutes vary in their provisions on the question. Some expressly require the payment in cash; others are silent as to a cash payment except as such payment may be implied from the general requirement of payment. Some statutes require the specified amount to be "paid," others merely make it "payable." In some there is no provision as to the effect of failure to make the payment; others make the subscription void in the absence of such a payment. Still others provide that no subscription shall be taken unless the payment is made. Statutory variations account for some, but

not all, of the differences in holdings as to the effect of failure to make the required payment.

There are some questions closely connected with that under annotation, but which are not within the scope of this discussion. The statutes herein discussed require the payment to be made upon each share subscribed, and, impliedly at least, impose upon the subscriber the duty of making such payment. Other statutes require a certain percentage of the capital stock to be paid in, without so clearly imposing such duty upon the individual subscribers. A requirement that a specified per cent of the stock subscribed shall be paid before the corporation is organized, or before it begins business, has been interpreted not to require a payment of the specified per cent of each share subscribed, but to require that the specified per cent on the whole amount subscribed be paid without regard to the sources from which it may come. *Yonkers Gazette Co. v. Taylor* (1898) 30 App. Div. 334, 51 N. Y. Supp. 969; *Eastern Pl. Road Co. v. Vaughan* (1856) 14 N. Y. 546; *Ogdensburgh, R. & C. R. Co. v. Frost* (1856) 21 Barb. (N. Y.) 541; *Beattys v. Solon* (1892) 64 Hun, 120, 19 N. Y. Supp. 37, affirmed without discussion of this point (1893) 136 N. Y. 662, 32 N. E. 1062; *Spartanburg & A. R. Co. v. Ezell* (1880) 14 S. C. 281. Accordingly, where the required percentage of the stock has been paid, the fact that the subscriber being sued has not paid his percentage is immaterial. *Lake Ontario, A. & N. Y. R. Co. v. Mason* (1857) 16 N. Y. 451; *Rensselaer & W. Pl. R. Co. v. Barton* (1857) 16 N. Y. 457, note; *Troy & R. R. Co. v. Kerr* (1854) 17 Barb. (N. Y.) 581; *United Growers Co. v. Eisner* (1897) 22 App. Div. 1, 47 N. Y. Supp. 906. In *Utah Hotel Co. v. Madsen* (1913) 43 Utah, 285, 134 Pac. 577, an action against a subscriber to recover his subscription, his defense that he had not paid in 10 per cent of the amount subscribed by him, and therefore did not become a stockholder, was overruled by the court, it appearing that more than 10 per cent of the entire stock had been paid in.

It was further held in this case that the statutory provision that the corporation should not file the affidavit indicating its intention to transact business until "at least 10 per cent of the stock subscribed for by each stockholder, and not less than 10 per cent of the capital stock of the corporation, had been paid in, was a condition imposed for the benefit of creditors of the corporation, and could not be taken advantage of by the subscriber in defense of his liability upon his stock." A stockholder, when sued upon his statutory liability to creditors of the corporation to an amount equal to the stock held by him, cannot defend upon the ground that the required percentage of the capital stock had not been paid in prior to the beginning of business by the corporation. *Eaton v. Aspinwall* (1859) 19 N. Y. 119, approved in *Aspinwall v. Sacchi* (1874) 57 N. Y. 381.

A statute which governed subscriptions taken before organization was held not to apply to subscriptions taken after organization, in *Erie & W. Pl. Road Co. v. Brown* (1855) 25 Pa. 156, and *Philadelphia & W. C. R. Co. v. Hickman* (1857) 28 Pa. 318. It was held in *Hanover Junction & S. R. Co. v. Grubb* (1876) 82 Pa. 36, that a conditional subscription made after the organization of the corporation was valid, although a cash payment required by statute for the validity of subscriptions generally was not made. And the reverse has been held, that a statute relating to subscriptions after organization does not govern subscriptions made before. *Donaldson v. Rabenhold* (1913) 23 Pa. Dist. R. 795.

This note does not deal in general with decisions based upon the theory of the foregoing cases that the statute did not govern the subscription involved, but with decisions dealing with the effect of failure to comply with a statute that does apply to the subscription.

The right of a subscriber to defeat liability on the ground that his subscription is invalid presents a different question than the right of a subscriber to defeat liability on the

ground that the corporation is not legally organized. The latter question is beyond the scope of this discussion.

The present note is confined to statutory requirements, as distinguished from requirements prescribed by the corporation or its directors. A distinction was made in *Hayne v. Beauchamp* (1846) 5 Smedes & M. (Miss.) 515, between a statutory requirement that a certain percentage or amount should be paid at the time of subscription, and such a requirement prescribed by the directors. This distinction was applied in *Water Valley Mfg. Co. v. Seaman* (1876) 53 Miss. 655, and it is there held that such a requirement, not being a statutory requirement, but in the contract of subscription, the failure to make the required payment at the date of subscription did not avoid the contract.

The present note is also confined to cases in which there was an actual subscription, as distinguished from an incomplete agreement. A subscriber who had not made the required payment was held not bound in *Galveston Hotel Co. v. Bolton* (1877) 46 Tex. 633, in which case the decision was based largely upon the fact that no subscription was intended, that which was urged as a subscription being merely a signing of a paper intended as an experimental effort to ascertain who would subscribe. The court states that the fact that no percentage was paid is important, as tending to show that whatever was done was an incomplete transaction, and not a consummated act of subscription. There is no decision upon the general rule. See *Van Schaick v. Mackin* (1908) 129 App. Div. 335, 113 N. Y. Supp. 408, *infra*, V.

II. Rule that subscription is invalid unless payment is made.

It is the theory of some courts that the payment of the required amount in case of subscription before organization is a condition precedent to the validity of the subscription.

Georgia.—*Wood v. Coosa & C. River R. Co.* (1861) 32 Ga. 278 (statute provided: "No subscription shall be received and allowed unless there shall

be paid to the commissioners, at the time of such subscription, the sum of \$5 on each share subscribed").

Maryland.—*Taggart v. Western Maryland R. Co.* (1866) 24 Md. 563, 89 Am. Dec. 760 (statute required that upon every subscription there should be paid, at the time of subscribing, the sum of \$1 on every share subscribed). But see *Oler v. Baltimore & R. R. Co.* (1875) 41 Md. 53, *infra*, III.

New York.—*Jenkins v. Union Turnp. Road* (1804) 1 Cai. Cas. 86 (charter provided that "every subscriber shall, at the time of subscribing, pay . . . the sum of \$10 for each share so subscribed"); *Crocker v. Crane* (1839) 21 Wend. 211, 34 Am. Dec. 228 (statute required payment of \$2 on each share at the time of subscription).

Pennsylvania.—*Hibernia Turnp. Road v. Henderson* (1822) 8 Serg. & R. 219, 11 Am. Dec. 593 (statute contained the following: "Provided, always, that every person offering to subscribe in the said books . . . shall previously pay to the attending commissioners the sum of \$5 for each and every share to be subscribed"); *Ogle v. Somerset & M. Turnp. Road Co.* (1825) 13 Serg. & R. 256.

South Carolina.—*Charlotte & S. C. R. Co. v. Blakely* (1848) 34 S. C. L. (3 Strobb.) 245 (statute provided: "On each share of stock subscribed for, the subscriber shall pay to the commissioners . . . the sum of \$5 . . . on nonpayment of said installment, the subscription shall be void." There were also other irregularities in the subscription).

Subscribers to stock in a corporation who have not made the payment required by statute are held not to be necessary parties to an action by creditors against stockholders, to enforce liability for unpaid subscriptions. *Ford v. Chase* (1907) 118 App. Div. 605, 106 N. Y. Supp. 30, affirmed in (1907) 189 N. Y. 504, 81 N. E. 1164.

A curative act was enacted in Pennsylvania to validate statutory irregularities in taking subscriptions, and this was held in *Clark v. Monongahela Nav. Co.* (1840) 10 Watts (Pa.) 364, to validate a subscription taken by the

commissioners without requiring the statutory payment.

As shown subsequently, a distinction has been made between subscriptions before and after organization. Under a statute which clearly relates to subscriptions after organization, the rule of the foregoing cases has been applied, and subscriptions without the required payment held invalid. *Black River & U. R. Co. v. Clarke* (1862) 25 N. Y. 208 (statute required payment of 10 per cent by each subscriber upon the amount subscribed by him at the time of subscribing); *New York & O. Midland R. Co. v. Van Horn* (1874) 57 N. Y. 473 (statute provided that "at the time of subscribing, every subscriber shall pay . . . 10 per cent on the amount subscribed by him in money; and no subscription shall be received or taken without such payment"); *United Growers Co. v. Eisner* (1897) 22 App. Div. 1, 47 N. Y. Supp. 906; *Hapgood v. Lusch* (1907) 123 App. Div. 23, 107 N. Y. Supp. 331; *Van Schaick v. Mackin* (1908) 129 App. Div. 335, 113 N. Y. Supp. 408; *South Buffalo Natural Gas Co. v. Bain* (1894) 9 Misc. 425, 30 N. Y. Supp. 264; *Harriman Nat. Bank v. Palmer* (1916) 93 Misc. 431, 158 N. Y. Supp. 111. [The New York cases cited in the introduction, *supra*, I., which sustain the validity of a subscription on which the required payment has not been made where the required percentage has been paid in by other subscribers, are not contrary to the foregoing cases, but, as there explained, are decided under a different form of statute.] Without stating whether the subscription was before or after incorporation, a subscription without the payment of the required statutory amount is held void in other cases. *State Ins. Co. v. Redmond* (1880) 1 McCrary, 308, 3 Fed. 764; *May v. Charlotouis* (1908) 128 App. Div. 127, 112 N. Y. Supp. 554 (obiter); *Perry v. Hoadley* (1887) 19 Abb. N. C. (N. Y.) 76; this rule is recognized in *Sanders v. Proctor* (1916) 172 App. Div. 713, 158 N. Y. Supp. 438.

A subscription to an existing corporation for stock in a branch corporation is void, where the cash payment

required by statute is not made. *Hayne v. Beauchamp* (1846) 5 Smedes & M. (Miss.) 515. The statute required each subscriber to pay 10 per cent on the amount of his subscription at the time of subscription. But it is held in this case that a subscriber to the stock of the branch corporation, who gave his note in lieu of the cash payment, had it discounted by the main corporation, and checked out the proceeds in payment of stock, was a stockholder not by virtue of his original subscription, but by the subsequent purchase, and was liable on the note.

A subscription without payment of the required amount was held void, where the corporation had a charter provision that upon every subscription of stock "there shall be paid at the time of subscribing . . . the sum of 50 cents on each share subscribed." *Fiser v. Mississippi & T. R. Co.* (1856) 32 Miss. 369. When the subscription was made with reference to the time of organization of the corporation does not appear. The subscription in this case was held validated, however, by the subsequent payment of the required amount before calls were made for instalments of stock sued for.

A subscription after organization was held invalid in *Re Standard F. Ins. Co.* (1885) 12 Ont. App. Rep. 486, under a statute providing that no subscription shall be legal or valid until 10 per cent shall have been actually and bona fide paid thereon. The court states that this statute was probably intended to apply in the first instance to subscriptions required as a preliminary condition to the company's commencing operations, but that under it a subscription after organization was not valid unless the payment had been made.

See *Re Central Bank and Denison v. Lesslie* (Can.) *infra*, III.

The reasoning by which the conclusion that the subscription is invalid has been reached best appears from the language of the courts. In *Hibernia Turnp. Road v. Henderson* (1822) 8 Serg. & R. (Pa.) 219, 11 Am. Dec. 593, Tilghman, Ch. J., referring to the statute set out above, states that

"words more strong and an intention more clearly expressed to make the payment of \$5 a condition precedent to the subscription cannot be conceived. . . . Assuming, then, that it was the intent of the law that no subscription should be received without a previous payment of \$5 a share, the case will be reduced to this simple question: Can a contract be enforced in a court of justice, which was made in violation of an act of assembly? It is not the first time this question has been asked in this court, and it has received but one answer. The contract cannot be enforced. . . . I consider the contract in this case, then, as void *ab initio*. The commissioners had no right to receive the subscription, or the corporation to ratify it. It was flying in the face of the law under which they drew their breath." Gibson, J., states that "the commissioners were ministerial officers, acting under a limited authority which they were strictly bound to pursue, and the act is positive that a deposit of \$5 on a share was to be a condition precedent. The permission to subscribe without the deposit was, therefore, a breach of duty, and the contract was illegal. But it is said the company to be formed was the only party intended to be benefited, and that it might waive the provisions thus introduced in its favor, and ratify the proceedings of the commissioners, who are said to have been exclusively its agents. But were the company in fact the only persons interested in the execution of this provision? It seems to me that not only the public at large, but various individuals, had an interest distinct from that of the company, the members of which were perhaps less concerned than any other party." Gibson, J., then states that the purpose of this provision in the statute was to insure bona fide subscribers, that the commissioners acted under special instructions in the statute, and were bound by them. The court in *Wood v. Coosa & C. River R. Co.* (1861) 32 Ga. 273, states that it would willingly have supported an action against the subscriber on his subscription, "be-

cause it is with an ill grace that a man puts his hand to a contract by which he expects to be benefited, and afterwards refuses to comply with it. But it has struck me in one strong point of view on which I cannot shut my eyes. The subscription was taken in direct opposition to the act of assembly. It was, therefore, void. So of this case. The corporation depended for its existence purely on the will of the legislature, who had the power and the right to dictate the terms and conditions on which one could become a member thereof, and entitled to the privileges and benefits of the grant. The condition prescribed in this charter of membership was the payment of \$5 on each share subscribed, at the time of such subscription, and without which no subscription 'should be received or allowed.' The subscriber had not paid the \$5; hence, his was no subscription; it amounted to nothing and could not be collected; for to allow such subscription enforced would be to admit the subscriber a member of the corporation against the express declaration of the statute. This cannot be. It is said that the defendant has ratified his subscription by offering, subsequently, to pay calls on that subscription, by voting in the organization, and otherwise acting as a member of the corporation. These were not the things prescribed by the act to enable him to become a member of the corporation. How can they have that effect when the terms of admission prescribed have not been performed? It is said, too, that the company has been organized on the faith of his subscription, and that of others; that the company has commenced the building of the road, and has expended large sums of money on the same; and that to allow the defendant to avoid his subscription on the score of its illegality, or otherwise, would be to allow him to commit a fraud on others who have subscribed innocently and in good faith, by compelling them to have the burden of his subscription as well as their own. If this were an action by one who had subscribed for stock on the faith of this subscription, believing it to have been made in

compliance with the charter, and who had been injured thereby, this might be a good argument to authorize a recovery in such action; but it cannot be a reason to authorize a recovery by the corporation of a subscription made in direct violation of the charter." In *Jenkins v. Union Turnp. Road* (1804) 1 Cal. Cas. (N. Y.) 86, where the subscription was before the organization of the corporation, the charter of which contained a provision that "every subscriber shall, at the time of subscribing, pay unto either of the said commissioners the sum of \$10 for each share so subscribed," the court states that the "commissioners were appointed by the statute to perform certain duties particularly prescribed. They were to receive subscriptions and to receive for the benefit of the defendants \$10 on each share of the stock of their company. The plaintiff subscribed, but it does not appear that he paid. At the time these steps were taken the corporation described in the act was not in existence. It was incapable of contracting. The acts to be performed by the commissioners were merely preparatory to its creation. To give effect to their acts their power must be strictly pursued. They had no discretion, no latitude of action; their line of conduct was marked with the utmost precision. They were directed to exact from the persons who were to be admitted members of the corporation, both subscription and payment as a condition precedent to their admission. If they omitted either to subscribe or to pay they did not come within the terms of admission. If so, the bare act of subscription was wholly nugatory." The court in *Hayne v. Beauchamp* (1846) 5 Smedes & M. (Miss.) 515, states: "Here, then, is a positive requirement of law that each individual subscribing for stock should pay a certain per cent at the time of subscribing. Could anyone become a stockholder without complying with this provision? It would seem not. It amounts in effect to a declaration prohibiting anyone from becoming a subscriber without paying the required amount. Two

things were necessary to constitute a stockholder: first, a subscription, or some act equivalent; and, second, the payment of the required sum, the latter being the most important act because it constituted the groundwork on which the mutual rights of the parties depended. It was a condition precedent to the right to become a stockholder, and without its performance the subscriber acquired no rights nor were any obligations imposed on the directors or commissioners. . . .

We have here a plain unambiguous declaration of law. We are not at liberty to say that it was useless, or that its object could be accomplished in a different way and at a different time. Subscribing for stock without paying the 10 per cent was a direct violation of the law, and, being so, it was void."

Under this theory, the corporation upon its organization cannot recover the required payment. *Hibernia Turnp. Road v. Henderson* (1822) 8 Serg. & R. (Pa.) 219, 11 Am. Dec. 593. The corporation cannot recover on the subscription. *Wood v. Coosa & C. River R. Co.* (1861) 32 Ga. 273; *Jenkins v. Union Turnp. Road* (N. Y.) *supra*; *New York & O. Midland R. Co. v. Van Horn* (1874) 57 N. Y. 473; *Charlotte & S. C. R. Co. v. Blakely* (1848) 34 S. C. L. (3 Strobb.) 245. See also *Albright v. Texas, S. F. & N. R. Co.* (1895) 8 N. M. 110, 42 Pac. 73, *infra*, III. Nor can a creditor of the corporation recover on the subscription (*Perry v. Hoadley* (1887) 19 Abb. N. C. (N. Y.) 76), even though the subscription agreement has been assigned to him (*Harriman Nat. Bank v. Palmer* (1916) 93 Misc. 431, 158 N. Y. Supp. 111).

As above stated, a distinction has been made between subscriptions before and after organization; it being held that the latter are valid, although the required payment is not made, not on the theory that the statute is not applicable to such subscription, but on the theory that the making of this cash payment may be waived by the corporation. *Taggart v. Western Maryland R. Co.* (1866) 24 Md. 563, 89 Am. Dec. 760. See statute, *supra*. Subscriptions made after the corpo-

rate organization have been sustained, although the cash payment has not been made, in jurisdictions which have not taken a position upon the validity of subscriptions taken before. *Minneapolis & St. L. R. Co. v. Bassett* (1874) 20 Minn. 535, Gil. 478, 18 Am. Rep. 376. The charter provided that "\$5 on each share shall be paid at the time of subscribing." The court states: "In this case, the subscription was made, as is alleged in the complaint and admitted by the demurrer, after the plaintiff's incorporation and organization. The plaintiff's charter does not forbid the taking of subscriptions without concurrent payment of \$5 upon each share, nor does the charter declare that subscriptions made without such payment shall be void. In our opinion, the plaintiff's charter, in providing that '\$5 on each share shall be paid at the time of subscribing,' while it confers upon plaintiff the right to insist upon the payment, does not make the successful exercise of this right indispensable to the validity of a subscription. The provision is a privilege for the benefit of the company, and, whatever may be imagined, there is no satisfactory reason for supposing that the legislature had any other object in enacting it. . . . If we are right in the opinion that this provision was made for the plaintiff's benefit, we can conceive of no reason why, in accordance with the familiar maxim, the plaintiff may not waive the privilege thus conferred upon it."

That failure to make payment as required by statute does not invalidate the subscription is the theory of the court in *Southern L. Ins. & T. Co. v. Lanier* (1853) 5 Fla. 110, 58 Am. Dec. 448, although that decision was based in part upon the theory that there was no provision in the act requiring the making of a cash payment on the stock there involved, which was stock that had been surrendered by the original subscribers and was being reissued.

III. Rule that subscription is valid although payment is not made.

The rule supported by the majority of courts is that the failure to pay the required statutory amount in cash

does not invalidate the subscription.

Alabama.—*Selma & T. R. Co. v. Rountree* (1845) 7 Ala. 670 (statute provided: "The subscription . . . shall be paid as follows, viz., \$5 on each share at the time of subscribing," etc.).

Georgia.—*Napier v. Poe* (1852) 12 Ga. 170 (statute, after providing for commissioners to take subscription, continued: "When the amount of two hundred and fifty thousand dollars shall have been subscribed bona fide, and the sum of ten per cent thereon shall have been paid in gold or silver or the bank notes of this state paying specie," the commissioners shall give notice and proceed to organize the corporation); *Mitchell v. Rome R. Co.* (1855) 17 Ga. 574 (statute provided: "Upon the subscription for shares in said stock, the subscribers shall pay the sum of five dollars upon each share subscribed for by such subscriber: Provided, that said company may commence the construction . . . so soon as three thousand shall be subscribed").

Illinois.—*Illinois River R. Co. v. Zimmer* (1858) 20 Ill. 654 (statute not set out, but is stated by court to have required 10 per cent of subscription to be paid at the time of making the subscription).

Indiana.—*Judah v. American Live-stock Ins. Co.* (1853) 4 Ind. 393 (statute required that at the time of subscribing there should be paid "an instalment of \$1 on each share of stock" subscribed).

Kentucky.—*Wight v. Shelby R. Co.* (1855) 16 B. Mon. 4, 63 Am. Dec. 522 (statute not set out).

Louisiana.—*Red River R. Co. v. Young* (1843) 6 Rob. 39 (charter required an instalment of 5 per cent at the time of subscription); *Mexican Gulf R. Co. v. Viavant* (1843) 6 Rob. 305 (charter required \$2 per share to be paid in at the time of subscribing); *Vicksburg, S. & T. R. Co. v. McKean* (1857) 12 La. Ann. 638.

Maryland.—*Oler v. Baltimore & R. R. Co.* (1875) 41 Md. 583 (statute directs that \$5 on each share be payable at the time of subscription); *Webb v. Baltimore & E. S. R. Co.*

(1898) 77 Md. 92, 39 Am. St. Rep. 396, 26 Atl. 113 (decided under § 162 of art. 23 of Maryland Code, which is not set out).

New Hampshire.—Piscataqua Ferry Co. v. Jones (1859) 39 N. H. 491 (by-laws provided that "10 per cent shall be payable upon subscription, or the subscription shall be void").

New Mexico.—Albright v. Texas, S. F. & N. R. Co. (1895) 8 N. M. 110, 42 Pac. 73.

North Carolina.—Haywood & P. Pl. Road Co. v. Bryan (1858) 51 N. C. (6 Jones, L.) 82 (statute required "that upon any subscription . . . there shall be paid at the time of subscribing . . . the sum of \$1 on every share subscribed." Statute did not declare the subscription void if payment was not made as in *McRae v. Russell*, *infra*, V. See discussion, *infra*).

Ohio.—Henry v. Vermillion & A. R. Co. (1848) 17 Ohio, 187 (statute not set out).

Texas.—Blair v. Rutherford (1868) 31 Tex. 465 (statute provided that the commissioners should "receive no subscriptions to said stock unless 5 per cent thereof in cash shall be paid to them at the time of subscribing; and, should they receive subscriptions to said stock without payment, they shall be personally liable to pay the same to said corporation when organized").

Virginia.—Stuart v. Valley R. Co. (1879) 32 Gratt. 146; *West End Real Estate Co. v. Claiborne* (1900) 97 Va. 734, 34 S. E. 900.

West Virginia.—Pittsburgh, W. & K. R. Co. v. Applegate (1882) 21 W. Va. 172 (statute required \$10 per share to be paid at the time of subscription).

Canada.—*Re Central Bank* (1888) 25 Can. L. J. 238 (statute required payment of 10 per cent in thirty days); *Denison v. Lesslie* (1879) 3 Ont. App. Rep. 536 (statute required that on the subscription each subscriber should pay forthwith 10 per cent of the amount subscribed by him).

The court, in *Clark v. Farrington* (1860) 11 Wis. 306, inclines to this

rule, although there is no decision on the question.

See *Minneapolis & St. L. R. Co. v. Bassett* (1874) 20 Minn. 535, Gil. 478, 18 Am. Rep. 376, *supra*, II., *Utah Hotel Co. v. Madsen* (1913) 43 Utah, 285, 134 Pac. 577, *supra*, I., and *Vermont C. R. Co. v. Clayes* (1848) 21 Vt. 30, *infra*, V.

See *Re Standard F. Ins. Co. (Ont.)* *supra*, II.

See *Taggart v. Western Maryland R. Co.* 24 Md. 563, 39 Am. Dec. 760, and *Minneapolis & St. L. R. Co. v. Bassett* (1874) 20 Minn. 535, Gil. 478, 18 Am. Rep. 376, *supra*, II., as to subscription after organization.

The early cases in Pennsylvania held a subscription invalid unless the cash payment was made. Subsequently in that state, under slightly different provisions, subscription before organization was held not invalid because of failure to make a payment. *Garrett v. Dillsburg & M. R. Co.* (1875) 78 Pa. 465. The statute involved provided that every subscriber shall pay 10 per cent of his subscription in money in good faith when he subscribes, "and no subscription shall be received or taken without such payment." See *supra*, II., for contrary decisions. The court states that "the law does not expressly require the payment of 10 per cent or any other sum when making an original subscription, before application for the charter." The court then refers to the tentative nature of the proposed corporation, which in this case was a railroad company, stating that until the sum of \$9,000 per mile was obtained the project was experimental and inchoate, and continues: "During the experiment it would be unreasonable to require anyone to pay in his money, and to whom, during this period of uncertainty, could the first subscriber pay?" And the court concludes that, "in the absence of an express provision of law requiring the original subscribers to pay 10 per cent in the manner required of the subscribers after the organization, it seems to us an original subscriber ought not to be permitted to escape from his contract, which he suffered to ripen into a finality, by

permitting his name to remain until organization became complete on its faith." The corporation was accordingly held entitled to recover of the subscriber the amount of his subscription. A reason for holding the subscription valid although payment is not made, similar to that given in *Garrett v. Dillsburg & M. R. Co. (Pa.) supra*, is expressed in *Denison v. Lesslie* (1879) 3 Ont. App. Rep. 536, where, in answer to the argument that it was ultra vires of the directors to accept a subscription unless it were accompanied by a present payment of 10 per cent, the court states that from the act as a whole it is clear "that the directors might solicit subscriptions and after a sufficient number have been received demand the payment of the 10 per cent. It is not probable that the promoters of the act failed to anticipate the unwillingness which persons called upon to subscribe would feel to pay any money until there had been subscriptions enough to secure organization. . . . Again, the persons entitled to vote at the first meeting are the subscribers who have paid up 10 per cent. It does not appear to be a forced construction to hold that this contemplates the possibility of persons being subscribers and not having paid the 10 per cent."

The supreme court of Maryland made a distinction between a statute requiring \$1 to be "paid" by the subscriber at the time of making his subscription to the stock, and a statute directing that \$5 on each share shall be "payable" at that time, holding that in case of the former act, by the very terms, the validity of the subscription is made to depend upon the actual payment, at the time, of the specified sum upon each share, while, in the latter, the validity is not made so dependent, but its meaning and effect are to fix the time when such sum becomes due and collectable. *Oler v. Baltimore & R. R. Co.* (1875) 41 Md. 583. Apart from the fact that the provision in question was contained in a by-law, and not in the charter or statute, the court in *Piscataqua Ferry Co. v. Jones* (1859) 39 N. H. 491, states that the provision in that case, viz.,

"10 per cent shall be payable upon subscription, or the subscription shall be void," is not that the 10 per cent shall be actually paid, but that it shall be payable, and the court states further that "it is putting no forced construction upon this contract to hold that the intention was not that each subscriber by the terms of his subscription and of this by-law was obliged actually to pay his 10 per cent, but that this amount should upon subscription, and as a condition precedent and a part of the contract of subscription, become due and payable at any time when the company should call."

It is the view of some of the foregoing cases, however, that the relation of stockholder is not finally established by the subscription. For example, in *Haywood & P. Pl. Road Co. v. Bryan* (1858) 51 N. C. (6 Jones, L.) 82, it is stated that "it may be that, at the first general meeting of the stockholders, the defendant might have been excluded from acting as one of them until he had paid the preliminary amount required of him according to the terms of his subscription, but they were not bound to do so, either by the terms of their charter or by any known principle of law. If they chose to trust him for the money he owed them, it would be a strange rule which would allow him to take advantage of their forbearance and his own neglect. They were at liberty to receive him as a stockholder, and if they did so, and he acted as one of them in organizing the company and in the regulation of its affairs, he cannot afterwards be heard to disavow his connection with it and repudiate his contract to contribute to its funds."

Under the statute involved in *Napier v. Poe* (1852) 12 Ga. 170, *supra*, the commissioners were held not entitled to organize the corporation until the drafts and checks there taken had been paid. See *infra*. Under other of the statutes, the corporation was held to have the right to organize without the payment of the required amount in cash. *Mitchell v. Rome R. Co.* (1855) 17 Ga. 574.

An English statute creating a com-

pany, which provided that "the company shall not issue any share . . . nor shall any share vest in the person accepting the same, unless and until a sum not being less than one-fifth part of the amount of such share shall have been paid up in respect thereof," was held not to prevent one to whom shares were issued without the required payment from becoming a shareholder, and liable as such, but only to prevent the dealing in such shares by the shareholder. *East Gloucestershire R. Co. v. Bartholomew* (1867) L. R. 3 Exch. (Eng.) 15. Similar decisions under a similar statute appear in *McEuen v. West London Wharves & Warehouses Co.* (1871) L. R. 6 Ch. (Eng.) 655, 40 L. J. Ch. N. S. 471, 25 L. T. N. S. 148, 19 Week. Rep. 337, and *Re West London Wharves & Warehouses Co.* (1868) 16 Week. Rep. (Eng.) 660. Accordingly in these cases one to whom stock had been issued was held liable as a shareholder to calls by the company. But in *Re Towns Drainage & Sewage Utilization Co.* (1873) L. R. 16 Eq. (Eng.) 104, 42 L. J. Ch. N. S. 786, 21 Week. Rep. 933, a shareholder who had not made the required payment, and who had transferred his shares, the transfer having been duly registered and his name removed from the register of shareholders, was held not to be liable as a contributor, on the theory that the agreement to take shares rested in fieri and was discharged by the transfer, which, being executed and registered, operated as a new contract between the company, transferrer, and transferee.

But see *Re Standard F. Ins. Co.* (1885) 12 Ont. App. Rep. 486, supra, II., where the *Bartholomew Case* and *Re West London Wharves & Warehouses Co.* are distinguished because of the differences in the statutes involved.

That the payment of the required amount is not a condition precedent to incorporation was held in *Smith v. Tallassee Branch Central Pl. Road Co.* (1857) 30 Ala. 650, an action by the corporation upon a stock subscription. A similar decision appears in *Bibb v. Hall* (1898) 101 Ala. 79, 14 So. 98, an

action by an assignee of a note given in payment of the subscriber's total subscription, where the question was as to the corporate existence of the corporation.

It was stated in *Chamberlain v. Painesville & H. R. Co.* (1864) 15 Ohio St. 225, that a general statute requiring an instalment of \$5 on each share of stock, to be made payable at the time of making the subscription, does not prescribe the form of making subscriptions, nor does the want of a stipulation for the payment of \$5 on each share of stock invalidate the subscription. This decision is approved in *Ashtabula & N. L. R. Co. v. Smith* (1864) 15 Ohio St. 323, where it was held that a conditional subscription was valid, although the cash payment had not been made. The court states that this provision of the statute does not apply until after the legal relation of the stock subscriber has been established, and when this has been done, it declares that an instalment of \$5 shall be payable on each share, that the time of making the subscription refers to the time at which it becomes complete, and, in the case at bar, the liability of the conditional subscriber to pay the first instalment after assessments arose when his subscription became absolute.

When sued by corporate creditors, a subscriber of stock in a corporation cannot set up the invalidity of the corporate organization because of the fact that it began business before one half of each subscription was fully paid up, as required by statute. *Dickason v. Grafton Sav. Bank Co.* (1905) 27 Ohio C. C. 357.

One who has duly subscribed and paid the required statutory deposit cannot defend an action for subsequent calls on the ground that other subscribers have not paid the statutory deposit. *Swartwout v. Michigan Air Line R. Co.* (1872) 24 Mich. 389.

The most general theory advanced by the courts which reach the conclusion that a subscription is not invalidated by failure to make the required payment is that the subscriber cannot thus take advantage of his own wrong. The court in *Pittsburgh, W. & K. R.*

Co. v. Applegate (1882) 21 W. Va. 172, says: "It seems to me to hold that the stockholder is exempt from liability because he received indulgence from the corporation is to permit him to take advantage of his own wrong. He has, by his subscription, induced others to take stock, and then, when the road is built and in operation and he thinks it is not a good investment, he will take advantage of the road which others built, and which he encouraged them to build by subscribing to the enterprise himself, and escape all obligations by pleading his own default. This would permit him to do the very thing as an individual that the law requiring the cash payment to be made at the time of the subscription, which was enacted for the public good, was designed to prevent. Both reason and the better authorities are in favor of the rule we here adopt that a subscriber to stock of a corporation cannot escape his liability to pay his subscription on the ground that he did not pay the required sum at the time he subscribed." In *Wight v. Shelby R. Co.* (1855) 16 B. Mon. (Ky.) 4, 63 Am. Dec. 522, it is stated that "the failure to pay the sum of \$1 on each share of stock subscribed cannot certainly be relied upon by the subscribers as exonerating them from their liability for their subscription. It was their duty to pay it at the time the stock was subscribed, but they should not be allowed to take advantage of their own wrong and release themselves from their whole obligation by a failure to perform a part of it. Even if the commissioners might have refused to receive the stock unless the payment had been made, yet, as they did not do it, the contract was, after the stock had been received without the payment, binding upon both sides." Again, it has been stated that, "waiving this question of pleading, we are clearly of opinion that the mere fact of the nonpayment of the 10 per cent at the time of subscription would not render it void. If the commissioners, at the time the subscriptions were made, saw fit to give time upon the part which should have

been paid down, they could not, for that reason, be permitted to refuse to the defendants the stock, when they should pay it in obedience to the call of the company for it. If the company violated its strict duty in giving them time on the first payment, they could not be allowed to take advantage of that wrong and refuse the subscribers the benefit of the stock, when they should offer to pay for it. So, on the other hand, the defendants cannot be allowed to take advantage of the indulgence extended to them when they made their subscriptions, for the purpose of repudiating them. This indulgence is a most ungracious defense, which should not be allowed unless it is strictly required by some inflexible rule of law. Good faith to other subscribers, who may have been induced to take stock on the strength of these very subscriptions, requires that the defendants shall go on with them in the execution of the enterprise. Good faith to the creditors of the company, who had a right to look to the list of subscribers to determine whether the company was worthy of credit, imperiously demands that those who by their subscriptions induced the credit shall be compelled to contribute to the fund from which they are to receive their pay." *Illinois River R. Co. v. Zimmer* (1858) 20 Ill. 654.

Other cases hold that the parties may waive the payment of the required amount. *Re Central Bank* (1888) 25 Can. L. J. 238 (apparently this subscription was after organization). See *Taggart v. Western Maryland R. Co.* (1866) 24 Md. 563, 89 Am. Dec. 760, *supra*, II.

Other cases proceed upon the theory that the statute does not require payment in cash. *Selman & T. R. Co. v. Rountree* (1845) 7 Ala. 670. The court discusses this question as follows: "The third section of the charter which is relied on by the defendant's counsel certainly does not in terms require the payment of the 5 per cent in money at the time of subscribing as a condition precedent to becoming a subscriber. Its object apparently is to settle definitely just

when and at what periods the whole amount subscribed shall be paid. Five dollars is to be paid at the time of subscribing, and the residue upon the call of the directors, who, by the proviso, are prohibited from calling for more than 10 per cent at any one time, and required to give twenty days' notice before the payment can be demanded. The obvious design of this section was to secure the stockholders against improper and unnecessary exactions from the directory, and is in the nature of a contract between the stockholders and the directors as to the time of payment of the entire sum subscribed."

See *Oler v. Baltimore & R. R. Co.* (1875) 41 Md. 583, and *Piscataqua Ferry Co. v. Jones* (1859) 39 N. H. 491, *supra*.

The statute involved in *Blair v. Rutherford* (1868) 31 Tex. 465, provided that the commissioners should "receive no subscription to said stock unless 5 per cent thereof in cash shall be paid to them at the time of subscribing; and, should they receive subscriptions to said stock without payment, they shall be personally liable to pay the same to said corporation when organized." Under this statute the making of the payment of 5 per cent is held not to be a condition precedent to the organization of the company, but under it a mere personal liability or penalty is imposed on the commissioners if they shall fail to collect the 5 per cent. In this case, a bona fide holder of notes which the subscriber had given in payment of his subscription was permitted to recover thereon.

Various results follow from this interpretation of the statutes. The payment in cash of the required amount not being made a condition precedent of the corporate organization, the corporation may, after organization, enforce payment of the amount. *Mitchell v. Rome R. Co.* (1855) 17 Ga. 574. Accordingly, an action on a note given in place of cash payment was sustained.

In *Wikle v. Avary* (1913) 12 Ga. App. 148, 76 S. E. 1039, it was held that a suit upon a note given in pur-

suance of a subscription to the capital stock in a corporation could not be defeated by proof that 10 per cent of the capital stock had not been paid in.

Creditors of the corporation may recover the amount in a proceeding in equity. *Albright v. Texas, S. F. & N. R. Co.* (1895) 8 N. M. 110, 42 Pac. 73; *Henry v. Vermillion & A. R. Co.* (1848) 17 Ohio, 187. A subscriber who gives a note for the required payment, with the consent of the commissioners organizing the corporation, is liable to the corporation thereon after its organization is completed. *Selma & T. R. Co. v. Rountree* (Ala.) *supra*. The subscription being valid without such payment, calls on the subscriber may be recovered. *Illinois River R. Co. v. Zimmer* (1858) 20 Ill. 654; *Wight v. Shelby R. Co.* (1855) 16 B. Mon. (Ky.) 4, 63 Am. Dec. 522; *Red River R. Co. v. Young* (1843) 6 Rob. (La.) 39; *Mexican Gulf R. Co. v. Viavant* (1843) 6 Rob. (La.) 305; *Oler v. Baltimore & R. R. Co.* (Md.) *supra*; *Webb v. Baltimore & E. S. R. Co.* (1893) 77 Md. 92, 39 Am. St. Rep. 396, 26 Atl. 113; *Piscataqua Ferry Co. v. Jones* (N. H.) *supra*; *Haywood & P. Pl. Road Co. v. Bryan* (1858) 51 N. C. (6 Jones, L.) 82; *Pittsburgh, W. & K. R. Co. v. Applegate* (1882) 21 W. Va. 172.

In *Judah v. American Livestock Ins. Co.* (1853) 4 Ind. 333, a subscriber who was being sued for calls on his subscription pleaded the nonpayment of the statutory amount on shares other than his own, apparently. The fact of nonpayment was held no defense, and a recovery on his subscription was allowed.

A subscription in which the subscriber has given drafts at thirty days for part of the payment required, and checks for the balance, all of which paper is good, is so far valid that one who thereafter offers to subscribe and pay in cash is not entitled to mandamus to compel the commissioners to accept his subscription to the exclusion of the former. *Napier v. Poe* (1852) 12 Ga. 170. The court in *Napier v. Poe* (Ga.) *supra*, concedes that until the draft and check which were given had been paid the

subscription is in court, and the commissioners are not entitled to meet and proceed to organize the corporation; yet, conceding this, the court states that it does not follow that those who subsequently offer to subscribe and pay the required amount in cash are entitled to mandamus to compel the commissioners to accept their subscription, for, as the court states, the subsequent subscribers must stand upon their legal rights, and not upon the imperfect subscription of their adversary; that the prior subscription was, to say the least of it, in fieri, and so continued until the maturity of the draft, and while thus in process of being made other persons had no right to displace them and take up the stock; that the prior subscribers had interest in the stock sufficient to authorize the commissioners to postpone others until the expiration of the time agreed upon for the payment of the money.

Payment may be made by an agent authorized to make the subscription; at least, payment so made which has never been repudiated is valid. *Litchfield Bank v. Church* (1860) 29 Conn. 137.

IV. Subscriptions of commissioners.

Whatever may be the rule as to subscriptions generally, a commissioner for the taking of subscriptions cannot invalidate his subscription on the ground that he did not pay the required amount. *Ryder v. Alton & S. R. Co.* (1851) 13 Ill. 516; *Highland Turnpike v. M'Kean* (1914) 11 Johns. (N. Y.) 98; *Grayble v. York & G. Turnp. Road Co.* (1823) 10 Serg. & R. (Pa.) 269. In denying to a commissioner for the taking of subscriptions the right to raise the objection, the court in *Ryder v. Alton & S. R. Co.* (1851) 13 Ill. 516, states that "he had full authority to procure subscriptions to the stock and receive the 5 per cent directed to be paid by the charter. As respects the stock in question he acted both as a commissioner and subscriber. In judgment of law, he received the money when he subscribed for the stock. The \$5 on each share subscribed by him was

in his own hands for the use of the company, the instant his subscription was made. Besides, it was his official duty to require payment from subscribers, and he ought not to be allowed to set up his violation of that duty to defeat the action." In holding that a commissioner could not defeat his subscription because of nonpayment of the statutory amount, the court in *Highland Turnpike v. M'Kean* (1814) 11 Johns. (N. Y.) 98, states that "it would be a useless ceremony for him to pay himself the money required to be advanced upon the subscription."

V. Effect of giving note or check in lieu of cash.

Whether a subscription is validated by the giving of commercial paper instead of making a cash payment is a question upon which the courts are not agreed. It has been held that a note given for the amount of the cash payment does not validate the subscription, and that there can be no recovery on the subscription. *State Ins. Co. v. Redmond* (1880) 1 McCrary, 308, 3 Fed. 764; *Leighty v. Susquehanna & W. Turnp. Co.* (1826) 14 Serg. & R. (Pa.) 434; *Boyd v. Peach Bottom R. Co.* (1879) 90 Pa. 169. A note given in payment of an original issue of stock subscribed for by one who has not made the cash payment required by statute does not validate the subscription. *Hapgoods v. Lusch* (1907) 123 App. Div. 28, 107 N. Y. Supp. 331 (holding that the corporation could not recover on the note).

A check which is intended as a substitution of individual credit for the cash payment required by statute is not a sufficient compliance with the statute. *Crocker v. Crane* (1839) 21 Wend. (N. Y.) 211, 34 Am. Dec. 228. It was held in this case that no recovery could be had on the check by one who occupied no better position than the corporation. The validity of a subscription in which the subscriber gave his check for the statutory payment, and afterwards, and before the check was presented, stopped payment so that nothing was received, was denied in *Excelsior Grain Binder Co. v. Stayner* (1881) 25 Hun (N. Y.) 91.

The statute provided that no subscription should be received unless at the time of making it the person so subscribing should pay 10 per cent of the par value of the stock subscribed for, in cash. Accordingly the right of the corporation to recover on the subscription was denied. A check which was not paid was held not to validate the subscription in *Van Schaick v. Mackin* (1908) 129 App. Div. 335, 113 N. Y. Supp. 408. Accordingly the subscription was held unenforceable, but this decision seems to be based, in part at least, upon the theory that the subscription was a mere agreement to subscribe, and for this reason was unenforceable. A check drawn upon a bank in lieu of the cash payment, by a person who had no funds to his credit, and which was never presented for payment, was held in *People ex rel. Plumas County v. Chambers* (1871) 42 Cal. 201, an action in quo warranto to test the corporate franchise, not to be a sufficient compliance with a statute requiring the payment "in cash," even though it was conceded that the check would have been paid if it had been presented to the bank.

See *Blair v. Rutherford* (1868) 31 Tex. 465, *supra*, III.

Other cases take a contrary view, Admitting that no recovery can be had on the subscription, it has been held that a note given for the cash payment is valid and enforceable. *McRae v. Russell* (1851) 34 N. C. (12 Ired. L.) 224. The statute involved in this case provided that upon each share of stock subscribed the subscriber is to pay \$5, and on nonpayment of said instalment the subscription shall be void. The court states it to be true that the act says the subscription shall be void unless the first instalment is paid, but that this "only proves that no recovery could be had on the subscription. But it does not show that if, instead of paying cash, he got a receipt for it by giving his bond, the bond would be also void. To invalidate the bond it is not sufficient that it is without consideration, but there must be an unlawful and vicious consideration."

... Although such a contract be void, yet if the purchaser give his bond for the price, that bond is not void. . . . In this case the defendant could not have been compelled to pay the \$5 a share by force of the subscription; yet if he and the other subscribers chose to waive the provisions thus made for their benefit respectively, and agreed that upon his giving bond for the same it should be taken as cash, and he admitted into the company, and he deliberately does so, it is not seen that any principle of law or justice is violated or that there is any reason why he should not pay this as much as any voluntary bond."

It has been held that one who has given a note in payment of his subscription to stock in a corporation which, by its charter, is required to have a certain amount of paid-up stock before going into operation, cannot defend an action on the note on the ground of illegality in the transaction. *Pine River Bank v. Hodsdon* (1865) 46 N. H. 114.

A subscriber who gave his note in payment of his subscription was held not entitled to come into equity to be relieved of the note, where it was given in order to enable the corporation to certify that private subscriptions had been paid, that it might obtain a payment upon a subscription which was conditioned on the payment of private subscriptions. *McRae v. Atlantic & N. C. R. Co.* (1860) 58 N. C. (5 Jones, Eq.) 395.

See *Hayne v. Beauchamp* (1846) 5 Smedes & M. (Miss.) 515, 43 Am. Dec. 523, *supra*, II.

Without determining the effect of a failure to make payment in any form, it is held in *Vermont C. R. Co. v. Claves* (1848) 21 Vt. 80, that a subscription is valid, where the subscriber, with the consent of the commissioners, gives his note in lieu of the payment. The statute in this case required that "every person at the time of subscribing shall pay to said commissioners \$5 on each share for which he may subscribe, and each subscriber shall be a member of said company." It is stated by the court "that the simple fact that the com-

missioners accepted the note of the defendant in lieu of so much money, or, as the case finds, in settlement of the sum which was to have been paid upon the making of the subscription," cannot have the effect "to give the defendant the right to repudiate his contract or render it void for want of consideration. The corporation having accepted this note as so much cash, he could not certainly deny to the defendant the rights and privileges of a corporator. The act does not, as in the case of bank charters, require the first instalment to be paid in specie, and no good reason is perceived why it should. If it is paid in money's worth, every valuable purpose of a payment is answered, and we see no objection to the commissioners regarding the defendant's note as money's worth, if they saw fit." Accordingly, the corporation was held entitled to maintain an action on the note which was given to the commissioner, and which contained a promise "to pay the commissioners of the Vermont Central Railroad Company."

The court in *Clark v. Farrington* (1860) 11 Wis. 306, favors the view that a note given in lieu of the cash payment is valid.

See *Ogdensburgh, C. & R. R. Co. v. Wolley* (1864) 1 Keyes (N. Y.) 118, 3 Abb. App. Dec. 398, and other cases *infra*, VI., as to payment of note.

In *Thorp v. Woodhull* (1844) 1 Sandf. Ch. (N. Y.) 411, an action by a stockholder whose agent had given a check in payment of the cash amount required by statute, to be relieved of his subscription, it was held that the subscription was not invalidated by the giving of a check, so as to entitle the subscriber to recover security given by him to secure the payment of the balance of his subscription. The case of *Crocker v. Crane* (1839) 21 Wend. (N. Y.) 211, 34 Am. Dec. 228, *supra*, is referred to, and distinguished by the statements that in the *Crocker* Case the commissioners received checks generally, and it was manifest that they were not drawn against funds already deposited in the bank, and were not intended to be paid on presentment, while in the

Thorp Case there was only the single instance of a check given, and a reference is made to a statement by the court in *Crocker v. Crane* that the receiving of an occasional check by the commissioner might not invalidate the subscription. In *Syracuse, P. & O. R. Co. v. Gere* (1875) 4 Hun (N. Y.) 392, a check given by a subscriber to stock in a railroad company, with the understanding between the subscriber and the agent who took the subscription that the check was not to be paid, was held valid, where the commissioners appointed to receive subscriptions had no knowledge or suspicion that the check was not good, or that it would not be paid in due course. Accordingly, recovery was allowed by the corporation against the subscriber on the check. There was no evidence that a check was received from any person other than the defendant, or that the directors had any knowledge of the understanding between the agent who took the subscription, and the subscriber, that the check would not be presented or paid, and the court held that under this situation the case came within the rule announced in *Thorp v. Woodhull* (N. Y.) *supra*. It was further held that the agent who took the subscription was not authorized to make the agreement in question, so that the directors of the corporation were held not bound by it.

A bona fide payment by certified check, which was paid by the bank on which it was drawn within three days from the time it was given, was held to be a sufficient payment within the meaning of a statute providing that the articles of association of a proposed corporation should not be filed and reported in the office of the secretary of state until at least \$1,000 in stock for every mile of railroad proposed to be made was subscribed, and 10 per cent paid thereon in good faith and in cash to the directors. *Re Staten Island Rapid Transit R. Co.* (1885) 37 Hun (N. Y.) 422; *Re Staten Island Rapid Transit R. Co.* (1885) 38 Hun (N. Y.) 381. On the contrary, in *People ex rel. New York, N. H. & H. R. Co. v. State R. Comrs.* (1903) 81 App. Div. 242, 81 N. Y. Supp. 20,

affirmed in (1903) 175 N. Y. 516, 67 N. E. 1083, an ordinary check for the 10 per cent of the capital stock which was paid in cash was held not to be a compliance with such requirement, although the check was, several days after the certificate of corporation had been filed, cashed by the corporation. This action, however, was one not on the stock subscription, but by the corporation which was questioning the corporate existence. The organization of the corporation in question was sustained, however, on other grounds.

VI. Effect of subsequent payment.

Some cases take the view that a subsequent payment of the required amount renders the subscriber liable, whatever may be the effect of a failure to make the payment at the time of subscribing. The subsequent payment of the required amount gives validity to the contract. *Hall v. Selma & T. R. Co.* (1844) 6 Ala. 741. At least, the payment of the money before the books of subscription were closed precludes the subscriber from raising any objection to the validity of such a subscription. *Klein v. Alton & S. R. Co.* (1851) 18 Ill. 514 (subscriber gave a note at time of subscribing, and subsequently paid the note. The payment, not the giving of the note, is regarded as the important fact). A payment before the organization of the company validates the subscription. *Judah v. American Live Stock Ins. Co.* (1853) 4 Ind. 333.

A subscriber who had paid the required cash payment in satisfaction of a judgment, to the recovery of which no resistance was made, must be taken to have conceded his liability and voluntarily to have paid the amount, and therefore the subscriber became liable, and the corporation could recover against him in an action for subsequent instalments. *Hall v. Selma & T. R. Co.* (Ala.) *supra*.

Assuming the subscription without payment of the required amount to be void, it has been held that the subsequent payment, taken in connection with the previous act of subscription, makes a valid subscription from the time the money is paid. *Fiser v.*

Mississippi & T. R. Co. (1856) 32 Miss. 359; *Black River & U. R. Co. v. Clarke* (1862) 25 N. Y. 208; *Ogdensburgh, C. & R. R. Co. v. Wolley* (1864) 1 Keyes (N. Y.) 118, 3 Abb. App. Dec. 398. A subscriber who had paid the required percentage subsequent to the time of making his subscription was held liable in *Buffalo & J. R. Co. v. Gifford* (1882) 87 N. Y. 294, in an action by the corporation to recover the balance of his subscription.

Assuming that a subscription without the required payment is void, it has been held that a subscriber becomes a shareholder where, eight months thereafter, he makes payment which is accepted by the corporation, and thereafter receives dividend checks which he indorses. *Re Central Bank* (1889) 16 Ont. App. Rep. 237. The statute involved in this case provided that "no shares shall be held to be lawfully subscribed for unless 10 per cent on the amount subscribed for be actually paid at the time, or within thirty days after the time of subscribing." *Hagarty, C. J. O.*, is of the opinion that such payment and its acceptance by the corporation vests the stock in the subscriber as of that time, on the theory that it can properly be treated as a new subscription, whether he again wrote his name or not. *Osler, J. A.*, states that under the above circumstances the subscriber and the corporation are estopped from denying that the subscription was reacknowledged, if subscription was then essential, and that he then became a shareholder; and this opinion is concurred in by *Burton, J. A. MacLennan, J. A.*, was of the opinion that the original subscription was void, and could not be revived by the subsequent payment alone, but that the subscriber, by indorsing the dividend checks, satisfied the "requirement of the statute of a subscription for the shares, and that he thereby became a legal holder of them."

See *Hayne v. Beauchamp, supra, II*. Payment in services is sufficient to validate the subscription. In *Beach v. Smith* (1864) 30 N. Y. 116, the subscriber had performed services for the corporation prior to making the sub-

scription, and it is stated by the court to be fairly inferable that the company, at the date of his subscription, was indebted to him in an amount greater than the cash payment required thereon. Upon the authority of *Black River & U. R. Co. v. Clarke* (1862) 25 N. Y. 208, *supra*, it is held to be sufficient that the amount of the cash subscription was subsequently paid. Accordingly, the subscriber was held bound to pay the amount of his subscription to the receiver of the corporation. Services rendered by a subscriber who was appointed solicitor of the company, and to whom shares were allotted, and who was credited on account of his services, were held sufficient to validate the subscription in *Re Standard F. Ins. Co.* (1885) 12 Ont. App. Rep. 486.

Where the company held the amount of a cash payment which was originally made on an invalid subscription for stock, at the time it was subsequently corrected by resubscription, the resubscription is valid. *Barrington v. Mississippi C. R. Co.* (1856) 32 Miss. 370.

One who has conveyed land to a corporation, agreeing to take stock therein in payment, cannot subsequently enforce a vendor's lien against the land because of nonpayment of the purchase price, on the theory that the subscription was not binding because at the time the cash payment was not made. *Elysville Mfg. Co. v. Okisko Co.* (1858) 5 Md. 152.

A subsequent payment by another without authority, which is ratified by the subscriber, makes a valid subscription. *Mississippi & T. R. Co. v. Harris* (1858) 86 Miss. 17.

In *Ogdensburgh, C. & R. R. Co. v. Wolley* (1864) 1 Keyes (N. Y.) 118, a subscription was held valid so as to entitle the corporation to recover thereon, where, before the suit was brought, the subscriber had paid a judgment recovered on a note given by him to evidence the cash payment required, together with instalments on the subscription which had been called for. The note had been assigned by the corporation to one who took before maturity, and in the ordi-

nary course of business, and when the subscriber was sued by such holder, he made no defense and subsequently as above stated paid the judgment recovered on the note. The court, after stating that the payment and the subscription need not be contemporaneous, states that the money was realized by and went into the treasury of the corporation, and the subscription was valid, at least, at the time the money was realized, which in this case was before the commencement of the suit. The court says further: "In the present case, the defendant did not directly pay the money, but, with the intent to effectuate his subscription, gave negotiable notes for three instalments and also for the original 10 per cent, and these notes he afterward paid. When he gave the notes, he had not reached the point of attempting to repudiate his subscription. By giving them, he authorized the plaintiff to negotiate them and apply the proceeds in payments upon his subscription, and this was done, and is the same in legal effect as if he had paid the money himself. It can make no difference whether the defendant afterward paid the notes thus given willingly or not, so long as they were in fact paid."

A contrary view as to the effect of subsequent payment has been taken in *Leighty v. Susquehanna & W. Turnp. Co.* (1826) 14 Serg. & R. (Pa.) 484, where the contract was held void, and a recovery for a balance due thereon denied, although a note given by the subscriber in lieu of the cash payment had subsequently been paid by him.

For subsequent payment as one of the elements of an estoppel, see *Selma & T. R. Co. v. Tipton* (1848) 5 Ala. 787, 89 Am. Dec. 344, *infra*, VII.

VII. Estoppel by subsequent acts.

In some cases the courts have not determined the effect of failure to pay the required amount, but have held on the facts that the subscriber is estopped to deny his liability.

A subscriber to corporate stock who assisted in the organization of the corporation will not be permitted to de-

feast an action on a note given by him in payment of his corporate stock on the ground that 50 per cent of the stock of the corporation was not paid in cash, as required by its charter. *Home Stock Ins. Co. v. Sherwood* (1880) 72 Mo. 461.

In an action by creditors against the stockholders to enforce the personal liability of the defendants to the amount of unpaid stock held by them, a subscriber who had made the required payment as to only part of the stock subscribed defended as to the remaining shares on the ground that he had not made the required payment, the court dismissed the defense with the statement that after the subscriber, with others, has executed a certificate of incorporation and duly filed it, and after the corporation has incurred honest debts, the subscriber cannot, as to creditors, be permitted to say that he should not be held to his contract, for the reason that he has not made the required payments. *George Irish Paper Corp. v. White* (1915) 91 Misc. 261, 154 N. Y. Supp. 778.

A subscriber who has appeared on the books of the corporation as a stockholder, and who has acted as such in a corporation which has been in operation for more than a year, cannot defeat liability to creditors by showing that the corporation had not received 10 per cent of its capital from its subscribers, as required by statute. *Abbott v. Aspinwall* (1857) 26 Barb (N. Y.) 202.

See the reported case (*JEFFERY v. SELWYN*, ante, 1111).

Although a subscription without the payment of the statutory amount is invalid, a subscriber who was present at a meeting of the stockholders and participated in their action by voting on the question of determining the route of a road being constructed by the corporation, was held estopped from alleging the nonpayment of the statutory amount, in *Erie & W. Pl. Road Co. v. Brown* (1855) 25 Pa. 156. A subscriber was held estopped to deny his liability to pay for his stock, by participating in the corporate organization, in *Clark v. Monongahela Nav. Co.* (1840) 10 Watts (Pa.) 364,

but that decision is based largely upon the effect of a curative act. See *supra*, II.

In *Selma & T. R. Co. v. Tipton* (1843) 5 Ala. 787, 39 Am. Dec. 344, a subscriber who gave his note for the cash payment, and participated in the organization of the company, and subsequently paid the note, was held to be estopped to deny his liability as a subscriber in an action by the corporation against him on his subscription. The court states that the subscriber's "participation in the organization of the company, his assent to treat it as a corporation as indicated thereby, and, still more strongly, by the payment of his note given for the 5 per cent and the acceptance of a place in the directory, all seem to show that he regarded the plaintiff as a corporation liable to all burdens and entitled to all privileges which the charter provided. Under such circumstances, both law and reason concur in saying that the defendant shall not be permitted to object that his subscription for stock does not oblige him to pay the amount, because he had not paid a part of it at the time he should, or because the plaintiff should not have organized and assumed the exercise of corporate functions." The statute involved in this case merely required the payment of \$5 on each share at the time of subscribing, without providing for the effect of a failure to make such payment.

Admitting that a note given in lieu of the cash payment does not validate the subscription, yet, where a subscriber gave his note, and received his receipt for the same as money, and the commissioners reported him as having paid, and he acted by his proxy in organizing the company, he cannot thereafter defeat an action against him by the corporation on his subscription. *Greenville & C. R. Co. v. Woodsides* (1851) 39 S. C. L. (5 Rich.) 145, 55 Am. Dec. 708.

As to acting as a member of the corporation, see *Wood v. Coosa & C. R. Co.* (1861) 32 Ga. 273.

An action by one who had made a loan to the corporation, against sub-

scribers who had not made the required cash payment, was sustained in *May v. Charlouis* (1908) 128 App. Div. 127, 112 N. Y. Supp. 554, affirmed in (1909) 195 N. Y. 607, 89 N. E. 1105, where the loan had been made to the corporation at the request of the subscribers sued, and upon the security and faith of the agreement executed by the subscribers, and upon the promises therein contained, which were made in express contemplation of a loan, and which authorized the procurement of the loan upon the faith of the agreement.

Where the subscribers enter into an agreement with one who is loaning money to the corporation, by which it is stipulated that the lender should make the loan for the stipulated amount, being the total amount of the subscriptions, at par for shares of stock of the corporation agreed to be taken by the several defendants, and that those defendants severally subscribed for and agreed to take at par the number of shares set opposite their respective names, such subscriptions to be payable when the note given by the corporation became payable, it was held that the lender might recover of the subscribers, although they had not paid the 10 per cent, in

Knickerbocker Trust Co. v. Dodge (1902) 67 App. Div. 468, 73 N. Y. Supp. 979. A similar decision upon similar facts appeared in *Union Trust Co. v. Van Schaick* (1913) 156 App. Div. 769, 141 N. Y. Supp. 945. The theory of these decisions was held, in *Harriman Nat. Bank v. Palmer* (1916) 98 Misc. 431, 168 N. Y. Supp. 111, not to require a decision against the subscribers, where the loan was made directly to the corporation without the intervention of the subscribers, although the subscription agreement which contained a provision that it might be pledged was assigned to the lender.

But one who has subscribed to stock of a corporation, the subscription paper containing a declaration that he has made the payment required by statute, has been held not estopped by the declaration from denying that he had made this payment. *New York & O. Midland R. Co. v. Van Horn* (1874) 57 N. Y. 473. It is stated by the court that the statute cannot be evaded by estoppel, and also that the corporation knew that the declaration was untrue when the subscription was made, hence it cannot claim to have the defendant concluded by it upon the doctrine of estoppel. W. A. E.

JAMES O'LEARY, Respt.,

v.

O. CROGHAN, Appt.

South Dakota Supreme Court — August 15, 1910.

(— S. D. —, 173 N. W. 844.)

Constitutional law — special privileges — Exemption Laws — classification of creditors.

1. Classification of creditors so as to deprive debtors of the benefit of the Exemption Laws with respect to certain classes of debts is prohibited by constitutional provision that no law shall be passed granting to any citizen or class of citizens privileges or immunities which, upon the same terms, shall not equally belong to all citizens.

[See note on this question beginning on page 1140.]

Exemption — classification of creditors — constitutionality.

2. A constitutional provision requiring the exemption to debtors of a homestead and a reasonable amount of

personal property does not authorize a classification of creditors so as to deprive the debtor of exemption with respect to certain classes of debts.

[See 11 R. C. L. 491.]

(Whiting and Gates, JJ., dissent.)

APPEAL by defendant from a judgment of the Circuit Court for Moody County (Jones, J.) in favor of plaintiff in an action on a promissory note given to him by defendant. *Reversed.*

The facts are stated in the opinion of the court.

Mr. Frederick A. Warren, for appellant:

Any law which provides that one class of citizens shall have preference in the matter of exemptions over another is unconstitutional and void.

Bofferding v. Mengelkoch, 129 Minn. 184, 152 N. W. 135; *Tuttle v. Strout*, 7 Minn. 465, Gil. 374, 82 Am. Dec. 108; 11 R. C. L. 491; *Anderson v. Canaday*, 37 Okla. 171, L.R.A.1915A, 1186, 131 Pac. 697, Ann. Cas. 1915B, 714; *Burrows v. Brooks*, 113 Mich. 807, 71 N. W. 460; *Fallihee v. Wittmayer*, 9 S. D. 479, 70 N. W. 642; *Chicago, M. & St. P. R. Co. v. Westby*, 47 L.R.A.(N.S.) 97, 102 C. C. A. 65, 178 Fed. 619; *State v. Doran*, 28 S. D. 486, 134 N. W. 53.

Messrs. Rice & Rice, for respondent:

The law in question is not unconstitutional.

National Surety Co. v. Starkey, — S. D. —, 170 N. W. 582; *Hamilton Nat. Bank v. Amster*, 134 Tenn. 537, 184 S. W. 5; *Gordon Bros. v. Wageman*, 77 Neb. 185, 108 N. W. 1067; *Singer Mfg. Co. v. Fleming*, 39 Neb. 679, 23 L.R.A. 210, 42 Am. St. Rep. 613, 58 N. W. 226; *People v. Gordon*, 274 Ill. 462, 113 N. E. 864; *Frazier v. Nashville Veterinary Hospital*, 189 Tenn. 440, 201 S. W. 751; 18 Cyc. 1426; *Brown v. Edmonds*, 8 S. D. 271, 59 Am. St. Rep. 762, 66 N. W. 310; *State v. Doran*, 28 S. D. 486, 134 N. W. 53; *Paddock v. Balgord*, 2 S. D. 100, 48 N. W. 840; *Sundback v. Griffith*, 7 S. D. 109, 63 N. W. 544; *Millerke v. Reiley*, 31 S. D. 342, 141 N. W. 136; *Re Kaeppler*, 7 N. D. 435, 75 N. W. 789; *Jewett Bros. v. Huffman*, 14 N. D. 110, 103 N. W. 408; *Chicago, M. & St. P. R. Co. v. Westby*, 47 L.R.A.(N.S.) 97, 102 C. C. A. 65, 178 Fed. 619; *Schaaf v. South Dakota Rural Credit Bd.* 39 S. D. 377, 164 N. W. 964; *Missouri, K. & T. R. Co. v. Harris*, 234 U. S. 412, 58 L. ed. 1377, L.R.A.1915E, 942, 34 Sup. Ct. Rep. 790; *Missouri, K. & T. R. Co. v. Cade*, 233 U. S. 642, 58 L. ed. 1135, 34 Sup. Ct. Rep. 678.

Polley, J., delivered the opinion of the court:

The only question presented for determination on this appeal is the constitutionality of chapter 150, Laws of 1911.

Section 4 of article 21 of the Con-

stitution reads as follows: "4. Exemptions.—The right of the debtor to enjoy the comforts and necessities of life shall be recognized by wholesome laws exempting from forced sale a homestead, the value of which shall be limited and defined by law, to all heads of families, and a reasonable amount of personal property, the kind and value of which shall be fixed by general laws."

Pursuant to the mandate contained in this section, the first legislature that convened after the adoption of the Constitution enacted chapter 86, Laws of 1890, which has become known as the General Exemption Law.

Section 18, art. 6, of the Constitution, provides that "no law shall be passed granting to any citizen, class of citizens or corporation, privileges or immunities which upon the same terms shall not equally belong to all citizens or corporations."

Chapter 150, Laws of 1911 (§ 2668, Rev. Code 1919), reads as follows: "Nothing in this chapter shall be so construed as to exempt any personal property from mesne or final process for laborers' or mechanics' wages or physicians' bills, or for the necessities of life, including only food, clothing and fuel, provided for the debtor or his family, except property absolutely exempt: . . . Provided, that in case of physicians' bills or for necessities of life, there shall also be exempt household and kitchen furniture, including stoves, of the debtor, to an amount in value not exceeding \$400, and also two cows; provided, however, that the collection of physicians' bills shall not be enforced by legal process in less than six months from the accruing thereof except when the debtor is about to remove from the state."

It is the contention of appellant that this law divides creditors into several classes, giving certain of

these classes advantages and preferences over other classes in the matter of the collection of their debts; that in giving or attempting to give such preference the legislature violated the above constitutional provisions; and that said law is unconstitutional and void.

The Exemption Law of 1890 (Code 1919, §§ 2657-2661, inclusive) enumerates certain classes of property, including a homestead of limited size and value, which shall be exempt from forced sale as against all claims of every kind and character (Code 1919, § 2657). It then enumerates various items of personal property that may be selected by the debtor in case an attempt is made to subject such property to the payment of his debts. To this extent the action of the legislature is in strict obedience to the mandate of the Constitution, but the Constitution does not authorize the legislature to discriminate between debtors or creditors so that a debtor may enjoy the benefits of his exemption as against one class of creditors that he may not enjoy against another class; nor that one class of creditors may have advantages over another class of creditors in the means of collecting their debts. Under the provisions of chapter 150, Laws 1911, the amount of a debtor's exemptions depends upon the nature of his debts. As against certain classes of claims he may not be allowed any exemptions at all, except such as are denominated as absolute exemptions, while as against other claims he may be allowed additional exemptions to the extent of \$750 worth of personal property, as provided by § 2659, or the alternative exemptions enumerated in § 2660. A corresponding discrimination is made as between different classes of creditors. A laborer or mechanic may satisfy his claim for wages out of any property of the debtor, except that made absolutely exempt, and may have immediate execution. A physician and one who has supplied the debtor with the necessities of life must leave the debtor \$400

worth of household and kitchen furniture, including stoves, and also two cows, in addition to his absolute exemptions; and the creditor who furnished the necessities of life may have immediate execution, but a physician cannot have execution until six months after the accruing of his claim. None of these discriminations are authorized by § 4 of article 21 of the Constitution; while, on the other hand, such discriminations are expressly prohibited by the provisions of § 18, art. 6. The size and value of the homestead and the kind and value of the personal property that shall be exempt are left entirely to the wisdom of the legislature. Its judgment on these matters is final. But whatever the value of the homestead and whatever the kind and value of the personal property that is allowed as exempt must be allowed to all debtors alike. The discriminations that have been attempted by the legislature may be wise and in the interest of the public at large, but until the Constitution has been changed, the legislature is without authority to make them. In discussing a similar provision in the Constitution of Minnesota, the supreme court of that state, in *Coleman v. Ballandi*, 22 Minn. 147, said: "This provision of the Constitution imposes upon the legislature the duty of exempting from seizure or sale, for the payment of any debt or liability, a reasonable amount of property, and of determining such amount by law. In the discharge of this duty, and the exercise of its undoubted power, its judgment and discretion as to the amount of the exemption, and its reasonableness, are final and conclusive, and it may increase or diminish such amount from time to time, according to its own views of an enlightened public policy. Beyond this, however, it cannot constitutionally go. Discrimination, in its exemption laws, between different

Exemption—
classification of
creditors—con-
stitutionality.

Constitutional
law—special
privileges—
Exemption Laws
—classification
of creditors.

classes of creditors and kinds of debts or liabilities, is a species of class legislation which is absolutely prohibited. This must be regarded as the settled doctrine in this state."

The same rule was followed in *Bofferding v. Mengelkoch*, 129 Minn. 184, 182 N. W. 185, and in *Burrows v. Brooks*, 113 Mich. 307, 71 N. W. 460. If the legislature could except a debt due for "necessaries" from the benefit of the Exemption Law, it could except any or all other debts, and, in that way, deprive a debtor of all benefit of the Constitution on this subject. *Donaldson v. Voltz*, 19 W. Va. 156; *Tuttle v. Strout*, 7 Minn. 465, Gil. 374, 82 Am. Dec. 108.

Careful consideration has been given to the very exhaustive argument presented by respondent's counsel, but, as there is nothing doubtful or difficult of construction in the constitutional provisions involved, a review of such argument would serve no useful purpose. We are satisfied that in enacting chapter 150, Laws of 1911, the legislature exceeded its constitutional power, and that said law is void.

The order appealed from is reversed.

Smith, P. J., concurring:

The Constitution says, in language too plain to need interpretation, that a reasonable amount of personal property shall be exempt to all persons, and under that constitutional requirement the legislature has itself declared what constitutes such reasonable exemptions in the General Exemption Law. The Constitution does not mean that citizens may be classified, and a certain exemption allowed one class and a different exemption or no exemption granted to another class; for example, that farmers may be given one exemption and merchants another, because the difference in conditions may be sufficient ground for a classification of such persons or occupations. The fallacy in the argument of respondent lies in that, by its logical application and effect, the legislature may grant one person a reasonable exemption and deprive

another of any exemption whatever. Respondent's counsel say: "The exemption is granted to all alike. All debtors can claim the privilege of the Exemption Law as to such debts."

But "any person furnishing food, fuel, or clothing, any properly licensed physician, and any workman for wages, can claim the benefit of the exception to the Exemption Law."

Granting an exemption to a debtor, with a provision under which it may be immediately seized and sold for a debt or class of debts, is equivalent to denying any exemption to such person. The statute is a classification of debts, and not of debtors. It is, in reality, a classification of creditors with special privileges, and one of the favored class is now claiming the privilege of depriving the debtor of his exemption.

But the Constitution says that "no law shall be passed granting to any citizen or class of citizens, privileges . . . which upon the same terms shall not equally belong to all citizens."

I am unable to see how it can be claimed that a statute allowing the debts of certain classes of creditors to constitute an exception to the General Exemption Law falls short of granting a privilege which does not belong equally to all citizens (creditors). The Constitution expressly forbids the granting of special privileges to any class of citizens. Special privileges, to be constitutional, must be granted to all citizens equally. To hold that, because distinctions may exist which justify a classification of creditors, debtors are to be denied exemptions in every case where such a classification of creditors may be justified, is certainly a non sequitur. The fact that the constitutionality of such legislation has not heretofore been challenged, to my mind, is not an argument sufficiently persuasive to justify a continued violation of the Constitution.

The considerable number of legislative enactments which in effect deprive citizens of the amount of per-

sonal-property exemptions which the legislature itself has declared to be "reasonable," in the General Exemption Law, but emphasizes the propriety and duty of enforcing the constitutional provision.

A discussion of exemption laws in existence prior to the adoption of the Constitution is not convincing, when it is remembered that the Constitution itself repealed all laws in conflict with its provisions, and contained a direct mandate to the legislature to enact laws which should enforce "the right of the debtor to enjoy the comforts and necessities of life . . . by wholesome laws exempting from forced sale . . . a reasonable amount of personal property, the kind and value of which to be fixed by general laws," and not by exceptions to the General Exemption Law in favor of favored classes of creditors.

The judgment should be reversed.

Whiting and Gates, JJ., dissenting:

Our colleagues are of the opinion that § 2668 of our Code is unconstitutional,—that it violates § 18, art. 6, in that such statute "divides creditors into several classes, giving certain of these classes advantages and preferences over other classes;" or, as one of our colleagues puts it: "The statute is a classification of debts, and not of debtors. It is, in reality, a classification of creditors with special privileges." We are of the opinion that our colleagues have failed to give any proper effect to the words "upon the same terms," which are found in the above section of the Constitution. Furthermore, we are of the opinion that the legislature has plenary power to declare what to it seems "a reasonable amount of personal property" (Const. § 4, art. 21) to be allowed as exempt upon certain "terms,"—that is, under any certain named conditions, state, or circumstances—just so long as it applies to all persons alike when the conditions, state, or circumstances are the same. Webster defines "terms" as "conditions; state; circumstances; esp. circumstances that limit or control."

There has never been a time in the history of this state or the former territory of Dakota when the legislature did not assume the right to classify exemptions, basing such classification on those differences in conditions, state, or circumstances which it believed sufficient to limit or control its action. A statute similar to the one now before us was § 9, chap. 37, Laws 1862, and this section was amended by chapter 8, Laws 1865–66, § 332, Code Civ. Proc. 1877, and chapter 34, Laws 1881. In territorial days we find, as early as 1877, the Code, §§ 333, 334, Code 1877, declaring, as do §§ 2670–2672 of our present Code, that certain persons should not be entitled to any exemptions, and that the so-called "additional" and "specific alternative" exemptions could not be claimed or else claimed in a limited amount only, as against judgments for certain kinds of debts. As early as 1883 we find § 1, chap. 50, Laws 1883, providing, as does § 2669 of our present Code, that no property should be exempt as against a judgment for the purchase price thereof. It is interesting, and we believe entitled to great weight in construing our Constitution, to note the legislation of the first state legislature, composed, in large part, of men who had been members of the constitutional conventions. Such legislature amended §§ 323–325, Code 1877, being the sections from which we have derived our present §§ 2658–2660. The sections then enacted, just as our present sections, gave to the head of the family "additional" exemptions to the amount of \$750, to a single person "additional" exemptions to an amount of \$300 only; gave to a debtor with a family "specific alternative" exemptions of household goods to the value of \$200, while all other debtors could make no claim of household goods as "specific alternative" exemptions; gave to a farmer, if the head of a family, "specific alternative" exemptions that might amount to over \$2,000 in value,—much in excess of what he could claim as "additional" exemp-

tions,—while another debtor, such as a merchant who might not chance to have the right kind of property to be claimed as "specific alternative" exemptions, was restricted to a claim of "additional" exemptions; and gave to a mechanic as "specific alternative" exemptions tools to the value of \$200, to a lawyer or doctor a library to the value of not \$200, but \$300, while any other person who chanced to own such tools or library could not claim same as "specific alternative" exemptions. This same legislature left unamended every other exemption statute then in existence.

Under the rule announced by our colleagues, every exemption law passed by such legislature, as well as every law which it left unamended, was, and ever since—together with all subsequent amendments thereof—has been, unconstitutional, and we have not now, and never have had since statehood, any exemption statute that conformed to § 18, art. 6, of the Constitution, unless it be subdivisions 1–6 of § 2658, and the corresponding parts of previous statutes. The only thing that could consistently be urged by our colleagues as saving our homestead exemption is that § 4, art. 21, specifically limits such homesteads to "heads of families." If it were not for such provision, our homestead law would, under the view of our colleagues, be unconstitutional, because the legislature would have no right to discriminate and classify exemptions according to the existing "terms," to wit, as between heads of families and those not heads of families. But it may well be asked, how could our colleagues uphold our homestead law, providing, as it does, not a homestead which shall be alike to all persons, but two homesteads, one for the farmer, another for the resident of a city, homesteads alike only in that there is the same limit as to value, but differing as to size. If the legislature cannot differentiate exemptions because of a difference in the nature of the debts, it cannot differentiate because of a debtor's occupation, nor

because one debtor may be the head of a family and another not. No one would contend that the territorial legislature was so restricted in its powers. What, then, is there, in any section of our Constitution, that in any way takes from the state legislature the power which it concededly would have had were it not for such section? All we can find is a mandate directing that there should be exemption laws that will insure the rights of debtors to enjoy the comforts and necessities of life. There is not one word that directs or requires such laws to apply the same to all kinds of persons, regardless of personal status or occupation, or to all kinds of debts, regardless of their origin. A legislature might well conclude that, in order for a poor man to have a credit sufficient to enable him to provide his family with food, clothing, and fuel, the merchant to whom he goes to purchase goods must know that, if he gives such party credit, such party cannot refuse to pay for such necessities and prevent the collection of the purchase price thereof while the owner of perhaps \$2,000 worth of property.

Appellant cites decisions of the Minnesota and Michigan courts in support of his position. The decisions of these courts seem to rest upon the term "any debt," as used in those sections of their Constitutions corresponding to our § 4, art. 21. The courts of those states hold that their Constitutions give to the legislature only the power to specify the property or limit the amount in value that shall be exempt; they hold that then the property so specified, or property to the amount named, is exempt from "any debt," thus holding that their Constitutions take from the legislatures the power to differentiate between "debts." We are not impressed with the soundness of the reasoning back of these decisions, especially when considered in the light of the fundamental proposition that a state legislature has all power not conferred upon the Federal government or

taken from it by the state Constitution.

Section 18, art. 6, Const., does forbid class legislation where there is no sufficient warrant for the attempted classification; but it is uniformly held that such a constitutional provision, forbidding only a classification between persons or things which are "upon the same terms," does not forbid legislatures from making classifications based upon difference in the terms,—the conditions, state, or circumstances surrounding the persons or things classified; all that such section requires is that a law shall have substantially the same application as to all persons or things under substantially the same conditions, state, or circumstances. *Bon Homme County v. Berndt*, 13 S. D. 309, 50 L.R.A. 351, 83 N. W. 333; *Re Watson*, 17 S. D. 486, 97 N. W. 463, 2 Ann. Cas. 321; *State v. Doran*, 28 S. D. 486, 134 N. W. 53; *Schaaf v. South Dakota Rural Credits Bd.* 39 S. D. 377, 164 N. W. 964; *Chicago, M. & St. P. R. Co. v. Westby*, 102 C. C. A. 65, 178 Fed. 619, 47 L.R.A. (N.S.) 97. Absolutely the only restrictions placed upon the legislature by § 4, art. 21, are that the right of every debtor must be recognized by exemption laws, there must be a homestead exemption to "heads of families," and the homestead must be defined and limited in value. Except as so restricted, the power of the legislature is plenary. The legislature can say what is a "reasonable amount of personal property" to be exempt in case of a head

of a family or in case of a single person; it can say what is a "reasonable" exemption in cases of debts for necessities purchased, taking into consideration the best interests of the debtors themselves and so as to assure to such debtors the "necessaries of life;" it can fix the law so that a man with ten children can hold as exempt more clothing and food than the man with one or none; it can amend § 2659, not only so as to distinguish between a single person and a married person, but so as to allow the head of a large family more than the head of a small family; it can enact a section such as § 2660, which it could not do if our colleagues are right; it can exempt proceeds of life insurance policies, as it does in § 2661, but could not do if our colleagues are right; it can enact sections such as §§ 2668-2672, no one of which is constitutional under the majority holding.

If in doubt as to the correctness of our conclusions, we should resolve such doubt in favor of the constitutionality of the statute,—not only because of that rule, so often announced by this court, that no statute should be held unconstitutional unless the fact of its unconstitutionality is beyond reasonable doubt, but because of almost thirty years of universal acceptance of and acquiescence in the validity of our exemption laws by the people, the legislators, and even the courts. 6 R. C. L. 75-101; 12 C. J. 714, 715.

The order appealed from should be affirmed.

ANNOTATION.

Validity of statute reducing or abolishing exemption as against particular classes of claims.

- I. Statute reducing or abolishing exemption of personalty, 1140.
- II. Statute abolishing vested right in homestead exemption, 1143.
- III. Rule in Georgia, 1144.

I. Statute reducing or abolishing exemption of personalty.

A statute reducing or abolishing

the general exemption of personalty guaranteed to a debtor as against particular classes of claims is generally held to be invalid as class legislation, in contravention to the Federal and state Constitutions. *Burrows v. Brooks* (1897) 113 Mich. 307, 71 N. W. 460; *Tuttle v. Strout* (1862) 7

Minn. 465, *Gil.* 374, 82 *Am. Dec.* 108; *Bofferding v. Mengelkoch* (1915) 129 *Minn.* 184, 152 *N. W.* 135. See also *Coleman v. Ballandi* (1875) 22 *Minn.* 144; *Bull v. Conroe* (1860) 18 *Wis.* 240. And see the reported case (*O'LEARY v. CROGHAN*, ante, 1134).

Thus, in *Burrows v. Brooks* (1897) 113 *Mich.* 307, 71 *N. W.* 460, wherein it appeared that the defendant, as a sheriff, had levied on a wagon owned by the plaintiff and used in his business as a drayman, in order to satisfy a judgment for personal labor, the court held that the property in question was exempt under a statute (2 *How. Stat.* subd. 8, § 7686), and that another act (§ 1 of Act No. 14, Public Acts 1885 [8 *Hew. Stat.* § 1717a]) which limited the right of exemption in cases where execution was issued on a judgment for personal labor was unconstitutional and void, being class legislation and in contravention of § 1, art. 16, of the Constitution of the state of Michigan, which provided as follows: "The personal property of every resident of this state, to consist of such property only as shall be designated by law, shall be exempted, to the amount of not less than \$500, from sale on execution or other final process of any court, issued for the collection of any debt contracted after the adoption of this Constitution."

And in *Tuttle v. Strout* (1862) 7 *Minn.* 465, *Gil.* 374, 82 *Am. Dec.* 108, the question was raised as to the constitutionality of an act entitled, "An Act for a Homestead Exemption," passed March 12, 1858, which provided for a homestead exemption, but excepted from the operation of the exemption debts for wages due clerks, laborers, and mechanics. The court held that the part of the act which excluded the specific class of debts mentioned from its operation was unconstitutional and void, as it erected a distinction as to particular classes of debts, saying: "In regard to the question raised by the plaintiff, we cannot resist the conclusion that the 9th section of the act conflicts with § 12 of the Bill of Rights. The lan-

guage of the Constitution is too plain to admit of a serious doubt, either as to its interpretation or application to the act under consideration. 'A reasonable amount of property shall be exempt from seizure or sale for the payment of any debt or liability.' This includes debts or liabilities of every kind or description, without exception; and it certainly requires no argument to show that a sum of money due for services rendered by a clerk, laborer, or mechanic is a debt or liability. The Constitution makes no exception in favor of any particular class of persons or kind of debts or liabilities; nor should we recognize the right of the legislature to make any such distinctions. If one class of persons, or kind of debts or liabilities, may be excepted, all may be; and the constitutional provision might thus be rendered entirely nugatory."

In *Bofferding v. Mengelkoch* (1915) 129 *Minn.* 184, 152 *N. W.* 135, the court held that a proviso (*Laws* 1913, p. 524, chap. 375, *Gen. Stat.* 1913, § 7951, subd. 16) which excluded from the operation of the General Exemption Law debts contracted for necessities supplied to the debtor was invalid and void. The court said: "The settled law of this state from the very beginning, under Const. art. 1, § 12, has been that, unless specifically authorized by the Constitution, there can be no discrimination in favor of any debt or class of debts, excepting, of course, such as the property is specifically subject to when acquired by the debtor."

In *Rogers v. Brackett* (1885) 34 *Minn.* 279, 25 *N. W.* 601, it was held that a statute (*Gen. Stat.* 1878, chap. 66, § 311) which provided that property, otherwise exempt, was subject to execution upon any judgment rendered in an action for its purchase price, was not unconstitutional as class legislation, and that the doctrine enunciated in *Tuttle v. Strout* (*Minn.*) supra, did not apply. The court said: "The inapplicability of [this case] to the case at bar is apparent when we consider the position of the buyer of

personal property in this state. He buys and takes the property subject to § 311; that is to say, subject to the right of his vendor as against him to seize the property upon execution to satisfy a judgment recovered in an action for the purchase money. The property passes to the buyer subject to this quasi vendor's lien. Of course, the buyer's right of exemption does not extend any further than to protect his right in the property, nor so as to prevent any other person from asserting and enforcing his right therein or thereto, whatever it may be. The buyer's right in the property, being its general ownership, is subject to the paramount right of the vendor to make the purchase money out of it in the way provided by § 311. That this does not infringe the constitutional provision as to exemptions, or encroach upon the doctrines of the case cited, is, in our opinion, entirely clear without further comment."

In *Coleman v. Ballandi* (1875) 22 Minn. 144, there was involved an amendment to the Homestead Exemption Act, adopted in 1869, which read as follows: "Such exemption shall not extend to any contract for a lien, or upon which a lien would arise under the lien laws of the state, for work done or material furnished in the erection or repair of a dwelling house, or other building, on said land." It was held that the act was only what it purported to be, an amendment of a section of the statute relating to homestead exemptions, and excepting from its operation cases founded on a "contract for a lien, or upon which a lien would arise under the lien laws of the state." So, it appearing that the plaintiff sought to assert a lien, not created by statute or agreement, on the homestead of his debtor, as a materialman, the court said: "Assuming that the legislature intended, by this amendment, specifically to give to a materialman, in the absence of any agreement, the right to secure and enforce his claim as a lien upon his debtor's homestead, and that the section as amended is susceptible of such a construction, it could not be upheld

as a constitutional exercise of legislative power under § 12 of the Bill of Rights. This provision of the Constitution imposes upon the legislature the duty of exempting from seizure or sale, for the payment of any debt or liability, a reasonable amount of property, and of determining such amount by law. In the discharge of this duty, and the exercise of its undoubted power, its judgment and discretion as to the amount of the exemption, and its reasonableness, are final and conclusive, and it may increase or diminish such amount from time to time according to its own views of an enlightened public policy. Beyond this, however, it cannot constitutionally go. Discrimination, in its exemption laws, between different classes of creditors and kinds of debt or liabilities, is a species of class legislation which is absolutely prohibited. This must be regarded as the settled doctrine in this state."

In the reported case (*O'LEARY v. CROGHAN*, ante, 1184) the court holds that an act (Laws 1911, chap. 150, Rev. Code 1919, § 2668) which excludes from the operation of the General Exemption Law certain claims of laborers, mechanics, and physicians, is invalid and unconstitutional, in that it granted special privileges to a class of creditors not enjoyed by all, in contravention to § 18, art. 6, of the Constitution, which provides: "No law shall be passed granting to any citizen, class of citizens or corporation, privileges or immunities which upon the same terms shall not equally belong to all citizens or corporations."

See also *Bull v. Conroe* (1860) 13 Wis. 234, wherein there is dictum to the effect that the legislature, in enacting laws reducing the debtor's right to exemption, could so legislate by general laws only, and that local or special legislation upon the privileges of debtors, which would deprive those residing in certain places, or belonging to particular classes, of the advantages conferred by law upon others, could not be sustained.

But in *McBride v. Reitz* (1877) 19

Kan. 128, wherein it appeared that the defendant sheriff levied upon certain property of the plaintiff which the latter contended was exempt, the sheriff justified the seizure under § 6 of the Exemption Law of 1868 (Gen. Stat. 474), which read as follows: "Sec. 6. None of the personal property mentioned in this act shall be exempt from attachment, or execution, for the wages of any clerk, mechanic, laborer, or servant." The plaintiff claimed that this section was unconstitutional and void because it was unequal and partial legislation, class legislation, and not within the powers of the legislature, being in contravention of § 17, art. 2, of the Constitution, which provided as follows: "All laws of a general nature shall have a uniform operation throughout the state; and in all cases where a general law can be made applicable, no special law shall be enacted." The court held that the legislature had full power to pass the act.

In *Haizlip v. Haizlip* (1912) 240 Mo. 392, 144 S. W. 851, wherein an act (Rev. Stat. 1909, § 8296) was assailed as unconstitutional in that it excluded from exemption all property in a proceeding instituted by a married woman for maintenance, or an order issued to enforce a decree for alimony, the court held that the act was not obnoxious to the constitutional provisions (Mo. Const. art. 4, § 53, subd. 17) which prohibited the passage of any special law, since, as the act applied in general to all married women, and all wives, before or after divorce, it was a general, and not a special, law, and hence not forbidden by the Constitution.

II. Statute abolishing vested right in homestead exemption.

A statute which attempts to abolish as against claims of a particular class the right to an exemption existing under a constitutional provision is invalid. *Cumming v. Bloodworth* (1882) 87 N. C. 83; *Volker-Scowcroft Lumber Co. v. Vance* (1907) 32 Utah, 74, 125 Am. St. Rep. 828, 88 Pac. 896; *Slyfield v. Willard* (1906) 43 Wash. 179, 86 Pac. 392; *Donaldson v. Voltz* (1881) 19 W. Va. 156.

Thus, in *Donaldson v. Voltz* (W. Va.) supra, there was under consideration a Constitution (art. 6, § 48) which, in creating a homestead exemption, provided as follows: "Any husband or parent residing in this state or the infant children of deceased parents may hold a homestead of the value of \$1,000, and personal property to the value of \$200, exempt from forced sale, subject to such regulations as shall be prescribed by law. Provided, that such homestead exemption shall in no wise affect debts or liabilities existing at the time of the adoption of this Constitution; and provided further, that no property shall be exempt from sale for taxes due thereon or for the payment of purchase money upon said property or for debts contracted for the erection of improvements thereon." By a subsequent act of the legislature (Acts 1872-73, § 6, chap. 193) it was enacted as follows: "No exemption claimed under the provisions of this act shall affect or impair any claim for the purchase money of the personal estate, in respect to which such exemption is claimed, or any claim for work or labor performed in a family as a domestic, or any voluntary lien on such estate given by the owner thereof, or any proceeding for the collection of taxes on county, district or township levies, or any debt created for funeral expenses, or any claim where the debtor is removing or about to remove his property out of this state with intent to defraud his creditors, or for rent upon a lease which has not been due more than a year." The court held that the act was unconstitutional and void, the legislature having no power to defeat the right to a homestead exemption guaranteed and created by the Constitution, saying: "To recognize the existence of such a power would be in effect to say that this provision of the organic law is liable to be defeated entirely at the will of the legislature. It is true that the exemption was to be 'subject to such regulations as may be prescribed by law;' but this power to regulate certainly does not mean the power to destroy. Where a constitution establishes a

right, but has not particularly designated the manner of its exercise, it is within the constitutional limits of the legislative power to adopt all necessary regulations in regard to the time and mode of exercising it, which are reasonable and uniform and designed to secure and facilitate the exercise of such right. Such a construction would afford no warrant for such an exercise of the legislative power as, under the pretense of regulating, should subvert or destroy the right itself."

In *Cumming v. Bloodworth* (1882) 87 N. C. 83, there was involved the Constitution of the state of North Carolina (art. 10, §§ 2, 4) which created a homestead exemption and expressly excepted from its operation liability to sale for taxes, obligations created for the purchase of the premises, and the lien of laborers and mechanics. The court held that an act of the legislature (*Battle's Rev. chap. 65* [1869-70]) giving to one who furnished materials a lien on the land was invalid and unconstitutional, as the exception was not provided for by the Constitution, saying: "The homestead being a right created and vested by the Constitution, with the exceptions to the exemptions defined and enumerated in the same, it was not in the power of the legislature to impair or abridge its efficacy for the purposes of its creation by adding other exceptions. To hold that the legislature can exercise such a power would be conceding to it the right to override the Constitution and frustrate the intention of its framers."

In *Volker-Scowcroft Lumber Co. v. Vance* (1907) 32 Utah, 74, 125 Am. St. Rep. 828, 88 Pac. 896, wherein it appeared that a homestead exemption to the value of \$1,500 was created by the Constitution, with no exceptions (Const. art. 22, § 1), the court held that the homestead statute (*Rev. Stat. 1898, § 1156*) which provided that a homestead was subject to execution in satisfaction of judgments obtained on debts secured by mechanics' or laborers' liens was invalid, as the legislature did not have the power to make the homestead subject to sale for a

particular debt, in contravention to the constitutional exemption stated above.

In *Slyfield v. Willard* (1906) 43 Wash. 179, 86 Pac. 392, the court considered a statute (*Bal. Code, § 5254* [P. C. § 847]) adopted in territorial days, which provided that a party could, by agreement in writing, waive the right to a homestead exemption. The court held that this section was nullified by the subsequent adoption of a Constitution providing as follows: "The legislature shall protect by law from forced sale a certain portion of the homestead and other property of all heads of families." The court said: "The question is . . . presented as to whether § 5254 of *Balinger's Code* (enacted in territorial days) is repugnant to art. 19 of the Constitution. In so far as it purports to justify an executory contract of the head of a family whereby he agrees to waive all of his exemptions, we think it is repugnant. The purposes of a constitutional provision or statute allowing exemptions are to prevent the weak from being overreached by the strong, to prevent pauperism, to guard the impecunious from their want of caution, to protect the families and other dependents of persons to whom exemptions are allowed, to guard the improvident and unfortunate against penury and want, and to save the state and the community from the burden and disagreeable consequences that experience has shown to be a natural result of laws subjecting all of the property of debtors to the demands of their creditors. If § 5254 had been enacted since the adoption of the Constitution, we do not think it could be seriously contended that the portion in question would not be obnoxious to the constitutional provision mentioned. If so, it would seem that the adoption of the Constitution must have had the effect of annulling that portion of said statute."

III. Rule in Georgia.

In Georgia two cases have passed on the validity of a statute reducing or abolishing the right to exemption as against particular classes of claims. In neither of these cases was the ques-

tion of class legislation considered, but the statute (Act of February 27, 1874) involved in each case was upheld as not abrogating a vested right to exemption in the debtor, or impairing the obligation of contracts. *Sparger v. Cumpton* (1875) 54 Ga. 355; *Harris v. Glenn* (1876) 56 Ga. 94.

In *Harris v. Glenn*, supra, it was contended that a statute (Act of February 27, 1874) which so amended a Code section as to exclude the exemption right as against a debt for purchase money was unconstitutional and void in that it abolished a vested right of exemption in the debtor. The court held that the legislature had the power to reduce or abolish the right of exemption, and that the modification in the above act was not unconstitutional, as there was no vested right in the debtor to the exemption. The court said: "Debtors have no vested right not to pay their debts. What they have and what they acquire the state may subject to legal process for the satisfaction of creditors. If the state will furnish the process and allow it to run, nothing that debtors own is beyond its reach. There is no fastness that can afford shelter against the public authority. Exemption of property from levy and sale for the payment of debts is but a privilege for the time being,—mere grace and favor, dependent on the will of the state. An exemption which exists by statute may be reduced or withdrawn by statute; and even constitutional exemptions

may be terminated by the same power that created them, the people expressing their sovereign will by amendment of the organic law. Exemption is but a statutory or constitutional shield, which, being removed, the exposure to process is the same as if it had never been interposed. . . . So long as the law exists by which exemption is granted and secured, the right to enjoy the exemption exists and should have the same protection from judicial tribunals that is accorded to any other right. But when the law is gone the right is gone."

In *Sparger v. Cumpton*, supra, it was held that the same act did not impair the validity of contracts because it enlarged the creditor's remedy. The court said: "It is said that the Act of 1874, if so applied, would impair the obligation of the contract, or divest the vested rights of the debtor. It is an entirely new view of the constitutional provision prohibiting the states from impairing the obligation of contracts to say that, under it, the states cannot give new and larger remedies than before. To take away remedies—to lessen, by any large measure, the property a creditor may go upon to collect his debt—may impair the obligation of the contract; but to say that to give a greater reach to the creditor's arm is to impair the contract on the other side is, indeed, pushing the doctrine very far."

W. J. K.

DAISY THOMAS, by Next Friend,

v.

PROCTOR & GAMBLE MANUFACTURING COMPANY, Appt.

Kansas Supreme Court—March 6, 1910.

(104 Kan. 432, 179 Pac. 372.)

Workmen's compensation — injury during noon intermission.

1. In an action under the Workmen's Compensation Law there was evidence that the plaintiff, a seventeen-year-old girl, who was paid by the hour, was injured during a half-hour intermission at noon, while, although at liberty to leave the premises, she remained there and, after eating her

Headnotes 1 and 2 by MASON, J.

lunch, engaged with fellow employees, in accordance with a custom known to and approved by her employer, in riding on a truck, her injury being caused by falling from the truck while it was being drawn by a fellow employee. Held, that a finding was justified that the accident occurred in the course of her employment.

[See note on this question beginning on page 1151.]

— arising out of employment.

2. It is further held that the evidence stated was sufficient to support a finding that the plaintiff's injury arose out of her employment.

— accident — what is.

3. The fall of an employee from a hand truck upon which he was riding for amusement, when it was suddenly turned by those drawing it, is an accident within the meaning of the Workmen's Compensation Act.

Appeal — conflict of evidence — effect.

4. In an action by an employee injured while riding for amusement on a

hand truck, in which judgment has been entered for plaintiff, any conflict in evidence as to the attitude of the employer towards the use of the truck for that purpose must, on appeal, be resolved in favor of plaintiff.

Workmen's compensation — injury arising out of employment.

5. An injury must be considered as arising out of and in the course of the employment, within the meaning of the Workmen's Compensation Act, if it was a direct and natural result of a risk reasonably incident to the employment in which the injured person was engaged.

APPEAL by defendant from a judgment of the District Court for Wyandotte County in favor of plaintiff in an action brought under the Workmen's Compensation Act to recover damages for personal injuries accidentally received by plaintiff while in defendant's employ. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. J. K. Cubbison and William G. Holt, for appellant:

There is nothing in the title of the Workmen's Compensation Act to indicate that an employee should recover compensation for injuries received during nonworking hours, and at a time when the employee controlled his own time, by reason of any injuries received while engaged in recreation or play for his own amusement, unless caused by the negligence of the master.

Sedlock v. Carr Coal Min. & Mfg. Co. 98 Kan. 680, L.R.A.1917B, 372, 159 Pac. 9; *Milwaukee v. Althoff*, 156 Wis. 68, L.R.A.1916A, 327, 145 N. W. 238, 4 N. C. C. A. 110.

Messrs. Arthur J. Stanley and Guy E. Stanley, for appellee:

Taking into consideration the long-continued practice of the use of trucks by girls in the employ of the defendant, the scope of employment had been so enlarged as to make it a proper matter for the jury to pass upon whether the use of the truck in the manner which resulted in the injury was reasonably incident to the employment.

Stuart v. Kansas City, 102 Kan. 307, 171 Pac. 913; *Monson v. Batelle*, 102

Kan. 213, 170 Pac. 801; *Hulley v. Moosbrugger*, 88 N. J. L. 161, L.R.A. 1916C, 1205, 95 Atl. 1007; *Rayner v. Sligh Furniture Co.* 180 Mich. 168, L.R.A.1916A, 22, 146 N. W. 665, Ann. Cas. 1916A, 386, 4 N. C. C. A. 851; *Lane v. Lusty* [1915] 3 K. B. 230, [1915] W. N. 252, 84 L. J. K. B. N. S. 1342, 113 L. T. N. S. 615, 8 B. W. C. C. 518; *Plumb v. Cobden Flour Mills Co.* Ann. Cas. 1914B, 503, note; *White v. Kansas City Stock Yards Co.* 104 Kan. 90, 177 Pac. 522.

Mason, J., delivered the opinion of the court:

Daisy Thomas, an employee of the Proctor & Gamble Manufacturing Company, about seventeen years of age, recovered a judgment against her employer under the Workmen's Compensation Law (Gen. Stat. 1915, §§ 5896 et seq.), and the defendant appeals.

The principal question involved is whether the plaintiff's injury was one arising out of and in the course of her employment. A suggestion is made that it did not result from

accident, but the occurrence relied upon seems clearly to fall within the definition of that term. The evidence in behalf of the plaintiff tended to show these facts: She had been working for the defendant a little over five months. Her hours were from 7 to 12 and from 12:30 to 5:30, except on Saturdays, when she did not work in the afternoon. She was paid by the hour. Her custom was to take her lunch with her and eat during the interval between noon and 12:30 which was allowed for that purpose, in the room where she worked, with the other girls in her department, seven or eight in number. The eating of lunch generally occupied about fifteen minutes. In the remaining fifteen minutes the girls, including the plaintiff, were in the habit of amusing themselves by riding on a small truck used in their department to pull boxes on. The girls had asked the foreman of this department if they could do this, and he had told them they could, but to be careful, and that he did not want any men up there. He knew of the practice and did not object to it, nor did any other representative of the company. During the noon half hour the girls were at liberty to go where they pleased. They hardly ever went down to the restaurants, however, because of the shortness of the time. If they did so they had to run in order to be back by 12:30. On the day of the accident one girl was drawing the truck, while the plaintiff, with two others, were kneeling on it. They had ridden from the powder room where they worked, into the ware-room, and were near the door between the two on the return trip, when in turning a corner the truck slid, and one girl jumped off. The other two fell to the floor, the plaintiff receiving injuries to her knee and ankle. This was a few minutes before 12:30.

Workmen's compensation—accident—what is.

The evidence for the defendant tended to show these facts: The company had a lawn and recreation

ground, about an acre in extent, fenced in with its buildings, and 5 or 6 acres outside, including a ball ground, all of which were accessible to the employees when not at work. The defendant had no control over them during the noon intermission. Usually at this time half of the girls went down to a restaurant on or near the factory premises. The work of the girls in the plaintiff's department was putting paper boxes on the powder machine. They had nothing to do with the trucks, which were handled by men. The assistant superintendent had cautioned the plaintiff against using the trucks, telling her that it was against the rules and very dangerous. He knew the girls had ridden on the trucks, and he and other representatives of the company frequently warned them against the practice. The subforeman of the powder room (called the foreman by the plaintiff) had no authority to permit the girls to use the trucks as playthings. All the foremen were instructed to prevent the girls from getting on the trucks.

1. The conflict of evidence as to the attitude of the company toward the girls' practice of playing with the trucks must, of course, be resolved in favor of the plaintiff. In order for the judgment to be upheld the evidence must have warranted two findings—that the plaintiff was injured in the course of her employment, and that the injury arose out of her employment. The fact that she was working by the hour, and that the accident took place out of working hours, does not conclusively establish that it did not occur in the course of her employment. The shortness of the intermission suggests that it was the expectation that most of the employees would remain on the premises, and the practice shown by the evidence confirms this. The purpose of the plaintiff and her associates in remaining in the factory after their lunch had been eaten was presumably to be on hand when work com-

Appeal—conclusion of evidence—effect.

menced, in order that there might be no delay—a matter in which the employer had an obvious interest. Their situation was quite like that of a workman who arrives at the factory and is fully prepared to begin work a few minutes before the whistle blows. In the leading English case on the subject, which has been frequently cited with approval in this country, the scope of the decision was fairly indicated by this language of the headnote: "A workman was paid by the hour for the number of hours per week that he was actually engaged on his work, not including the midday dinner hour. During that hour he was at liberty to stay and take his meal on the premises, or to go elsewhere. He stayed on the premises, and sat down to eat his dinner, and while so doing a wall fell upon him and he was injured. . . . Held, that during the dinner hour there had been no break in the employment of the workman, and that he was entitled to claim compensation." *Blovelt v. Sawyer* [1904] 1 K. B. 271.

In the opinion of the master of the rolls the whole situation was gone over in these words: "On the evidence as it stands on the judge's notes I should have felt no difficulty, because it would appear *prima facie* to indicate that the man was in his master's employment during the whole of each day, from the time at which he went to his work to the time when he came away, and equally during the dinner hour, if he stayed, as during any other part of the time. He would be there on the contract with his master during all those hours, either directly in order to do that for which he was employed, or for some purpose ancillary thereto. That would embrace all his movements within the ambit of the factory, going or coming or stopping there for any purpose ancillary to his work. But we are told that there were admissions made between the parties, which do not appear on the judge's note, that men in the position of the applicant were not paid by the day or

week, but by the hour, and that the dinner hour was excluded from the computation of his wages, and was not a time during which he was earning pay. That creates a difficulty, or, at all events, requires consideration. It seems to me, however, that if the dinner hour can be brought in as part of the time which is given by the workman for some purpose ancillary to his work, such as feeding himself, which is, of course, essential to enable him to do his work, it would be taking too technical a view to say that the pause in the actual course of his work for the purpose of eating his dinner was a break in his employment from the time that he stopped work to the time at which he began again. It seems to me that, notwithstanding what is alleged as to the payment being for the hours in which the applicant was actually engaged in work, and not for the time in which he took his meals, we must take a broader view, and treat him as continuing in the employment of the master by the consent of the master, inasmuch as it is for the master's advantage that the workmen should have an opportunity to feed themselves. A workman would do his work all the better by taking his meal at that time, and if it is part of the contract between him and his master that he may do so upon the works, instead of going away, that may be a matter of mutual convenience. A man might, for instance, live at a distance, and it might be desirable from the master's point of view that he should not tire himself by going to and fro for his food instead of reserving his strength for his work. It does not seem to me that, as a matter of law, it can be said that, when sitting down to his dinner, the applicant had ceased to be in his master's employment. From the mere facts that he was not paid for this particular time, and that he was not engaged in the main purpose of his work, it cannot, as a matter of law, be said that he had ceased to be in

the employment of his master." Pages 273, 274.

One of the Lord Justices said: "It also appears that he was not obliged to leave the place where he was working and obtain shelter and food elsewhere. That being the case, how can it be said that this accident did not occur in the course of his employment?" Page 275.

Another added: "In my view it can make no difference if the fact is that by the terms of the particular engagement the workman was to have the right, if so minded, to get his dinner on the employer's premises. I think it would be to place a narrow construction on the act if we held that the accident to the applicant did not occur in the course of his employment." Page 276.

Of an employee who during the noon intermission, after eating his lunch on the premises, fell into the river and was drowned, it has been said: "All the circumstances and facts tend to show that up to this time he expected to resume his work when lunching time had expired, and hence he was within the scope of his service when walking at this place." *Milwaukee Western Fuel Co. v. Industrial Commission*, 150 Wis. 635, 642, 150 N. W. 999.

Other expressions bearing on the matter are: "The relation of master and servant, in so far as it involves the obligation of master to protect the servant, is not suspended during the noon hour, where the master expressly, or by fair implication, invites his servants to remain on the premises in the immediate vicinity of the work." *Bradbury, Workmen's Comp.* 3d ed. 524.

"As directly applied to the noon intermission, it is a long and well-settled rule that the service tie, or contractual relations and obligations between master and servant, is not broken by such suspension of all activities directly beneficial to the employer." *Haller v. Lansing*, 195 Mich. 753, 758, L.R.A.1917E, 324, 162 N. W. 337.

See also *Boyd Workmen's Comp.*

§ 481; 1 *Honnold, Workmen's Comp.* § 111; *Etherton v. Johnstown Knitting Mills Co.* 184 App. Div. 820, 172 N. Y. Supp. 724; *Racine Rubber Co. v. Industrial Commission*, 165 Wis. 600, 162 N. W. 664; *Griffith v. Cole*, 183 Iowa, 415, L.R.A.1918F, 923, 165 N. W. 577, 15 N. C. C. A. 674; *Riley v. Cudahy Packing Co.* 82 Neb. 319, 117 N. W. 765; *Sundine's Case*, 218 Mass. 1, L.R.A.1916A, 318, 105 N. E. 433, 5 N. C. C. A. 616.

We conclude that there was room for a finding that the plaintiff's injury occurred in the course of her employment. If it had been the result of some accident which was due to the physical conditions under which the work was performed—say to the falling of plaster in the rooms where the girls were playing—this would be quite obvious, and the judgment for the plaintiff would clearly be warranted.

2. Whether the plaintiff's injury arose out of her employment is a more difficult question. Injuries received in play are not usually capable of being so classified. Two illustrative cases are reported, passed upon by a commission and a committee of arbitration, which are in some respects quite similar to that under consideration. *Socquet v. Connecticut Mills Co.* Conn. Comp. Dec. p. 653; *Thompson v. W. L. Douglas Shoe Co.* 2 Mass. W. C. C. 145. If the present case is to be taken out of the general rule, it must be upon the ground that the habit of the girl employees to play with the trucks during the noon intermission, with the knowledge and express consent of the foreman, and without objection by anyone representing the defendant, made such practice one of the conditions under which the business was carried on, upon much the same principle as employers are held liable for the results of horseplay which had grown into a custom. *White v. Kansas City Stock Yards, Co.* 104 Kan. 90, 177 Pac. 522. In-

Workmen's compensation—injury during noon intermission.

—injury arising out of employment.

juries have been held to arise out of the employment whenever they are "such as the character of the business or the conditions under which it is carried on make likely, and the result either was or should have been in contemplation of the employer." *Jacquemin v. Turner & S. Mfg. Co.* 92 Conn. 382, L.R.A. 1918E, 496, 103 Atl. 115. The plaintiff's participation in the use of the truck would not seem necessarily to bar her recovery, her conduct being of a kind to be expected in girls of her age, and the question of her want of care not being material, the action not being founded on her employer's negligence.

The trial court gave an instruction to the effect that, if the plaintiff was injured as a direct and natural result of a risk reasonably incident to the employment in which she was engaged, it must be considered as arising out of and in the course of her employment. This is complained of, but substantially the test proposed has often been approved. *Challis v. London & S. W. R. Co.* [1905] 2 K. B. 154, 157, 74 L. J. K. B. N. S. 569, 53 Week. Rep. 613, 93 L. T. N. S. 330, 21 Times L. R. 486, 7 W. C. C. 23; *Brice v. Edward Lloyd* [1909] 2 K.B. 804, 810, 101 L. T. N. S. 472, 25 Times L. R. 759, 53 Sol. Jo. 744, 2 B. W. C. C. 26; *Holland-St. Louis Sugar Co. v. Shraluka*, — Ind. App. —, 116 N. E. 330; *Pace v. Appanoose County*, — Iowa, —, 168 N. W. 916, 17 N. C. C. A. 682; *Hulley v. Moosbrugger*, 88 N. J. L. 162, L.R.A.1916C, 1203, 95 Atl. 1007. See also *Benson v. Bush*, 104 Kan. 198, — A.L.R. —, 178 Pac. 747, decided February 8, 1919.

In a case in which the decision was against the employee the general rule was thus stated and illustrated:

"The same right to compensation will follow if an injury arising from a risk of the business is suffered while the employee is doing something which, although quite outside of his obligatory duty, is permitted by his employer for their mutual convenience, such as eating his din-

ner on the premises, or any similar act to the performance of which the employer has assented. . . .

"In the present case the commissioner has found, in substance if not in words, that the employer knew of the employees' custom of heating bottles in the dry room at the mouth of the hot-air pipe, and, upon principles familiar to courts before compensation acts were invented, the right to so heat bottles, became, by the tacit consent of the employer, a term or condition added to the contract of employment, so that if the injury, which clearly arose from a risk of the business, had occurred while the claimant was engaged in heating his bottle at the customary time and place, he would doubtless have been entitled to compensation." *Mann v. Glastonbury Knitting Co.*, 90 Conn. 116, 120, 121, L.R.A.1916D, 86, 96 Atl. 369, 12 N. C. C. A. 891.

In a case where, during the noon hour, an employee was found crushed by an elevator, it was said: "The deceased was required to take his lunch to the plant with him, and was permitted and expected to eat it upon the premises. No particular place was assigned to any of the employees to eat their lunch, but each man was permitted to eat it wherever he desired about the plant. All the employees used the elevator during the lunch hour as they had occasion to, just as they used it during the hours the plant was in operation. Whether the deceased was negligent in his operation of the elevator, or in attempting to get off while it was in motion, is immaterial. . . . The proof amply sustains the finding that the accident arose out of and in the course of the employment." *Humphrey v. Industrial Commission*, 285 Ill. 372, 375, 120 N. E. 817.

A workman has been allowed to recover under the Compensation Act where he caused an explosion by lighting his pipe near a gasoline can in a tool house, to which he had gone to eat his dinner, having violated no rule, and not knowing of the presence of the vapor.

Haller v. Lansing, 195 Mich. 753, L.R.A.1917E, 324, 162 N. W. 335. In Dzikowska v. Superior Steel Co. 259 Pa. 578, L.R.A.1918F, 888, 103 Atl. 351, the employee was permitted to recover where he set fire to his oily apron while lighting a cigarette; and in Whiting-Mead Commercial Co. v. Industrial Acci. Commission, — Cal. —, 5 A.L.R. 1518, 173 Pac. 1105, an employee's injury, due to his setting fire in the same way to a turpentine-soaked bandage on his hand, was held to fall within this rule, quoted from another case: "Such acts as are necessary to the life, comfort, and convenience of the servant while at work, though strictly personal to himself, and not acts of service, are incidental to the service, and injury sustained in the performance thereof is deemed to have arisen out of the employment. A man must breathe and occasionally drink water while at work. In these and other conceivable instances he ministers unto himself, but, in a remote sense, these acts contribute to the furtherance of the work. . . . That such acts will be done in the course of employment is necessarily contemplated, and they are inevita-

ble incidents. Such dangers as attend them, therefore, are incident dangers. At the same time injuries occasioned by them are accidents resulting from the employment." Archibald v. Workmen's Compensation Comr. (Archibald v. Ott) 77 W. Va. 448, 451, 452, L.R.A. 1916D, 1013, 87 S. E. 792.

It would perhaps not unduly extend the principle to say that the employer might, under some circumstances, have an interest in his employee's taking suitable exercise in a brief interval allowed for refreshment and rest.

Inasmuch as the evidence may be regarded as establishing that the play in which the plaintiff was injured had become a settled custom, with the knowledge and indeed the express approval of the foreman in charge of the department, and without objection on the part of anyone, the court is of the opinion that ^{—arising out of employment.} her injury may be regarded, not only as having occurred in the course of her employment, but as having arisen out of it.

The judgment is affirmed.

All the Justices concur.

Petition for rehearing denied.

ANNOTATION.

Compensation for injuries during lunch hour on employer's premises.

In a number of cases it has been held that an injured workman is entitled to compensation for injuries received on the master's premises, although the accident occurred during the lunch hour when work was not actively in progress, where the eating of the lunch on the premises was with the master's knowledge and consent, express or implied.

Thus an employee may be found to be performing service "growing out of and incidental to his employment," where he was seated on a large piece of rubber in a room in the factory at the noon hour, eating his lunch in accordance with the long-established custom known by and tacitly consented to by his employer, and a pile of

crude rubber near him unexpectedly fell on him, breaking his leg. Racine Rubber Co. v. Industrial Commission (1917) 165 Wis. 600, 162 N. W. 664.

And in Blovelt v. Sawyer (1903) 6 W. C. C. (Eng.) 18, a bricklayer who was paid according to the number of hours he actually worked, and who was at liberty to remain upon the premises to eat his dinner or not as he thought fit, sat down during the noon hour under the shelter of a wall which he was engaged in building, and while there was seriously injured by the wall falling upon him. The court said that even though he was paid by the hour, the intermission for dinner could be regarded "as part of the time allowed for some purpose ancillary to

the work to be done, as, for example, eating the necessary food; it would be taking a strained view to say that the pause in the middle of the work for dinner was a break in the employment." It was accordingly held that he was within the act and entitled to compensation under its provisions.

An injury to a city employee engaged in outdoor work in inclement weather, by the explosion of vapor from a gasoline tank in a tool house used in connection with the work, to which he had gone for shelter while eating his dinner, when he struck a match to light his pipe, arises out of and in the course of the employment if he violated no rule of the employer, and was not aware of the presence of the vapor. *Haller v. Lansing* (1917) 195 Mich. 753, L.R.A.1917E, 324, 162 N. W. 335.

No injury to a night watchman caused by the falling of a shanty into which he had gone to cook some food, as it was raining, may, in the absence of any prohibition against the use of the shanty, be considered as arising out of and in the course of his employment. *Morris v. Lambeth Borough Council* (1905) 22 Times L. R. (Eng.) 22, 8 W. C. C. 1.

And where a workman in a brewery was found dead at the bottom of an elevator shaft on his employer's premises during his lunch hour, and it appeared that he worked in a cellar, and that it was customary for the men after eating their lunches to go to the ground floor for air, and for beer which was served free, it was held that it must be presumed that he was on the ground floor for some purpose of his employment, and that while so present he fell down the elevator shaft, and that consequently he was killed while in the course of his employment. *Donlon v. Kips Bay Brewing & Malting Co.* (1919) 189 App. Div. 415, 179 N. Y. Supp. 93.

In *Humphrey v. Industrial Commission* (1918) 285 Ill. 372, 120 N. E. 816, it was held that the fact that the accident occurred during the noon hour and while the plant was not in opera-

tion had no bearing on the case, since the deceased was required to take his lunch to the plant and was permitted and expected to eat it upon the premises. In this case the employee had services to perform in connection with the elevator during the noon hour, and was found crushed between the elevator and the gate.

But there can be no recovery for injuries received during the lunch hour where the employee at the time was in a place where he had no right to be.

Thus, an employee of a contractor engaged to do repair work upon the first and second floors of a building is not entitled to compensation for injuries received during the noon hour, when, after he had left the building for lunch, he returned and, while passing the remainder of the noon hour in the boiler room, was injured by the explosion of the boiler. *Manor v. Pennington* (1917) 180 App. Div. 130, 167 N. Y. Supp. 424.

So in *Brice v. Lloyd* (1909) 2 B. W. C. C. (Eng.) 26, a workman went some distance from where he was at work to a pumping station on the employer's premises, and climbed upon a warm tank, where he sat to eat his supper. In getting down from the tank he fell through an aperture in it and was scalded, receiving injuries from which he died. Compensation was denied, not because the injury occurred during the lunch hour, but because he had gone into a place where he had no right to go, and would have been subject to discharge had he been found there.

In *Brassard v. Delaware & H. Co.* (1919) 186 App. Div. 647, 175 N. Y. Supp. 359, the court said that it is true that an employee is within the protection of the New York act, not only when actually at work, but when at a meal which is had upon the premises during a temporary interruption of the work. Compensation was denied, however, on the ground that the employee had not yet been actually engaged in his labor, and did not have a legal right as employee to be upon the premises at the time. *W. M. G.*

LAURA BUSH, Appt.,
v.
ADOLPH BUSH.

Arkansas Supreme Court — October 7, 1918.

(135 Ark. 512, 205 S. W. 895.)

Divorce — verbal condonation — effect.

Condonation of a cause of divorce for adultery on the part of the wife is effected by the parties agreeing in the presence of others to terms of reconciliation, followed by his taking her to their former home, from which she had departed, although he changes his mind and sends her away again almost immediately on arriving there, so that actual cohabitation is not resumed.

[See note on this question beginning on page 1157.]

APPEAL by defendant from a decree of the Chancery Court for Lawrence County (Humphries, Ch.) in favor of plaintiff in an action brought to obtain a divorce for alleged adultery. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. W. A. Cunningham and W. E. Beloate, for appellant:

The facts do not constitute adultery on the part of defendant.

Allen v. Allen, 101 N. Y. 658, 5 N. E. 341; Pollock v. Pollock, 71 N. Y. 137.

Condonation was effected by the agreement of the parties to the terms of reconciliation.

Turnbull v. Turnbull, 23 Ark. 621; Shirey v. Shirey, 87 Ark. 179, 112 S. W. 369; 14 Cyc. 637.

Cruel treatment and adultery are both statutory causes of divorce, and where one is guilty of one and the other the other, neither is entitled to one.

Wilson v. Wilson, 128 Ark. 110, 193 S. W. 504; Day v. Day, 6 Ann. Cas. 169, and note, 71 Kan. 385, 80 Pac. 974.

Mr. W. P. Smith for appellee.

McCulloch, Ch. J., delivered the opinion of the court:

This is an action instituted by a husband against his wife to obtain a decree for divorce on the alleged ground of adultery. The parties intermarried in December, 1914, and lived together until on or about July 2, 1917; a girl baby having been born unto them in the meantime, who was about a year and a half old at the time of the separation. The acts of adultery are alleged to have been had with one Swan during the month of May,

1917. The answer of the defendant contained a denial of the charge of adultery, but the court found the issue of fact in favor of the plaintiff and granted the divorce.

The plaintiff is a farmer residing in Lawrence county, out in the country a few miles from Alicia, and defendant's parents reside in the same neighborhood. The proof shows beyond dispute that the parties did not live happily together after a few weeks subsequent to their intermarriage. The proof shows, too, that the plaintiff was at fault in that his conduct toward his wife was overbearing and intolerant, and at times brutal. He admits in his testimony that he determined a few weeks after the marriage that he and his wife could not live happily together, and that he would have carried her back to her parents if he could have "put her back home in as good shape as he found her." The proof shows that plaintiff struck his wife on several occasions, once with a bed slat, and his own explanation shows that it was on very trivial grounds that he struck his wife. It seems that during the month of May, 1917, a rumor became current in the neigh-

borhood that the defendant and Swan were corresponding with each other by letter, and that there were perhaps improper relations between the two. The first information communicated to plaintiff concerning the matter was made by defendant's father, and the plaintiff at once began an investigation, which, he says, convinced him of the infidelity of his wife, and on July 2d he took her back to the home of her parents and left her there. The extent of the communications between defendant and Swan is fully developed in the testimony, and the defendant from the very start made frank admissions concerning them. The evidence shows that defendant wrote to Swan twice, once by postal card and the other time by letter, and in each instance she gave the communication to other parties to mail or deliver. The letter was unsealed, and neither of the contents of the communications have been proved, except that one of the witnesses testified that, while he could not remember all of the contents of the letter, it began by addressing Swan as "dear boy" or "dear old boy." It appears from the testimony that defendant and Swan had been sweethearts before her intermarriage with plaintiff. The proof also shows that Swan wrote a letter to defendant in which he stated that rumors were current in the neighborhood concerning their conduct, and that it would be best for them to discontinue further communications. The communications between the defendant and Swan seem to have been conducted without any attempt whatever at secrecy. The letters were unsealed and were intrusted for delivery to acquaintances who had full opportunity to read them, and who did read them.

The testimony also proved two meetings between defendant and Swan in plaintiff's absence. On one occasion defendant attended a singing school at a church house in the neighborhood one night, and left the place with Swan before the

singing ended. The facts concerning their meeting come from defendant herself, and she states that she started home in company with Swan, but after walking together for a certain distance she heard someone coming, and, realizing the awkwardness of the situation, she ran away from Swan and went home alone. Defendant admits that in the letter to Swan she expressed her willingness for him to come to her home to see her while her husband was absent attending a lodge meeting. She states that Swan came to the gate on the occasion mentioned, and that she went out there to meet him. Her husband was absent, but others who lived in the house were there at the time. Defendant denied that there was any criminal intimacy between her and Swan, and there is no proof of such intimacy further than the correspondence and meetings above recited.

The chancellor concluded that acts of adultery were inferable from the proved relationship and communications between the parties. Since we have concluded to dispose of this cause on another issue, which will be presently discussed, it is perhaps unnecessary to determine whether the chancellor was justified in drawing the inference that acts of adultery had been committed between defendant and Swan; but when all the circumstances are considered together the inference is necessarily a very weak one, and it is doubtful, to say the least of it, whether it ought to be indulged so as to convict the defendant of so grave a charge as infidelity to her husband. The defendant from the very start admitted to her husband that she had been guilty of acts of indiscretion, and the openness with which the communications between those parties was conducted evinces a consciousness on her part of slight acts of indiscretion, rather than more serious acts of culpable immorality.

But, without passing on the ques-

tion of the sufficiency of the evidence to warrant the finding of the chancellor, we pass to the further question in the case whether or not the alleged offense of adultery was condoned by the plaintiff so as to preclude him from pleading the original acts as grounds for divorce. The proof shows that after plaintiff carried his wife back to her parents on July 2d he visited her several times at that place; but there is a sharp conflict in the testimony as to the character and circumstances of those visits. Defendant testified that plaintiff remained there with her two nights and occupied the same bed with her and the baby. The testimony of others living in the house was to the effect that plaintiff occupied the same room with defendant on those two nights. Plaintiff denied this, however, and introduced testimony tending to show that he did not stay at the house of defendant's parents on those nights, or on any other night after he carried her back to the home of her parents. It is unnecessary to determine where the preponderance of testimony on that question lies, for we propose to base our conclusion on other admitted facts concerning the conduct of plaintiff toward his wife.

It is admitted that plaintiff visited his wife at the home of her parents on July 5th, and that there, in the presence of defendant's mother, the parties agreed upon terms of reconciliation, and that they were to resume their relations as husband and wife, and that she was to return to his home. After entering into this agreement, plaintiff went out to the field where defendant's father was at work and told the latter about the reconciliation, and received the congratulations and good wishes of his father-in-law. Plaintiff went back to the house, and he and his wife started back on their journey to his home, a distance of about 3 miles, with the understanding that their reconciliation was complete. When they got to plaintiff's home, it was

about dark, and after remaining there a very short time, perhaps ten or fifteen minutes, plaintiff announced to defendant that he had concluded that they could not get along together, and directed that she get together some of her clothes and that he would take her back to her parents. She objected to going back, but he insisted, and against her protest he carried her back to her parents. Plaintiff's brother was living with him at the time, and they had cultivated a crop together, and the evidence tends to show that plaintiff's change of mind was brought about on account of his brother's threat that he would not live there if defendant was taken back into the home. Plaintiff denied that that was the cause of his change of mind, but he gives such an unsatisfactory explanation of his conduct at that moment that the conclusion is irresistible that his brother's attitude was the cause of his change of mind. We think the evidence shows that, while he had fully made up his mind to take his wife back to his home and to become completely reconciled and forgive her alleged past offense, he deliberately made a choice between her and his brother, and decided to give her up rather than suffer his brother to leave.

The question now presented is whether or not he made that choice too late, and is barred by his acts of reconciliation with his wife. The definition of "condonation" in its legal application to marital relations is stated by one of the text-writers on that subject as follows: "Condonation is the voluntary forgiveness and remission of a cause for divorce upon the condition that the offender will reform and will not be guilty of another cause for divorce. The condonation, in order to constitute a waiver of the cause for divorce, must amount to a reconciliation and a reunion of the parties. The reconciliation may be by express agreement of the parties to forgive the past and continue to live together. But ordinarily the

condonation is implied from the conduct of the injured party. One who relies upon a cause for divorce must not be guilty of inconsistent conduct. If such party has acted as if no real injury was inflicted, or has pursued a course of conduct evincing an intention to forgive the past and not apply for a divorce, he is estopped to declare a contrary intention." 1 Nelson, Div. & Sep. § 450.

The same author, in another section (452), further states the law on the subject as follows: "The conduct which amounts to a condonation must be something more than mere verbal forgiveness. It must amount to a reconciliation of the parties to such an extent as to evince an intention to forgive the offense and an acceptance of the forgiveness by the offender. The offer of the injured party to return and resume cohabitation is not such a waiver of the past as will amount to condonation. At most, such offer amounts to a waiver only on condition that a reconciliation is brought about. Such offer is not inconsistent with an intention to apply for a divorce in case the offer is declined."

The conduct of the appellant, according to his own admission, contains all the elements necessary to constitute legal condonation of the alleged offense. It was voluntary and complete. It

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is true that he changed his mind and undertook to rescind his acts of forgiveness and reconciliation before the resumed relations with his wife had proceeded to the extent of actual cohabitation or sexual intercourse, but it is not essential that the relation should have proceeded to that extent in order to become complete and binding. There are two modes or forms of condonation, one express and the other implied; and, while there are some authorities that go to the extent of holding that an implied condonation is not completed with any act short of actual cohabitation, we find none of

the authorities that hold that an express condonation need go that extent.

There is no statute in this state on that subject, and we must therefore resort to the application of common-law principles for the purpose of determining what does and what does not constitute an act of condonation which is binding.

We have already seen from the statements of the text-writers on the subject that mere words alone are not sufficient to constitute even an express condonation unless acted upon by the parties by resuming to some extent the marital relations. In the language of the Lord Chancellor in the case of *Keats v. Keats*, 32 L. T. 321, condonation means "a blotting out of the offense imputed, so as to restore the offending party to the same position which he or she occupied before the offense was committed." The case just cited contains an interesting discussion on the subject of what is necessary to constitute a complete condonation, and the following is stated to be the law on that subject: "It is true that forgiveness . . . is an act of the mind, but it can only be manifested by words or by outward acts. The acts which prove forgiveness may be so strong and unequivocal, as by taking home an offending wife and cohabiting with her, that they may conclusively establish condonation. But words, however strong, can at the highest only be regarded as imperfect forgiveness, and, unless followed up by a something which amounts to a reconciliation and of a reinstatement of the wife in the condition she was in before she transgressed, it must remain incomplete. It has been argued that nothing less than renewed sexual intercourse will be sufficient to establish condonation. It is obvious, without adducing instances to illustrate my meaning, that that in some cases may be a test wholly inapplicable."

The few cases which apparently

hold to the rule that actual intercourse is essential to a completion of the condonation are cases where the husband or wife remained in the house with the offending party after discovering the acts of infidelity, and in none of the cases did it occur, so far as we can discover, that the parties had separated and afterwards resumed to any extent their relations as husband and wife. In the present case it is seen that there was a complete separation and later a complete verbal reconciliation in the presence of other parties, and this was acted upon by a return of the wife to the home of her husband pursuant to the agreement that there was to be complete forgiveness and a resumption of the marital relation. They walked a distance of 3 miles to get back to their home, and it was only after they had gotten there that

the plaintiff changed his mind and decided to recall his act of reconciliation. We think it was too late for him to do so, for he had deliberately entered into the agreement with his wife and permitted her to act upon that agreement by leaving the home of her parents and journeying back with him to their former home.

This conclusion is distinctly in line with our decision in the case of *Shirey v. Shirey*, 87 Ark. 175, 112 S. W. 369, where we held that the dismissal of a divorce suit pursuant to an agreement to resume the marital relation constituted a complete condonation of the alleged offense.

The decree of the Chancery Court is therefore reversed, and the cause is remanded, with directions to dismiss the complaint for want of equity.

ANNOTATION.

Condonation of matrimonial offense without cohabitation.

- I. Acts constituting condonation, 1157.
- II. Acts not constituting condonation:
 - a. Promise to condone, 1158.
 - b. Acts of conjugal kindness, 1159.
 - c. Conduct irreconcilable with condonation, 1160.

I. Acts constituting condonation.

There seems to be but one decision besides the reported case (*BUSH v. BUSH*) wherein a cause for divorce has been held to be condoned by agreement or act of the parties without cohabitation. The view that has been adopted by the courts is that words, at the highest, can only be regarded as imperfect forgiveness, and in all cases they must be followed by some act, implied or express, amounting to a reinstatement of the guilty party to his or her previous status. In the vast majority of the cases a recommencement of cohabitation was the proof offered of condonation.

In *Merriam v. Merriam* (1917) 207 Ill. App. 474, an action was brought for divorce on the ground of desertion. It appeared that the wife was in the habit of indulging excessively in the

use of intoxicants, and as a result of such conduct a written agreement was entered into by her with her husband, which provided for a separation for a period of three months, and that if her reformation was complete the marital relation was to be resumed, otherwise a permanent separation agreement would be entered into. The evidence showed that the wife performed her part of the agreement, but at the end of the prescribed time the plaintiff refused to reinstate her. The court held that the husband had condoned the wife's previous conduct on condition, and the condition having been performed, the condonation was complete. The court said: "He agreed to reinstate her to her marital rights upon condition, and she performed the condition. We think, therefore, that there was a condonation of the offense by the complainant. Complainant contends that there can be no condonation unless the guilty party is reinstated to all marital rights, and as this was not done in the instant case, there was no condonation.

The case of *Anderson v. Anderson* (1911) 89 Neb. 570, 131 N. W. 907, Ann. Cas. 1912C, 1, is cited in support of this contention. In that case there was an agreement whereby the husband was to go to a sanitarium to be cured of certain ailments, and for this purpose agreed to stay a certain period. Before the expiration of the time and before he was cured, he returned, and again repeated the offenses charged against him. It was there held that there was no condonation. It is obvious that the facts in that case are entirely dissimilar to the facts in the case at bar."

In the reported case (*BUSH v. BUSH*, ante, 1153) the wife was charged with acts of adultery and the parties separated. Subsequently a reconciliation was effected, the husband expressly forgave his wife, and brought her back to his domicile. Shortly after their arrival he renounced his forgiveness and compelled her to leave. It is held that an action for divorce would not lie, since condonation was complete though cohabitation had not been resumed.

II. Acts not constituting condonation.

a. Promise to condone.

It has been held that a mere promise to condone in the future, or a promise to condone on performance of a condition, is not condonation so as to bar a subsequent action for the offense complained of, where the promise is not accepted or the condition fulfilled. The forgiving party in such cases has merely an intention to act, and, to condone the offense, that intent must be followed up by acts or conduct which reinstate the offending party. *Wolff v. Wolff* (1894) 102 Cal. 433, 36 Pac. 767, 1037; *Anderson v. Anderson* (1911) 89 Neb. 570, 131 N. W. 907, Ann. Cas. 1912C, 1; *Goeger v. Goeger* (1900) 59 N. J. Eq. 15, 45 Atl. 349; *Taber v. Taber* (1904) — N. J. Eq. —, 66 Atl. 1082; *Moore v. Moore* (1890) 41 Mo. App. 176.

In *Wolff v. Wolff* (Cal.) *supra*, an action by a wife for divorce on the ground of cruel treatment, it appeared that after the parties had separated the husband sought a reconciliation,

and the wife promised that she would return to him. The Civil Code provided that condonation must, by express agreement, remit the offenses of the guilty party and restore such party to his or her marital rights. It was held that the wife's voluntary promise to return and live with her husband was not condonation as defined by the statute.

In *Anderson v. Anderson* (1911) 89 Neb. 570, 131 N. W. 907, Ann. Cas. 1912C, 1, an action for divorce on the ground of cruelty, it appeared that the wife left her husband because of his cruel treatment of her. Subsequently the parties agreed that the husband was to go to a sanitarium for treatment for a period of one year, at the end of which time, if a cure had been effected, the parties were to resume the marital relations. The husband stayed in the sanitarium but two months, and on his return resumed his ill-treatment of plaintiff. The court, in granting a decree of divorce to the wife, held that she had not condoned his former cruelties, as her promise to condone had been upon condition, and the condition had not been performed by the defendant.

In *Goeger v. Goeger* (1900) 59 N. J. Eq. 15, 45 Atl. 349, it appeared that a wife had been guilty of an act of adultery, and a separation ensued. Subsequently a reconciliation was sought, and the husband promised to receive the wife back, and conveyed property to her as an evidence of good faith. The wife urged that these acts constituted condonation. It was held that condonation was not sufficiently shown, since the husband's actions were merely a promise to condone. The court said: "Forgiveness of the offense, whether it be evidenced by words or acts, is not necessarily legal condonation, which requires the forgiveness to be followed in fact by a reconciliation, in which the wife is reinstated to such conjugal cohabitation or connubial intercourse as may be adapted to the circumstances of the parties. An inclination to condone is not sufficient, if not followed by an actual reinstatement."

In *Taber v. Taber* (1904) — N. J.

—, 66 Atl. 1082, it appeared that the parties had separated because of the husband's contraction of a venereal disease. At a later date the wife returned to her husband on the condition that marital relations should not be resumed. Shortly after the wife again left the defendant because of his insistence that the marital relation should be resumed. In a suit for divorce the defense of condonation was pleaded. It was held that there had been no condonation, the court saying: "These expositions of the meaning of condonation show clearly that it is something more than forgiveness, in the sense of ceasing to harbor resentment. It is not only a blotting out of the offense from the mind and heart of the person forgiving, but a restoration of the offender to his former position. If the wife says: 'I will cease to entertain feelings of resentment against you for the wrong you have done me. I will go back and be your housekeeper, but I will not maintain wifely relations with you'—it is manifest that the condonation is not complete."

In *Moore v. Moore* (1890) 41 Mo. App. 176, it appeared that the parties had separated, and an effort was made to reconcile their difficulties. The wife promised to return and live with her husband, and he promised to give a stated sum each month for the support of the family, and to discontinue his previous habit of drinking to excess. The parties did not resume the marital relation, as the husband failed to carry out his part of the agreement. The conduct of the wife was urged as condonation. It was held that there had been no condonation, but merely a promise to condone, and the husband's failure to perform the condition precedent prevented condonation. The court said: "These matters are also urged as a condonation. We think they do not amount to that. She had become convinced that his continued intemperate habits and mode of life had prevented him from supporting her and her child, but on his promise she consented to delay action. Her expectations and hopes were again not realized, and condonation

did not take place. Condonation is conditional, and if the offense said to be forgiven is repeated, or not discontinued, there is no condonation. The alleged condonation here was not a forgiving; it was merely a promise upon condition."

b. Acts of conjugal kindness.

The fact that acts of conjugal kindness have been shown to the offending party does not amount to condonation. It is not unlikely that the innocent party, prompted by a feeling of compassion, or a remembrance of former happy days, should perform some act of kindness toward the offender which might show forgiveness, but not an intention to restore the offender to marital rights, which is one of the essentials of condonation. *Hunter v. Hunter* (1901) 132 Cal. 473, 64 Pac. 772; *Whinnery v. Whinnery* (1913) 21 Cal. App. 59, 130 Pac. 1065; *Guthrie v. Guthrie* (1887) 26 Mo. App. 566.

In *Hunter v. Hunter* (Cal.) *supra*, an action was brought for a divorce, the wife alleging cruelty. After the alleged acts of cruelty the parties separated, and during the separation the wife wrote several letters which the husband claims condoned the cruelty. The Code provided that neither cohabitation, passive endurance, nor conjugal kindness should be evidence of condonation unless accompanied by an express agreement to condone. The court held that the letters were acts of conjugal kindness, and no express agreement to condone could be inferred therefrom.

In *Whinnery v. Whinnery* (1913) 21 Cal. App. 59, 130 Pac. 1065, an action was brought for divorce on the ground of cruelty. It appeared that subsequent to the separation of the parties the plaintiff performed several acts of conjugal kindness for the defendant. It was held that such acts did not show condonation, as the statute provided that in such cases the acts must be accompanied by express agreement to condone, and these were lacking in the case at bar. The court said: "It is apparent from the record that the cause of divorce grew out of the excessive acts of ill-treatment of plaintiff on the part of defendant, and there is

no evidence disclosed that there was any express agreement on the part of plaintiff to condone the offense of defendant; hence condonation was not made out within the contemplation of the statute."

In *Guthrie v. Guthrie* (1887) 26 Mo. App. 566, it appeared that the wife had left her husband because of his cruelty. Subsequently the husband was seriously injured, and his wife returned to his home and nursed him for a period of three years. On his recovery she again left, and filed a petition for a divorce. The defendant alleged that the cruelty had been condoned by the return for three years. The court, in granting a divorce, held that the cruelties had not been condoned, and said: "Without going further into these details, we take it to be a fair inference from the evidence that, living apart from him because her situation when living with him was intolerable, she returned to him when he received this hurt, which threatened to end in his speedy death, out of a feeling of sympathy and under a sense of duty; that she returned, not for the purpose of cohabiting with a well man capable of injuring her, but for the purpose of nursing a helpless invalid, in all probability, about to die. Even if his conduct during the three years in which she remained with him and nursed him had been in all respects kind and exemplary, it might be difficult to say that such a return was a condonation of his past offenses, and it might be regarded a harsh rule of law that would convert such a sacrifice on her part into a deprivation of her legal rights."

c. Conduct irreconcilable with condonation.

The courts are not inclined to hold that an offense has been condoned where the parties have merely entered into negotiations, but there are acts indicative of the absence of a complete accord. While it will be presumed that a husband and wife living under the same roof have cohabited, this inference is rebutted by evidence that the parties occupied separate rooms, or by evidence of a course of treatment towards the offender inconsis-

ent with the presumption of cohabitation. *Lindsay v. Lindsay* (1907) 226 Ill. 309, 80 N. E. 876; *Mattes v. Mattes* (1905) 121 Ill. App. 400; *Truitt v. Truitt* (1910) 154 Ill. App. 242; *Greenwell v. Greenwell* (1916) — R. L. —, 98 Atl. 53; *Sayles v. Sayles* (1918) 41 R. L. 170, 103 Atl. 225; *Rudd v. Rudd* (1894) 66 Vt. 91, 28 Atl. 869; *Faulkner v. Faulkner* (1916) 90 Wash. 74, 155 Pac. 404; *Keats v. Keats* (1859) 5 Jur. N. S. (Eng.) 176, 28 L. J. Prob. N. S. 57, 1 Swabey & T. 324, 7 Week. Rep. 377; *Gooch v. Gooch* L. R. [1893] P. (Eng.) 99, 62 L. J. Prob. N. S. 73, 1 Reports, 516, 68 L. T. N. S. 462, 41 Week. Rep. 655.

In *Lindsay v. Lindsay* (1907) 226 Ill. 309, 80 N. E. 876, it appeared that a wife deserted her husband, and, after being absent for a period of two years, returned to his residence, but did not resume marital relations with him. In an action for divorce on the ground of desertion, it was held that the wife's return was not proof of condonation by the husband. The court said: "There was never any sort of condonation of the desertion. Perhaps neither of the parties can be justified in their conduct during the period after her return, but if there was no condonation of the desertion appellant did not forfeit his right to a divorce on the ground of desertion. The fact that they lived together under the same roof is no proof of condonation under the circumstances of the case, and the fact that she returned did not prove that the desertion did not continue."

In *Mattes v. Mattes* (1905) 121 Ill. App. 400, a bill by a wife for a divorce on the ground of adultery, it appeared that the wife, on learning of her husband's infidelity, continued to reside in the same house with him, but occupied a separate room and refused to cohabit with the defendant as his wife. The defendant claimed that his adultery had been condoned by the plaintiff's acts. It was held that the plaintiff had not condoned the adultery of her husband by remaining in the homestead after knowledge of the fact. The court said: "There is nothing in this record tending to show

appellant forgave her husband. . . . In refusing to accord her husband marital rights, and by occupying a separate room in the house, she did all within her power, consistent with her duty to her children, to manifest her disapproval of his conduct. The fact that she remained silent should not, under the circumstances, be construed as acquiescence or forgiveness on her part, amounting to condonation."

In *Truitt v. Truitt* (1910) 154 Ill. App. 242, it appeared that the parties had separated, but later a reconciliation was effected between them and the wife returned, remaining with her husband but a week. The husband filed a bill charging her with adultery committed prior to the reconciliation. It was held that there had been no condonation, as the marital relation was not resumed, the court saying: "Condonation depends upon proof of the resumption of marital cohabitation. Her veracity being so clearly impeached, the testimony of appellant should be believed as against her discredited testimony. Condonation is the forgiveness of misconduct constituting a cause for divorce, upon the condition that the offender will not in future be guilty of such misconduct. 9 Am. & Eng. Enc. Law, 2d ed. 322. 'Forgiveness which is to take away the husband's right to a divorce must not fall short of reconciliation, and that this must be shown by the reinstatement of the wife in her former position, which renders proof of conjugal cohabitation, or the restitution of conjugal rights, necessary.'"

In *Greenwell v. Greenwell* (1916) — R. I. —, 98 Atl. 53, it appeared that the wife lived in the same house with her husband for a period of four months after the last act of cruelty was committed, but the marital relation was not resumed. It was held that the acts of cruelty were not condoned by the wife, since the relation of husband and wife had not been resumed after the cruel treatment of the husband.

In *Sayles v. Sayles* (1918) 41 R. I. 170, 103 Atl. 225, a petition was filed for divorce by a wife on the ground

of cruelty. It appeared that the wife, subsequent to swearing to the petition, returned to her husband and lived with him for a period of three days until the citation was served. Both parties testified that the wife performed her usual household duties, but that there was no sexual intercourse between the parties. It was held that there had been no condonation, the court saying: "'Condonation' is forgiveness. To be effective it must be voluntary and intentional. Such intention may be expressed in words, or it may be implied from the acts of the injured party. In the present case there might be a presumption of sexual cohabitation, and therefore of condonation, from the fact that the petitioner occupied the same bed with her husband for a brief period after the final act of cruelty of which she complains. Such presumption, however, may be rebutted. *Wilson v. Wilson* (1888) 16 R. I. 122, 13 Atl. 102; *Burns v. Burns* (1877) 60 Ind. 259; *Danforth v. Danforth* (1895) 88 Me. 120, 31 L.R.A. 608, 51 Am. St. Rep. 380, 33 Atl. 781; *Keezer, Marr. & Div.* § 250. The testimony is conclusive that no sexual intercourse took place, and therefore any claim of condonation must necessarily be based upon some other ground."

In *Rudd v. Rudd* (1894) 66 Vt. 91, 28 Atl. 869, it was held that there had been no condonation of the acts of cruelty, where the wife lived in the same house with her husband for a week subsequent to the cruel treatment. The court said: "The exceptions present no element of condonation. There was no forgiveness by the petitioner, no promise of future kind treatment by the petitionee, and no resumption of marital relations after the assault of June 15, 1890, was committed. On the contrary, the petitioner avoided the petitionee as much as possible, some of the time hiding from him, though remaining in the house with him until the final separation, which was on June 30, 1890."

In *Faulkner v. Faulkner* (1916) 90 Wash. 74, 155 Pac. 404, it appeared that, pending an action for divorce brought by the husband, he resided

with the defendant, and the defense of condonation was pleaded. In disposing of the question the court said: "It is true he resided at the common home of himself and the defendant during the pendency of the action, but since he occupied a separate room in the house, apart from the defendant, this would not have been sufficient ground on which to defeat the divorce action, and much less is it a sufficient ground for the vacation of the decree entered therein. . . . The appellant's counsel in their brief assert that the record shows that the respondent cohabited with the appellant during the time the action was pending, and that she was led thereby to believe that the grievances against her had been condoned, and the action discontinued, but the record, as we read it, does not sustain the claim. The appellant details a circumstance from which it might be inferred that the respondent had cohabited with her during the time the divorce action was pending, but in answer to a direct question put to her by the presiding judge, inquiring whether he had done so, she answered in the negative. It is not necessary to argue, of course, that if the premise from which a conclusion is deduced fails of proof the conclusion must fail also."

In *Keats v. Keats* (1859) 5 Jur. N. S. (Eng.) 176, the wife was charged with certain acts of adultery, causing the separation of the parties. In an action for a divorce for such infidelity, the defense of condonation was pleaded. In holding that the defense was not good and that the husband was entitled to a divorce, the court said: "It is true that forgiveness, as was argued, is an act of the mind, but it can only be manifested by words or by outward acts. The acts which prove forgiveness may be so strong and unequivocal, as by taking home an

offending wife and cohabiting with her, that they may conclusively establish condonation. But words, however strong, can at the highest only be regarded as imperfect forgiveness, and unless followed up by something which amounts to reconciliation, and to a reinstatement of the wife in the condition in which she was before she transgressed, it must remain incomplete. It has been argued that nothing less than renewed sexual intercourse will be sufficient to establish condonation. It is obvious, without adducing instances to illustrate my meaning, that this in some cases may be a test wholly inapplicable."

In *Gooch v. Gooch* L. R. [1898] P. (Eng.) 99, it appeared that husband and wife had separated under an agreement which provided that "no proceedings shall be commenced or prosecuted by or on behalf of either party against the other, in respect of any cause of complaint which now exists or has arisen before the date of these presents." This clause was held by the court not to condone acts of adultery committed by the wife prior to the making of the agreement. The court said: "Unless these words, on their true construction, amount to a covenant not to plead the adultery of the petitioner, as the respondent has pleaded it, they constitute no imaginable reply to the respondent's plea. Do they, then, express any obligation on the part of the respondent not to set up his wife's adultery as an answer to the charge against him? I am clearly of opinion that they do not. It it had been intended that such an obligation should be imposed, nothing would have been easier than to have used language of which the import would have been unambiguous."

E. C. B.

EDWIN T. EARL, Respt.,
v.

L. A. DUTOUR et al., Appts.

California Supreme Court (Dept. No. 2) — August 20, 1919.

(— Cal. —, 183 Pac. 438.)

Boundaries — conveyance of half of lot bounding on street.

1. A conveyance of the half of a lot which is bounded by a public street does not include the half of the street, for the purpose of determining where the line dividing the halves falls, although the grantor owns to the middle of the street.

[See note on this question beginning on page 1165.]

— rebutting presumption — extension of lines to center of street.

2. The presumption that the portion of a lot between the center and side lines of a street is not to be considered in determining the boundaries of a conveyance of the half of the lot bordering on the street is not rebutted by the facts that the conveyance is

made with reference to a plat on which the side lines of the lots are extended to the center of the street, and the area marked on each lot includes the portion in the street, while the allotment of water to the lot is based on such area.

[See 8 R. C. L. 1083.]

APPEAL by defendants from a judgment of the Superior Court for Los Angeles County (Taft, J.) in favor of plaintiff, and from an order denying a new trial in an action brought to quiet title to certain land. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. W. J. Ford and W. Le Roy Thomas, for appellants:

Lots, and streets or avenues, are separate and distinct terms and have separate and distinct meanings.

Montgomery v. Hines, 134 Ind. 221, 33 N. E. 1100; Wegge v. Madler, 129 Wis. 412, 116 Am. St. Rep. 953, 109 N. W. 223; Devlin, Deeds, 3d ed. § 1020, p. 1953; Burbach v. Schweinler, 56 Wis. 386, 14 N. W. 449.

When a deed to a lot refers to a recorded map, the map becomes a part of the deed, and as thus described the map controls a further description by metes and bounds, or courses and distances.

Masterson v. Munro, 105 Cal. 433, 45 Am. St. Rep. 57, 38 Pac. 1106; Sutherland v. Jackson, 32 Me. 80; 4 R. C. L. § 37, p. 102; Madison v. Mayers, 97 Wis. 399, 40 L.R.A. 635, 65 Am. St. Rep. 127, 73 N. W. 43; People v. Blake, 60 Cal. 508; Vance v. Fore, 24 Cal. 435; Penry v. Richards, 52 Cal. 672; McKeon v. Millard, 47 Cal. 581.

In a conveyance made according or by reference to a map or plat, the

grantee takes title subject to the streets, alleys, or other public grounds appearing thereon, and the property is not to be measured by going to the center of such street, alley, or public ground.

Burbach v. Schweinler, 56 Wis. 386, 14 N. W. 449; Devlin, Deeds, 3d ed. § 1020, p. 1953; Fraser v. Ott, 95 Cal. 661, 30 Pac. 793; 4 R. C. L. § 60, p. 120; Wegge v. Madler, 129 Wis. 412, 116 Am. St. Rep. 953, 109 N. W. 223.

Messrs. Anderson & Anderson, for respondent:

The term "lot" in referring to city property is generally understood to mean the lot itself in contradistinction to the street, whereas in referring to country property the term "lot" often is synonymous with the term "tract" or "parcel," extending, of course, to the center of the highway embraced within such tract or parcel.

Ontario Land & Improv. Co. v. Bedford, 90 Cal. 181, 27 Pac. 89; Pilz v. Killingsworth, 20 Or. 432, 26 Pac. 305; Lundberg v. Sharvey, 46 Minn. 350, 49 N. W. 60; Webster v. Little Rock, 44 Ark. 536; Collins v. New Albany,

59 Ind. 396; *Schenectady v. Union College*, 144 N. Y. 241, 26 L.R.A. 614, 39 N. E. 67; *Pepper v. O'Dowd*, 39 Wis. 538; *Aldrich v. Thurston*, 71 Ill. 324.

Lennon, J., delivered the opinion of the court:

This appeal is from a decree quieting plaintiff's title to a strip of land 15 feet wide adjacent to the center line of lot 17 of the Hillard tract in the county of Los Angeles.

Plaintiff and defendant own, respectively, the easterly and westerly halves of lot 17, and the sole question in dispute is whether the center line of the lot forms the eastern or western boundary of the strip of land in suit. The answer to this question depends upon the construction to be placed upon the word "lot," in the deed by which was conveyed to defendants the "westerly one-half of lot 17 of the Hillard tract, as per amended map recorded in book 43, page 64, miscellaneous records of said county."

Inasmuch as the map referred to clearly indicates that the western boundary of lot 17 is the center line of an avenue 60 feet in width, it was contended on behalf of plaintiff and held by the trial court that the 30-foot strip covered by the street was part of the "lot" within the meaning of the deed, and that therefore the eastern boundary of defendants' land was a line halfway between the center line of the avenue and the eastern boundary of lot 17.

With this conclusion we are unable to agree. However clearly it may appear that the owner of a lot holds title to the center of an adjoining street, subject to the public easement, and that the boundary of the lot is technically, therefore, the center of the street, in view of the fact that the owner of such lot or land has no right to the possession

or occupancy of any portion of such public street, we are of the opinion that the word "lot," as generally and customarily used, does not include such portion of the

street. *Wegge v. Madler*, 129 Wis. 412, 116 Am. St. Rep. 953, 109 N. W. 223. As stated by the supreme court of Indiana: "Lot and street are two separate and distinct terms, and have separate and distinct meanings. The term 'lots,' in its common and ordinary meaning, includes that portion of the platted territory measured and set apart for individual and private use and occupancy. While the term 'streets' means that portion set apart and designated for the use of the public, and such is the sense in which such terms will be presumed to have been used, unless it be made to appear that a contrary meaning was intended." *Montgomery v. Hines*, 134 Ind. 221, 255, 33 N. E. 1101.

In the absence, therefore, of any circumstance indicating that a more unusual and technical meaning of the "lot" was contemplated and intended by the grantor, it will be presumed that the grant of a fractional part or of a given number of feet of a certain lot or parcel of land conveys the given fractional part or number of feet of that portion of the lot or parcel of land which is set apart for private use and occupancy.

Plaintiff contends that the circumstances revealed by an analysis of the map referred to in the deed indicates that the defendants' grantor used the word "lot" as including the portion lying in the street, as well as the portion set apart for private use. These circumstances are stated as follows: "First. The length of all lot lines is given in chains on the face of the map, and extends to the center of the avenues in front. The widths of the streets are not given on the map itself, but are stated in the legend on the map, such width being given in feet. Second. The side-lot lines themselves are extended by dashed lines to the centers of the avenues in front. Third. The gross area is given in acreage marked on each lot. Fourth. The center line of each avenue is marked on the map by a dashed line which

Boundaries—
conveyance of
half of lot
bounding on
street.

is intersected in nearly all instances by dashed lines extending the heavy lines of the lots to the center of the avenues."

Giving to these items all the force which may reasonably be claimed for them, they tend to show no more than that it was intended that lot owners in the Hillard tract should take title to the center of the streets or avenues. They do not, we think, tend in any way to rebut the presumption that defendants' grantor used the word "lot" in its ordinary and commonly accepted meaning. Of no greater force, in our opinion, is the fact that the

deed in question conveyed one half of the water right appurtenant to lot 17, the same having originally been allotted on the basis of acreage including the portion of the lot lying in the street. It follows that the presumption stands un rebutted.

—rebutting presumption—extension of lines to center of street.

The judgment appealed from is reversed.

We concur: Wilbur, J.; Melvin, J.

Petition for rehearing denied, September 18, 1919.

ANNOTATION.

Location of division line under conveyance of land as affected by street.

- I. Introductory, 1165.
- II. Division line affected by street, 1165.
- III. Division line not affected by street, 1166.

I. Introductory.

It is well settled that, where land is conveyed with reference to a boundary on a street, the grantor ordinarily takes to the center of the street. See the note to *Re Bronx Parkway*, 2 A.L.R. 1. The present note, assuming the existence of that rule, discusses the narrow question whether, in the conveyance of the part of a tract of land which fronts on a street, the division line is to be determined by including in the tract conveyed the appurtenant half of the street, or whether it is to be determined by taking the portion conveyed entirely from the portion of the tract appropriated to private use.

II. Division line affected by street.

In some cases wherein it appeared that a portion of a tract of land abutting on a street was conveyed, it has been held that the division line between that portion and the remainder of the parcel was to be located as a result of considering the center line of the street as the boundary of the original tract. *Helmer v. Castle* (1884) 109 Ill. 664; *Henderson v. Hatterman* (1893) 146 Ill. 555, 34 N. E.

1041; *Stinchfield v. Gerry* (1874) 64 Me. 200; *Cochran v. Smith* (1893) 78 Hun, 597, 26 N. Y. Supp. 103.

In *Helmer v. Castle* (Ill.) supra, it appeared that the description in a deed of land bounded on the north by a road described a course "commencing at the northeast corner of that part of section 11, . . . south of the road there running; thence running westerly along the line of said road," etc. The difficulty was in locating the starting point. An early deed to part of the tract, which had been divided into two parts on either side of the road and extending to the center thereof, called for the "east half of the southeast quarter, south of the road," which language was used in all deeds, including that to the grantor from whom both parties derived title. The court considered this to mean extending north to the center line of the road, saying that since the common source took to the center of the road and did not reserve the fee of the south half of the road to himself, the grant under consideration must be considered as bounded on the north thereby, and consequently the land in dispute belonged to the plaintiff.

In *Henderson v. Hatterman* (1893) 146 Ill. 555, 34 N. E. 1041, it appeared that the defendants were the grantees

of a lot in the subdivision of a tract, and that they claimed that their southern boundary was the northerly line of the road on which their lot abutted. The center of this road was the "Indian boundary line," and the deed to the appellants called for a course running along this line from the starting point, the line being 33 feet south of the north side of the road. Since the starting point was in the line in the middle of the road, the court held that the course must be along the line, and not along the north side of the road. It was pointed out that since the center of the highway bounds the land abutting thereon, the starting point mentioned in the deed must have been in the center of the road, and at the intersection of such road with the center of the road on the west of the lot. The center of the road as a monument controlled the courses and distances, and these in turn superseded the call in the deed for 1 acre of land. In addition the court called attention to the fact that the plat of the subdivision described land "lying north of Indian boundary line," presumptively embracing the north half of the road. Consequently the defendants were entitled to the possession of only that portion of the tract included in the measurements above described.

In *Stinchfield v. Gerry* (1874) 64 Me. 200, the plaintiff claimed "that defendant committed trespass on premises conveyed to him by deed of warranty, containing the following description: 'A certain piece or parcel of land . . . being the most northerly 50 acres of lot number 42 according to Norcross's survey.'" It was agreed that a road was laid out on the east line of lot No. 42, one half being on such, "and one half on the lot next east," and that, if plaintiff was entitled to be bounded by the west side of the road in order to obtain his acreage, the defendant was a trespasser, but not if the center of the road was the eastern boundary of the plaintiff's land. It was held that since the plaintiff's boundary was the east line of lot No. 42, and since the road was laid out in this east line, he could not claim to measure his acreage from the

west line of the road, and that consequently the defendant was no trespasser. There was no ambiguity in the deed which entitled the plaintiff to claim that the covenants in his deed gave him 50 acres free from encumbrances.

In *Cochran v. Smith* (1893) 73 Hun, 597, 26 N. Y. Supp. 103, an action for trespass on land, it was necessary to fix the boundary or division line between the lands of the plaintiff and the defendant, the lot of the former being bounded on the west and north by two streets, and on the east by the lot of the defendant, which was likewise bounded on the north by a street. The mother of both the plaintiff and the defendant was their common grantor, and the court pointed out that it was her intention that each of these lots should contain 1 acre of land. The place of beginning called for in the deed to the plaintiff was the junction of the two roads on which the lot abutted, and the court held that by this was meant the intersection of the center line of the two roads, on the principle that a conveyance of land bounded by a highway carries "the fee to the center thereof as part of the grant." And likewise the courses described as "by" the avenue and "by" the road must be considered as meaning "by" the center line thereof. Such a construction of the plaintiff's deed was strengthened by the fact that when her lot was measured a bolt was driven in the ground at the spot in the middle of the avenue from which the measurement was begun. A later survey made in the same manner met with the assent of the plaintiff, and gave her just 1 acre of land.

III. Division line not affected by street.

In some cases the conveyance of a portion of a parcel of land abutting on a street has been considered as a grant, irrespective of the street, and the location of the division line between the portion was made by considering the side line of the street as the boundary of the original tract. *Fraser v. Ott* (1892) 95 Cal. 661, 30 Pac. 793; *Montgomery v. Hines* (1893) 134 Ind. 221, 33 N. E. 1100; *Wegge v. Madler* (1906) 129 Wis. 412, 116 Am. St. Rep.

953, 109 N. W. 223. And see the reported case (*EARL v. DUTOUR*, ante, 1163).

Thus in *Montgomery v. Hines* (1893) 134 Ind. 221, 33 N. E. 1100, it was said: "The term 'lots,' in its common and ordinary meaning, includes that portion of the platted territory measured and set apart for individual and private use and occupancy."

This reasoning was followed in *Wegge v. Madler* (1906) 129 Wis. 412, 116 Am. St. Rep. 953, 109 N. W. 223, wherein the court said: "The lot must be understood to mean the land, independently of the street or avenue."

In *Fraser v. Ott* (1892) 95 Cal. 661, 30 Pac. 793, an action to quiet title to a parcel of land, it appeared that the plaintiff was the owner of "the north 2 acres of block No. 13" of the Western Development Company's 4-acre blocks, as per a map of record. The defendant claimed a strip of land along the south side of the plaintiff's lot, and contended that the plaintiff's 2 acres should be measured "by extending the same to the center of the adjacent street on the west." The question then was as to the location of the plaintiff's south line, and this in turn "depended upon the location of his west line." It was held that, while a conveyance of land bounded by a highway passed title to the center thereof, it did not follow that a grant of 2 acres, as in the present case, "must be measured by going to the center" of the street. The blocks in this instance were "4-acre blocks," and the description calling for the "north 2 acres of the block" conveyed the north half thereof exclusive of the street, and this was shown to be the intention here by the additional grant of a right of way "over the east end of the south half of the same block." The court also pointed out that a "block" is "a portion of a city inclosed by streets."

In *Montgomery v. Hines* (Ind.) supra, an action to quiet title, the land in question was part of lot 5 of a certain plat. The defendant's deed called for a piece of land "commencing at the southeast corner of lot 5, thence north to the northeast corner, west 72

feet, south to the south line, and east to beginning," which comprised a strip of land on the east side of lot 5, running along a 40-foot street. The plaintiffs later received a conveyance of lots 4 and 5, excepting the 72 feet on the east side of lot 5, and they claimed that the 72 feet called for in the deed extended west only 72 feet from the center of the above-mentioned street, which constituted the east boundary. The court said: "When land is regularly and legally platted for town purposes, and it is not contended that this was not so platted, and lots and streets marked off and described, giving width of street and size of lots, a lot, we think, must be understood to mean the land independently of the street, though the adjacent lot owner, by the purchase of the lot, or that portion bordering on and lying adjacent to the street, takes title ordinarily to the center of the street, subject to the rights of the public. This same title to the street he would take, if, in describing the lot, it were described by metes and bounds, running to and along the street. . . . The conveyances in this case gave to the purchasers the legal title to 72 feet, bounded on the east by the east line of the lot (the west boundary line of the street), and extending back onto the lot 72 feet from that line. There was nothing in the conveyance to authorize any different construction. This is the common and usual meaning of the words used, and there is nothing to indicate that the words were used in any other sense."

In *Wegge v. Madler* (Wis.) supra, an action of ejectment, it appeared that one Kasten, who was the owner of portions of lots 1 and 2 in question, conveyed to the plaintiff a parcel of land commencing 50 feet east of the northwest corner of lot No. 1, and to the defendant another parcel of land commencing at the northwest corner of lot No. 1, which lot was bounded on both the north and west by streets 80 feet wide. It was contended by the plaintiff that the northwest corner of lot No. 1 must be considered as situated at the intersection of the center lines of these two streets, and that

consequently his own parcel began at a point 50 feet east of the center of the street bounding lot No. 1 on the west. It was held that while "the grantee of a lot in a recorded plat takes title to the center of an adjoining street, subject to the public easement," since the abutting landowner

has no right of occupancy or possession therein, the street is not mentioned in the conveyance, and is not to be considered as included in the description of the grant. "The lot must be understood to mean the land independently of the street or avenue."

R. S.

NAVASSA GUANO COMPANY, Appt.,

v.

ELLEN NIXON COCKFIELD et al., Exrs., etc., of S. R. Cockfield,
Deceased, et al.

United States Circuit Court of Appeals, Fourth Circuit—April 3, 1918.

(165 C. C. A. 363, 253 Fed. 883.)

Fraudulent conveyance — change of beneficiary.

The change by an insolvent about to die of the beneficiary named in a policy on his life, from his personal representative to a relative, is fraudulent as to his creditors, although no fraud was intended and the policy had no surrender value.

[See note on this question beginning on page 1173.]

APPEAL by plaintiff from a decree of the District Court of the United States for the Eastern District of South Carolina (Smith, J.) in favor of defendants in a suit to subject the proceeds of an insurance policy to the payment of creditors of decedent. *Reversed.*

The facts are stated in the opinion of the court.

Argued before Pritchard, Knapp, and Woods, Circuit Judges.

Messrs. Willcox & Willcox, Henry E. Davis, and Philip H. Arrowsmith, for appellant:

The change of beneficiary did not take effect until indorsement on the policy, and no such indorsement on the policy was ever made.

Thompson v. Equitable Life Assur. Soc. 95 S. C. 16, 78 S. E. 439; Deal v. Deal, 87 S. C. 395, 69 S. E. 886, Ann. Cas. 1912B, 1142; Holder v. Prudential Ins. Co. 77 S. C. 299, 57 S. E. 853; Freund v. Freund, 218 Ill. 189, 109 Am. St. Rep. 283, 75 N. E. 925.

A transfer by decedent to his brother as a gratuity, of a policy that was made payable to his estate, was such a transfer of assets as is prohibited by statute, and the transfer under such circumstances was of the entire proceeds of the policy itself, and the creditors are entitled to subject such proceeds to the payment of their debts.

Central Nat. Bank v. Hume, 128 U.

S. 195, 32 L. ed. 370, 9 Sup. Ct. Rep. 41; Elliott's Appeal, 50 Pa. 75, 38 Am. Dec. 525; Lytle v. Baldinger, Ann. Cas. 1912B, 896, note; 12 R. C. L. 511; 20 Cyc. 361; Chamberlain v. Butler, 87 Am. St. Rep. 488, note.

A transfer by a debtor in violation of statute can be set aside as a fraud on the rights of creditors, by proving either that it was without consideration or that it was in bad faith.

McElwee v. Kennedy, 56 S. C. 154, 34 S. E. 86; Lenhardt v. Ponder, 64 S. C. 354, 42 S. E. 169.

In transactions between relatives, upon proof of relationship, the transferee must clearly show the good faith of the transaction.

Tucker v. Weathersbee, 98 S. C. 406, 82 S. E. 638; Braffman v. Glover, 35 S. C. 436, 14 S. E. 935; Virginia-Carolina Chemical Co. v. Hunter, 94 S. C. 65, 77 S. E. 751.

Messrs. Kelley & Hinds and A. C. Hinds, for appellee:

The claim that the change is not in conformity with the terms of the pol-

icy is personal to the insurance company, and cannot be asserted by anyone else.

May, Ins. § 399; *Martin v. Stubblings*, 126 Ill. 387, 9 Am. St. Rep. 620, 18 N. E. 657; *Opitz v. Karel*, 118 Wis. 527, 62 L.R.A. 982, 99 Am. St. Rep. 1010, 95 N. W. 948; *Manchester Fire Assur. Co. v. Glenn*, 13 Ind. App. 365, 55 Am. St. Rep. 225, 40 N. E. 926, 41 N. E. 847.

The provisions in insurance policies prescribing the mode of the change of beneficiary are invariably construed as being inserted for the protection of the insurer, compliance with which may be waived by the company, and as between the assignor and assignee it is no defense that the mode of assignment prescribed has not been followed.

Hogue v. Minnesota Packing & Provision Co. 59 Minn. 39, 60 N. W. 812; *Embry v. Harris*, 107 Ky. 61, 52 S. W. 958; *Lee v. Murrell*, 9 Ky. L. Rep. 104; *Hewlett v. Home for Incapables*, 74 Md. 350, 17 L.R.A. 447, 24 Atl. 324; *Hewins v. Baker*, 161 Mass. 320, 37 N. E. 441; *Burgess v. New York L. Ins. Co.* — Tex. Civ. App. —, 53 S. W. 602; *Chamberlain v. Butler*, 87 Am. St. Rep. 497, note.

The personal representative of S. R. Cockfield and, therefore, his creditors (unless they can establish fraud), are estopped by the acts of the said S. R. Cockfield from claiming the proceeds of the policy in question.

Thompson v. Equitable Life Assur. Soc. 95 S. C. 16, 78 S. E. 439; *Barren v. Williams*, 58 S. C. 280, 79 Am. St. Rep. 840, 36 S. E. 561; *New York L. Ins. Co. v. Black*, 3 Md. 341, 56 Am. Dec. 742.

Inasmuch as the insured did all in his power to make the change according to the terms of the policy, and nothing remained to be done but to make the indorsement thereupon by the company, which had not even attempted to show any good reason why the indorsement was not made, a court of equity will deem that done which ought to have been done, and give effect to the change.

John Hancock Mut. L. Ins. Co. v. White, 20 R. I. 457, 40 Atl. 5; *Wilcox v. Equitable Life Assur. Soc.* 173 N. Y. 50, 93 Am. St. Rep. 579, 65 N. E. 857; *May, Ins. § 3990*; *Parrot v. Mexican C. R. Co.* 207 Mass. 184, 34 L.R.A. (N.S.) 277, 93 N. E. 590; *Supreme Lodge, O. A. G. C. v. Terrell*, 99 Fed. 330; *Berkeley v.* 6 A.L.R.—74.

Harper, 3 App. D. C. 308; *Nally v. Nally*, 74 Ga. 669, 58 Am. Rep. 459; *Hirschl v. Clarke*, 81 Iowa, 200, 9 L.R.A. 841, 47 N. W. 78; *Schmidt v. Iowa K. of P. Ins. Asso.* 82 Iowa, 304, 11 L.R.A. 205, 47 N. W. 1032; *Wood v. Brotherhood of American Yeomen*, 148 Iowa, 400, 126 N. W. 949; *Heydorf v. Conrack*, 7 Kan. App. 202, 52 Pac. 700; *Schoenau v. Grand Lodge, A. O. U. W.* 85 Minn. 349, 88 N. W. 999; *St. Louis Police Relief Asso. v. Strode*, 103 Mo. App. 694, 77 S. W. 1091; *Independent Foresters v. Keliher*, 36 Or. 501, 78 Am. St. Rep. 785, 59 Pac. 324, 1109, 60 Pac. 563; *Donnelly v. Burnham*, 86 App. Div. 226, 83 N. Y. Supp. 659, affirmed in 177 N. Y. 546, 69 N. E. 1122; *Tolson v. National Provident Union*, 60 Misc. 460, 115 N. Y. Supp. 534, affirmed in 130 App. Div. 884, 114 N. Y. Supp. 1149; *Bernheim v. Martin*, 45 Wash. 120, 88 Pac. 106; *McGowan v. Supreme Ct. I. O. F.* 104 Wis. 173, 80 N. W. 603; *Waldum v. Homstad*, 119 Wis. 312, 96 N. W. 806.

Although S. R. Cockfield was insolvent at the time the change of the beneficiary took place, the transaction is not void as against the Statute of Elizabeth, or as a voluntary donation, because the insurance policy had no cash surrender value, and therefore nothing of value was diverted from his estate.

Page v. Hendrick, 10 Mich. 300; *Judson v. Courier Co.* 15 Fed. 541; *Pope v. Wilson*, 7 Ala. 690; *Klemm v. Bishop*, 56 Ill. App. 613; *Brackett v. Waite*, 4 Vt. 389; *Sanders v. Main*, 12 Wash. 665, 42 Pac. 122; *Harden v. Wagner*, 22 W. Va. 356; *Stigler v. Stigler*, 77 Va. 163; *Shaver v. Shaver*, 35 App. Div. 1, 54 N. Y. Supp. 464; *Morehead v. Mayfield*, 109 Ky. 51, 58 S. W. 473; *Barbour v. Larue*, 106 Ky. 546, 51 S. W. 5; *Pulsifer v. Hussey*, 97 Me. 443, 54 Atl. 1076; *Barbour v. Connecticut Mut. L. Ins. Co.* 61 Conn. 240, 23 Atl. 154; *Barron v. Williams*, 58 S. C. 280, 79 Am. St. Rep. 840, 36 S. E. 561; *Sanders v. Aetna L. Ins. Co.* 95 S. C. 36, 78 S. E. 532, Ann. Cas. 1915B, 1284; *Morris v. Dodd*, 110 Ga. 606, 50 L.R.A. 33, 78 Am. St. Rep. 129, 36 S. E. 83; *Re Judson*, 113 C. C. A. 158, 192 Fed. 834; *Re Buelow*, 98 Fed. 86, 2 N. B. N. Rep. 230; *Barbour v. Larue*, 106 Ky. 546, 51 S. W. 5; *Re McKinney*, 15 Fed. 535; *Re Steele*, 98 Fed. 78, 2 N. B. N. Rep. 281; *Re Lange*, 91 Fed. 361; *Burlingham v. Crouse*, 228 U. S. 459, 57 L. ed. 920, 46 L.R.A. (N.S.) 148, 33 Sup. Ct. Rep. 564;

Everett v. Judson, 228 U. S. 474, 57 L. ed. 927, 46 L.R.A.(N.S.) 154, 33 Sup. Ct. Rep. 568; Andrews v. Partidge, 228 U. S. 479, 57 L. ed. 929, 33 Sup. Ct. Rep. 570.

Knapp, Circuit Judge, delivered the opinion of the court:

The material facts appear to be these: On February 5, 1916, S. R. Cockfield, of Johnsonville, South Carolina, insured his life for \$6,000, payable at his death to his legal representatives, and paid the first annual premium of \$185.70. The policy contained this provision: "The insured may, at any time while this policy is in force, by written notice to the company at its home office, change the beneficiary or beneficiaries under this policy, such change to take effect only upon the indorsement of the same on the policy by the company."

On February 5, 1917, the insured paid the second annual premium, partly by note secured by the policy, and thereby continued the insurance in force for another year. Three days later, February 8th, he was stricken with a serious and, as it proved, fatal illness. The next day, the 9th, or later, he wrote the insurance company: "Inclosed please find policy 29,888, which you will change the beneficiary and make it payable to Reamer L. Cockfield, related to me as brother. Please attend to this, and return to me promptly."

Under date of the 13th, the company acknowledged receipt of the policy and request, and added: "We attach a formal request to be complied with for this purpose. Have your signature witnessed by a disinterested party, return to us, and the matter will have our immediate attention. In the meantime your policy will be held in abeyance."

The insured died on the 16th of February, without having executed the "formal request." It is admitted that he was insolvent when his letter to the company was written and at the time of his death. Reamer L. Cockfield, the brother named in the letter, was a physi-

cian, and as such attended the insured in his last illness, and the trial court found in effect, and upon ample and convincing testimony, that S. R. Cockfield, when he wrote the insurance company, had been advised by his brother that his illness would probably terminate fatally. In a word, we take it to be established that the insured changed the beneficiary named in his policy, or attempted to do so, with full knowledge of his insolvency and in anticipation of death within a comparatively short time.

The suit is brought, as the decree appealed from succinctly states, "to subject the proceeds of this insurance policy, which the insurance company admits to be due and payable to the party who may be lawfully entitled, to the payment of the creditors of S. R. Cockfield, upon the ground, first, that the transfer was invalid, null, and void as to creditors, and, next, that in any event the transfer was insufficiently executed, so as to pass the title of the policy, and it still remains the property of the estate of S. R. Cockfield, and should be administered as such, and applied to the payment of his creditors." The court below sustained the transfer of the policy and awarded the proceeds to the transferee, Dr. Cockfield, less so much as represents the premiums paid by the insured in his lifetime, which was directed to be turned over to his executors. The decree distributes the insurance money accordingly, and the creditor appeals.

We put aside, without expressing any opinion, the contention of appellant that the attempted change of beneficiary was ineffectual for any purpose, in order to decide the case upon the assumption that the letter written to the company by the insured a few days before his death effected a valid transfer of the policy and its proceeds, except as against the rights of creditors. The argument in behalf of appellee rests upon the proposition that, inasmuch as the policy by its terms had no cash surrender value, only

two annual premiums having been paid, its transfer to the brother diverted nothing of value from the insured's estate, and this we apprehend is the crux of the case. Some support is sought by analogy in that section of the Bankruptcy Law which provides for the disposition of insurance on the life of a bankrupt, and under which it is held that a policy having no surrender value does not pass as an asset to the trustee. *Burlingham v. Crouse*, 228 U. S. 459, 57 L. ed. 920, 46 L.R.A.(N.S.) 148, 33 Sup. Ct. Rep. 564. But this is not a bankruptcy proceeding, and it seems manifest that the statutory right of a trustee in such case cannot measure or affect the right of creditors in a suit like this to reach the proceeds of a policy on the ground that as to them it has been fraudulently transferred. The only law here applicable is the Statute of Elizabeth, which, upon this issue, is the common law of South Carolina.

Granting, however, the principle invoked by the appellee, that a policy without surrender value may be validly transferred even as against creditors, we are not prepared to hold that the policy in question had no surrender value at the time of its transfer. If the insured had then been in his usual health, with the normal expectation of life, his estate would not have been depleted by a change of beneficiary, and creditors could not justly complain. In that case the transferee might have taken a burden, instead of a bounty, because of the probability that an indefinite number of premiums would have to be paid. But the situation here is altogether different. The insured knew that he was about to die; he had been told so by his brother. He therefore knew, or at least supposed, that presently, and long before another premium would be payable, the full amount of his policy, less the small note secured thereby, would come into the hands of his executors and be subject to the claims of creditors. The only reasonable infer-

ence is that in these circumstances he undertook to turn over to his brother, to whom it was a pure donation, the insurance money which otherwise would go to the payment of his debts. This being so, we think it cannot be said that the transferred policy was valueless. On the contrary, as it seems to us, the fact of impending death, the practical certainty that the life of the insured would end within a few days, operated to remove the element of contingency, and gave to the policy at the time of its transfer an actual pecuniary value closely approximating its face amount. The terms of the policy relating to surrender value may be controlling, when the insured entertains the ordinary expectation of life; but they should not be permitted to shield a gratuitous transfer to the prejudice of creditors, when he knows that death is an early certainty. Nor can the transfer in question be defended on the ground of difference between conscious and constructive fraud, for it is familiar doctrine that every man must be presumed to intend the natural consequences of his acts. The insurance procured by Cockfield was by his direction made payable to his legal representatives, and it thereby became, whatever its value, an asset of his estate. When he sought to change the beneficiary, he knew that death was near, and that the proceeds of the policy, if not transferred, would soon be paid to his executors; and he was therefore chargeable with the results of his action, even if he lacked the intention of defrauding his creditors. In short, we are convinced that the transaction under review was fraudulent as to creditors and must be so adjudged.

Fraudulent conveyance—change of beneficiary.

And this conclusion is sustained, as we think, by the clear weight of authority. A case directly in point is *Stokoe v. Cowman*, 29 Beav. 637, 54 Eng. Reprint, 775. The facts are strikingly similar. Cowan had two policies upon his life, one taken

out in April, 1857, the other in June, 1858, both payable to his estate. On November 9, 1859, he assigned them absolutely to his mother, to whom they had been previously pledged for a small amount. He died insolvent on the 3d of December following. Stokoe, a creditor at the time of the assignment, brought suit to set it aside. At the time of the transfer Cowan was ill with consumption, and it was known by those about him that he could live but a short time longer. The same defense was set up as here, that the policies were of little or no value, the assignee being liable to pay the premiums, and their value, therefore, depending entirely upon the amount of future payments. But the master of the rolls, in a brief but very explicit opinion, held that the assignment could not stand as against creditors, and gave the plaintiff a decree for the full amount of the policies, less the sum for which they were pledged, saying, among other things, that "the value of a policy does not depend so much on the number of payments made, as on the age of the insured and the state of his health at the time the assignment takes place."

To the same effect is another English case decided a few years later, *Freeman v. Pope*, L. R. 9 Eq. 206, 39 L. J. Ch. N. S. 148, 21 L. T. N. S. 816, 18 Week. Rep. 399, which is cited with approval in *Central Nat. Bank v. Hume*, 128 U. S. 195, 32 L. ed. 370, 9 Sup. Ct. Rep. 41. In the latter case the Supreme Court said (128 U. S. pages 204 and 207): "In the view of the law, credit is extended in reliance upon the evidence of the ability of the debtor to pay, and in confidence that his possessions will not be diminished to the prejudice of those who trust him.

This reliance is disappointed, and this confidence abused, if he divests himself of his property by giving it away after he has obtained credit. And where a person has taken out policies of insurance upon his life for the benefit of his estate, it has been frequently held, as against creditors, his assignment, when insolvent, of such policies, to or for the benefit of wife and children, or either, constitutes a fraudulent transfer of assets within the statute, and this, even though the debtor may have had no deliberate intention of depriving his creditors of a fund to which they were entitled, because his act has in point of fact withdrawn such a fund from them, and dealt with it by way of bounty. *Freeman v. Pope*, supra. . . . The rule stands upon precisely the same ground as any other disposition of his property by the debtor. The defect of the disposition is that it removes the property of the debtor out of the reach of his creditors. . . . The obvious distinction between the transfer of a policy taken out by a person upon his insurable interest in his own life, and payable to himself or his legal representatives, and the obtaining of a policy by a person upon the insurable interest of his wife and children, and payable to them, has been repeatedly recognized by the courts."

We regard these authorities as decisive of the instant case and further discussion appears unnecessary. It follows that the decree appealed from, so far as it awards any portion of the insurance money to the appellee, must be reversed, and the cause remanded, with instructions to enter a decree in accordance with the views herein expressed.

ANNOTATION.

Validity as against creditors of change of beneficiary of insurance policy from estate to individual.**I. Transfer held valid:**

- a. In absence of statute, 1173.
- b. Under statute, 1174.
- c. Rule in Missouri, 1176.

II. Transfer held invalid, 1176.*I. Transfer held valid.**a. In absence of statute.*

In a number of jurisdictions the transfer of an insurance policy by the insured to an individual has been held to be valid as against the creditors of the insured. *Davis v. Cramer* (1918) 133 Ark. 224, 202 S. W. 239; *National Bank v. Appel Clothing Co.* (1905) 35 Colo. 149, 4 L.R.A. (N.S.) 456, 117 Am. St. Rep. 186, 83 Pac. 965; *Barbour v. Connecticut Mut. L. Ins. Co.* (1891) 61 Conn. 240, 23 Atl. 154; *State ex rel. Wright v. Tomlinson* (1877) 16 Ind. App. 662, 59 Am. St. Rep. 335, 45 N. E. 1116; *Johnson v. Alexander* (1890) 125 Ind. 575, 9 L.R.A. 660, 25 N. E. 706; *Langford v. Freeman* (1877) 60 Ind. 46; *Hearing's Succession* (1874) 26 La. Ann. 326; *David Adler & Sons Clothing Co. v. Hellman* (1898) 55 Neb. 266, 75 N. W. 877.

In *Davis v. Cramer* (Ark.) *supra*, it appeared that one who had insured his life in the sum of \$10,000, payable to his estate, later changed the beneficiary, making the policy in favor of his sister and his son. A creditor sought to have this transfer set aside after the death of the insured. It was held that the act of the insured in changing the beneficiary from his estate to his sister and son of itself could not operate as a fraud on his creditors, though the insured at the time of the transfer was insolvent, and the transfer voluntary, unless the transfer carried with it some property value that could be subjected by the creditor to his claim. And since no property subject to execution had been transferred, beyond the cash surrender value of the policy, it was held that the creditor was entitled to that sum and to nothing more.

In *Barbour v. Connecticut Mut. L.*

III. Rule in Kentucky:

- a. Transfer to wife, 1180.
- b. Transfer to another than wife, 1181.

IV. Rule in Massachusetts, 1181.

Ins. Co. (1891) 61 Conn. 240, 23 Atl. 154, it appeared that an insured having failed in business offered the policies to his creditors, who failed to accept them because of their insignificant value. Just prior to his discharge from insolvency he transferred the policies and named his wife as beneficiary. On a later failure his creditors sought to have this transfer set aside as fraudulent. It was held that since he had made an offer of the policies to his creditors, and since the policies were practically valueless at the time they were transferred, there were no elements of fraud involved therein. A subsequent creditor could not attack a transfer made prior to his claim when there are no debts remaining unpaid which had been owing at the time of the transfer.

In *State ex rel. Wright v. Tomlinson* (1897) 16 Ind. App. 662, 59 Am. St. Rep. 335, 45 N. E. 1116, it appeared that one who had insured his life, naming his estate as the beneficiary, shortly before his death, and while insolvent, directed that his wife should be made beneficiary thereunder. It was held that the transfer of the policy was valid and not in fraud of creditors. The creditors were injured only to the extent of the amount paid in premiums during the two years the policy was in existence.

In *Johnson v. Alexander* (1890) 125 Ind. 575, 9 L.R.A. 660, 25 N. E. 706, there was involved a policy which was originally payable to the executors, etc., of the insured. He later assigned this policy to a creditor, taking an agreement from them to pay any balance over and above their claim to his heirs or order. His widow sought to recover the balance of the proceeds paid on the policy at her husband's

death. It was held that this transfer was valid as against an execution creditor of the insured, who had been injured only to the extent of premiums paid thereon by his debtor. The court said that there was no difference between the transaction in question and a purchase of insurance by the insured in the name of his wife which would have been free from the claims of his creditors though he was insolvent when it was purchased.

In *Langford v. Freeman* (1877) 60 Ind. 46, it appeared that a policy of life insurance payable to the insured was rewritten, naming his mother as the beneficiary. No fraudulent intent was alleged. It was held that the mother was entitled to the proceeds, as against the creditors of the insured.

In *Hearing's Succession* (1874) 26 La. Ann. 326, creditors sought to have the widow of an insured inventory as part of his estate a policy taken out in his own name and transferred to his wife and child. The court said: "A man may take out a policy of insurance on his life in the name of anyone, or, having taken it out in his own name, he may . . . transfer it to whom he pleases." It was pointed out that to force a wife to inventory the proceeds of the policy as a part of the husband's estate would result in the defeat of the husband's attempt to protect the wife.

In *National Bank v. Appel Clothing Co.* (1905) 35 Colo. 149, 4 L.R.A. (N.S.) 456, 117 Am. St. Rep. 186, 83 Pac. 965, wherein judgment creditors sought to subject certain life insurance policies of their debtor to the payment of a judgment, it was held that an assignment of the policies to the wife or daughters of the debtor could not be disregarded, where it had been made when the debtor was not insolvent, or before the existence of the indebtedness in question. To cancel a conveyance on the ground of fraud on creditors it must be shown that debts existed at the time the transfer was made, or that it was made with a view to the contracting of future obligations.

In *David Adler & Sons Clothing Co.*

v. Hellman (1898) 55 Neb. 266, 75 N. W. 877, it appeared that a husband had transferred a policy of life insurance to his wife shortly before his death, which transfer his creditors sought to set aside as fraudulent. It was held that since the debtor, at the time of the assignment, had sufficient property to satisfy his indebtedness, the transfer was valid.

b. Under statute.

In some jurisdictions the proceeds of a life insurance policy are, by statute, secured to the beneficiary named therein to his assignee, or to a certain class of persons free from the claims of creditors of the insured. Under such an act an insured may, as against creditors, transfer a policy from his estate to an individual beneficiary.

Florida.—*Eppinger v. Canepa* (1883) 20 Fla. 262.

Illinois.—*Cole v. Marple* (1881) 98 Ill. 58, 38 Am. Rep. 83.

Maine.—*Pulsifer v. Hussey* (1903) 97 Me. 434, 54 Atl. 1076. Compare *Wyman v. Gay* (1897) 90 Me. 36, 60 Am. St. Rep. 238, 37 Atl. 325.

Maryland.—*Elliott v. Bryan* (1885) 64 Md. 368, 1 Atl. 614; *Earnshaw v. Stewart* (1885) 64 Md. 513, 2 Atl. 734.

Ohio.—*Lytle v. Baldinger* (1911) 84 Ohio St. 1, 95 N. E. 389, Ann. Cas. 1912B, 894. Compare *Child v. Graham* (1882) 8 Ohio Dec. Reprint, 294.

South Carolina.—*Barron v. Williams* (1900) 58 S. C. 280, 79 Am. St. Rep. 840, 36 S. E. 561.

In *Eppinger v. Canepa* (Fla.) *supra*, creditors sought to obtain the proceeds of two insurance policies on his life, taken by the insured in his own name, and shortly thereafter transferred to two friends. It was held that under the statute providing that the proceeds of an insurance policy are to be paid to the beneficiary directed therein, and may not be reached by creditors of the insured, the transfer was valid.

Cole v. Marple (Ill.) *supra*, was a creditors' bill whereby it was sought to reach the proceeds of an insurance policy made payable to the executors of the insured, and assigned to his wife shortly before his death and while he was insolvent. The court pointed out that under the statute a

wife might insure the life of her husband for her own benefit, free from all claims of creditors, and held that it was within the spirit of the statute to permit a policy already issued to be assigned to her in the same manner. However, since the insured was insolvent, it was held that all premiums paid by him within the period of the Statute of Limitations, together with interest thereon, might be recovered by the creditors.

Pulsifer v. Hussey (Me.) supra, was a bill by a trustee in bankruptcy, "seeking to hold a policy of insurance on the life of the bankrupt." The beneficiary of the policy assigned her interest to the insured, who later, while greatly indebted, assigned to his daughter the interest in event of his death, but not the endowment, which was payable to the beneficiary if he survived twenty years. It was held that the interest assigned to the daughter had no surrender value, since that belonged to the insured during the endowment period, and that it was of no value to creditors, since it was exempt from their claim under both the Bankrupt Act and the state statute.

But in *Wyman v. Gay (Me.) supra*, wherein it was shown that an insolvent debtor had transferred to a certain creditor two insurance policies on his life, the total value of which was \$345.52, it was held that the assignment was void as against other creditors of the insured. While insurance, the annual premium of which is less than \$150, is protected by statute, the policy when assigned in payment of a debt becomes assets in the hands of a creditor, and is placed without the protection of the statute.

In *Elliott v. Bryan (Md.) supra*, it was sought to subject to the claims of a creditor the proceeds of a policy of life insurance taken out by the debtor in his own name, and later assigned to his wife while he was insolvent. It was held that under the statute a husband might assign to his wife, free from claim of creditors, any policy of insurance on his own life, and this regardless of whether he possessed

other property from which to satisfy the claims of his creditors.

In *Earnshaw v. Stewart (Md.) supra*, a bill to set aside the assignment of a life policy made by a father to his four sons as in fraud of the rights of his creditors, it was held that the assignment was valid under a statute providing that one may make a voluntary assignment of a policy of life insurance to his wife or children, free and clear "from all claims of the creditors of such insured persons."

In *Lytle v. Baldinger (Ohio) supra*, it was shown that a debtor, while insolvent, transferred to his wife and son certain policies of insurance on his life. A creditor sought to reach the proceeds of these policies for the satisfaction of the debt. It was held that under the statute such an assignment of an insurance policy was valid, and that the creditor was entitled only to the return to the estate of the money used in the purchase of the insurance.

In *Child v. Graham (1882) 8 Ohio Dec. Reprint, 294*, it appeared that an insolvent debtor, a few weeks before his death, had transferred to his wife a life insurance policy payable to himself, which assignment it was sought to set aside. It was held that, although a statute provided that insurance transferred to a married woman should be free from the claims of her husband's creditors, "the original validity of the transfer to her was manifestly assumed," and a transfer made with fraudulent intent was not within the statute. She was to be protected from creditors seeking to collect debts, but not from creditors seeking relief from fraud."

In *Barron v. Williams (1900) 58 S. C. 280, 79 Am. St. Rep. 840, 36 S. E. 561*, it appeared that one Barron, some time prior to an assignment for creditors, transferred to his wife a policy of insurance on his life which had been made payable to his representatives. It was shown that at the time of the assignment for creditors Barron's property, including the cash surrender value of the policy, amounted to less than the amount exempted by the law from the claims of creditors.

It was held that since the gift was not detrimental to the rights of creditors it could not be considered fraudulent or void.

c. Rule in Missouri.

Th courts in Missouri have held that the transfer of a life insurance policy by a husband to his wife is valid as against his creditors. *Chapman v. McIlwrath* (1882) 77 Mo. 38, 46 Am. Rep. 1; *Judson v. Walker* (1899) 155 Mo. 166, 55 S. W. 1083. In the latter case, the court, basing its decision on a statute of 1879, decided that an insolvent husband's assignment of his life insurance to his wife and children was valid as against his creditors. The statute, however, provided that the exemption from claims of creditors established thereby should not apply to premiums paid in excess of \$500 per annum, and in connection therewith the court pointed out that when the beneficiaries of the policies had been changed the insurance possessed a cash surrender value, and that if, instead of making the transfer, the husband had taken out new insurance, the rate would have been higher. Consequently it was decided that the creditors were entitled to the benefit of this value in the policies, and the court held that they might claim the cash surrender value of the policies at the time of the assignment, with interest thereon, less the sum of \$500.

The case of *Chapman v. McIlwrath*, supra, was decided after the adoption of the statute considered in the case previously cited, and apparently an earlier version of the same statute was in force at the time of the transfer in question. But the court did not consider the statute, but based its decision on the fact that the husband was not indebted at the time of the assignment of the insurance to his wife, and that it could not, therefore, be avoided "without proof of an intent to defraud" subsequent creditors.

II. Transfer held invalid.

In some jurisdictions, where a policy of insurance is made payable to the estate of the insured, who later transfers the policy to another, such trans-

fer is fraudulent and void as against the creditors of the insured.

United States.—*Ætna Nat. Bank v. Manhattan L. Ins. Co.* (1885) 24 Fed. 769. And see the reported case (*NAVASSO GUANO Co. v. COCKFIELD*, ante, 1168). See also *Central Nat. Bank v. Hume* (1888) 128 U. S. 195, 32 L. ed. 370, 9 Sup. Ct. Rep. 41.

Alabama.—*Friedman Bros. v. Fennell* (1892) 94 Ala. 570, 10 So. 649. *Michigan.*—*Ionia County Sav. Bank v. McLean* (1891) 84 Mich. 625, 48 N. W. 159.

Mississippi.—*Catchings v. Manlove* (1861) 39 Miss. 655.

New Jersey.—*Travelers Ins. Co. v. Grant* (1896) 54 N. J. Eq. 208, 33 Atl. 1060.

New York.—*Continental Nat. Bank v. Moore* (1903) 83 App. Div. 419, 82 N. Y. Supp. 302; *Gould v. Fleitmann* (1919) 188 App. Div. 759, 176 N. Y. Supp. 631. Compare *McCord v. Noyes* (1855) 3 Bradf. 139; *Hurlbut v. Hurlbut* (1888) 49 Hun, 189, 1 N. Y. Supp. 854; *Del Valle v. Hyland* (1894) 76 Hun, 493, 27 N. Y. Supp. 1059; *Tuthill v. Goss* (1895) 89 Hun, 609, 35 N. Y. Supp. 136, and *Shaver v. Shaver* (1898) 35 App. Div. 1, 54 N. Y. Supp. 464.

North Carolina.—*Burton v. Farinholt* (1882) 86 N. C. 260.

Pennsylvania. — *Elliott's Appeal* (1865) 50 Pa. 75, 88 Am. Dec. 525; *Re McKown* (1901) 198 Pa. 96, 47 Atl. 1111. Compare *Provident Life & T. Co. v. Fidelity Ins. Trust & S. D. Co.* (1902) 203 Pa. 82, 52 Atl. 34.

Tennessee. — *Walter v. Hartman* (1902) — Tenn. —, 67 S. W. 476.

England. — *Schoudler v. Wace* (1808) 1 Campb. 487; *Jenkyn v. Vaughan* (1856) 3 Drew. 419, 61 Eng. Reprint, 963, 2 Jur. N. S. 109, 25 L. J. Ch. N. S. 338, 4 Week. Rep. 214; *Stokoe v. Cowan* (1861) 29 Beav. 637, 54 Eng. Reprint, 775, 7 Jur. N. S. 901, 4 L. T. N. S. 695, 9 Week. Rep. 801; *Freeman v. Pope* (1869) L. R. 9 Eq. 206, 39 L. J. Ch. N. S. 148, 21 L. T. N. S. 816, 18 Week. Rep. 399, affirmed in (1870) L. R. 5 Ch. 538, 39 L. J. Ch. N. S. 689, 33 L. T. N. S. 208, 18 Week. Rep. 906; *Taylor v. Coenen* (1876) L. R. 1 Ch. Div. 636, 34 L. T. N. S. 18;

Re Mouat [1899] 1 Ch. 831, 68 L. J. Ch. N. S. 390, 47 Week. Rep. 506, 80 L. T. N. S. 406.

Canada.—Shorey v. Dolloff (1916) Rap. Jud. Quebec 25 B. R. 482, 22 Rev. de Leg. (L. C.) 7.

Thus in *Catchings v. Manlove* (Miss.) *supra*, the court expressed the rule and the basis thereof as follows: "The fact that the party was insolvent at the time of the transfer renders the mere voluntary assignment to a wife or children void in law as to creditors, because the debtor has no right to withdraw his property from the liability to pay his debts to the prejudice of his creditors." It was held unnecessary to specify a fraudulent intent. To the same effect see *Burton v. Farinholt* (N. C.) *supra*.

In *Walter v. Hartman* (Tenn.) *supra*, it was pointed out that the policy would have gone to increase the funds of the estate, if the assignment had not been made.

In *Lehman v. Gunn* (1899) 124 Ala. 213, 51 L.R.A. 112, 82 Am. St. Rep. 159, 27 So. 475, wherein it appeared that an insured had taken a policy of insurance, naming as beneficiaries his father and mother, the court said: "It cannot be doubted that if the policy had been taken out and payable to the estate of the insured, and subsequently by him transferred as a gift to his father and mother, that such a transaction would have been void as against existing creditors."

In *Ætna Nat. Bank v. Manhattan L. Ins. Co.* (Fed.) *supra*, an action in equity, it appeared that insurance policies were payable originally to the executors, administrators, or assignees of a husband, and were assigned to his wife shortly before his death for the purpose of defeating creditors. It was held that the fund should not be paid until the respective rights of the assignee and the creditors had been determined, since it might be shown that the assignment was inoperative against creditors.

In *Friedman Bros. v. Fennell* (1892) 94 Ala. 570, 10 So. 649, wherein it appeared that a man, while indebted and insolvent, took out a policy of insurance in his own name and later trans-

ferred it to his minor son, it was held that such a transaction was not within the protection of the statute, providing that one may insure his life for the benefit of his wife and minor children, exempt from claims of creditors. The court said: "The policy being in the name of the father, his attempt to transfer it to his child stands on no higher plane than any other attempt he might make to give away his property at the expense of his debts. Such gifts are constructively fraudulent."

In *Ionia County Sav. Bank v. McLean* (1891) 84 Mich. 625, 48 N. W. 159, it was shown that a father, having taken out a policy of insurance on his life payable to his representatives, assigned it while insolvent to his daughters in order to defeat his creditors. It was held that while the statute provided immunity from the claims of creditors for insurance taken out for the benefit of a wife and children, the assignment of a policy was not within the protection of the statute. The transfer, if made while the insured was solvent, would have been valid, but not otherwise.

In *Catchings v. Manlove* (1861) 39 Miss. 655, it appeared that an insolvent debtor assigned a policy of life insurance to his wife and children just prior to his death. On a bill by his creditors to subject the proceeds of the policy to the payment of their claims against him, the court said: "The fact that the party was insolvent at the time of the transfer renders the mere voluntary assignment to a wife or children void in law as to creditors, because the debtor has no right to withdraw his property from liability to pay his debts, to the prejudice of his creditors."

In *Travelers Ins. Co. v. Grant* (1896) 54 N. J. Eq. 208, 33 Atl. 1060, it appeared that a husband had delivered to his wife two policies of life insurance payable to his representatives. It was held that the gift was void as a fraud on creditors whose debts arose prior to any of the payments of premiums.

In *Continental Nat. Bank v. Moore* (1903) 83 App. Div. 419, 82 N. Y. Supp. 302, it appeared that one Mason, having embezzled a large sum of money

from his employers which he could not repay, transferred to his wife and daughter certain policies of insurance on his life, originally payable to his estate, and a few days thereafter committed suicide. It was held that the assignment was void as against his creditors.

In *Gould v. Fleitmann* (1919) 188 App. Div. 759, 176 N. Y. Supp. 631, it was shown that one Heinze, while insolvent, assigned to his sister four policies of insurance payable to his estate. It was held that the creditors of Heinze might set aside these transfers as fraudulent against them, regardless of the fact that the policies had no cash value at the time of the assignment. The ruling fact in the case was the fact that the transfer was made to put the proceeds of the policies out of the reach of creditors. Moreover, it was said, the policies were valuable contracts, constituted property, and were subject to the rules governing the transfer of property.

In *McCord v. Noyes* (1855) 3 Bradf. (N. Y.) 139, it appeared that a husband had taken out policies of insurance on his life in his own name, and had them assigned to another, who agreed to pay the premiums and to pay the proceeds of the policies to the wife of the insured after deducting a certain sum. The court said that the insured, instead of effecting insurance directly in the name of his wife, which would have been lawful, has accomplished the same result substantially by assigning the policies to an assignee in trust for his wife, the assignee agreeing to pay the premiums, and so removing all ground for complaint that the husband had contributed the fund for sustaining the policies. The transfer was valid and free from the claim of the creditors of the husband.

In *Hurlbut v. Hurlbut* (1888) 49 Hun, 189, 1 N. Y. Supp. 854, it appeared that a father had assigned his policy of insurance to his daughter, at a time when a large number of debts of the firm of which he was a member remained unpaid. It was held that this assignment by the father was not, as a matter of law, void as fraudulent

against creditors, but only subject to be found so by a jury as a matter of fact.

In *Del Valle v. Hyland* (1894) 76 Hun, 493, 27 N. Y. Supp. 1059, it was shown that an insolvent debtor had transferred to one of his creditors, for an ample consideration, all his interest in five policies of insurance on his life. It was held that a debtor might pay one creditor in preference to another, and that, as the assignee's claim against the insured was much larger than the cash value of the policies, the transfer need not be considered as fraudulent and void against creditors.

In *Tuthill v. Goss* (1895) 89 Hun, 609, 35 N. Y. Supp. 136, wherein it appeared that a partner in an insolvent firm had transferred to his wife his life insurance policy, it was held that, under the statute, the wife was entitled to the policy as against creditors, but that the creditors might have the amount paid in premiums above \$500 annually.

In *Shaver v. Shaver* (1898) 35 App. Div. 1, 54 N. Y. Supp. 464, it was shown that one Shaver had applied for a policy of insurance on his life in favor of his brother. The company refused to issue such a policy, but directed him to have the policy made payable to his representatives, and then assign it to his brother, and the transaction was concluded in that manner. It was held that since the policy had been intended for the brother, and had been taken out to replace one in the brother's favor which had lapsed, it must be considered as taken out for his benefit, and so the transfer was not void as in fraud of creditors even though the insured was insolvent at the time it was made. The assignment was delivered simultaneously with the policy.

In *Burton v. Farinholt* (1882) 86 N. C. 260, it appeared that a person who had insured his life, the proceeds thereof to be payable to his representatives, transferred the policy to his three daughters while he was insolvent, dying some time later with property insufficient to pay his debts. His administrator sought to subject the proceeds of the policy to the payment

of debts. The court said of the assignment of the policy by the insured that, "being indebted to a state of clear insolvency at the time of its voluntary assignment to his daughters, his act was fraudulent as to his creditors and void in law, whether made with an intent actually fraudulent or not." The transfer without valuable consideration was void.

In *Elliott's Appeal* (1865) 58 Pa. 75, 88 Am. Dec. 525, it appeared that one Elliott, while insolvent, assigned to his wife three policies of insurance on his life, dying a few months thereafter, and it was held that under the facts of the case the assignments must be considered fraudulent and void as to creditors.

In *Re McKown* (1901) 198 Pa. 96, 47 Atl. 1111, it appeared that a policy of insurance was taken out, payable to the representatives of the insured. Ten years later he made a written assignment of it to his wife, who, however, was not aware of this until after his death. The insured was greatly indebted at the time of this assignment, and died without sufficient assets to discharge his debts. It was held that the assignment of the policy to his wife was fraudulent as to creditors, and void.

But in *Provident Life & T. Co. v. Fidelity Ins. Trust & S. D. Co.* (1902) 203 Pa. 82, 52 Atl. 34, it appeared that a policy of insurance had been taken out, the proceeds to be payable to the insured if he reached the age of sixty. Later he made an assignment for creditors, but his assignee did nothing with respect to this policy, which had eight years to run before maturity and possessed no cash value. The insured married shortly afterward, and, in consideration of marriage, assigned his interest in the policy to his wife, who died two months thereafter. It was held that the right of the administrator of the wife to the proceeds of the policy on maturity was superior to that of the assignee for creditors, who had abandoned any interest therein. Moreover, there was a valuable consideration for the assignment, and there was nothing to apprise her of her husband's insolvency.

In *Walter v. Hartman* (1902) — Tenn. —, 6 S. W. 476, it appeared that one who had taken out an insurance policy on his life, payable to his estate, assigned it, while insolvent, to his mother, after being shot, and shortly before his death. The court said: "When the policy is procured by the insured for himself and made payable to his executors, administrators or assignees, it becomes an interest in him which he could not assign fraudulently as a matter of fact or of law. The policy would have passed to the estate of the insured for the benefit of creditors had it not been for the assignment, which must be considered fraudulent."

In *Schoudler v. Wace* (1808) 1 Campb. (Eng.) 487, it appeared that a bankrupt, having previously insured his life, failed to deliver the policy to his assignees in bankruptcy, but later assigned the policy to one who transferred it to the defendant for a valuable consideration, the defendant collecting the proceeds thereof on the death of the insured. It was said by the court: "This was a possibility of benefit to which the assignees were entitled as part of the effects of the bankrupt. Nor can they be considered as having abandoned their right to it when its existence had never been notified to them. I think, however, the defendant has a right to deduct so much as the plaintiffs must have laid out in the payment of arrears, etc., had the policy been regularly delivered up by the bankrupt."

In *Jenkyn v. Vaughan* (1856) 2 Jur. N. S. 109, 3 Drew. 419, 61 Eng. Reprint, 963, 25 L. J. Ch. N. S. 338, 4 Week. Rep. 214, it appeared that the insured had assigned to trustees for the benefit of his wife certain policies of life insurance, and had died greatly indebted. Creditors of the insured sought to have the assignment declared fraudulent and void. It was held that the circumstances surrounding the transaction were such as to warrant an inquiry in the case.

In *Stokoe v. Cowan* (1861) 29 Beav. 637, 54 Eng. Reprint, 775, 7 Jur. N. S. 901, 4 L. T. N. S. 695, 9 Week. Rep. 801, it appeared that one Cowan had

taken out policies of insurance in his own name, and later, while deeply indebted and about to die, had assigned the policies to his mother in consideration of a debt due her. It was held that in spite of the fact that the policies might have been of little market value, the assignment of them could not stand against creditors, except as security for the money due the assignee.

Freeman v. Pope (1869) L. R. 9 Eq. (Eng.) 206, 39 L. J. Ch. N. S. 148, 21 L. T. N. S. 816, 18 Week. Rep. 399, was a suit by a subsequent creditor for the purpose of setting aside a voluntary settlement of a policy of insurance as being fraudulent and void under 13 Eliz. chap. 5, as against the creditors of the settlor. It appeared that the insured had assigned his insurance to his goddaughter, while he was indebted, but not insolvent. It was held that, regardless of the intention to defraud creditors, where one made a settlement at a time when he was indebted, it might be held fraudulent and void as against subsequent creditors.

In *Taylor v. Cone* (1876) L. R. 1 Ch. Div. (Eng.) 686, 34 L. T. N. S. 18, it was shown that a person had insured his life in two policies of £1,000 each, and had settled the same on his wife by a deed of trust. The insured was a merchant of considerable business, but an inquiry found that he would have been unable to pay his debts at the time of this assignment, and he later died insolvent. The plaintiff's claim arose after the transfer. It was held that since the insured was not in a position to pay all his creditors at the time of the transfer, it must be considered fraudulent and void as against them.

In *Re Mouat* [1899] 1 Ch. (Eng.) 831, 68 L. J. Ch. N. S. 390, 47 Week. Rep. 506, 80 L. T. N. S. 406, wherein it was shown that one whose estate proved to be insolvent had assigned to his niece two policies of insurance on his life, it was held that these assignments became void when the creditors of the insured asserted their claim, and that they were entitled to subject

the funds to the satisfaction of their debt.

In *Shorey v. Dolloff* (1916) Rap. Jud. Quebec 25 B. R. 482, 22 Rev. de Leg. (L. C.) 7, it appeared that, having insured his life in a policy payable to his estate, the insured made a loan on the policy and transferred it to the company as security, later appropriating the policy for the benefit of his wife. The plaintiffs, creditors of the insured, had previously issued a writ of garnishment against the insurance company, and on the death of the insured claimed the proceeds. It was held that a policy of insurance could not be assigned to the wife of the insured where a garnishment had been issued against the policy.

III. Rule in Kentucky.

a. Transfer to wife.

The courts of Kentucky, by virtue of a statute, hold that the assignment of a life insurance policy by a husband to his wife is valid as against his creditors. *Morehead v. Mayfield* (1900) 109 Ky. 51, 58 S. W. 473; *Steeley v. Steeley* (1901) 23 Ky. L. Rep. 996, 64 S. W. 642; *Smith v. Milton* (1916) 171 Ky. 819, 188 S. W. 877. Compare *Stokes v. Coffey* (1871) 8 Bush, 583.

In *Morehead v. Mayfield*, *supra*, it was shown that after obtaining a policy of insurance on his life, payable to his executors, etc., the insured assigned it to his wife shortly before his death and while he was insolvent. It was held that under the statute the transfer of the policy by the husband to the wife was valid, and that the proceeds thereof were free from the claims of creditors, except as to the premiums paid while he was insolvent, which were considered to have been paid in fraud of creditors.

Steeley v. Steeley (1901) 23 Ky. L. Rep. 996, 64 S. W. 642, was an action by creditors to subject to the payment of their claims the proceeds of a policy of insurance on the life of their debtor. It was shown that the insured had transferred the policy and made it payable to his wife, instead of to his representatives. It was held that this transfer was not fraudulent as to creditors, since the policy pos-

sessed no cash surrender value, only one payment having been made thereon.

In *Smith v. Milton* (1916) 171 Ky. 819, 188 S. W. 877, it was shown that an insolvent debtor had transferred and made payable to his wife a policy of insurance on his life, which had been taken out in the name of his legal representatives. After deducting the amount of a loan made to him, the company paid the balance of the proceeds to the widow. It was held that this assignment was valid under the statute, but that the premiums paid by Smith while insolvent must be deducted and paid to the creditors.

In *Stokes v. Coffey*, *supra*, it appeared that one Coffey had taken out a policy of insurance on his life, payable to his representatives, and later exchanged this policy for one payable to his wife, Coffey at the time being on the verge of bankruptcy. It was sought to subject the proceeds of this policy to the claims of creditors. The court said: "The change of the policy originally made payable to the husband's representatives, so as to vest the title thereto in the wife, was a voluntary gift or assignment of a portion of the husband's estate, and was void as to his antecedent creditors."

b. Transfer to another than wife.

The transfer of an insurance policy by one to another than his wife is not within the protection of the Kentucky statute, and has been held void as to the creditors of the assignor. *Planters' State Bank v. Willingham* (1901) 111 Ky. 64, 63 S. W. 12. In that case it appeared that an insured, being indebted to a trust company, assigned to it his insurance policies, otherwise payable to his representatives, and shortly thereafter made a general assignment for the benefit of creditors, who then sought to subject to their claims the value of these policies which had been collected by the assignee. It was held that the assignment of these policies was in contemplation of insolvency, and for the purpose of preferring a creditor, and that consequently it was invalid, the assets passing under the later deed of general assignment.

IV. Rule in Massachusetts.

In Massachusetts, in decisions based on a statute, it has been held that the assignment of a life insurance policy by a husband to his wife is valid as against his creditors. *Bailey v. Wood* (1909) 202 Mass. 562, 89 N. E. 149; *York v. Flaherty* (1911) 210 Mass. 35, 96 N. E. 53. In the case first cited it appeared that the beneficiary had, as yet, received nothing, but the court decided to determine the amount due the creditors, if any, and it was held that they were entitled to the amount of the premiums "paid by the husband while insolvent," together with interest thereon, "subject to the Statute of Limitations."

In *York v. Flaherty*, *supra*, no premiums had been paid following the assignment of the policy, and the court held that none paid prior thereto had been "paid in fraud of creditors." The assignment in that case had been of part of a policy, and this was held to be in no wise different from the transfer of a whole policy, which was held valid as against creditors in *Bailey v. Wood*, *supra*.

In *Bailey v. Wood*, *supra*, it also appeared that a bankrupt had assigned a "fifteen-year policy" to his daughter, who collected the full amount thereof on maturity. He had obtained the interest in the policy as the sole heir of his sister, to whom he had originally assigned the policy, which had been taken out in his own name. It was held that this transfer constituted a gift to the daughter, and that she could claim no benefit thereunder, by reason of statute or common law, as against creditors.

In *York v. Flaherty*, *supra*, where it appeared that an insolvent had transferred an interest in his life insurance to his son, it was held that such a transfer was in fraud of creditors and invalid.

In *King v. Cram* (1904) 185 Mass. 103, 69 N. E. 1049, wherein it appeared that a bankrupt, while solvent, had transferred a policy of insurance on his life to his sister-in-law with no intent to defraud creditors, it was

held that the conveyance was valid and could not be considered as in fraud of creditors. And this whether

it was considered as based on consideration, or made purely as a gift.

R. S.

AGENCY OF CANADIAN CAR & FOUNDRY COMPANY, Limited, et al.

v.

AMERICAN CAN COMPANY, Appt.

United States Circuit Court of Appeals, Second Circuit — April 21, 1919.

(258 Fed. 363.)

Interest — contract rate — effect of suit.

1. Under a contract for a specified rate of interest from a beginning date to the date of payment of the amount, that rate will control even in a court of equity until the decree is entered, and will not change when demand is made or suit begun.

[See note on this question beginning on page 1196.]

Equity — recovery of money.

2. There is no reason to resort to equity in an action for the recovery of a sum of money merely.

[See 10 R. C. L. 276.]

Appeal — equitable instead of law action — right to entertain.

3. An appellate court may dispose of a cause upon its merits, which is brought in equity when it should have been brought at law, if no objection to the jurisdiction was made in the lower court.

Contract — of government — authority of committee.

4. A foreign government is bound by a contract within the scope of the authority of a supply committee which is composed in part of members of its embassy, which contract is executed by the president of such committee, the authority of which is authenticated by the country's ambassador.

Courts — power to determine foreign sovereign.

5. The identification of the sovereign de jure or de facto of a country is a political, not a judicial, question.

Evidence — certificate of personality of foreign ambassador.

6. The certificate of the Secretary of State of the United States that a certain person is the ambassador representing a foreign country is conclusive of that fact in the courts.

[See 10 R. C. L. 1131.]

— certificate of foreign ambassador.

7. The certificate of the ambassador of a foreign country as to the powers and character of a committee representing that country is conclusive upon the courts against that government on the matters to which it relates.

[See 10 R. C. L. 1131.]

State — change in form of government — effect.

8. The rights and liabilities of a state are not affected by a change in the form or personnel of the government, no matter how the change may be effected.

[See 15 R. C. L. 104.]

Interest — liability for.

9. One who has not agreed to pay interest is only chargeable with it from the time of making default.

[See 15 R. C. L. 11.]

— interest not contemplated by parties.

10. No interest is chargeable upon a fund belonging to one person and in possession of another until the custodian is placed in default, if the parties contemplated that the fund should not be subject to payment of interest.

[See 15 R. C. L. 11.]

Appeal — failure to take — effect on right to interest.

11. A complainant failing to appeal from the decree awarding interest to him cannot ask the appellate court to increase the amount allowed to him prior to entry of decree.

APPEAL by defendant from a decree of the District Court of the United States for the Southern District of New York (Mayer, District Judge) in favor of complainants in a suit to recover a sum of money with interest, alleged to have been improperly withheld from them by defendant. *Modified.*

Statement by Rogers, Circuit Judge:

This cause comes here on appeal from a decree entered in the United States district court for the southern district of New York, on August 14, 1918. The Agency of Canadian Car & Foundry Company, Limited, hereinafter called the "Agency Company," is a corporation organized under the laws of the state of New York, and is a citizen of that state, having its principal place of business in the city of New York. The Recording & Computing Machine Company, hereinafter called the "Recording Company," is a corporation organized under the laws of the state of Ohio, and is a citizen of that state, having its principal place of business in the city of Dayton, in that state. The American Can Company is a corporation organized under the laws of the state of New Jersey, and is a citizen of that state, having its principal place of business in the city of New York. The Canadian Car & Foundry Company, Limited, hereinafter referred to as the "Canadian Company," is a corporation under the laws of the Dominion of Canada.

On, respectively, February 27, 1915, and March 8, 1915, two contracts were entered into at Petrograd, Russia, between the chief artillery board of the Russian government and the Canadian Company. The first contract was for 2,500,000 high explosive shells and 500,000 shrapnel shells. The second contract was for 2,000,000 shrapnel shells. The 2,500,000 shrapnel shells so contracted for required 2,500,000 time fuses. This caused the Canadian Company in March, 1915, to enter into a contract with the Recording Company, in which the latter company agreed to manufacture for the former company 2,500,000 time fuses. In pursuance of these contracts the Russian government,

through its attorney, advanced to the Canadian Company between April 20, 1915, and November 8, 1915, \$9,904,997.

In October, 1915, there was organized the Russian supply committee in America, which took charge on behalf of the Russian government of all matters arising out of the contracts; and between November 22, 1915, and January 5, 1917, the attorney for this committee, acting under its instructions, turned over to the Canadian Company, on account of the purchase price stipulated in the contracts, various amounts aggregating \$64,000,000, which, with the advances made prior to November 22, 1915, aggregated \$74,000,000. On March 8, 1916, the contract of February 27, 1915, and the contract of March 8, 1915, were amended, and as amended were assigned with the consent of the Russian government to the Agency Company. After March 8, 1916, the performance of the contracts was carried on exclusively by the Agency Company.

Under date of August 23, 1916, an agreement was made between the Recording Company and the defendant for the manufacture by the Recording Company of 1,250,000 "22-second Russian combination fuses." Under date of October 31, 1916, an agreement was made between the Agency Company, the Recording Company, and the defendant, whereby the Agency Company waived any claim or lien which it had upon the time fuses manufactured by the Recording Company for the defendant under the contract of August 23, 1916. In the contract of October 31, 1916, the defendant agreed to pay to the Agency Company \$1 of the purchase price of each fuse delivered "until all sums which may now or hereafter be due from and payable" by the Recording Company to the Agency Company should be adjusted

or otherwise satisfied. This agreement is one of especial importance in this case. The Agency Company claimed that as a result of the dealings between the Recording Company and itself the latter was indebted to it in a large amount, and under date of November 17, 1916, what is known as the "arbitration agreement" was entered into between these two companies. They therein agreed to adjust and settle all accounts and claims arising under the agreement between them.

On January 2, 1917, the Agency Company assigned, among other things, to the chief artillery board of the Imperial Russian government, which was referred to in the assignment as "the government," "all debts, accounts, and sums of money now due and owing, or accruing due from the manufacturer to the Agency Company up to, but not in excess of," \$2,352,315.63. The agreement also assigned to the Russian government the agreement of October 31, 1916, "with full right and authority on the part of the government to receive from the American Can. Company all sums of money payable to the Agency Company under the terms of said agreement." And the agreement expressly provided that the government would pay to the Agency Company "the aggregate amount of the sum or sums that may now be due or hereafter ascertained to be due or accruing due from the manufacturer to the Agency Company, under the terms of said agreements first above referred to, and to make such payments to the Agency Company as and when such sums respectively are ascertained, or are admitted by the manufacturer to be due or accruing due: Provided, however, that the government shall not be liable to pay any sum or sums due or accruing due from said the Recording & Computing Machines Company in excess of the aggregate amount of two million three hundred and fifty-two thousand three hundred and fifteen dollars and sixty-three cents (\$2,352,-

315.63), and that for any sum or sums due or hereafter accruing due from the manufacturer to the Agency Company, in excess of the amount paid by the government in respect thereof, the Agency Company shall retain its rights to receive payment for the same from the manufacturer and the said Ohmer: And provided, also, that the rights of the Agency Company to issue execution on any judgment recovered by it against the manufacturer and/or the said Ohmer in respect of the same shall not be exercised by the Agency Company until after the government has been reimbursed by the manufacturer and the said Ohmer for any and all sums paid and/or credited to the Agency Company hereunder, nor until all contracts which the manufacturer now has or may hereafter have for the manufacture of Russian time fuses have been completed by the Recording & Computing Machines Company."

On January 11, 1917, the Recording Company agreed with the Russian government that each firm or corporation having a contract with it for time fuses (including thereby the defendant) should deduct \$1 from the purchase price of each fuse and pay the same to the government until payment should be made in full of the amount which the government was required to pay to the Agency Company under the agreement referred to in the preceding paragraph. On September 14, 1917, the defendant by letter acknowledged that it held \$1,500,000 (or \$1 per fuse upon the fuses manufactured for it) for account of the Agency Company or the Imperial Russian government as their interests might appear, and it agreed to retain the same "until such time as there shall have been made a final settlement and adjustment of accounts" between the parties interested, to wit, the Recording Company, the Agency Company, the Imperial Russian government, and the defendant, "or until their interests shall be finally determined by

law." The agreement of September 14, 1917, also contained an important agreement as to the payment of interest, to which more specific reference is made in the court's opinion.

On December 18, 1917, an agreement was made between the Agency Company, the Recording Company, and the Russian government acting through General Khrabroff, the president of the Russian supply committee in America, which it is claimed was a complete and final settlement, adjusting and determining all matters of account, including the amount due from the Recording Company to the Agency Company; and on that day the Recording and Agency Companies by a separate instrument stated and adjusted their accounts, and the Recording Company conveyed to the Agency Company an interest, constituting a prior claim, to the extent of \$713,176.07 in the fund of \$1,500,000 held by the defendant; and on the same day last above named the Russian government assigned to the Agency Company and to the Recording Company all its right, title, and interest either in law or in equity in and to the sum of \$1,500,000, and such interest as may be payable thereon, held by defendant, in such proportion that the Agency Company "shall have and enjoy the sum of \$713,176.07 out of said moneys, and the Recording Company shall have and enjoy the balance of \$786,823.93 of said moneys and such interest as may be payable upon said moneys, to be divided equally between said companies."

This suit is brought to compel the defendant to pay to the plaintiffs the moneys which they claim are improperly withheld from them by the defendant. The defendant admits that it is indebted in the amount of \$1,500,000, and declares that it has been ready and willing to pay the same as soon as payment thereof would relieve it from possible liability to pay the same again in whole or in part to some other claimant or claimants. The defendant denies that the governments referred to in

the various averments of said bill of complaint as "the Russian government" were the same governments; and it declares that it is without knowledge whether any rights or property alleged in said bill of complaint to have been acquired or vested in any Russian government have been acquired or vested in any other or subsequent Russian government in said bill of complaint mentioned, or in the complainants, or either of them, or whether any person, natural or corporate, or persons or body of persons, referred to in said bill of complaint or in any exhibit thereto as acting or purporting to act on behalf of any Imperial Russian government or any other Russian government, had authority or power to so act. The court below has entered a decree in favor of complainants.

Argued before Rogers, Hough, and Manton, Circuit Judges.

Messrs. Simpson, Thatcher, & Bartlett, and Graham Sumner, for appellant:

When the legislative or executive department recognizes that any political change has taken place in a foreign country, the courts should take judicial notice of the time when and circumstances under which the change took place.

Jones v. United States, 137 U. S. 202, 212, 34 L. ed. 691, 695, 11 Sup. Ct. Rep. 80; Underhill v. Hernandez, 168 U. S. 250, 42 L. ed. 456, 18 Sup. Ct. Rep. 83; Oetjen v. Central Leather Co. 246 U. S. 297, 62 L. ed. 723, 38 Sup. Ct. Rep. 309; Ricaud v. American Metal Co. 246 U. S. 304, 62 L. ed. 733, 38 Sup. Ct. Rep. 312; O'Neill v. Central Leather Co. 87 N. J. L. 552, L.R.A.1917A, 276, 94 Atl. 789.

When a new sovereign acquires jurisdiction over certain territory, the authority of all agents and representatives of the old sovereign is deemed to be revoked.

Alexander v. Roulet, 13 Wall. 386, 20 L. ed. 564; More v. Steinbach, 127 U. S. 70, 32 L. ed. 51, 8 Sup. Ct. Rep. 1067; Ely v. United States, 171 U. S. 220, 43 L. ed. 142, 18 Sup. Ct. Rep. 840.

Even as to matters of record public officers are not permitted to certify as to the contents or effect of documents, but they are permitted merely to give

certified copies of documents which are on record.

Greenl. Ev. 16th ed. § 498; 17 Cyc. 336, 337; Church v. Hubbard, 2 Cranch, 187, 2 L. ed. 249; Turner v. Kouwenhoven, 100 N. Y. 115, 2 N. E. 637; Billingsley v. Stratton, 11 Ind. 396; Daggett v. Bonewitz, 107 Ind. 277, 7 N. E. 900; Wood v. Pleasants, 3 Wash. C. C. 201, Fed. Cas. No. 17,961; United States v. Mitchell, 2 Wash. C. C. 478, Fed. Cas. No. 15,791; Hanson v. South Scituate, 115 Mass. 386; Enfield v. Elington, 67 Conn. 459, 84 Atl. 818.

It is always competent for parties to provide by agreement for some rate of interest other than the legal rate, and when they agree that some other rate shall be figured to the date of payment of the principal sum, the agreement will be recognized and enforced, and the claim will not carry interest at the legal rate until it is merged in a judgment or decree.

Zimmermann v. Klauber, 139 App. Div. 26, 123 N. Y. Supp. 642; Union Estates Co. v. Adlon Constr. Co. 221 N. Y. 183, — A.L.R. —, 116 N. E. 984; O'Brien v. Young, 95 N. Y. 428, 47 Am. Rep. 64; Northwestern Mut. L. Ins. Co. v. Perrill, Fed. Cas. No. 10,339.

Messrs. T. Ludlow Chrystie, Arnold Wainwright, and Francis K. Raynor for appellee Agency Company.

Messrs. Walter C. Noyes, H. A. Toulmin, and H. A. Toulmin, Jr., for appellee Recording Company:

The question of sovereignty is a political question, the determination of which by the legislative and executive departments binds the judicial.

Jones v. United States, 137 U. S. 202, 212, 34 L. ed. 691, 695, 11 Sup. Ct. Rep. 80; Percy v. Stranahan, 205 U. S. 257, 265, 51 L. ed. 793, 795, 27 Sup. Ct. Rep. 545; Williams v. Suffolk Ins. Co. 18 Pet. 415, 10 L. ed. 226; The Hornet, 2 Abb. (U. S.) 35, Fed. Cas. No. 6,705.

The judiciary of a country recognizes the condition of things, with respect to the government of another country which once existed, to continue until the political department of its own government has recognized a change.

Phillips v. Payne, 92 U. S. 130, 132, 23 L. ed. 649, 650; Kennett v. Chambers, 14 How. 38, 50, 14 L. ed. 316, 321; Gelston v. Hoyt, 3 Wheat. 246, 251, 4 L. ed. 381, 383; Clark v. United States, 3 Wash. C. C. 101, Fed. Cas. No. 2,838.

The certificate of the Secretary of State is conclusive evidence of the Russian ambassador's authority.

Re Baiz, 135 U. S. 403, 481, 34 L. ed. 222, 231, 10 Sup. Ct. Rep. 854; United States v. Benner, Baldw. 234, Fed. Cas. No. 14,568.

The change in the form of the Russian government does not affect the situation.

The Sapphire, 11 Wall. 164, 167, 20 L. ed. 127, 130.

The certificate of the Russian ambassador as to the Russian supply committee was admissible.

Klingemann's Goods, 3 Swabey & T. 18, 8 L. T. N. S. 172, 11 Week. Rep. 218; Oldenburg's Goods, L. R. 9 Prob. Div. 234, 53 L. J. Prob. N. S. 46, 32 Week. Rep. 724, 49 J. P. 104.

Acting in an office is proof of being an officer. The proofs of the acts of the Russian supply committee constitutes prima facie evidence of their official character.

1 Greenl. Ev. 171; Doe ex dem. Hopley v. Young, 8 Q. B. 63, 115 Eng. Reprint, 798, 15 L. J. Q. B. N. S. 9, 9 Jur. 941; Bank of United States v. Dandridge, 12 Wheat, 64, 68, 6 L. ed. 552, 554; Ronkendorff v. Taylor, 4 Pet. 349, 358, 7 L. ed. 882, 885; Ex parte Ward, 173 U. S. 452, 456, 43 L. ed. 765, 766, 19 Sup. Ct. Rep. 459; Golder v. Bressler, 105 Ill. 419; Jacob v. United States, 1 Brock, 520, Fed. Cas. No. 7,157.

It was permissible for the witnesses to testify that they were members of the Russian supply committee; the production of the record of their appointment was not necessary.

Hall v. Bishop, 78 Ind. 370; James v. State, 41 Ark. 451; State v. Findley, 101 Mo. 217, 14 S. W. 185, 8 Am. Crim. Rep. 191; Sawyer v. Steele, 3 Wash. C. C. 464, Fed. Cas. No. 12,406.

Rogers, Circuit Judge, delivered the opinion of the court:

This is a suit in equity brought for the recovery of \$1,500,000 with interest. The general rule, of course, is that, where the cause of action is for the payment of a sum of money merely, there is no reason why a court of equity should be resorted to. Raton Waterworks Co. v. Raton, 174 U. S. 360, 43 L. ed. 1005, 19 Sup. Ct. Rep. 719. An action at law is regarded as the appropriate remedy in such

Equity—recovery of money.

cases; the remedy at law being full, adequate, and complete. The Judicial Code (Act March 3, 1911, chap. 231, 36 Stat. at L. 1163) in § 267 (Comp. Stat. § 1244, 5 Fed. Stat. Anno. 2d ed. p. 989) expressly declares that suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate, and complete remedy may be had at law. The bill of complaint in this case, however, alleges that the plaintiffs have no adequate remedy at law and that the fund which they seek to recover is held by the defendant in trust. Whether there is or ever has been a specific trust res, or anything more than an ordinary indebtedness, payment of which the plaintiffs might have obtained in an action at law, and whether such an action would have been fully adequate, has not been raised by motion or answer, or on the argument. We observe, however, that counsel for defendant states in his brief as a fact that "there is no fund in a proper sense; there is merely an indebtedness of \$1,500,000 owing by the defendant." Although an appellate court may, and not infrequently does, sua sponte, take the objection and dismiss the bill (*Southern P. R. Co. v. United States*, 200 U. S. 841, 50 L. ed. 507, 26 Sup. Ct. Rep. 296), it will not in all cases pursue that course. We see no reason why in the present situation, we should enter upon that inquiry, but we will assume that, if the plaintiffs are entitled to the money for which they have filed their bill, they may maintain their suit in a court of equity.

We may, however, add that the complainants derive through an assignment, and that the assignee of a chose in action under the decisions of the Supreme Court cannot proceed in equity merely on the ground that his interest is an equitable one, but must proceed at law. *New York Guaranty & Indemnity Co. v. Memphis Water Co.* 107 U. S. 205, 27 L. ed. 484, 2 Sup. Ct. Rep. 279; *Hayward v. Andrews*, 106 U. S. 672, 27 L. ed. 271, 1 Sup. Ct. Rep. 544. We

are not unaware that, where a part only of a chose in action has been assigned, the assignee has been allowed to sue in equity, upon the theory that courts of law would not recognize the right to split up a single cause of action into many actions without the assent of his debtor, since it might subject him to many embarrassments not contemplated in the original contract. *Mandeville v. Welch*, 5 Wheat. 277, 5 L. ed. 87. But even in case of partial assignments it is not necessary to sue in equity if the debtor consents to the assignment. 5 C. J. 1000. In this case the whole interest was assigned by the same instrument to two assignees, although in unequal shares, and these two assignees are the complainants, and the whole chose, and not a part of it, is the subject-matter involved. If there are equitable grounds why the assignees should not have proceeded at law, they do not suggest themselves. The defense has not interposed objections, and none were made by the district judge, and under the circumstances we are not now inclined to dispose of the case otherwise than upon the merits.

We start with the proposition that there is conceded to be \$1,500,000 in the possession of the defendant which it is not entitled to withhold, provided the Russian government has through its proper officials effectively transferred and assigned all the right, title, and interest it may at any time have had therein to the plaintiffs in this suit, so that upon payment being made to the plaintiffs in the proportions to which they may be respectively entitled the defendant cannot be compelled to pay twice, because some Russian government at some time in the future may repudiate the action taken by those who signed the agreement of December 18, 1917, and deny their authority to act as the official representatives of Russia. We also find that this fund belongs

Appeal—equitable instead of law action—right to entertain.

to the complainants in the following proportions: \$713,176.07 to the Agency Company; \$786,823.93 to the Recording Company. What interest, if any, on these respective sums the complainants may be entitled to will be considered in a subsequent part of the opinion.

We come, then, to consider first whether the Russian government has surrendered effectively any interest it may have had in the \$1,500,000 owing by the defendant; and it is to be observed in respect to this phase of the case that the agreement of December 18, 1917, by which the Russian government is said to have transferred to complainants all its interest in the fund, was by Khrabroff as president of the Russian supply committee in America, "acting for and on behalf of the Russian government," which reads as follows:

"Whereas, by agreement dated the 8th day of March, 1916, made between the parties hereto and . . . as voting trustees, two hundred (200) shares of the capital stock of . . . the Agency Company were assigned and pledged to the said voting trustees as security for the performance by the Agency Company of the two contracts mentioned in said agreement; and

"Whereas, all matters and questions arising out of or in connection with the performance of said contracts have now been adjusted and settled and it is desired to dissolve the voting trust created by said agreement and to reassign said shares:

"Now, therefore, this indenture witnesseth: The parties hereto hereby consent and agree to the cancellation of the said hereinabove recited agreement, dated the 8th day of March, 1916, and to the dissolution of the voting trust thereby created and the reassignment of the shares of the capital stock of the Agency Company mentioned in said agreement and the delivery of the certificates of said shares to the holders of the voting trust certificates issued under the provisions of said agreement."

Whatever rights the Russian government may at any time have had in the fund of \$1,500,000, they came to an end with the execution of the above document, provided General Khrabroff had authority to act on behalf of the Russian government. The claim that he had no authority to act for the government of Russia is not taken seriously by us. His authority is conclusively shown. General Khrabroff was president of the Russian supply committee. That committee, as previously said, was created in October, 1915. Associated with General Khrabroff on the committee were the commercial attaché, the naval attaché, and the financial attaché to the Russian embassy at Washington, the official character of all of whom had been duly recognized by the government of the United States, as appears from a diplomatic list issued by the Department of State and also from the certificate of the Russian ambassador to the United States, Boris Bakhmetieff, all of which are in the record.

On July 5, 1917, the United States government recognized Boris Bakhmetieff as the Russian ambassador. The record contains a certificate, signed and sealed on May 8, 1918, by Robert Lansing, Secretary of State of the United States of America, stating that Boris Bakhmetieff presented his letter of credence to the President and was officially received by the President as ambassador extraordinary and plenipotentiary of Russia on July 5, 1917, and that he has since that date been recognized by the Department of State as the ambassador of Russia. The certificate of the ambassador declared the official character of the Russian supply commission, and that it was organized to purchase supplies in the United State for Russia, and to accept supplies purchased or manufactured in the United States for Russia, and that it had power to settle all matters relating to contracts for sup-

Contract of
government-
authority of
committee.

plies so purchased or manufactured during the time herein involved.

Who is the sovereign de jure or de facto of a country is a question for the political departments of the government. It is not a judicial question.

Courts—power to determine—foreign sovereign.

The decision of the matter by the political departments is in this country conclusive upon the judges. *Jones v. United States*, 137 U. S. 202, 212, 34 L. ed. 691, 695, 11 Sup. Ct. Rep. 80.

The same principle is the established law of England. *Peru v. Dreyfus Bros.* L. R. 38 Ch. Div. 348, 356, 359. In the same way the question, Who represents and acts for a foreign sovereign or nation in its relations with the United States? is determined, not by the judicial department, but exclusively by the political branch of the government. *Re Baiz*, 135 U. S. 403, 34 L. ed. 222, 10 Sup. Ct. Rep. 854. So that the certificate of the Secretary of State, above referred to, certifying to the official character of Boris Bakhmetieff as the Russian ambassador to the United

Evidence—certificate of personality of foreign ambassador.

States, is not only evidence, but it is the best evidence, of Mr. Bakhmetieff's diplomatic character, and is to be regarded by the

courts as conclusive of the question, and the court could not proceed upon argumentative and collateral proof.

—certificate of foreign ambassador.

And the certificate of Mr. Bakhmetieff, given under his hand and seal as Russian ambassador, concerning the membership and powers of the Russian supply committee, must be regarded in like manner as an authoritative representation by the Russian government on that subject, and as such binding and conclusive in the courts of the United States against that government on the matters to which it relates.

In *The Dormoy's Goods*, 3 Hagg. Eccl. Rep. 767 (1832), the court held that the certificate of the

French consul general was sufficient proof of the law of France, the doubt being whether the French ambassador himself should not have certified, instead of the consul general. In *Klingemann's Goods*, 3 Swabey & T. 18, 8 L. T. N. S. 172, 11 Week. Rep. 218 (1862), the ambassador to Great Britain of the King of Hanover gave a certificate under the seal of the legation that a will executed in accordance with the law of England was a valid will under the law of Hanover, and the court held that such a certificate was sufficient evidence of the foreign law. In *Oldenburg's Goods*, L. R. 9 Prob. Div. 234, 53 L. J. Prob. N. S. 46, 32 Week. Rep. 724, 49 J. P. 104 (1884), the question was as to the law of Russia concerning the validity of a will of a deceased member of the royal family. The court received in evidence a certificate under the hand and seal of the Russian ambassador in England to the effect that by the law of Russia no testamentary dispositions of any member of the royal family could have any effect unless approved by the Emperor. The certificate was accepted as sufficient proof of the law of Russia.

The court has no doubt as to the validity of the settlement made in December, 1917. The principle of law is well established that the rights and liabilities of a state are not affected by a change in the form of government or the personnel of

State—change in form of government—effect.

a government, no matter how that change may be effected. The obligations of a state, the debts due to and from it, are not affected by any transformation in the internal organization of its government. In *Taylor's International Public Law*, § 161, he says: "As the people as a whole were bound at their creation by the acts of organized agents, each new government succeeds not only to the fiscal rights, but to the fiscal obligations, of its predecessor."

And in § 160 he says: "It is the privilege of every state to adopt

any form of government it deems best suited to its internal wants and conditions, and its identity is never lost so long as its corporate existence survives. While that is preserved neither internal revolutions, nor alienations of parts of its territory, can diminish any of its rights or discharge it from any of its obligations."

The question at issue being, on this phase of the case, whether the Russian government has effectually divested itself of all interest in the moneys now in the hands of the defendant, this court holds that the certificate of the personal representative of that government, duly accredited to and recognized by the government of the United States, certifying that the official who assumed to assign and release any such interest as his government might have, was authorized to act in behalf of his government in making such assignment and release, is competent and conclusive evidence, which the court below properly held to be decisive.

This brings us to the question as to the rate of interest which the defendant should be required to pay to the complainants. In the agreement of September 14, 1917, the defendant agreed that, in the event of any portion of the \$1,500,000 fund becoming payable to the Recording Company from the defendant, the latter "will allow a charge by you [the Recording Company] for interest at the rate of 2 per cent per annum, or such other rate as the Can Company [defendant] may actually receive from its banking house on the deposit of the aforesaid sum upon such sum as may be paid to you from the aforesaid sum; said interest to be figured from November 1, 1917, to the date of payment of the amount. It is furthermore understood that no charge for interest prior to November 1, 1917, shall be allowed."

At the time that agreement was made there were, as we have seen, disputes pending between the Recording Company, the Agency Com-

pany, and the Russian government, and also between those parties and the defendant. As this fund was withheld pending the settlement of the disputes, it was agreed that interest was "to be figured from November 1, 1917, to the date of payment of the amount," and it was also expressly agreed, as above appears, that "no charge for interest prior to November 1, 1917, shall be allowed." The district judge accordingly has held, rightfully, that the Recording Company was entitled to interest only from November 1, 1917.

Then the agreement was that interest was to be allowed at the rate of 2 per cent per annum, or such other rate as the defendant received from its banking house on the deposit of the \$1,500,000 fund; and the testimony in the record shows that defendant has not received from any banking house interest on any deposit at a higher rate than 2 per cent per annum since November 1, 1917. The district judge accordingly has held that the Recording Company is entitled to interest at the rate of 2 per cent per annum from November 1, 1917, to December 28, 1917, and that from December 28, 1917, it is entitled to interest at the rate of 6 per cent per annum. His theory evidently was that the Recording Company on December 28, 1917, was entitled to receive the \$786,823.93, a final settlement having been arrived at, but as the defendant declined to pay when the time for payment arrived on December 28, 1917, and stated that it would not pay except "pursuant to the judgment of a court," it was from that time on in default, and therefore bound to pay interest at the legal rate of 6 per cent per annum. We have no doubt that the defendant would be rightfully chargeable with that rate from the time of the default if the parties had not expressly agreed that the rate of interest should be 2 per cent per annum "to the date of payment of the amount." If those words mean to the date when the money should

have been paid, the district judge was right in charging the defendant with interest at the rate of 6 per cent per annum from December 28th. If the words, however, mean to the date when payment is made, he committed an error. If the parties meant the words to have the former meaning, they certainly did not say so; and the court is not at liberty to say so for them. In *Ex parte Fewings*, L. R. 25 Ch. Div. 338, 53 L. J. Ch. N. S. 545, 50 L. T. N. S. 100, 32 Week. Rep. 352, Fry, L. J., said, "Paid" refers to an actual receipt of money." And we say that, in the same way, "to the date of payment of the amount" means to the date of the actual receipt of the money.

The question of interest was little discussed at the argument. We derived from it no assistance as to the rights of parties to interest who are situated as are the parties to this litigation. The court below cited no authorities upon the question of interest, and neither of the counsel for the complainants have cited any in their briefs. This court approached this subject of the right of interest in sympathy with the holding of the lower court, thinking, though perhaps without justification, that the conduct of the respondent in withholding payment was influenced by the low rate of interest upon which the parties had agreed. On this branch of the case the court entertained much the same feeling as that which Lord Chancellor Herschell expressed in *London, C. & D. R. Co. v. Southeastern R. Co.* [1893] A. C. 429, 437, when he said: "I confess that I have considered this part of the case with every inclination to come to a conclusion in favor of the appellants . . . of giving them interest . . . for this reason: that I think that when money is owing from one party to another, and that other is driven to have recourse to legal proceedings in order to recover the amount due to him, the party who is wrongfully withholding the money from the other ought not in justice to benefit

by having that money in his possession and enjoying the use of it, when the money ought to be in the possession of the other party, who is entitled to its use. Therefore, if I could see my way to do so, I should certainly be disposed to give the appellants, or anybody in a similar position, interest upon the amount withheld, from the time of action brought, at all events. But I have come to the conclusion, upon a consideration of the authorities, agreeing with the court below, that it is not possible to do so, although, no doubt, in early times the view was expressed that interest might be given under such circumstances by way of damages."

The English and the American law on the subject of interest differ, or did differ, at the time Lord Herschell wrote. The courts of this country generally allow interest at the legal rate by way of damages from the time of the maturity of an obligation, where the parties have not made an express agreement for interest after maturity. We have not in this case that difficulty to encounter. The difficulty here is that we do not see our way to sustaining the decree of the district judge in allowing interest at the rate of 6 per cent from December 28, 1917, on the sum due the Recording Company. That interest we might have allowed, were it not for the express agreement of the parties that the fund should bear interest at the rate of 2 per cent until payment.

Prior to Stat. 37 Hen. VIII. chap. 9, the taking of interest for the use of money was unlawful in England. That statute authorized the taking of interest, and fixed the lawful rate at 10 per cent per annum, and punished anyone who received more with forfeiture and imprisonment. The history of the right to interest in England is a matter of curious interest until 1854, when Stat. 17 & 18 Vict. chap. 90, abolished all usury laws and established "free trade in money," largely through the influence of Jeremy Bentham. In this country the courts from the begin-

ning viewed the allowance of interest with greater favor than the courts of England. There was never any doubt with our courts about the right to interest when expressly contracted for, or where an undertaking to pay it might be implied from the usages of trade; and from a very early date the American courts recognized the fact that the English common law was not suited to the conditions existing in this country and they declined to follow it. In *Selleck v. French*, 1 Conn. 32, 6 Am. Dec. 185, Chief Judge Swift, speaking for the Connecticut supreme court of errors, specified nine classes of cases in which interest was allowed in that state, and concluded by saying: "Such are the principles which have been long established in this state." And the fifth of the propositions it is interesting to note was the following: "5. Where one has received money for the use of another, and it was his duty to pay it over, interest is recoverable for the time of the delay; but if the holder of money for another is guilty of no neglect or delay, he will not be chargeable with interest."

The principle that one who has not agreed to pay interest is nevertheless chargeable with it from the time of his default in making payment is undoubtedly the law in this country. In *Chicago v. Tebbetts*, 104 U. S. 120, 125, 26 L. ed. 655, 656, the principle was recognized and applied that a party guilty of unreasonable and vexatious delay in making payment is chargeable with interest from the time the debt became due, and is not relieved by offering to pay interest from the time when the delay began to be unreasonable and vexatious. In that case the delay was accompanied by litigation; as the court put it, the city had litigated and contested the demand year after year and in court after court.

In 22 Cyc. 1498, it is said to be the rule that interest is allowed as damages where there has been unreason-

able and vexatious delay in making payment.

We do not, however, have to consider what limitations, if any, attach to the doctrine above announced in so far as the Recording Company's claim to interest is concerned; for we are dealing with an express agreement which the parties made as to the payment of interest. In 16 Am. & Eng. Enc. Law, 1053, it is laid down that "as a matter of course, where the interest of the parties as to the rate after maturity is expressed in the contract, such rate, if not illegal, will in general control."

This is the law of New York; the courts holding that, when a contract provides that interest shall be paid at a specified rate until the principal is paid, the contract rate governs until the payment of the principal, or until the contract is merged in a judgment. *Taylor v. Wing*, 84 N. Y. 471; *O'Brien v. Young*, 95 N. Y. 428, 47 Am. Rep. 64.

In *Holden v. Freedman's Sav. & T. Co.* 100 U. S. 72, 25 L. ed. 567, the maker of a note agreed to pay it, with 10 per cent interest. The court held that interest should be computed at that rate up to the maturity of the note, and thereafter at 6 per cent. After calling attention to the fact that the agreement of the parties extended no further than to the time fixed for the payment of the principal and was silent as to everything beyond that, the court said: "If payment be not made when the money becomes due, there is a breach of the contract, and the creditor is entitled to damages. Where none has been agreed upon, the law fixes the amount according to the standard applied in all such cases. It is the legal rate of interest where the parties have agreed upon none. If the parties meant that the contract rate should continue, it would have been easy to say so. In the absence of a stipulation, such an intentment cannot be inferred."

And see *Brewster v. Wakefield*, 22 How. 118, 16 L. ed. 301; *Burnhisel v. Firman*, 22 Wall. 170, 22 L.

Interest—
liability for.

ed. 766. If the local law is different, the Federal courts will follow it. *Cromwell v. Sac County*, 96 U. S. 51, 61, 24 L. ed. 681, 687; *Ohio v. Frank*, 103 U. S. 697, 26 L. ed. 531. In *New Orleans v. Warner*, 175 U. S. 120, 147, 44 L. ed. 96, 109, 20 Sup. Ct. Rep. 44, the agreement was that if the warrants were not paid upon the date fixed for presentation, they should bear interest at the rate of 8 per cent until paid. The court, after referring to *Holden v. Freedman's Sav. & T. Co.* supra, and the other cases cited, said: "These very cases, however, recognize the principle that, if the parties themselves have fixed a rate to be paid up to the time of payment, that rate will be respected. In this case both the statute and the warrants provided that such warrants shall bear interest at the rate of 8 per cent 'until paid,' and we are therefore of opinion that complainant is entitled to that rate from November 26, 1894, the date of filing the bill and issuing the subpoena."

The commencement of the suit was a sufficient demand to charge the defendant with interest from that day.

When the agreement is for the payment of interest at a certain rate until the note is paid, the parties have agreed upon the amount of the damages to be paid because of the nonpayment of the principal at maturity. *Reeves v. Stipp*, 91 Ill. 609. In *Browne v. Steck*, 2 Colo. 70, the note sued on provided for interest at the rate of 10 per cent per month from maturity until paid. The court regarded the rate specified as *prima facie* sufficient to establish the measure of damages for the breach of the contract. This was followed in *Buckingham v. Orr*, 6 Colo. 587, 591, 592. In *Daniel on Negotiable Instruments*, 6th ed. vol. 2, § 1458, that authority says: "And if the note runs with a certain rate of interest until paid, that rate, if legal, runs after maturity as before."

And see *Augusta Nat. Bank v. Hewins*, 90 Me. 255, 38 Atl. 156; *Jennings v. Moore*, 189 Mass. 197, 75

N. E. 214; *Seymour v. Continental L. Ins. Co.* 44 Conn. 300, 26 Am. Rep. 469. We conclude, therefore, that in an action at law if the parties agree upon the rate of interest until the money is paid, or until date of payment, that agreement is controlling and fixes the measure of damages upon default.

But this is not an action at law. It is a suit in equity, and the question arises whether the same rule is to be applied that would be applicable if the action had been at law. The courts of equity have long had certain rules which they applied to certain classes of cases. If a trustee was guilty of unreasonable delay in investing the trust fund or in transferring it to those destined to receive it, he was compelled to pay interest to the cestuis que trustent even where it was not prayed by the bill. An executor or administrator whose duty it was to pay the testator's obligations as soon as he had assets collected which were sufficient for the purpose was himself charged with interest at the same rate the obligations bore. And if he failed to account promptly to the residuary legatee for the surplus of the estate, he himself had to pay interest for the balance improperly retained. So, if a trustee of a bankrupt's estate neglected to pay a dividend to the creditors, equity required him to pay interest from the time when the breach of duty commenced. A trustee could not make a profit out of his trust, and if in breach of his duty he used the trust fund in trade, the cestui had the option of taking either interest or the actual profits which might have been realized. Sometimes he was charged in England with 4 per cent and sometimes with 5 per cent interest, and sometimes with compound interest, according to the circumstances of the case. In this country the trustee who has been guilty of misconduct has been usually charged the legal rate of interest. But the class of cases to which reference has been made have been cases where interest has not been derived from any con-

tract or agreement or statute, but in accordance with the well-established principles of equity jurisdiction. And we are dealing here with an actual agreement fixing the rate of interest to be paid from a specified date "to the date of payment."

We are not aware that equity will construe such an agreement differently from the construction placed upon it at law. The construction to be placed on the language of contracts is the same both at law and in equity. *Jersey City v. Flynn*, 74 N. J. Eq. 104, 70 Atl. 497; 13 C. J. 521. And contracts for interest are governed by the same rules of construction and interpretation as are other contracts. 16 Am. & Eng. Enc. of Law, 1001. In 22 Cyc. 1475, it is said: "The courts of equity, in decreeing or refusing interest, generally follow the law; but interest is sometimes allowed by courts of equity, in the exercise of a sound discretion, when it would not be recoverable at law."

We find no reason and no authority for saying that equity will not follow the law in giving effect to the agreement of the parties as to the rate of interest with which the defendant was to be charged "to date of payment." In *Ex parte Fewings*, L. R. 25 Ch. Div. 338, 53 L. J. Ch. N. S. 545, 50 L. T. N. S. 100, 32 Week. Rep. 352, the agreement was to pay at the rate of 5 per cent per annum so long as the principal or any part thereof remained unpaid. The claim was reduced to judgment, and in England judgments carry interest at the rate of 4 per cent. The chief judge in bankruptcy held that, where the parties had expressly agreed that the rate should be 5 per cent until paid, the creditor would be entitled to that rate after judgment and until paid. The lords justices of the court of appeal reversed the holding, and held that the true construction was that interest at the rate of 5 per cent should be paid so long as any part of the principal remained due under the contract, so long as the contract for payment remained in force, but that the con-

tract came to an end when judgment was entered and the liability under it was gone, being merged in the judgment, so that it could not therefore be said that there was an agreement to pay 5 per cent. So in the case now under discussion the rate of 2 per cent continues until the decree is entered.

We must conclude from what has been said that the decree was erroneous in so far as it awarded to the Recording Company interest at the rate of 6 per cent per annum on the ^{—contract rate—} _{effect of suit.} sum of \$786,823.93

from December 28, 1917, to the entry of the decree. The Recording Company would have been entitled under the agreement of September 14, 1917, to interest at the rate of 2 per cent per annum from November 1, 1917, to the entry of the decree, if it had not been for the agreement of December 22, 1917. By that agreement the Recording Company assigned to the Agency Company one half of the interest it should receive upon the moneys withheld by the defendant. The decree should have provided for the payment to the Recording Company of one half the interest on the sum of \$786,823.93, at the rate of 2 per cent per annum from November 1, 1917, to the entry of the decree.

We now come to the interest the Agency Company was entitled to receive. Upon the trial the Agency Company urged (1) that it was entitled to interest on the entire \$1,500,000 from the time the several instalments thereof fell due to December 22, 1917, and thereafter on \$718,176.07 to the date of decree, at the rate of 6 per cent per annum, and also one half of any and all interest which the Recording Company might be entitled to receive from the defendant; or (2) if that be denied, that defendant be required to account to the Agency Company for the profits realized by the defendant from the use of the funds in its business and that the plaintiff should also receive one half of any and all interest which the

Recording Company might be entitled to receive from the defendant; or (8) if neither of these contentions should be upheld, that it was entitled to interest at the rate of 6 per cent per annum on \$713,176.07 from December 28, 1917, to the date of the decree, and, further, one half of any and all interest which the Recording Company might be entitled to receive from the defendant.

The district judge held that the Agency Company was not entitled to interest on its \$713,176.07 until after the December settlement and the Agency Company's demand on December 28, 1917. From that date he held the Agency Company entitled to interest from the defendant on its \$713,176.07 at the rate of 6 per cent per annum. He also held that it was entitled, in pursuance of the terms of the agreement of December 22, 1917, between the Agency Company and the Recording Company to one half of the interest on the Recording Company's \$786,823.93 from November 1, 1917, to December 28, 1917, which defendant was under obligation to pay to the Recording Company at the rate of 2 per cent per annum, and the decree so provided. Neither of the plaintiffs have appealed, but the defendant in its appeal disputes the allowance of interest.

From what has been said it appears that the Agency Company was entitled to one half of the interest which the Recording Company is to receive on \$786,823.93 from November 1, 1917, to the entry of the decree, instead of to December 28, 1917, as the lower court directed. But with that question determined there remains to be settled the question concerning the interest on \$713,176.07, which we have seen is due to the Agency Company out of the \$1,500,000 retained by the defendant. While the defendant agreed to pay interest at the rate of 2 per cent per annum on the sum of \$786,823.93 due to the Recording Company, it never expressly agreed to pay any interest on

the \$713,176.07 due to the Agency Company; and in the agreement of December 22, 1917, wherein the Agency Company and the Recording Company adjusted matters as between themselves, it was stated that there was due to the Agency Company "a balance of \$713,176.07 and one half of any and all interest which the Recording Company may receive upon the moneys withheld by the American Can Company," the defendant herein. It is evident for reasons we are not concerned with that it was not contemplated that interest should be paid by the defendant to the Agency Company on the balance of \$713,176.07. Under these circumstances the defendant was not chargeable with interest until it placed itself in default; but from that time it was chargeable with interest at the legal rate.

—interest not contemplated by parties.

We have pointed out in an earlier part of this opinion that the High Court of Chancery from early days compelled trustees to pay interest when they withheld the trust fund. That practice our equity courts followed. In *Gray v. Thompson*, 1 Johns. Ch. 82, Chancellor Kent charged a trustee with interest on a trust fund which he had failed to distribute, because he rendered no sufficient excuse for not distributing it as it was his duty to have done. Other cases in equity might readily be cited. And in this country our courts have applied the principle in actions at law. This general rule is stated in 22 Cyc. 1505, where the authorities are collected. It is there said: "Where money belonging to another is not paid over to the person entitled to receive it at the time it should be paid over, interest is generally allowed as damages for such wrongful withholding thereof."

And in 22 Cyc. 1514, it is also said, citing the authorities, that "where the amount of the demand is sufficiently certain to justify the allowance of interest thereon, the existence of a set-off or counterclaim which is itself unliquidated

will not prevent the recovery of interest on the balance of the demand found due from the time it became due."

And where the amount of a demand is definitely agreed upon by the parties, interest will be allowed from the date of such liquidation. *Thomas v. Wells*, 140 Mass. 517, 5 N. E. 485; *Clark v. Dutton*, 69 Ill. 521; *Hoagland v. Segur*, 38 N. J. L. 230.

We do not overlook the fact that, where the amount demanded is disputed on reasonable grounds and in good faith, interest will not be allowed on the demand until the right thereto is authoritatively determined. We think, however, that it was the duty of the defendant to pay when it was properly informed that the parties "had arrived at a final settlement" and demand of payment was made on December 28, 1917. The defendant's refusal to pay without a lawsuit is not to be excused by any of the circumstances of the case. We therefore agree with the court below that the Agency Company is also entitled to interest on its \$713,176.07 at the rate of 6 per cent per annum from December 28, 1917.

In what has been said concerning interest we have pointed out the principles which should have been applied to the case by the district judge at the time the decree was entered. The situation is not now what it was at that time, because of the failure of either of the complainants to appeal from the decree.

The result is that neither of the complainants is entitled to ask the court to increase the amount of interest which it is entitled to receive from the defendant up to the entry of the decree. This court has made no calculation for the purpose of determining the exact amount of interest the complainants would have received under the decree as entered and under the decree as it should have been entered if the correct principle had been applied. We have indicated in what the error consisted; and if it appears that the rectification of the error will reduce the amount of interest due from the defendant the decree must be modified accordingly.

As the Agency Company did not appeal, it is strictly entitled to claim only one half of the 2 per cent interest which the Recording Company will receive from the defendant on \$786,823.93 from November 1, 1917, to December 28, 1917; that being the amount awarded to it under the decree below. But the counsel of each complainant has asked the court to settle the question of interest as between the two complainants as though each had appealed. In compliance with that suggestion the Recording Company must be directed to pay over to the Agency Company one half of the 2 per cent interest to be received from defendant on \$786,823.93 from November 1, 1917, to the entry of the decree.

The case is remanded to the District Court, which is directed to proceed in accordance with this opinion.

ANNOTATION.

Rate of interest after maturity on contracts fixing rate "until payment."

This note is limited to cases involving contracts providing for a specified rate of interest until payment of the principal sum, the question at issue being whether or not the words "until payment," or whatever similar expression may have been employed in the particular contract considered, amount

to an agreement to pay the stipulated rate after maturity. Questions as to the rate of interest on judgments on such contracts, as to the validity of contracts to pay particular rates of interest, as to contracts containing express agreements as to the rate to be paid after maturity and as to the

Appeal—failure to take—effect on right to interest.

rate of interest on contracts generally after maturity, are not considered herein.

Of little value on the question under discussion are the cases which hold that even in the absence of the clause "until payment," or a similar clause, the rate of interest specified in the contract controls after maturity, whether such result is attributable to the view that interest after, as well as before, maturity, is contractual, or to the view taken in England and in some of the states, that "interest" after maturity is by way of damages, the amount of which is measured by the rate specified in the contract. (See 21 *Laws of England* (Halsbury) 48.) Some cases of this kind, however, are subsequently cited because of the intimation that in any event the clause in question would have led to the same conclusion.

Majority view.

The holding of the reported case (*AGENCY OF CANADIAN CAR & FOUNDRY Co. v. AMERICAN CAN Co.* ante, 1182) that "if the parties agree upon the rate of interest until the money is paid, or until date of payment, that agreement is controlling and fixes the measure of damages upon default," is supported by the great majority of the cases in the United States in which this question has arisen.

United States.—*Shepherd v. Pepper* (1889) 133 U. S. 626, 33 L. ed. 706, 10 Sup. Ct. Rep. 438; *New Orleans v. Warner* (1899) 175 U. S. 120, 44 L. ed. 96, 20 Sup. Ct. Rep. 44; *Fauntleroy v. Hannibal* (1879) 5 Dill. 219, Fed. Cas. No. 4,692, affirmed in (1881) 105 U. S. 408, 26 L. ed. 1103; *Northwestern Mut. L. Ins. Co. v. Perrill* (1879) 4 Ohio L. J. 196, Fed. Cas. No. 10,339; *Sanford v. Savings & L. Soc.* (1895) 80 Fed. 54.

District of Columbia.—*Lockwood v. Lindsey* (1895) 6 App. D. C. 396.

Illinois.—*Bank of Illinois v. Stickney* (1842) 5 Ill. 4.

Kansas.—*Dudley v. Reynolds* (1863) 1 Kan. 285; *Small v. Douthitt* (1863) 1 Kan. 335.

Kentucky.—*Crosthwait v. Misener* (1877) 13 Bush, 543; *White v. Curd*

(1887) 86 Ky. 191, 5 S. W. 553; *McNeil v. Watkins* (1894) 15 Ky. L. Rep. 780.

Maine.—*Duran v. Ayer* (1877) 67 Me. 145; *Augusta Nat. Bank v. Hewins* (1897) 90 Me. 255, 38 Atl. 156.

New York.—*Taylor v. Wing* (1881) 84 N. Y. 471; *O'Brien v. Young* (1884) 95 N. Y. 428, 47 Am. Rep. 64; *Wilcox v. Van Voorhis* (1891) 58 Hun, 575, 12 N. Y. Supp. 617; *City Real Estate Co. v. MacFarland* (1910) 67 Misc. 286, 122 N. Y. Supp. 477; *Zimmermann v. Klauber* (1910) 139 App. Div. 26, 123 N. Y. Supp. 642; *Sands v. Gilleran* (1913) 159 App. Div. 37, 144 N. Y. Supp. 337; *Morrisania Sav. Bank v. Bauer* (1881) 3 Month. L. Bull. 102.

Rhode Island.—*Lanahan v. Ward* (1876) 10 R. I. 299.

South Carolina.—*Mobley v. Davega* (1881) 16 S. C. 73, 42 Am. Rep. 632; *Miller v. Hall* (1882) 18 S. C. 141; *Miller v. Edwards* (1882) 18 S. C. 600; *Bowen v. Barksdale* (1890) 33 S. C. 142, 11 S. E. 640.

Utah.—*Jensen v. Lichtenstein* (1915) 45 Utah, 320, 145 Pac. 1036.

The language used in the reported case (*AGENCY OF CANADIAN CAR & FOUNDRY Co. v. AMERICAN CAN Co.* ante, 1182) is "to the date of payment of the amount," and the holding receives additional force from the fact that the court clearly reveals its feeling that the equities of the case would lead to a different holding if any warrant therefor could be found.

In *Shepherd v. Pepper* (U. S.) supra, the court, referring to notes which bore interest "at the rate of 9 per cent per annum until paid," says: "In regard to allowing interest on the principal of the notes at the rate of 9 per cent per annum until paid, it is to be said that such was the contract in each note."

In *Lockwood v. Lindsey* (D. C.) supra, it is held that a judgment on a note bearing interest "at the rate of 8 per cent per annum from the date hereof until paid," made and payable in a foreign jurisdiction where such rate was legal, was properly rendered for the amount of the principal sum for which the note was given, with interest thereon at the rate of 8 per

cent per annum from the date of the note until paid.

The case of *Bank of Illinois v. Stickney* (Ill.) supra, involved notes drawing interest at a specified rate from date until paid; a mortgage on a stock of goods, etc., authorizing a sale before the maturity of the notes, if deemed necessary by the mortgagee, was given as security for the notes; by subsequent agreement between the parties the goods were sold before the maturity of the notes, and notes payable at a date after the maturity of the original notes were taken in payment therefor. It was held that the mortgagee was entitled to his interest on the original notes until the maturity of the sale notes.

It is held in *Dudley v. Reynolds* and *Small v. Douthitt* (Kan.) supra, that a promissory note bearing interest at a specified rate "until paid" binds the maker to pay the specified rate for the use of the sum named in the note until the debt is paid, and not merely until maturity of the note.

In *Crosthwait v. Misener* (1877) 13 Bush (Ky.) 543, it is held that a note with interest "at the rate of 10 per cent per annum from date until paid" bears interest at that rate until actual payment. This case even went to the extent of requiring sale bonds given on a coercive sale of the maker's property in payment of the claim, and running for six months to bear the same rate of interest as the note itself.

White v. Curd (1887) 86 Ky. 191, 5 S. W. 553, involved a note made payable with interest from date at a specified rate, but it was shown that it should have been with interest at that rate from date "until paid." The court held that the note, as it read, would have borne interest at the specified rate only until maturity, and thereafter at the legal rate, but that, with the mistake corrected, it would bear interest at the specified rate until payment.

In *McNeil v. Watkins* (1894) 15 Ky. L. Rep. 780, an action upon a note which, by its terms, bore 10 per cent interest from date, it was claimed by the plaintiff that the agreement was, that the note should bear this rate of

interest until the debt should be paid, and that the words "until paid" were omitted by mistake of the draftsman; this agreement was established as to one of the makers, but not as to others. The court held that a judgment against the former for 10 per cent interest until the debt should be paid was proper, but that as to the other makers, the judgment should not be for a greater rate of interest than 6 per cent after the maturity of the note.

Two notes were involved in the case of *Duran v. Ayer* (1877) 67 Me. 145; one stipulated merely that it was with interest at a specified rate, the other that it was with interest at said rate "till such note is paid." The court said: "The notes were on time, and at the rate of 12 per cent. It has been held in such case that after maturity of the note, the plaintiff is entitled to interest by operation of law, and not by any provision of the contract." This language would seem to make no distinction between the two notes, but from the summary of the defendant's brief, as reported on page 149, liability to pay interest on the second note at the rate specified therein to the time of trial, which was long after maturity, seems to have been conceded.

In the later Maine case of *Augusta Nat. Bank v. Hewins* (1897) 90 Me. 255, 38 Atl. 156, it is held that a promissory note payable at a certain time after date with interest at the rate of 9 per cent until paid bears interest at that rate after the maturity of the note as well as before. The court calls particular attention to the use of the words "until paid," and says: "It had already been decided that without these words such a note would draw the stipulated interest till maturity, and only the legal rate of interest (6 per cent) thereafter. *Eaton v. Boissonnault* (1877) 67 Me. 540, 24 Am. Rep. 52. We think it was to guard against this result that the words 'until paid' were inserted in the note now under consideration."

It is held in *Mobley v. Davega* (1881) 16 S. C. 73, 42 Am. Rep. 632, that a note payable twelve months after date, "with interest from date at 12½ per cent per annum, interest pay-

able annually," and described in a mortgage executed contemporaneously to secure its payment, as a note "with interest thereon at the rate of 12½ per cent per annum till paid," draws the same rate of interest after maturity as before. The court bases its conclusion partially on the fact that the note itself, though running only one year, provides that interest shall be payable annually, thus indicating "a mutual stipulation for an indefinite extension of credit, and annual payment of interest during the extension," but the decision is also rested upon the words "till paid," used in the description of the note in the mortgage.

The note sued on in *Bowen v. Barksdale* (1890) 33 S. C. 142, 11 S. E. 640, was made payable "twelve months after date with interest from date 10 per cent per annum . . . and if not paid at maturity the interest to be added to the principal and bear interest, and so continue until the note is paid." It was held that interest at the rate specified should be added to the principal after maturity of the note annually.

The interest provision in the note considered in *Jensen v. Lichtenstein* (1915) 45 Utah, 820, 145 Pac. 1036, was "with interest thereon at the rate of 7 per cent per annum from date until paid, both before and after judgment;" it was held that this rate would continue although the legal rate was 8 per cent, and although there was a further provision that in case of default in the payment of interest the holder might declare the whole amount due, in which case the principal sum and all unpaid interest should draw interest at the rate of 12 per cent per annum until paid, where, although there had been default, the holder had failed to exercise his option to declare the whole amount due. The note also provided for the payment of interest in regular instalments, and it was held that overdue instalments of interest would bear interest at the legal rate.

In *Northwestern Mut. L. Ins. Co. v. Perrill* (1879) 4 Ohio L. J. 196, Fed. Cas. No. 10,339, it is held that a mortgage bond "with interest thereon until paid at the rate of 8 per cent," is

a contract to pay interest at the rate of 8 per cent until the principal debt is paid, and not merely for the time the bond is to run.

The rule deducible from the New York cases is said, in *Zimmermann v. Klauber* (1910) 139 App. Div. 26, 123 N. Y. Supp. 642, "to be that, where the parties have stipulated for the payment of interest at a fixed rate 'until the principal sum is paid,' that rate will prevail up to the date of entry of judgment, but where a rate of interest is provided for the payment of moneys without any such limitation as above quoted, the rate is determined as fixed by the contract up to the time of default, and thereafter at the legal rate fixed by statute." The mortgage considered in this case provided for interest "at 4 per centum per annum, until the aforesaid principal sum shall be paid," and it was held that this rate prevailed after maturity as well as before.

In *Taylor v. Wing* (1881) 84 N. Y. 471, the court says: "In each of plaintiff's mortgages, it was expressly stipulated that the principal sum should bear interest at 7 per cent until it was paid. It is admitted that there was no error, notwithstanding the statute, subsequently passed, reducing the rate of interest to 6 per cent, in allowing the plaintiff interest at 7 per cent, as stipulated, until the date of the decision of the case."

This question was not involved in *O'Brien v. Young* (1884) 95 N. Y. 428, 47 Am. Rep. 64, but in the course of the opinion, the court says: "When the contract provides that the interest shall be at a specified rate until the principal shall be paid, then the contract rate governs until payment of the principal, or until the contract is merged in a judgment."

In *Sands v. Gilleran* (1913) 159 App. Div. 37, 144 N. Y. Supp. 837, the court quoted this rule with approval, although it held that it was not applicable to the case then being considered, since the mortgage involved therein contained no such provision.

In *Wilcox v. Van Voorhis* (1891) 58 Hun, 575, 12 N. Y. Supp. 617, it is held that a bond and mortgage conditioned

for the payment of a specified sum in one year, "with interest thereon, at the rate of 7 per cent per annum, to be paid half yearly, on the first days of January and July in each year, and also at the time the principal shall be paid," would bear interest at the specified rate after maturity.

In *City Real Estate Co. v. MacFarland* (1910) 67 Misc. 286, 122 N. Y. Supp. 477, the court says: "The mortgage in suit provides for the payment of the debt on December 13, 1906, with interest thereon to be computed at and after the rate of $5\frac{1}{2}$ per cent per annum until the whole of said principal sum is paid. Under such a provision the contract rate of interest governs until payment of the principal, or until the contract is merged in the judgment."

Morrisania Sav. Bank v. Bauer (1881) 3 Month. L. Bull. (N. Y.) 102, involved a bond and mortgage providing for the payment of interest at the rate of 7 per cent per annum until the principal sum should be paid. It was held that this rate of interest would apply until the principal sum was paid, or until judgment was rendered, in spite of a change in statute reducing the legal rate of interest, but not affecting contracts already existing.

A few New York cases which might appear to be opposed to the general rule in that state really support it, but are distinguished on the ground that the words relied on in each case were not equivalent to the expression "until paid."

In *Ferris v. Hard* (1892) 135 N. Y. 354, 32 N. E. 129, it is held that a provision in a bond for the payment of a specified sum in four equal annual payments, that it should be "with interest semiannually on all sums remaining from time to time unpaid," is not like an agreement to pay interest on a principal sum until that principal sum is paid, and hence that the bond would bear interest at the specified rate only until maturity, and thereafter only at the legal rate.

Weyand v. Park Terrace Co. (1909) 135 App. Div. 821, 120 N. Y. Supp. 192, was an action to foreclose a mortgage bearing less than the legal rate of interest, and containing a provision

that the whole of the principal sum should become due upon default of the payment of interest. The mortgagee elected to declare the principal due, and, in discussing the rate of interest which should be allowed thereafter, the court says: "If the obligation had been to pay interest until the principal sum was paid, then the rate determined in the obligation must have obtained until the contract was merged in the judgment." This case was subsequently reversed in (1911) 202 N. Y. 231, 36 L.R.A.(N.S.) 308, 95 N. E. 728, Ann. Cas. 1912D, 1010, on the ground that there had been no default, but without any allusion to the question of interest.

The interest provision in the mortgage considered in *Savage v. Beecher* (1912) 139 N. Y. Supp. 173, read: "With interest thereon at the rate of $4\frac{1}{2}$ per cent per annum, such interest as may have then accrued to be paid on the first day of June, 1895, and thereafter interest to be paid semiannually on each first day of June and December, until the principal sum hereby secured shall be paid and on the day when said principal sum shall be paid." It was held that this clause simply provided that until the principal sum should be paid, the obligor should pay interest semiannually on the date specified, and was not intended to fix the rate of interest after maturity.

The bond considered in *Lanahan v. Ward* (1872) 10 R. I. 299, provided for the payment of interest from date at a specified rate per annum, payable on a certain date, and thereafter semiannually "until the principal sum of \$7,500 be paid." It was held that under the quoted provision the specified rate of interest would govern to the time of actual payment, but that after maturity it would be simple interest at a specified rate, whereas, prior thereto, the interest instalments which became due might be reckoned with interest on them up to the time when the principal was due.

Miller v. Hall (1882) 18 S. C. 141, involved a bond conditioned for payment in five equal annual instalments "with interest payable annually from

date upon the whole amount unpaid and at the rate of 10 per centum per annum." It was held that the bond bore annual interest at the specified rate after maturity of the last instalment as well as before, the court construing the words "upon the whole amount unpaid" as equivalent to the words "till paid." The case of *Miller v. Edwards* (1882) 18 S. C. 600, involved the same points as *Miller v. Hall* (S. C.) *supra*, and was heard with it, and a similar decision rendered. In each of these cases there was a dissenting opinion, but it goes only to the question as to whether the words used in the bond were equivalent to the words "till paid," and does not dispute the conclusion of the prevailing opinion that if the latter expression had been used, the effect would have been to continue the specified rate of interest after maturity.

In *Fauntleroy v. Hannibal* (1879) 5 Dill. 219, Fed. Cas. No. 4,692, affirmed without discussion of this point in (1881) 105 U. S. 408, 26 L. ed. 1103, it is held that municipal bonds bearing interest at the rate of 10 per cent per annum, payable upon presentation of coupons, "until the payment is well and truly made of the said principal sum," would bear interest at the rate of 10 per cent after maturity, although the coupons themselves, which contained no provision as to interest, would bear interest only at the rate of 6 per cent after the date upon which they were payable.

In *New Orleans v. Warner* (1899) 175 U. S. 120, 44 L. ed. 96, 20 Sup. Ct. Rep. 44, it is held that warrants issued by a city under a statute providing that they should be paid from a certain fund, and that if on presentation there were not sufficient moneys in such fund to meet them, they should thereafter bear interest at a prescribed rate above the legal rate of interest "until paid," such provisions being also expressed in the warrants themselves, would bear interest at the prescribed rate from the time of their presentation until actually paid.

The exact wording of the provision for interest considered in *Sanford v. Savings & L. Soc.* (1893) 80 Fed. 54, 6 A.L.R.—76.

cannot be determined from the report of the case, but the court held that the agreement of the parties was that the original debt should bear interest at the specified rate until paid, and hence that the rate was not affected by the date of maturity.

Besides the cases cited above a number of decisions which do not directly pass upon the question support this rule by obiter statements or by inference.

Newton v. Wilson (1876) 31 Ark. 484, was an action involving a note bearing interest "at the rate of 2½ per cent per month from date until paid." The only question considered was whether such a note, which was valid when made, was affected by a subsequent usury statute, but it seems to have been assumed that the rate of interest expressed in the note would continue after maturity.

In *Rector v. Collins* (1885) 46 Ark. 167, 55 Am. Rep. 571, and *Hicks v. Coody* (1887) 49 Ark. 425, 5 S. W. 714, it is held that equity will not reform a promissory note payable in futuro, with interest from date at more than the legal rate, by adding the words "until paid," even though the parties intended it to bear that interest after as well as before maturity. It is clearly inferred, however, that the effect of the correction, if it had been allowed, would have been to continue the specified rate after maturity.

The question at issue in *Wyoming Nat. Bank v. Brown* (1898) 7 Wyo. 494, 75 Am. St. Rep. 935, 53 Pac. 291, was the effect of a statute changing the rate of interest allowable upon judgments, upon a judgment obtained before the passage of the act. The court, in reaching its conclusion, says: "In reason, and by the very great preponderance of authority, where there is either an express or implied contract to pay interest until the principal sum shall be paid, interest at the agreed rate, or, in the absence of an agreed rate, at the rate prescribed by law at the date of the contract, will be the rate recoverable until payment of the principal, or until the contract is merged in a judgment."

A number of cases in which the stip-

ulated rate is held not to apply after maturity base the holding on, or at least call attention to, the absence from the contract of the words "until paid," or any similar expression. *Hunneman v. Milwaukee* (1849) Fed. Cas. No. 6,878; *Newton v. Kennerly* (1876) 31 Ark. 626, 25 Am. Rep. 592; *Pettigrew v. Summers* (1877) 32 Ark. 571; *Gardner v. Barnett* (1880) 36 Ark. 476; *Brown v. Hardcastle* (1885) 63 Md. 484.

Some cases arising in jurisdictions where, either by statute or precedent, the rule in force allows interest at the specified rate after maturity, even in the absence of any stipulation therefor, refer to clauses "until payment" or the like as added reasons for the conclusion reached.

Thus, in *Boswell v. Big Vein Pochontas Coal Co.* (1914) 217 Fed. 822, which involved a mining lease providing for instalment payments to be evidenced by notes "with interest at the rate of 5 per cent per annum from date until paid," the notes themselves, however, omitting the words "until paid," the court held, in accordance with the rule followed by the Federal courts generally, that the question of the rate of interest after maturity was one of local law (in this case, of the law of Virginia), and that, under the decisions of the courts of the local jurisdiction, the specified rate would continue even under the provisions of the notes themselves; but says: "Even if there were room for doubt as to the proper construction of the notes in the case at bar, the wording of the lease (the formal and fully expressed contract of the parties) removes, as it seems to me, all possibility of even a plausible contention that the contract is otherwise than for 5 per cent per annum until payment."

Union Inst. for Sav. v. Boston (1880) 129 Mass. 82, 37 Am. Rep. 305, arose out of a mortgage which provided that upon payment after a specified time at a specified date "with interest semiannually at the rate of 7½ per cent per annum," the mortgage and a note of even date promising payment of the said sum and interest at the time aforesaid should be void.

The note referred to provided that interest should be paid during the term "and for such further time as said principal sum or any part thereof shall remain unpaid." The conclusion of the court that where the parties to a contract stipulate for a higher rate of interest than the legal rate, interest after the breach of the contract is ordinarily to be measured by the rate stated in the contract to the time of payment or of judgment, is reached without reference to the wording of the interest provision in the note, but the court intimates that if its conclusion had not been reached otherwise, it might have deemed this wording sufficient to have justified it.

The exact wording of the notes considered in *Lamprey v. Mason* (1889) 148 Mass. 231, 19 N. E. 350, is not set out in the report. The court, however, calls attention to the fact that each of the notes expressly provided that the rate of interest should continue after maturity for such time as the principal sum or any part of it should remain unpaid, and says that even in the jurisdictions which do not follow the rules prevailing in Massachusetts (that the rate of interest named in a contract to be paid for the use of money when it is due is impliedly agreed between the parties to be the rate which shall be paid by way of damages for the detention of the money after it is due) an express stipulation of the parties for the payment of a certain rate of interest for the detention of money after it becomes due would be given effect unless conflicting with statutes against usury.

In *French v. Bates* (1889) 149 Mass. 73, 4 L.R.A. 268, 21 N. E. 237, which was an action against the guarantors of the payment of interest on notes bearing interest at a specified rate, payable "during said term, and for such further time as said principal sum or any part thereof shall remain unpaid," it is held that the notes would bear interest at the specified rate after maturity. The court says: "This, we think, would be held even by those courts which allow the statutory, and not the stipulated, rate of interest after maturity when the provision is not

express that the stipulated rates shall continue after maturity."

There are a number of other cases which reach the same conclusion as to the rate of interest after maturity on contracts containing provisions of this kind, but apparently without regard to such provisions.

In *American Securities Co. v. Goldsberry* (1915) 69 Fla. 104, 1 A.L.R. 15, 67 So. 862, it is held that a mortgage debt bears interest at the contract rate to the date of the final decree on foreclosure. In this case the mortgage was given to secure a note bearing interest at the specified rate "from date until paid," but it does not appear whether or not the quoted words were the basis of the holding.

The note considered in *Hager v. Blake* (1884) 16 Neb. 12, 19 N. W. 780, followed in *Allendorph v. Ogden* (1889) 28 Neb. 201, 44 N. W. 220, provided for interest at the specified rate "from the date of said note until the same shall be paid." It was held that this rate would continue after maturity, but the court does not seem to have attached any particular weight to the wording of the interest provision, as it reaches its conclusion upon the authority of *Kellogg v. Lavender* (1883) 15 Neb. 256, 48 Am. Rep. 339, 18 N. W. 88, in which the note contained nothing corresponding to the words "until the same shall be paid."

Bond v. Dolby (1885) 17 Neb. 491, 23 N. W. 351, which involved a note providing for the payment of "interest at the rate of 12 per cent per annum, from date until paid," likewise holds upon the same authority that this rate would prevail after maturity.

In *Cox v. Smith* (1865) 1 Nev. 161, 90 Am. Dec. 476, it is held that a note made payable "with interest thereon at the rate of 6 per cent per month . . . until paid" continues to draw the specified rate of interest after maturity and after judgment.

The subsequent case of *McLane v. Abrams* (1866) 2 Nev. 199, however, reaches the conclusion that the words "until paid" are not needed to make the rate specified in such a note prevail after maturity, where the statute provides that when there is no express

contract in writing fixing a different rate of interest, interest shall be allowed at the rate of 10 per cent per annum.

The note sued on in *Monnett v. Sturges* (1874) 25 Ohio St. 384, was "with interest from date at 10 per cent," and provided further that if not paid when due, "the interest should be paid after that time, and on the first of December and the first of June, semiannually thereafter till paid." It was held that the rate of 10 per cent would continue after maturity. The court, however, does not seem to have made this depend upon the wording of the interest provision in the note, but says: "It is equally well settled that a contract to pay a specified rate of interest is a contract to pay interest at that rate until the principal debt is paid, and not merely for the term the note is to run."

It is expressly stated in the opinion in *Marietta Iron Works v. Lottimer* (1874) 25 Ohio St. 621, decided subsequently, but at the same term as *Monnett v. Sturges* (Ohio) *supra*, that the decision in that case did not depend upon the express provision in the contract as to the payment of interest after maturity, but declared the legal effect of any agreement to pay a rate of interest greater than 6 per cent if not in excess of that allowed by the statute.

In *Hamilton & R. Hydraulic Co. v. Chatfield* (1883) 38 Ohio St. 575, it was held to be unnecessary to decide whether or not a provision in bonds making interest at a specified rate payable semiannually "until the principal sum shall be paid, on the presentation of the annexed interest bonds," is a stipulation for the payment of the specified rate after maturity, since, under the rule prevailing in Ohio, the specified rate would prevail after maturity whether expressly so agreed or not.

In *Shipman v. Bailey* (1882) 20 W. Va. 140, the notes involved provided for interest at 8 per cent per annum until paid. It is held that interest should be computed at the specified rate to the date of the judgment, but this holding was only incidental to the

conclusion that the judgment itself should bear interest at the specified rate, and in the light of the subsequent decision of the same court in *Pickens v. McCoy* (1884) 24 W. Va. 344, where, largely upon the authority of this case, the same conclusion is reached as to a bond the interest provision of which contains nothing corresponding to the words "until paid," it would seem that these particular words had little to do with the conclusion reached by the court.

In *Wiswell v. Baxter* (1866) 20 Wis. 681, it is held that a mortgage given to secure the payment of a specified sum "with interest thereon according to the condition of one certain promissory note," the note referred to providing for interest "until paid" at a specified rate, bears interest to judgment at the specified rate, even though the Statute of Limitations had run against the note before the commencement of the action to foreclose the mortgage. In reaching its conclusion the court seems to lay considerable stress upon the words "until paid," but in the earlier case of *Spencer v. Maxfield* (1862) 16 Wis. 178, it was held that an obligation for the payment of money on a certain date with interest higher than that given by law would continue at that rate after maturity, even though the obligation was entirely silent as to the rate of interest after maturity.

Minority view.

The view that such expressions as "until payment" refer only to the time as fixed by contract for payment, and do not affect the question of the rate of interest after maturity, is not, however, without some American authority.

A promissory note, payable on or before a certain date, "with interest at the rate of 3 per cent per month until paid," does not provide for the rate of interest after maturity, and thereafter bears interest only at the legal rate. *Collier v. Field* (1872) 1 Mont. 612; *Rader v. Ervin* (1872) 1 Mont. 632.

In *Wright v. Hanna* (1904) 210 Pa. 349, 59 Atl. 1097, the action was upon notes bearing 4 per cent interest "from date until paid;" the court says:

"Where the interest on a promissory note is fixed at less than 6 per cent, such rate applies up to maturity of the notes, and the words "until paid" relate to such maturity, and thereafter the legal rate of 6 per cent will prevail."

Gray v. State (1880) 72 Ind. 567, was an action brought to compel the payment of certain bonds issued by the state. They contained a provision for the payment of interest at the rate of 5 per cent per annum, semiannually, "until payment of the principal sum, which principal sum . . . is payable twenty-five years from the date hereof." The court seems to have given no consideration to the words "until payment of the principal sum," but says: "Neither the bonds nor the coupons provide for the rate of interest after maturity; the rate therefore must be determined by law."

United States Nat. Bank v. Wadingham (1907) 7 Cal. App. 172, 93 Pac. 1046, was an action on a note drawn on a blank form, containing a provision for payment "with interest, payable monthly, at the rate of — per cent per — until paid," and a further provision, "should this note not be paid at maturity it shall thereafter bear interest at the rate of 2 per cent per month," the former provision was altered with a pen to read, "without interest until paid." It was held that while the provision for the payment of interest after maturity was irreconcilable with the provision that it should be without interest until paid, the note would be construed as being without interest until maturity and as bearing interest at the rate of 2 per cent per month thereafter.

In *Haywood v. Miller* (1896) 14 Wash. 660, 45 Pac. 307, it is held that a provision in a note for interest "at the rate of 6 per cent per annum from date until paid" must be construed as providing for a rate of interest from the date of the note until its maturity only, where the note contains a further provision that it shall "bear interest at the rate of 12 per cent per annum, payable semiannually from maturity."

In *United States v. North Carolina* (1889) 126 U. S. 218, 84 L. ed. 339, 10 Sup. Ct. Rep. 920, it is held that the general principle that an obligation of the state to pay interest, whether as interest or as damages on any debt overdue, cannot arise except by the consent and contract of the state, manifested by statute, or in a form authorized by statute, would prevent a provision in bonds issued by the state of North Carolina, redeemable on a certain date, that they should be "with interest thereon at the rate of 6 per cent per annum, payable half-yearly . . . until the principal be paid on surrendering the proper coupons hereto annexed," from having effect after maturity, where the statute under which the bonds were issued made no provision for payment of interest after the maturity of the bonds, and no coupons were attached for such post diem interest.

The rule in Canada appears to have been established by *St. John v. Rykert* (1884) 10 Can. S. C. 278, where the contract consisted of a note "with interest at the rate of 2 per cent per month until paid," and a mortgage deed given as collateral "with interest thereon at the rate of 24 per cent per annum until paid." The court took the view that the words "until paid" referred only to the date of payment fixed by the contract, and that the rate of interest specified would be payable to maturity only.

The same construction has been given in subsequent cases to various equivalent expressions: *Powell v. Peck* (1886) 12 Ont. Rep. 492, affirmed in (1887) 15 Ont. App. Rep. 138 (until payment in full); *Archbold v. Building & L. Asso.* (1888) 15 Ont. Rep. 237 (until fully paid off and satisfied); *People's Loan & D. Co. v. Grant* (1890) 18 Can. S. C. 262, affirming (1890) 17 Ont. App. Rep. 85 (until such principal money and interest shall be fully paid and satisfied); *Freehold Loan Co. v. McLean* (1892) 8 Manitoba L. R. 116 (until the whole is fully paid and satisfied); *Manitoba & N. W. Loan Co. v. Barker* (1892) 8 Manitoba L. R. 296 (till the whole of the principal money is paid); *Credit*

Foncier Franco-Canadian v. Schultz (1893) 9 Manitoba L. R. 70 (until the principal is fully paid); *British Canadian Loan & Agency Co. v. Farmer* (1904) 15 Manitoba L. R. 593 (till the whole of the said principal is paid); *Hossack v. Shaw* (1918) 56 Can. S. C. 581, 42 D. L. R. 130 (until paid).

In *Powell v. Peck* (Ont.) supra, and in *Manitoba & N. W. Loan Co. v. Barker* (1892) 8 Manitoba L. R. 296, supra, there were provisions for payment of interest at the rate stipulated for on all overdue payments of interest, and it was contended that such provisions showed an intention to continue the specified rate of interest after maturity, but the court held otherwise and allowed only simple interest at the legal rate.

In *Credit Foncier Franco-Canadian v. Schultz* (1893) 9 Manitoba L. R. 70, supra, however, the mortgage contained a further covenant "that the mortgagor will pay the mortgage money and interest, . . . and in case of default, at the said rate, compounded with rests each half year, to be paid on all and any payment in default, whether of principal or interest or both." And it was held that, under this covenant, interest was payable after maturity at the rate specified in the mortgage.

Muttlebury v. Stevens (1886) 13 Ont. Rep. 29, involved a mortgage which had been declared due because, of default in payment of interest. The mortgage provided for 7 per cent interest, payable half yearly, "upon such balance as may remain unpaid at the times when the interest becomes payable, respectively." The question was as to the rate of interest for the six months allowed for redemption, and it was held that it should be the contract rate, partly because this was probably within the contemplation of the parties, and partly because that rate was held to be reasonable.

The English cases reach a different result than do the Canadian cases; but, as intimated at the beginning of the note, the result in the English cases is not attributable to a construction of the term "until payment," but

to the view which is set forth in 21 Laws of England (Halsbury) 43, as follows: "Where there is a contract for the payment of money on a day certain, with interest at a fixed rate down to that day, and default is made

in payment of the principal, the rate of interest mentioned in the contract is the rate usually allowed from the time of default; there is, however, no general rule of law to that effect."

M. A. L.

JOHN PINE, Appt.,

v.

FRED REYNOLDS, Clerk, et al.

Iowa Supreme Court—October 17, 1919.

(— Iowa, —, 174 N. W. 257.)

Adverse possession — inclosed portion of highway.

1. Possession of the unused portion of a highway which an abutting owner has included within his fence is not adverse so as to ripen into title by lapse of time.

[See note on this question beginning on page 1210.]

Evidence — presumption as to boundaries of highway.

2. The court will not presume from the location of fences and trees along the border of a highway alone that they were placed in accordance with the monuments or on lines designated by the highway authorities at the time the highway was located and opened for public use.

[See 13 R. C. L. 56.]

Highway — boundaries — field notes — conclusiveness.

3. The plat and field notes of the location and establishment of a high-

way control in the absence of evidence from which it may be inferred that the fences of abutting owners were erected in accordance with the actual and practical location of the highway.

[See 13 R. C. L. 57.]

— estoppel to assert title.

4. The mere fact that an owner of land abutting on an opened highway has maintained his fences for many years so as to include a portion of the highway, and has occupied the land up to the fence, does not estop the public from asserting title to the land actually belonging to the highway.

APPEAL by plaintiff from a decree of the District Court for Audubon County (Rockafellow, J.) dismissing a petition filed to enjoin defendants from removing plaintiff's fence from its location in the public highway. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Mantz & White for appellant.

Messrs. T. M. Rasmussen and Graham & Graham, for appellees:

Plaintiff cannot, under the doctrine of adverse possession, acquire rights in and to a part of the road in controversy as against the rights of the public.

Kuehl v. Bettendorf, 179 Iowa, 1, 161 N. W. 28.

The doctrine of acquiescence does not apply as against the public.

Quinn v. Baage, 138 Iowa, 426, 114

N. W. 205; Dickinson County v. Fouse, 112 Iowa, 21, 88 N. W. 804; Kuehl v. Bettendorf, supra.

The mere fact that fences may have been built or trees planted on a public highway without objection on the part of the public is not sufficient to create an estoppel.

Quinn v. Baage, 138 Iowa, 426, 114 N. W. 205.

Title by prescription cannot be acquired to land used as a public highway, under a mistake of fact on the part of the public and the landowners

as to the true location of the highway.

State v. Waterman, 79 Iowa, 860, 44 N. W. 677.

No length of use by the public of a highway which is supposed to be on a certain line, but which by mistake is not, can give any claim to the highway under the Statute of Limitations, except as to the true line.

Bolton v. McShane, 79 Iowa, 26, 44 N. W. 211; State v. Waterman, 79 Iowa, 860, 44 N. W. 677.

Stevens, J., delivered the opinion of the court:

Plaintiff is the owner of the southeast quarter of section 34, Greeley township, which lies immediately north of section 5 in Audubon township, Audubon county. The two tracts are separated by a public highway. The line between them is a correction line, and the tract south thereof is divided into lots. The defendants are the clerk and trustees of Greeley township, and plaintiff seeks in this suit to enjoin them from moving the fence on the north side of said highway to a line located by the county engineer a short distance north of its present location. The highway in question was established in September, 1873. The original government field notes, and also the field notes of the original survey of the highway, were offered in evidence; but it is claimed by counsel for appellant that the latter are incorrect.

The controversy results from a dispute as to the true location of the southeast corner of section 34. One Wattles, who at the time was county surveyor of Audubon county, made a survey between section 34 in Greeley township and section 5 in Audubon township in 1881, but found no stone or monument marking the southeast corner of section 34. He, however, established a corner, marking the same with a stone. His field notes were duly made of record. Some years later, another surveyor undertook to locate this corner and fixed same at a point 28.5 feet north of the stone set by Wattles. The northwest corner of section 5, as established by the government survey,

which is 1,350.6 feet east of the southeast corner of section 34, is not in dispute. The northwest corner of section 5 was determined and established by a commissioner appointed by the district court about fifteen years before the present controversy arose. The evidence discloses that stones were found in the highway between the northwest and northeast corners of section 5, but at least 20 feet south of a line drawn between the two corners. They are also out of line with the Wattles stone at the southeast corner of section 34, and which is south of the correction line.

Plaintiff's fence, according to the monuments at the northwest and northeast corners of section 5, is at the south end about 28 feet in the highway and at a place some distance west about 5 feet. The stone at the northwest corner of section 5 has been lowered two or three times, and a witness, who was present at the time, testified to the manner of lowering the same, and it appears from this testimony that the stone was not moved from the point where it was originally located by the government surveyors. All of the witnesses testifying upon that point agree that plaintiff's fence on the north side of the highway is irregular and that the east end is several feet further south than the west end or in the center.

If the monument marking the northwest corner of section 5 and the corner established by the commissioner appointed by the court at the northeast corner thereof represent the true government corners, then all of the testimony shows that the southeast corner of section 34, as established by Wattles, is at least 28 feet south of the government corner.

As before stated, the line between sections 34 and 5 is a correction line and should be straight. Correction lines are first laid out and other lines are run with reference thereto.

The evidence does not disclose when the highway in question was first opened for travel, nor does it

appear whether there was a fence between sections 5 and 34 at the time of its location. There is no direct evidence that plaintiff's fence was placed upon a line designated or fixed by the highway authorities, and it was not located in accordance with the field notes of the road as established. One witness testified that he had seen the stone placed by the government surveyors, at the southeast corner of section 34, and that it was afterwards washed away. There is a small creek near the point where it is claimed this stone was located. The witness, at the time he claims the stone was washed away, was quite young, and it was a good many years ago.

A row of willows was set out by the owner of lot 2 in section 5 in the early eighties, and many of the trees are still standing. The evidence does not, however, show that they were set out upon a line located or fixed at the time the road was established and opened, but presumably, from the evidence, they were intended to be placed approximately on the line as its location was understood by the owner. Plaintiff's fence has been maintained at its present location for at least thirty years.

It is the claim of counsel for appellant that the evidence quite conclusively shows that the highway in question was in fact opened and the fences erected on the lines laid out and established by the proper authorities, and that, in point of fact, the highway as opened and used for more than forty years is the highway actually located and opened by the public, and that it is immaterial whether the location thereof is in conformity to the recorded plat or field notes of the surveyor locating the same. To sustain this contention, they cite and rely upon *Brause v. Fayette County*, 164 Iowa, 606, 146 N. W. 6; *Tomlinson v. Golden*, 157 Iowa, 237, 138 N. W. 448; *Bridges v. Grand View*, 158 Iowa, 402, 139 N. W. 917; *Klinkefus v. Vanmeter*, 122 Iowa, 412, 98 N. W. 286; *Buch v. Flanders*, 119

Iowa, 164, 93 N. W. 101; *Kerker v. Bettendorf Metal Wheel Co.* 140 Iowa, 210, 118 N. W. 306; and other cases.

In *Brause v. Fayette County*, supra, which is most closely analogous in its facts with the case at bar, the court held that the fences inclosing the highway in controversy were placed on a line designated by the measurements and monuments of the surveyor at the time of fencing, and that same had been continuously used as originally opened for travel, and was therefore the practical and actual location of the highway, and that same would control as against long subsequent surveys which showed that it was not located in accordance with the recorded plats and field notes of the established highway.

The evidence in the case at bar fails to show that the highway was originally opened and fences built in accordance with stakes, monuments, or lines located by the county surveyor, or the county authorities. It does not appear from the record that the land in sections 34 and 5 was fenced at the time of the establishment of the highway, nor is there anything showing how the plaintiff's fence came to be where it now stands. The Wattles monument was placed at the southeast corner of section 34 long after the establishment and actual opening of the highway. Of course, a landowner planting trees adjacent to a highway would quite naturally endeavor to get same approximately on the line, but the trees on the north end of lot 2 in section 5 were not planted until several years after the highway was opened, and the fence on the south side of the highway was moved several feet north of the row of trees about sixteen years before the commencement of this suit. The court cannot pre-

Evidence—presumption as to boundaries of highway.

sume, from the location of the fences and trees alone, that same were placed in accordance with monuments, or on lines designated by the highway authorities at the

time the same was located and opened for public use. The overwhelming weight of the evidence leaves no doubt that plaintiff's fence is not on the true line, and, in the absence of evidence from which it may be inferred that the same was erected in accordance with the actual and

Highway—
boundaries—
field notes—con-
clusiveness.

practical location of the highway, the plat and field notes of the establishment

and location thereof should control. The line on which defendants seek to locate plaintiff's fence is substantially in conformity to the line on which the highway was originally established by the board of supervisors, as shown by the original field notes. It is true there are some inaccuracies in these field notes, but they are of minor importance.

The facts bring the case within our holding in *Quinn v. Baage*, 138 Iowa, 426, 114 N. W. 205, and *Bidwell v. McCuen*, 183 Iowa, 633, 166 N. W. 369, which follows *Quinn v. Baage* and numerous other decisions of this court. In the former of the above cases, the court, referring to the question of adverse possession and acquiescence, said:

"But where the road has been established and continually used, the mere fact that the fences bordering it are not on the true line, and the portion beyond has been occupied by the landowner up to the fence, and not made use of by the public, will

—estoppel to
assert title.

not work an estoppel against the public, but the en-

tire width of the highway may be appropriated by the public whenever required for the purposes of travel.

"Manifestly, the doctrine of acquiescence can have no application to the fixing of a boundary between the abutting owner and the highway, for no one representing the public is authorized to enter into an agreement upon or to acquiesce in any particular location. The fee to

the streets is in the town or city, but always in trust for the public. The municipality can neither sell nor convey nor authorize their use for private uses. It has no authority with reference thereto save as conferred by the statute. *Stanley v. Davenport*, 54 Iowa, 463, 37 Am. Rep. 216, 2 N. W. 1064, 6 N. W. 706. The same doctrine has been held to apply to highways in the country. *Dickinson County v. Fouse*, 112 Iowa, 21, 83 N. W. 804. It was there noted that the easement does not vest in the people of the county, but the public generally, and that while the board of supervisors may establish, maintain, or discontinue, and township officers may keep in repair, yet nothing goes with these powers not expressed or implied as essential for their performance. The doctrine of acquiescence is founded on the presumption of an agreement fixing the division line from long maintenance of a fence or other monument marking a line as a boundary between the adjoining owners, and this is of such strength that, after the lapse of ten years, in the interest of peace and quiet, they are not permitted to gainsay the agreement thus inferred. In other words, having adopted a line as a boundary between them by unmistakable acts, they are not permitted to deny the agreement to be implied therefrom. *Miller v. Mills County*, 111 Iowa, 654, 82 N. W. 1038."

Plaintiff had not, therefore, acquired a right to maintain his fence in the highway either by adverse possession or by the consent or implied agreement of the public, and there is no theory upon which the doctrine of estoppel may be applied.

Adverse possession—inclosed portion of highway.

It follows that for the reasons indicated the decree and judgment of the court below is right, and therefore is affirmed.

Ladd, Ch. J., and Weaver and Gaynor, JJ., concur.

ANNOTATION.

Encroachment of fence on highway as affecting title or rights of public.

- I. Introductory, 1210.
- II. General rule:
 - a. Rule stated, 1210.
 - b. Application of rule, 1211.
- III. Rule in Massachusetts, 1216.

I. Introductory.

This note deals with the decisions which discuss the effect of the encroachment of the fence of a landowner on a highway, and includes not only those cases where the title is claimed by adverse possession, but also those where the public authorities have acquiesced in the encroachment. The discussion is limited to cases where the highway encroached on has been opened and used by the public.

II. General rule.

a. Rule stated.

Where a highway has been established and continually used, the mere fact that the fences bordering it are not on the true line and the landowner has occupied up to the fence does not affect the rights of the public, but the entire width of the highway may be appropriated by the public whenever it is required for the purpose of travel.

Indiana.—*Brooks v. Riding* (1874) 46 Ind. 15; *Sims v. Frankfort* (1881) 79 Ind. 446; *Wolfe v. Sullivan* (1893) 133 Ind. 331, 32 N. E. 1017.

Iowa.—*Quinn v. Baage* (1907) 138 Iowa, 426, 114 N. W. 205; *Quinn v. Monona County* (1908) 140 Iowa, 105, 117 N. W. 1100; *Bridges v. Grand View* (1913) 158 Iowa, 402, 139 N. W. 917; *Christopherson v. Forest City* (1916) 178 Iowa, 893, 160 N. W. 691; *Kuehl v. Bettendorf* (1917) 179 Iowa, 1, 161 N. W. 28; *Webster County v. Wasem Plaster Co.* (1919) — Iowa, —, 174 N. W. 583. See the reported case (*PINE v. REYNOLDS*, ante, 1206).

Kansas.—*Webb v. Butler County* (1893) 52 Kan. 375, 34 Pac. 973.

Maine.—*Pillsbury v. Brown* (1890) 82 Me. 450, 9 L.R.A. 94, 19 Atl. 858.

Michigan.—*Crawford v. Ross* (1901) 126 Mich. 634, 86 N. W. 132.

New York.—*Peckham v. Henderson*

(1858) 27 Barb. 207; *Walker v. Caywood* (1865) 31 N. Y. 51; *St. Vincent Female Orphan Asylum v. Troy* (1879) 76 N. Y. 108, 32 Am. Rep. 286.

Ohio.—*Fox v. Hart* (1842) 11 Ohio, 414; *Lane v. Kennedy* (1861) 13 Ohio St. 42; *McClelland v. Miller* (1876) 28 Ohio St. 488; *Heddleston v. Hendricks* (1895) 52 Ohio St. 460, 40 N. E. 408; *Wright v. Oberlin* (1902) 23 Ohio C. C. 509.

Rhode Island.—*Simmons v. Cornell* (1851) 1 R. I. 519.

Wisconsin.—*Childs v. Nelson* (1887) 69 Wis. 125, 33 N. W. 587; *Nicolai v. Davis* (1895) 91 Wis. 370, 64 N. W. 1001.

The reason of the rule was stated in *Wolfe v. Sullivan* (1893) 133 Ind. 331, 32 N. E. 1017, as follows: "The common-law maxim is 'once a highway, always a highway.' Highways belong to the public, and are under the control of the sovereign, either immediately or through local governmental instrumentalities. The right of the public to the use of the highways is not barred by the Statute of Limitations. No one can acquire a right to the adverse use of a legally established highway by user, no matter how long such use may continue, for each day's user is a nuisance punishable by fine. There can be no such thing as a permanent, rightful, private possession of a public street."

In *Quinn v. Baage* (1907) 138 Iowa, 426, 114 N. W. 205, it was said: "Though the authorities are in conflict on the question, this court is committed to the doctrine that in establishing and maintaining a highway a municipality exercises governmental functions, and for this reason the Statute of Limitations does not run against it with respect to encroachment therein. . . . But where the road has been established and continually used, the mere fact that the fences bordering it are not on the true line, and the portion beyond has been occupied by the landowner up to the fence, and not made use of by the public, will

not work an estoppel against the public, but the entire width of the highway may be appropriated by the public whenever required for the purposes of travel. The continued use of the highway rebuts any suggestion of abandonment, and the fact that the entire width has not been appropriated to such use indicates no more than that in the opinion of the then road officers all is not immediately necessary to meet the demands of the traveling public. . . . Manifestly the doctrine of acquiescence can have no application to the fixing of a boundary between the abutting owner and the highway, for no one representing the public is authorized to enter into an agreement upon, or to acquiesce in, any particular location. The fee to the streets is in the town or city, but always in trust for the public. The municipality can neither sell nor convey nor authorize their use for private uses. . . . As an official of the county or township is not authorized to establish the line other than in its true location, it follows that the public cannot be bound by such an agreement, if made, or by acquiescence in a line erroneously treated as correct, no matter for how long a time. The public is not bound to take possession of the entire highway or street, but may use such portion as may be necessary for the public convenience and appropriate the remainder whenever needed."

b. Application of rule.

In *Brooks v. Riding* (1874) 46 Ind. 15, an action to foreclose a mortgage, it appeared from the evidence that the defendant had purchased a lot from the plaintiff purporting to have a frontage of 55 feet on the street, and the defendant gave the mortgage in question to secure the unpaid purchase price. After the mortgagor had taken possession he discovered that the frontage was 50 feet instead of 55, and he defended the action on the ground of fraudulent misrepresentations by his vendor. The evidence showed that the 5 feet in question was part of the highway and had been inclosed by a previous owner. In holding that the lot had only 50 feet

of frontage, the court said: "But it does not appear, in the case under examination, that the owners or occupants of any other lot on the line of the street upon which the lot in question was situated had extended it so as to occupy any portion of the street. It only appears that the city authorities had simply permitted the occupant of the lot in question to occupy a small portion of the street not then needed by the public. In our opinion, the inclosure and occupation of the 5 feet of the street by Brooks and those under whom he claims did not destroy the rights of the public in such strip of ground and vest the title thereto in him or those through whom he derived his title."

In *Sims v. Frankfort* (1881) 79 Ind. 446, the plaintiff sought an injunction to prevent the defendant city from severing a strip of land adjoining the highway which the plaintiff claimed was part of his property. It appeared that the strip was originally part of the street, but the landowner had encroached on the street in building his fence to the extent of this strip 80 inches in width, and the fence had been erected for a period of more than twenty years. That part of the street was claimed under adverse possession. The court held that no rights had been acquired by reason of the encroachment.

In *Wolfe v. Sullivan* (1893) 133 Ind. 331, 32 N. E. 1017, an action was brought by the municipality to abate an alleged nuisance in that the defendants, owning a lot, had erected a fence running parallel to the street, but which encroached on the street a distance of 10 feet. It was held that the maintenance of the encroachment for the period required to secure title by adverse possession gave no right to continue it.

In *Quinn v. Baage* (1907) 138 Iowa, 426, 114 N. W. 205, an action was brought to enjoin the defendants, who were officers of a town, from removing a certain fence claimed by the plaintiff to be the boundary line between his property and the highway. The town officers contended that the fence was in the highway. It was claimed

by the landowner that the town had acquiesced in the position of the fence if it did encroach on the highway, and also that the defendant town was estopped from asserting its claim to the strip in question. It was held that the encroachment gave no rights in the highway, and that the town officers had the right to remove the fence.

In *Quinn v. Monona County* (1908) 140 Iowa, 105, 117 N. W. 1100, apparently involving the same encroachment, it further appeared that the landowner had made improvements by planting trees just inside the fence on the property constituting part of the highway. In a proceeding to determine the location of the boundary line, the landowner, relying on the acquiescence of the county, the court said: "There is nothing from which the inference of acquiescence on the part of the county can be predicated, save that until recently the county did nothing toward removing the fence. But that is not sufficient to justify a holding of acquiescence or estoppel, even were it applicable to highways properly and legally established. There was a claim of estoppel on the part of the county, but that matter is fully considered in the original case, *supra*, and what is said in that opinion need not be repeated here. It is enough to say in this connection that nothing has been added to the testimony on this proposition from what appeared in the former case. The improvements made by plaintiff were placed upon the land but a few years before this controversy arose. These improvements consisted of trees planted just inside of the fence which it is claimed marked the line of the highway. As said in the case already referred to, the planting of these trees did not constitute an estoppel."

In *Bridges v. Grand View* (1913) 158 Iowa, 402, 139 N. W. 917, it appeared that the plaintiffs owned certain lots which fronted on a street in the defendant town. The town had served notice on the plaintiffs to tear up and remove a sidewalk and fence along the front of these lots, and the plaintiffs brought an action to restrain the town from interfering with

the walk or the fence or from changing the line between the street and the property. The original line between the plaintiffs' property and the street had been lost. It was held that the plaintiffs did not obtain title to this part of the street through adverse possession or estoppel of the town.

In *Christopherson v. Forest City* (1916) 178 Iowa, 893, 160 N. W. 691, an action was brought to quiet the title to plaintiff's property and to enjoin the defendant town from opening a certain alley or removing the fences. The town claimed that the plaintiff's fences were out on the street on three sides of her property. The landowner's grantor had had the county surveyor locate the boundary, and had set his fences accordingly. The plaintiff did not know that these fences encroached upon the street until the time this litigation was commenced, they having been located on the street for over thirty years. It was held that the plaintiff could not claim any part of the street through adverse possession, since the Statute of Limitation did not run against the government or any of its instrumentalities, including a town or city. It was also held that the town was not estopped from claiming the true line by permitting the plaintiff to make valuable improvements, as the erection of fences is not such an improvement.

In *Kuehl v. Bettendorf* (1917) 179 Iowa, 1, 161 N. W. 28, an action to quiet the plaintiff's title to a strip which the defendant contends is a part of one of the streets of the town, it appeared that the plaintiff's father, when he purchased the property in question in 1877, fenced the property on a line with the fences of adjoining owners, but which in reality encroached upon the street about 3 feet. The plaintiff claimed that he had obtained the title to this 3-foot space by adverse possession, acquiescence, and improvements, estopping the city from reasserting its title. The court held that neither by adverse possession nor by estoppel had the plaintiff acquired any rights in the street.

In the reported case (*PINE v. REY-*

NOLDS, ante, 1206) it appeared that the plaintiff's fence was placed so that it encroached on the highway. It is held that the landowner acquired no right to maintain his fence on a portion of the highway either by adverse possession or acquiescence, and the public authorities could assert their right at any time to use the highway to its full width.

In *Webster County v. Wasem Plaster Co.* (1919) — Iowa, —, 174 N. W. 588, where a section line highway was not located on the true line, counsel for the property owner whose fences encroached on the true line argued that by opening the highway to its full width and erecting grades which had been worked and kept in repair, and by permitting railroad companies whose tracks crossed the same to construct and for a long period of time maintain crossings and grades in connection therewith, acquiescence in the highway as opened and the fences as constructed—they having, according to the allegations of the property owner, been maintained in their present location for more than twenty years—by the public, will be presumed. The court answered the argument by declaring that the doctrine of acquiescence has no application to public highways, and that the public is not required to open a highway to its full established width until necessity arises therefor.

But in an earlier Iowa case (*Axmear v. Richards* (1900) 112 Iowa, 657, 84 N. W. 686) an action was brought to restrain the defendant, a road supervisor, from removing a fence on plaintiff's land along the highway. The supervisor claimed that the fence inclosed a portion of the highway. It was held that the landowner, having maintained his fence in this position for a period of thirty years, had obtained title to the portion of the highway inclosed, and the public could not regain possession.

In *Webb v. Butler County* (1893) 52 Kan, 375, 34 Pac. 973, an action against the defendants as public officers, to enjoin them from opening up a supposed highway over the plaintiff's land, the petition set forth the

authorization and establishment of a highway 40 feet wide on the western line of the plaintiff's premises in 1872, one half of which was laid on his land. He alleged that the road was never actually opened over his land, but that a hedge had been planted along the west line, which had been used as a fence for several years, and that the land had been plowed and cultivated up to the fence for more than ten years. The court laid down the following rule as to obtaining title against the public by an encroachment on a highway: "The fact that the public may not use or travel over the full width of such a highway will not operate to narrow it. It is frequently the case that the full width of country roads is not improved or used, for the reason that the necessities of the public for the time being do not require it; but such limited use will not lessen the right of the public to use the entire width of the highway when the increased travel and the exigencies of the public make it necessary. It has been held that where an easement is obtained by adverse use alone, the extent of the easement must be measured by the actual use; but this rule has no application to a road of a certain width authorized and established in pursuance of statute. It is clear that the vacation statute invoked was never intended to vacate a part of the width of a road not actually used where there is travel over the entire length of such road. The encroachments by the plaintiff upon this highway gave him no rights as against the public."

In *Pillsbury v. Brown* (1890) 82 Me. 450, 9 L.R.A. 94, 19 Atl. 858, it appeared that the defendants, acting on behalf of their town, widened the street in front of the plaintiff's property and built a sidewalk. The plaintiff claimed that in so doing they did not keep within the limits of the street, but extended it onto her lands, and she brought this action of trespass. The street as originally laid out was 3 rods wide, but only a portion of it had been used as a highway, and the plaintiff claimed that she had obtained title to the remainder

through adverse possession. The court said: "Where . . . a tract 3 or 4 rods wide, such as is usually laid out as a highway, has been used as a highway, although 20 or 30 feet only have been used as a traveled path, still, this is such a use of the whole as constitutes evidence of the right of the public to use it for a highway, by widening the traveled path, or otherwise, as the increased travel and the exigencies of the public may require. This seems to us to be sound law as well as good sense; and we hold in this case that the public is entitled to a way 3 rods wide, as originally laid out, notwithstanding the wrought part of it, and the part actually used by travelers, may have been very much less than that; and that the traveled path may from time to time be widened or otherwise improved, as the growing wants of the public may require, provided such improvements are kept within the limits of the way as originally laid out. And, in this case, the evidence satisfies us that in widening the traveled path and building the sidewalk, the defendants did keep within the limits of the way as originally laid out, and were not, therefore, guilty of a trespass upon the plaintiff's land."

In *Crawford v. Ross* (1901) 126 Mich. 634, 86 N. W. 132, the defendant was street commissioner of the city of Ann Arbor, and as such entered on the locus in quo with the purpose of improving it, claiming it to be a part of one of the streets of the city. The land in controversy was a strip 7 feet in width, which had been fenced in by the plaintiff. The defendant removed this fence and entered on the work of filling in and grading the ground. The plaintiff then instituted an action of trespass *quare clausum*. It was claimed by the defendant that the true line of the street passed 7 feet east of the plaintiff's fence. It was claimed by the plaintiff that the Statute of Limitations had run against the city. The charter provided as follows: "No person shall be deemed to have gained any title, as against the city, by lapse of time, to any street, lane, alley, common, or public square

heretofore laid out or platted by the proprietors of said city, or any part thereof, by reason of encroachment or inclosure of the same." It was held that this act was constitutional, since it simply declared that owners of adjacent property may not, by fencing in a portion of the street, deprive the city of its ownership.

In *Peckham v. Henderson* (1858) 27 Barb. (N. Y.) 207, it appeared that a legislative act established the width of the highway in question at 6 rods. The road was fenced only 4 rods wide, the remaining 2 rods being used by the plaintiff as part of his property for over thirty years. A statute provided that the people would not see any person for or in respect to any lands by reason of any right or title of the people to the same, unless such right or title shall have accrued within twenty years before any suit or other proceeding shall be commenced. It was held that this included a case of encroachment on the highway, and the land ceased to be a partition of the highway at the end of twenty years, the public losing title.

But in *Walker v. Caywood* (1865) 31 N. Y. 51, the question again arose whether a landowner could obtain title to a portion of the highway which he had inclosed, and the court held that the public did not lose its title to the highway by the lapse of time.

In *St. Vincent Female Orphan Asylum v. Troy* (1879) 76 N. Y. 108, 32 Am. Rep. 286, it appeared that the plaintiff claimed a portion of the highway under adverse possession, and he had constructed and maintained a wall in the highway for a period of twenty years. It was held that the encroachment of the wall on the highway did not divest the public of the title.

In *Fox v. Hart* (1842) 11 Ohio, 414, it appeared that at the time a public highway was laid out, only a part of its width was used. Nearly twenty years before the institution of the action, the plaintiff's grantor moved his fence several feet into the highway. The defendant, supervisor of the town, moved the fence back to its proper position, whereupon the plaintiff brought this action for trespass. It was held

that the landowner had obtained no title by his encroachment on the highway.

In *Lane v. Kennedy* (1861) 13 Ohio St. 42, it appeared that the plaintiff owned land adjoining a highway, and that he extended his fence so as to include a portion of the highway, which had originally been laid out at a width of 4 rods, but only a portion of this being used. The plaintiff claimed that he had obtained title by adverse possession by the encroachment uninterruptedly for a period of twenty years. The court said: "There was nothing in the character of the improvement which indicated an intention to permanently appropriate the land. It was a mere fence; and, as the bill of exceptions informs us, a worm fence and crooked at that. He carefully avoided inclosing any part of the road actually used by the public. He infringed no right which was then enjoyed or apparently desired. Nothing was done to excite the apprehension of the public or to call for its protest. We hear of no declarations, and all his acts were consistent with a temporary occupancy, by the permission or the mere sufferance of the public, till the land should be required for its use. . . . The circumstances do not show that the plaintiff, in placing his fence up to the traveled part of the street, thereby designed or intended to withhold the part inclosed from the public use, should it ever be required, and we are not at liberty to presume it."

In *McClelland v. Miller* (1876) 23 Ohio St. 488, it was sought to obtain an injunction to prevent the defendant, as supervisor of the town, from entering upon the plaintiff's premises and removing fences and doing other irreparable damage. The defendant claimed that the highway along the plaintiff's property had been laid out and established 60 feet wide, and that the plaintiff had encroached on this highway to the extent of 7½ feet. It was held that the plaintiff had acquired no rights by adverse possession.

In *Heddleston v. Hendricks* (1895) 52 Ohio St. 460, 40 N. E. 408, it ap-

peared that the highway was laid out in 1862, and in 1868 the plaintiff's grantor erected along the highway a wooden wall which inclosed part of the highway. The wooden wall was replaced by a stone one in 1875. The action was brought to restrain the defendant, a supervisor, from cutting down and removing the bridge and destroying the stone wall. The court said: "In view of the cases, and what seems to be the settled law on the subject, it appears to us that the circuit court erred in its conclusions of law from the facts found, that the landowner in this case had, by adverse possession, acquired the right to maintain his encroachment on the highway. . . . The exigencies of the public travel required that the wall should be removed and the road opened to its full width. This the supervisor was proceeding to do when enjoined. The wall and hedge constituted an encroachment on the highway, and therefore a nuisance, which could not ripen into a right, however long continued."

In *Wright v. Oberlin* (1902) 23 Ohio C. C. 509, an action was brought to enjoin the defendant village from laying its sidewalk further in upon the land of the plaintiff. The highway as dedicated to the village was 60 feet in width, but the part actually used as a highway varied, in front of the plaintiff's premises a fence having been so built that it encroached on the highway to the extent of 35 feet. It was held that the plaintiff did not take title to this strip through the running of the Statute of Limitations.

In *Simmons v. Cornell* (1851) 1 R. L. 519, it appeared that the land in question had been in the possession of the plaintiff for over twenty years, but that originally it was part of the highway, and had been encroached on by the plaintiff. The plaintiff claimed that, he having been in the uninterrupted possession of the land in question for more than twenty years, the right of the public had been extinguished. It was held by the court that although long possession under claim of right is conclusive as between individuals, the rule did not apply against the state, and the plaintiff

could not obtain title to a portion of the highway by reason of his long possession.

In *Childs v. Nelson* (1887) 69 Wis. 125, 33 N. W. 587, it appeared that the original width of the highway was 66 feet, but only a portion of this had ever been used. The town authorities decided to open the road to its full width, and found that the plaintiff's fence encroached on the highway several feet, whereupon they ordered its summary removal. The court said: "The contention that the plaintiff acquired some estate or right in the part of St. Croix street inclosed by his fence, by adverse possession of himself and grantors, is almost too groundless to be candid."

In *Nicolai v. Davis* (1895) 91 Wis. 370, 64 N. W. 1001, it appeared that the town highway was laid out in 1847 at a width of 3 rods. For several years the plaintiff's fences had encroached on this highway until the defendant town through its officers took steps to move these fences to the correct boundary line. In an action to enjoin the town from removing the plaintiff's fences, the court said: "This highway appears to have been opened, worked and traveled substantially on the line on which it was so laid out, for more than forty-five years prior to this controversy. The mere fact that the plaintiff had for many years encroached upon the road by putting a portion of his fences in the road, and otherwise, did not bar the town from the legal right of having

the road at any time opened to its full width as originally surveyed and laid out."

III. Rule in Massachusetts.

In Massachusetts a statute (Mass. Pub. Stat. 1887, chap. 54, § 1) provides that where a fence has encroached on a highway for a period of forty years, the continuance of the fence is justified and it cannot be removed by the public authorities. *Cutter v. Cambridge* (1863) 6 Allen, 20; *Winslow v. Nayson* (1873) 113 Mass. 411.

In *Cutter v. Cambridge*, supra, an action was brought for trespass for removing the plaintiff's fence. The defendant city defended on the ground that the fence was within the limits of the highway. It appeared that the fence had encroached upon the highway as originally laid out for a period of sixty years. It was held that while the rule at common law was to the effect that no length of time would create an adverse right against the public, the statute gave a right to continue the fence.

In *Winslow v. Nayson*, supra, it appeared that the plaintiff's fence encroached on the highway a distance of several feet, and had been so situated for about forty-five years. An injunction was sought to restrain the defendants, who were road commissioners, from interfering with the fence. The court held that, the landowner having maintained his fence for a period of forty years, he had the right to continue it. E. C. B.

EX PART FRANK MING.

Nevada Supreme Court — May 29, 1919.

(— Nev. —, 181 Pac. 319.)

Constitutional law — amendment — entry in journal — sufficiency.

1. The spreading of a proposed amendment to the Constitution at large upon the legislative journals is not required by a constitutional provision that it must be entered in the journals, but an identifying reference, such as the bill number and purpose of the amendment, is sufficient.

[See note on this question beginning on page 1227.]

Statutes — construction — meaning of words.

2. When a word is used in a statute or Constitution it is presumed to be used in its ordinary sense unless the contrary is indicated.

[See 25 R. C. L. 988.]

Habeas corpus — proceedings beyond jurisdiction — when courts will act.

3. The supreme court will not interfere to release under a writ of

habeas corpus one against whom the district attorney has directed a justice of the peace to conduct a preliminary hearing in a misdemeanor case, as authorized by statute, with a view to further hearing before the district court, which, under the Constitution, has no jurisdiction of such cases, until the latter court attempts to assume jurisdiction.

ORIGINAL application by petitioner for a writ of habeas corpus to secure his discharge from custody to which he had been committed for having violated the Initiative Prohibition Statute. Writ discharged and proceedings dismissed.

The facts are stated in the opinion of the court.

Messrs. McCarran, Miller, & Mashburn, for petitioner:

Section III. of article 19, being first proposed by resolution in the legislature of 1909, was never entered on the journals of either house of that legislature, and was never entered in hæc verba on the journals of either the legislature of 1909 or the legislature of 1911 next succeeding.

State ex rel. Stevenson v. Tuffy, 19 Nev. 391, 3 Am. St. Rep. 895, 12 Pac. 835; Koehler v. Hill, 60 Iowa, 543, 14 N. W. 738, 15 N. W. 609; Cooley, Const. Lim. 183; Collier v. Frierson, 24 Ala. 103; State ex rel. Galusha v. Davis, 20 Nev. 227, 19 Pac. 894; State ex rel. Torreyson v. Grey, 21 Nev. 378, 19 L.R.A. 134, 32 Pac. 190; State ex rel. Bailey v. Brookhart, 113 Iowa, 250, 84 N. W. 1064; Kadderly v. Portland, 44 Or. 118, 74 Pac. 710, 75 Pac. 222; People ex rel. Crowell v. Lawrence, 36 Barb. 177; State ex rel. Woods v. Tooker, 15 Mont. 8, 25 L.R.A. 560, 37 Pac. 84; Durfee v. Harper, 22 Mont. 354, 56 Pac. 582; Re Constitutional Convention, 14 R. I. 649; State v. McBride, 4 Mo. 303, 29 Am. Dec. 636; State ex rel. Morris v. Mason, 43 La. Ann. 590, 9 So. 776; Opinion of Justices, 6 Cush. 573; Oakland Paving Co. v. Hilton, 69 Cal. 479, 11 Pac. 3; Bussie v. Brazzell, 128 Mo. 93, 49 Am. St. Rep. 542, 30 S. W. 526; Miller v. Johnson, 92 Ky. 589, 15 L.R.A. 524, 18 S. W. 522; McBee v. Brady, 15 Idaho, 761, 100 Pac. 97; State ex rel. McClurg v. Powell, 77 Miss. 543, 48 L.R.A. 652, 27 So. 927; University of North Carolina v. McIver, 72 N. C. 76; Bott v. Wurts, 63 N. J. L. 289, 45 L.R.A. 251, 43 Atl. 744, 881; People ex rel. Elder v. Sours, 31 Colo. 369, 102 Am. St. Rep. 34, 74 Pac. 167; People ex rel. Kent County v. 6 A.L.R.—77.

Loomis, 135 Mich. 556, 98 N. W. 262, 3 Ann. Cas. 751; Union Bank v. Oxford, 119 N. C. 214, 34 L.R.A. 487, 25 S. E. 966; Green v. Graves, 1 Dougl. (Mich.) 351; Rode v. Phelps, 80 Mich. 598, 45 N. W. 493; People v. Dettenthaler, 118 Mich. 595, 44 L.R.A. 164, 77 N. W. 450; Re Senate File, 25 Neb. 864, 41 N. W. 981; State ex rel. Owen v. Donald, 160 Wis. 21, 151 N. W. 331; State ex rel. Postel v. Marcus, 160 Wis. 354, 152 N. W. 419.

The district court has no jurisdiction to hear or determine the offense with which petitioner stands accused, in the first instance, and hence the justice's court has no jurisdiction to hold a preliminary examination with a view to certifying the case to the district court.

Moore v. Orr, 30 Nev. 457, 98 Pac. 398; Green v. Superior Ct. 78 Cal. 556; State v. Myers, 11 Mont. 365, 28 Pac. 650.

Mr. L. D. Summerfield, for respondent:

A constitutional amendment does not have to be entered in full on the journals, and compliance is had where there is an identifying reference to the amendment on such journals.

Constitutional Prohibitory Amendment, 24 Kan. 700; Oakland Paving Co. v. Tompkins, 72 Cal. 5, 1 Am. St. Rep. 17, 12 Pac. 801; Thomason v. Ashworth, 73 Cal. 73, 14 Pac. 615; People v. Strother, 67 Cal. 624, 8 Pac. 383; West v. State, 50 Fla. 154, 39 So. 412; Worman v. Hagan, 78 Md. 152, 21 L.R.A. 716, 27 Atl. 616; Re Senate File, 25 Neb. 864, 41 N. W. 981; State ex rel. Adams v. Herried, 10 S. D. 109, 72 N. W. 93; Gottstein v. Lister, 88 Wash. 462, 153 Pac. 595, Ann. Cas. 1917D, 1008; Cudihee v. Phelps, 76

Wash. 314, 136 Pac. 367; *State ex rel. Postel v. Marcus*, 160 Wis. 354, 152 N. W. 419.

The complaint sufficiently charges the offense.

People v. Logan, 1 Nev. 110; *State v. Anderson*, 3 Nev. 254; *State v. Buralli*, 27 Nev. 41, 71 Pac. 532; *State v. Probasco*, 62 Iowa, 400, 17 N. W. 607; *State v. Sherman*, 137 Mo. App. 70, 119 S. W. 479.

In whichever court the case is tried, the defendant has the equal protection of the law, and is accorded due process of law. The penalties are the same for each defendant in each tribunal.

People v. Mire, 173 Mich. 357, 138 N. W. 1066.

Messrs. Leonard B. Fowler, Attorney General, and Robert Richards, also for respondent:

The constitutional amendment, which is the subject of attack, was duly entered upon the journals of both houses at both sessions in a way that it can be identified, and such entering is a full compliance with our Constitution, wherein it provides that a constitutional amendment be entered in the journals.

State ex rel. George v. Swift, 10 Nev. 176, 21 Am. Rep. 721; *People v. Strother*, 67 Cal. 624, 8 Pac. 383; *Oakland Paving Co. v. Tompkins*, 72 Cal. 5, 1 Am. St. Rep. 17, 12 Pac. 801; *State ex rel. Adams v. Herried*, 10 S. D. 109, 72 N. W. 93; *West v. State*, 50 Fla. 154, 39 So. 412; *Cudihee v. Phelps*, 76 Wash. 314, 136 Pac. 367; *Worman v. Hagan*, 78 Md. 152, 21 L.R.A. 716, 27 Atl. 616; *Gottstein v. Lister*, 88 Wash. 462, 153 Pac. 595, Ann. Cas. 1917D, 1008.

Messrs. Brown & Belford and J. M. McNamara, amici curiæ.

Coleman, Ch. J., delivered the opinion of the court:

This is an original proceeding in habeas corpus. A complaint was filed in the justice court of Reno township charging petitioner with having violated the Initiative Prohibition Statute which was adopted by a vote of the people at the general election in November, 1918 (Stat. 1919, p. 1). After the arrest of the petitioner, the district attorney of Washoe county, pursuant to § 28 of the statute, filed with the justice of the peace an election to have that

officer hold a preliminary hearing in said case.

Two grounds are strenuously urged for the issuance of the writ in this proceeding. The first is that the amendment to our Constitution providing for the enactment of laws upon the initiative of the people was not properly adopted; the second that the statute wherein it authorizes the district attorney to elect to have a justice of the peace hold a preliminary hearing attempts to confer upon both the justice of the peace and the district court jurisdiction of a misdemeanor, and is therefore in violation of the constitutional rights of petitioner.

The main question in this case is as to whether or not the amendment to our Constitution, providing for the enactment of laws by submitting proposed statutes to the people by an initiative petition, was adopted as provided by our Constitution. Section 1, art. 16, which provides the method of amending our Constitution, reads as follows: "Any amendment or amendments to this Constitution may be proposed in the senate or assembly; and if the same shall be agreed to by a majority of all the members elected to each of the two houses, such proposed amendment or amendments shall be entered on their respective journals, with the yeas and nays taken thereon, and referred to the legislature then next to be chosen, and shall be published for three months next preceding the time of making such choice. And if in the legislature next chosen as aforesaid, such proposed amendment or amendments shall be agreed to by a majority of all the members elected to each house, then it shall be the duty of the legislature to submit such proposed amendment or amendments to the people, in such manner and at such time as the legislature shall prescribe, and if the people shall approve and ratify such amendment or amendments by a majority of the electors qualified to vote for members of the legislature voting thereon, such amendment or

amendments shall become a part of the Constitution." pass. Clay Tallman, Chairman.

It is conceded by petitioner that all requirements of this section relating to amendments were complied with, except as to entering the amendment upon the journal. The journal of the assembly of 1908-1909, at page 79, shows: "Motions and Resolutions.—By Mr. Brooks: Assembly Joint and Concurrent Resolution No. 7, proposing to amend § 1 of article 4 of the Constitution of Nevada, pertaining to the initiative and referendum, and other legislative authority, and power connected therewith. On motion of Mr. Brooks, duly seconded, rules suspended, reading so far had considered first reading, rules further suspended, resolution read second time by title, and referred to committee on judiciary."

The resolution was thereafter adopted, the journal (page 143) showing that it was designated thereupon as "Assembly Joint and Concurrent Resolution No. 7." After the adoption in the assembly it went to the senate. The journal of that body shows:

"Introduction and First Reading. . . . Assembly Joint and Concurrent Resolution No. 7, proposing to amend § 1 of article 4 of the Constitution of Nevada, pertaining to the initiative and referendum, and other legislative authority and power connected therewith. Senator Tallman moved that the rules be suspended, reading so far had considered first reading, rules further suspended, bill be read second time, and referred to committee on judiciary. Carried. . . .

"Reports of Committees.—Mr. President: Your committee on judiciary have had Assembly Bill No. 107 under consideration and beg leave to report on the same with the recommendation that it be referred to committee on education.

"Also, Assembly Joint and Concurrent Resolutions Nos. 7 and 8, and beg leave to report the same by introducing substitutes, and recommending that the substitutes do

"Introduction and First Reading. —Senate Substitute for Assembly Joint and Concurrent Resolution No. 7, proposing to amend article 19 of the Constitution by adding to said article, § 3 relating to the initiative and referendum and the powers thereby conferred upon the qualified electors.

"Senator Tallman moved that the rules be suspended, reading so far had considered first reading, rules further suspended, resolution be read second time by title, and referred to committee on judiciary. Carried."

Thereafter all references to the resolution, as appears from the journal, were to "Senate Substitute for Assembly Joint and Concurrent Resolution No. 7," and as such it was adopted by both houses of the legislature. The question is: Do the statements contained in the journals constitute such an entry as the Constitution contemplates?

At the very threshold of the consideration of this question we are confronted with the case of *State ex rel. Stevenson v. Tuffy*, 19 Nev. 891, 3 Am. St. Rep. 895, 12 Pac. 835, which counsel for petitioner contend is decisive of this matter. We are unable to see that the case mentioned decides the point which is now under consideration. The court there says: "No entry of the proposed amendment was made upon the journal of either house, and the question presented is whether or not this omission was fatal to the adoption of the amendment."

In this connection, we wish to call attention to certain language which we find in the work entitled "The Revision and Amendment of State Constitutions" (Dodd), commenting on the *Tuffy* Case, where it is said, at page 148: ". . . In Nevada, where an entry upon the journal was required, no entry whatever was made, and the proposed amendment was held invalid because of failure to comply with a specific constitutional requirement."

In a note to the text above quoted we find the following: " . . . An examination of the journals shows no entry of any sort which can be identified as that of the amendment under consideration."

The enrolled resolution which was attacked shows that it passed February 28, 1883, and after a most exhaustive examination of the journals we fail to find in them any allusion whatever to the passage or adoption of the resolution, nor does counsel for petitioner point out in his brief where any allusion to its adoption or passage appears therein. Thus it is seen that not even an attempt was made "to enter" in the journal the proposed amendment involved in the Tuffy Case.

In that case it was evidently a conceded fact that no entry had been made upon the journal of the proposed amendment. Not so in this matter. The real question here is: Was an entry made? If we find that no entry was made upon the journal, the Tuffy Case would be an authority sustaining counsel's contention. It is true that in that case some expressions are found which seem to sustain the contention urged for it; but, as they are not based upon facts involved in the case, they are mere dicta, and the case cannot aid us in the least in determining the question before us. The law laid down in the Tuffy Case cannot be questioned.

The case of *Koehler v. Hill*, 60 Iowa, 543, 14 N. W. 738, 15 N. W. 609, is the only authority cited in the Tuffy Case which can be said to sustain the contention that, when a vote is had upon a proposed amendment in the legislative bodies, it must be entered in full upon the journals, and it is even conceded in that opinion that "to enter" on the journal does not necessarily mean spreading the same at length thereon; while the quotations from Judge Cooley are merely to the effect that the constitutional requirements are mandatory. Nowhere in the language quoted from him is it held that "to enter" the proposed amend-

ment upon the journal means that the same must be spread at length thereon. Nor is such the holding in the case of *Collier v. Frierson*, 24 Ala. 108, referred to therein. The question involved in this proceeding was not before the court in that case. For the reasons given, we do not think we should be influenced by the Tuffy Case.

But learned counsel for petitioner strenuously urges that the provision of the Constitution to the effect that a proposed amendment to the Constitution, when adopted by either branch of the legislature, must be entered at length upon the journal of the body so adopting such amendment, is sustained by the weight of authority, and in support of this assertion, in addition to the authorities already mentioned by us, calls our attention to the following cases: *Oakland Paving Co. v. Hilton*, 69 Cal. 479, 11 Pac. 3; *Kadderly v. Portland*, 44 Or. 118, 74 Pac. 710, 75 Pac. 222; *State ex rel. Woods v. Tooker*, 15 Mont. 8, 25 L.R.A. 560, 37 Pac. 840; *Durfee v. Harper*, 22 Mont. 354, 56 Pac. 582; *McBee v. Brady*, 15 Idaho, 761, 100 Pac. 97; *Nesbit v. People*, 19 Colo. 441, 36 Pac. 221; *People ex rel. Elder v. Sours*, 31 Colo. 369, 102 Am. St. Rep. 34, 74 Pac. 167; *People ex rel. Kent County v. Loomis*, 135 Mich. 556, 98 N. W. 262, 3 Ann. Cas. 751; *State ex rel. Postel v. Marcus*, 160 Wis. 354, 152 N. W. 419.

We will consider these cases in the order in which they have been named. The case of *Oakland Paving Co. v. Hilton* did not determine the question here involved. The opinion by Thornton, J., which lays down the rule invoked, was concurred in by only one justice, the other justices concurring in the order only.

The case of *Kadderly v. Portland* is no authority sustaining the contention which it is cited to support. It is said in the opinion: "There is no question but that all the forms prescribed by the Constitution were strictly and accurately observed. . . ."

The contention in that case was that the legislature of 1899 had no authority to propose the amendment. The question involved in this case was not under consideration.

As to the Colorado and Montana cases, learned counsel for petitioner concede that there is a "slight difference" between the constitutional provisions of those states and that of Nevada relative to the method of proposing amendments to the Constitution. We think the difference is very pronounced. The Constitution of Nevada provides that the proposed amendment shall "be entered" upon the journal, while the Constitutions of the states mentioned provide that the proposed amendment shall be "entered in full." This is such a marked difference that we feel it would be a waste of time to dwell upon the lack of applicability of the opinions from those states.

As to the case of *McBee v. Brady*, 15 Idaho, 761, 100 Pac. 97, it need only be said that the question as to what constituted an entry upon the journal (which is the point here involved) was not even considered. The court held that the method provided by the Constitution for its amendment must be followed, but it did not go into or determine the question of what was necessary to constitute an entry of an amendment upon the journal. Thus it will be seen that the case is not an authority sustaining the contention.

As to the case of *People ex rel. Kent County v. Loomis*, the court expressly declined to pass upon the question here involved, saying: "But it is unnecessary to determine the question, as we think that the journal of each house shows the resolution in full as passed by it."

It may be said that, when originally considered, the court, in *State ex rel. Postel v. Marcus*, supra, adopted the view that is contended for by petitioner. However, upon rehearing the original opinion was reversed, and the opposite rule held to be the correct one. Marshall, J., who wrote the original opinion, filed

an opinion vigorously dissenting from the prevailing opinion filed on rehearing, in which he said that "an entry by mere number or number and title is not sufficient, nor is an entry in extenso necessary." Thus it will be seen that upon rehearing he conceded that the proposed amendment did not have to be spread in full upon the journal. But Timlin, J., who participated in the consideration of the case upon both hearings, in his opinion upon rehearing says: "When the first decision in this case was approved unanimously by this court, and filed, the opinion of the court was written by Justice Marshall, with a concurring opinion by Chief Justice Winlow. I think it is nowhere expressly stated in either of these opinions that the word 'entered,' found in article 12 of the Constitution, could be satisfied only by a verbatim record or a record in extenso of the proposed amendment."

This disposes of the authorities relied upon by the petitioner, and we think from an analysis of them that it is fair to say that the views urged by petitioner are sustained by the decisions from the court of last resort of the state of Iowa only; and there was a dissenting opinion in the first of those cases.

We will now consider the authorities that hold that the proposed amendment does not have to be entered in full upon the journal, but that an identifying reference is all that is necessary. The supreme court of California, in *Oakland Paving Co. v. Tompkins*, 72 Cal. 5, 1 Am. St. Rep. 17, 12 Pac. 801, speaking through Temple, J., said: "The only question submitted is whether the constitutional amendment No. 1, ratified by the electors at the general election in 1884, being an amendment to § 19, art. 11, was proposed by the legislature as required by § 1, art. 18, of the Constitution. That section provides that amendments may be proposed in the senate and assembly, and if two thirds of all the members elected to each of the two houses shall vote in favor

thereof, such proposed amendment or amendments shall be entered in the journals, with the yeas and nays taken thereon,' etc. The objection is that the proposed amendment was not entered in the journal of either house, as required by the Constitution. It was not copied into the journal, but there was entered an identifying reference, such as is always entered in regard to legislative bills; that is, it was proposed as a senate bill and was referred to by title and number. The yeas and nays were entered as directed. It is agreed that the amendment thus proposed was submitted to the people, and received a very large majority of the votes cast. . . . All admit that the constitutional requirement must be strictly performed. But it does not follow from this that the language of the instrument must be understood literally. The same rules of construction must be applied, to ascertain what its requirements are, as though it were not mandatory and prohibitory. And we think, when an act commanded or authorized may be done in different ways, either of which would be a strict compliance with the terms of the instrument understood in some common and popular sense, either mode may be pursued, unless some reason is discoverable for holding that one of such modes only will answer. If, for instance, the direction to enter the amendment in the journal is complied with, in some usual and popular sense of the language, either by copying the amendment into the journal or by placing upon the journal an identifying reference only, either will do unless the context shows a different intention. Now, the word 'enter' primarily means to go in, or to come in, but has many derivative meanings, and is often employed in elliptical expressions, and is quite apt to be so used that the literal or most obvious meaning cannot be attributed to it. We read, for instance, in the laws of Congress, that citizens may enter at the Land Office a tract of land, and the expression is repeated

in different forms many times. We are often told that a certain horse has been entered for a race, or an animal has been entered at a fair. What is really done in each instance is to make a record of certain important facts for preservation or notice. And such is certainly a very ordinary meaning of the word 'enter' when used in this derivative sense; that is, to register the essential facts concerning the thing said to be entered. And we think it may be fully admitted that the most natural and obvious meaning of the word, when employed in this derivative sense, is to copy, without greatly affecting the argument. We find near the title page of nearly every book printed that it has been entered in the office of the Librarian of Congress. What is really left with the Librarian is the title page of the proposed book, and this constitutes the entry, although after it is printed the author is now required to present a copy of the book for the congressional library. We sometimes read that a certain play of Shakespeare was entered at Stationers' Hall. We find that the entry really made was a brief identifying reference, preliminary to obtaining license to print. Such instances of the use of the word, and of the phrase in which it occurs, might be multiplied indefinitely, but these are enough to show that this usage is quite common. Now, if we substitute in all these and like cases the word 'copy,' or the phrase, 'enter at large,' for the word 'enter,' we are conscious at once that a great change has been made. Indeed, the mere fact that the qualifying words, 'at large,' 'at length,' 'in full,' do so often accompany the word 'enter,' is proof that all feel that it is not a synonym of the word 'copy.' . . . This is sufficient to uphold the amendment, unless we can see from the context that something else was meant. We perceive no such intent. The evident purpose of the entire provision doubtless was to preserve a record of the vote. As a majority controls the journals, it may have

been apprehended that it might be made to appear that the proposal was duly passed, although lacking the requisite majority, and so it was required that the yeas and nays be entered. But, however this may be, the principal thing is the record of the yeas and nays, and this purpose is accomplished as perfectly by the entry made as it would be by any other. As to preserving the identity of the amendment proposed, there is no greater difficulty in this matter than with reference to bills."

This view was adhered to in an opinion by Thornton, J., in *Thomasson v. Ashworth*, 73 Cal. 73, 14 Pac. 615.

Mr. Justice Brewer, than whom few, if any, have brought greater learning, ability, and wisdom to the Supreme Court of the United States, in Constitutional Prohibitory Amendment, 24 Kan. 700, in considering the identical question now presented for our consideration, said: "The Constitution provides that the 'proposed amendments, together with the yeas and nays, shall be entered on the journal.' Article 14, § 1. Is the failure to enter this amendment at length on the journals fatal? It is well said by counsel that no change can be made in the fundamental law, except in the manner prescribed by that law. . . . In other words, proceedings under a Constitution to change that Constitution must be in accord with the manner prescribed by that Constitution. But this only brings us to the real question in this case: Is a proposition to amend the Constitution in the nature of a criminal proceeding, in which the opponents of change stand as defendants in a criminal action, entitled to avail themselves of any technical error, or mere verbal mistake; or is it rather a civil proceeding, in which those omissions and errors which work no wrong to substantial rights are to be disregarded? Unhesitatingly we affirm the latter."

The decision just mentioned was considered and quoted from at length by Maxwell, J., long an able

and honored member of the supreme court of Nebraska, in *Re Senate File*, 25 Neb. 864, 41 N. W. 981. The court, in a unanimous opinion, concurred in the views expressed by Brewer, J., in the Kansas case.

In *Cudihee v. Phelps*, 76 Wash. 314, 136 Pac. 367, the supreme court of Washington, in an opinion by Parker, J., and unanimously concurred in, quoted with approval the language of the supreme court of California which we have quoted from *Oakland Paving Co. v. Tompkins*, 72 Cal. 5, 1 Am. St. Rep. 17, 12 Pac. 801. The same question was again before the court in *Gottstein v. Lister*, 88 Wash. 462, 153 Pac. 595, Ann. Cas. 1917D, 1008, the court adhering to the views formerly expressed.

The supreme court of South Dakota, in *State ex rel. Adams v. Herried*, 10 S. D. 109, 72 N. W. 93, in considering this question, said: "The conflict in the adjudications results from a diversity of opinion regarding the meaning of the phrase, 'enter on their journals,' as used in the several state Constitutions in reference to proposed amendments. The decisions cannot be reconciled. Perhaps it is proper to conclude that there is a slight preponderance of authority in favor of the identifying reference theory. This conflict existed in 1885, when our Constitution was framed. It should be presumed that the members of the constitutional convention exercised the utmost care in selecting appropriate language to express the results of their deliberations. What the convention intended should be the method of amending the instrument then prepared should govern the legislature, and control this court in determining whether any alteration therein has been effected. In ascertaining what meaning the convention intended should be given the phrase in question, it would seem proper to presume that the convention was acquainted with the constructions which had been placed upon the same language, when used in the same connection,

by the courts of the other states, and to presume that, had it been intended to restrict the legislature to one of these constructions, all doubt would have been removed by employing the words, 'entered at large.' Not having added the words, 'at large,' it is reasonable to infer that it was intended to allow the legislature the liberty of adopting either method of entry. In any event, language was employed which courts of the highest respectability have held to warrant either an entry in full or by an identifying reference. Under the modern methods of conducting legislative business, and preserving bills and joint resolutions, the action of the two houses and the contents of proposed amendments can be as safely and as surely preserved by one manner of entry as the other. The legislature having adopted a construction sustained by, perhaps, the greater weight of authority,—one which does not defeat any object intended to be secured by the Constitution,—such action on its part is entitled to consideration by this court in ascertaining what interpretation shall be given to the language under discussion."

The Constitution of Maryland provides, as does ours, that a proposed amendment shall be entered on the journal. The supreme court of that state, in *Worman v. Hagan*, 78 Md. 152, 21 L.R.A. 716, 27 Atl. 616, in passing upon the sufficiency of the entry of a proposed amendment which read, "An Act to Amend Section One of Article Seven of the Constitution of This State," said: "We find that the legislature by the Act of 1890 (chapter 255) proposed an amendment to § 1 of article 7, and that the act was passed by three fifths of all the members elected to each house. It was stated on the journal of each house that 'An Act to Amend Section One of Article Seven of the Constitution of This State' was passed; and the yeas and nays are set forth, being more than three fifths of all the members elected to each

house. The requirements of the Constitution were in all respects observed, unless it is necessary, as maintained by the appellants, that the act should be set out verbatim on the journals. Each house had the bill in its possession when it passed it; and the bill was fully and clearly identified by its title. There would have been no greater certainty if every word of it had been recited. We must give a reasonable construction to the words of the Constitution. There was but one bill with this title. The entries on the journals of the two houses that this bill had been passed by the yeas and nays, which were stated, described their legislative action as distinctly as it could be expressed. The yeas and nays were associated as closely as possible with the enactment contained in the bill; that is to say, with the proposed amendment. It was not in the power of any person to mistake the meaning of the entry."

We have reviewed every case that has been called to our attention, or which we have been able to find, throwing any light upon the question under consideration, and we are of the opinion that the authorities, when carefully analyzed, will be found to be opposed to the view urged in behalf of petitioner, except in the cases from the state of Iowa, and the first case in that state on the subject was by a divided court. In view of the holding by the great majority of the courts, it would seem that we would not hesitate in reaching the conclusion that the entry in the journal in question is a sufficient compliance with the constitutional requirements.

Constitutional
law—amend-
ment—entry in
journal—
sufficiency.

It is the contention that the constitutional convention intended that proposed amendments should be spread in full, at large, in extenso, upon the journal, so that no doubt might arise as to the provisions. This, in our opinion, is the only reason that can be urged to sustain the contention; yet, in view of another section of the Constitution, we do

not think there is any reason why we should hold that the constitutional convention so intended, but there are persuasive reasons to justify our taking the contrary view. We think it a fair presumption that the men comprising the constitutional convention were among the most learned, experienced, and careful men of the then territory. Appreciating the great importance of the choice of the language which should be used, every word was carefully weighed. Hours were spent by our constitutional convention, in some instances, in considering the propriety of using a particular word.

When a word is used in a statute or Constitution, it is supposed it is used in its ordinary sense, unless the contrary is indicated. A careful investigation fails to show that the constitutional convention used the word "entered," in the connection in which it is now considered, in any other sense than that ordinarily given it; and that the convention did not mean, when it provided that when a proposed amendment should be "entered" upon the journal, it should be spread thereupon in full, at large, in extenso, is, we think, amply justified from consideration of other sections of the Constitution. Section 18 of article 4 provides that "all bills or joint resolutions" passed by each house "shall be signed by the presiding officers of the respective houses, and by the secretary of the senate and the clerk of the assembly," and § 20 of article 5 provides: "The secretary of state shall keep a true record of the official acts of the legislative and executive departments of the government, and shall, when required, lay the same before either branch of the legislature. . . ."

Thus we see that ample provision was made for the preserving of the joint resolutions which might be adopted, in the identical language in which adopted. This seems to conclusively show the lack of necessity of spreading joint resolutions at

large upon the journals, and hence the probable reason why the Constitution does not provide for the entering in full of proposed amendments thereupon. In this connection, we think the language of this court in a unanimous opinion in the case of *State ex rel. George v. Swift*, 10 Nev. 185, 21 Am. Rep. 721, wherein the constitutional provisions mentioned were under consideration, is conclusive. The court said: "Obviously, then, the journals have no greater intrinsic value as evidence than the enrolled bill, which, in compliance with the above-quoted provision of the Constitution, is signed and attested by the very same officers who sign the journals."

While we do not deem it necessary, in the light of what has been said, to present further reasons for sustaining the sufficiency of the journal entry questioned in this proceeding, it may nevertheless be of interest, as well as of value, to call attention to a rule of law laid down by Hawley, Ch. J., one of our distinguished predecessors. The language to which we allude will be found in the opinion in the case of *State ex rel. Cardwell v. Glenn*, 18 Nev. 35, 1 Pac. 189, and reads as follows:

"The Constitution does not deal in details. In construing the provision in question we must consider the modes of thought which gave expression to the language used, in connection with the usage and custom pertaining to the duty of the officer named in the Constitution, in order to determine what was meant. The intention of those who framed the instrument must govern, and that intention may be gathered from the subject-matter, the effects and consequences, or from the reason and spirit of the law. Even where the language admits of two senses, each conformable to common usage, that sense should be adopted which, without departing from the literal import of the words, best harmonizes with the object which the framers of the instrument had in view.

'Perhaps the safest rule of interpretation, after all, will be found to be to look to the nature and objects of the particular powers, duties, and rights with all the lights and aids of contemporary history, and give to the words of each just such operation and force, consistent with their legitimate meaning, as may fairly secure and attain the ends proposed.' 1 Story, Const. § 405a. This rule is subject to some qualifications, which it is here unnecessary to discuss. *Id.* § 406. . . .

"We glean from this history that the co-ordinate departments of the state government, including among its numbers several persons who were members of the constitutional convention, have for the past nineteen years construed the provision of the Constitution as giving the authority to the assistant clerk of the assembly and the assistant secretary of the senate to sign the bills and joint resolutions which passed the respective houses. The people of this state have acquiesced in that construction, and it has received the apparent sanction of the courts, although it has never before, to our knowledge, been called in question. Property and other rights have vested, and ought not to be overthrown unless it is manifest that the construction given by the other departments is absolutely erroneous. Even in such cases courts of great ability have hesitated, and, in some extreme cases, refused, to declare the law unconstitutional. But, from the views we have expressed, it will be observed that we do not consider the construction, as given by the other departments, erroneous. We believe it is correct; still, if it is not free from doubt,—and that, it seems to us, is the most that can be said,—it is clearly our duty to give some weight to the construction which has been deliberately given by the legislative and executive departments. *Evans v. Job*, 8 Nev. 338. 'Great deference is certainly due to a legislative exposition of a constitutional provision, and especially when it is made almost

contemporaneously with such provision, and may be supposed to result from the same views of policy and modes of reasoning which prevailed among the framers of the instrument expounded.' *People ex rel. Gallup v. Green*, 2 Wend. 275."

See also 6 R. C. L. 63.

The force of this language will be readily realized, in view of the fact that at an early period in the history of this state a proposed constitutional amendment was adopted, and the journal entry thereof was not in full, but was in the nature of an identifying reference only. See journal of the assembly 1879, ninth session, at page 301, relative to Senate Joint Resolution No. 28, and senate journal of the same session, at page 221, relative to the same resolution.

It is urged by the learned attorney general that the courts should not hold the amendment to the Constitution in question invalid, for the reason that, if we were to do so, it would necessarily follow that many important laws upon the statute books would be affected thereby, among which he enumerates the act providing for the prosecution of felonies by information, the law conferring the right of suffrage upon the women of the state, certain laws relative to taxation, and laws pertaining to bonds for highway improvements. Respectable authority exists sustaining the contention made, but, in view of the conclusion we have reached, we do not deem it necessary to pass upon this point, and for the same reason we do not think that we need to review other points urged upon us in behalf of respondent.

We come now to the second contention made in behalf of petitioner. After setting forth the fact that the district attorney had elected to have the justice of the peace hold a preliminary hearing, and that the justice made an order directing that a preliminary hearing be had upon the charge, the petition alleges "that said proceedings, election, and order, and the whole thereof, are contrary

to law and void," for the reason that the justice of the peace has no jurisdiction to proceed with a preliminary hearing upon the ground that the district court has no jurisdiction in misdemeanor cases. To sustain the contention our attention is invited to the case of *Moore v. Orr*, 30 Nev. 458, 98 Pac. 398. We have no doubt but that the court reached the correct conclusion in that case; and should the justice of the peace go through the formality of holding a preliminary hearing, and at the conclusion thereof order that the petitioner be held to answer to the district court, we are not prepared to say that jurisdiction would be acquired by the district court to proceed with the trial. On the other hand, if the contention of petitioner to the effect that the election of the district attorney and the order of the justice that a preliminary be held are null and void, such action

stands, in legal effect, as though it had never been taken, and the justice of the peace has complete jurisdiction to proceed to trial upon the merits. Thus, assuming the contention of learned counsel for petitioner to be correct as to the law, for us to undertake to pass upon the legal question until a court which is without jurisdiction proceeds to exercise jurisdiction would be to pass upon a moot question—something courts invariably refuse to do. *Pacific Live Stock Co. v. Mason Valley Mines Co.* 39 Nev. 105, 153 Pac. 431.

Habeas corpus—
proceedings
beyond jurisdic-
tion—when
courts will act.

It follows from what we have said that the writ heretofore issued herein must be discharged, the petitioner remanded, and these proceedings dismissed.

It is so ordered.

Sanders and Ducker, JJ., concur.

ANNOTATION.

Construction of requirement that proposed constitutional amendment be entered in journals.

I. Where Constitution requires "entry" of amendment:

a. View that entry must be in full, 1227.

b. View that entry need not be in full, 1228.

II. Where Constitution requires "entry in full" of amendment, 1230.

I. Where Constitution requires "entry" of amendment.

a. View that entry must be in full.

In some jurisdictions it is held that under a requirement that a proposed amendment must be entered on the journals of each house of the legislature the full text must be so entered, and a failure to do so constitutes a fatal defect, rendering nugatory the whole amendment, notwithstanding its subsequent ratification by the people. *State ex rel. Bailey v. Brookhart* (1901) 118 Iowa, 250, 84 N. W. 1064; *Keehler v. Hill* (1883) 60 Iowa, 543, 14 N. W. 788, 15 N. W. 609; *McMillen v. Blattner* (1885) 67 Iowa, 287, 25 N.

W. 245. And see *People ex rel. Kent County v. Loomis* (1904) 135 Mich. 556, 98 N. E. 262, 3 Ann. Cas. 751.

In *Koehler v. Hill* (1883) 60 Iowa, 543, 14 N. W. 788, an action to recover for beer sold and delivered, it appeared that the electors of the state had ratified an amendment to the Constitution, prohibiting the manufacture and sale of intoxicating liquors. The question presented was whether the amendment had been constitutionally agreed to and adopted. The Constitution provided that "any amendment or amendments to this Constitution may be proposed in either house of the general assembly; and, if the same shall be agreed to by a majority of the members elected to each of the two houses, such proposed amendment shall be entered on their journals, with the yeas and nays taken thereon." In construing this provision the court held that it was intended that the proposed amendment should be entered at length in the journal. The

court said, in this connection: "The evident intent of the Constitution is that the proposed amendment should be entered at length on the journal, or, at least, so entered as to leave no reasonable doubt as to its provisions. This must be so, or the entering of the yeas and nays can be as readily dispensed with as entering the resolution, and yet this is the constitutional mode of ascertaining whether a majority of the members elected to each house agreed to the amendment." See to the same effect *McMillen v. Blattner* (1885) 67 Iowa, 287, 25 N. W. 245; *State ex rel. Bailey v. Brookhart* (1901) 113 Iowa, 250, 84 N. W. 1064.

In *People ex rel. Kent County v. Loomis* (1904) 135 Mich. 556, 98 N. W. 262, 8 Ann. Cas. 751, it appeared that an amendment was proposed and passed in the house, and entered in full in the house journal as passed. It was amended and passed in the senate, and entered in full in the senate journal as amended. The house agreed to the amendment, but did not cause the amendment as amended to be entered in full in its journal. The constitutional provision governing the submission of amendments required that an amendment, when agreed to by two thirds of the members of each house, "shall be entered on the journals, respectively, with the yeas and nays taken thereon." Reviewing the authorities the court said by way of dictum: "Those cases which require an entry of the resolution in full, as passed, have much the better of the argument." It was, however, held that the journal entries as made showed the amendment in full and were sufficient. See to the same effect *Re Senate File* (1889) 25 Neb. 864, 41 N. W. 981, wherein a similar entry was held to be sufficient. See also *Nesbit v. People* (1894) 19 Colo. 441, 36 Pac. 221, stated at length in II. *infra*.

The entry of a proposed amendment in the journals by the secretary of state has been held to be within the terms of the Constitution requiring that amendments "shall be entered" on the journals of both houses. It was so held in *State ex rel. Morris v. Mason* (1891) 43 La. Ann. 640, 9 So.

776. It was contended that the entry was made without previous authority from the senate. The authority of the secretary of state to enter the amendment was questioned, whereas his authority to enter the yeas and nays was unquestioned. The court said that failure of the secretary to enter one would have resulted just as fatally to the proposed amendment as failure to enter the other; and the tacit admission of the correctness of one entry left the inference of the correctness of the other.

b. View that entry need not be in full.

In the majority of jurisdictions a requirement that a proposed constitutional amendment shall be entered in the journals of the legislature by which it is proposed is not construed to mean that it must be set out verbatim in the legislative journals, but full and clear identification by title on the journals is sufficient to make the amendment valid after its adoption by popular vote.

California. — *People v. Strother* (1885) 67 Cal. 624, 8 Pac. 383; *Thomason v. Ruggles* (1886) 69 Cal. 465, 11 Pac. 20; *Oakland Paving Co. v. Tompkins* (1887) 72 Cal. 5, 1 Am. St. Rep. 17, 12 Pac. 801; *Thomason v. Ashworth* (1887) 73 Cal. 73, 14 Pac. 615. Compare *Oakland Paving Co. v. Hilton* (1886) 69 Cal. 479, 11 Pac. 3; *Hilton v. Heverin* (1886) — Cal. —, 11 Pac. 27.

Florida. — *West v. State* (1905) 50 Fla. 154, 39 So. 412.

Idaho. — *McBee v. Brady* (1909) 15 Idaho, 761, 100 Pac. 97.

Kansas. — *Constitutional Prohibitory Amendment* (1881) 24 Kan. 709.

Maryland. — *Worman v. Hagan* (1893) 78 Md. 152, 21 L.R.A. 716, 27 Atl. 616.

North Dakota. — *State ex rel. Twichell v. Hall*, — N. D. —, 171 N. W. 213.

South Dakota. — *State ex rel. Adams v. Herried* (1897) 10 S. D. 109, 72 N. W. 93.

Utah. — *Lee v. Price*, — Utah, —, 181 Pac. 948.

Washington. — *Gottstein v. Lister* (1915) 88 Wash. 462, 153 Pac. 595, Ann. Cas. 1917D, 1008; *Cudihee v.*

Phelps (1913) 76 Wash. 314, 136 Pac. 367.

Wisconsin.—State ex rel. Postel v. Marcus (1915) 160 Wis. 354, 152 N. W. 419.

In *Worman v. Hagan* (Md.) supra, the court construed the fourteenth article of the Constitution, providing that the general assembly may propose amendments to the Constitution, provided that the same shall stand when amended and passed by three fifths of all the members of each of the two houses "by yeas and nays, to be entered on the journals with the proposed amendment." It was stated in the journal of each house that "an act to amend § 1 of article 7 of the Constitution" was passed; and the yeas and nays were set forth. It was contended that the amendment was invalid, not having been entered verbatim on the journals as required by the Constitution. It was held that the amendment was entered in the journal sufficiently.

In *Oakland Paving Co. v. Tompkins* (1887) 72 Cal. 5, 1 Am. St. Rep. 17, 12 Pac. 801, the question submitted was whether the constitutional amendment No. 1, ratified by the electors at the general election in 1884, being an amendment to § 19, article 11, was proposed according to § 1, article 18, of the Constitution, providing that an amendment shall be entered in the journals with the yeas and nays taken thereon. The amendment was not copied into the journal, but there was entered an identifying reference; that is, it was proposed as a senate bill and was referred to by title and number, and yeas and nays entered as directed. It was held that there was sufficient entry within the meaning of the constitutional requirement. See to the same effect *Thomason v. Ashworth* (1887) 73 Cal. 78, 14 Pac. 615. Compare the earlier California cases holding contra (*Hilton v. Heverin* (1886) — Cal. —, 11 Pac. 27 and *Oakland Paving Co. v. Hilton* (1886) 69 Cal. 479, 11 Pac. 3), in each of which the decision was by a divided court, with one or more justices absent, and less than a majority of the court concurring on this point.

A proposition for an amendment to the Constitution, entered in full on the senate journal and by title only on the journal of the house, was held a sufficient entry within the meaning of the Constitution, in *State ex rel. Adams v. Herried* (1897) 10 S. D. 109, 72 N. W. 98. The constitutional provision involved in that case was to the effect that a "proposed amendment or amendments shall be entered on their journals."

In *State ex rel. Postel v. Marcus* (1915) 160 Wis. 354, 152 N. W. 419, the entry of the proposed amendment to the Constitution was made on the assembly journal by number and title, and, at the time it was adopted, it was entered in the senate journal in the same way. The resolution was referred to the committee on elections, was reported back for passage and amendments (simply correcting immaterial variances), and adopted by yeas and nays vote, at which time it was entered in the assembly journal at large in its final form. The Constitution required that it should be entered in the journals of both houses. It was held that this constitutional provision did not make imperative entry in full in the journals of both houses.

In *Gottstein v. Lister* (1915) 88 Wash. 462, 153 Pac. 595, Ann. Cas. 1917D, 1008, it was held that an entry on the journal referring to the proposed amendment in the language of the title to the proposing act is sufficient, without copying on the journals the proposed amendment in full. See to the same effect *Cudihee v. Phelps* (1913) 76 Wash. 314, 136 Pac. 367.

In *West v. State* (1905) 50 Fla. 154, 39 So. 412, it was held that the failure to enter a constitutional amendment at large on the journals did not invalidate the amendment, the decision being put on the ground that the effect of the ratification by the people was not to be destroyed by the omission of a ministerial act. See to the same effect *Constitutional Prohibitory Amendment* (1881) 24 Kan. 709.

In *State ex rel. Stevenson v. Tuffy* (1887) 19 Nev. 391, 3 Am. St. Rep. 895, 12 Pac. 835, a proceeding was brought

for the purpose of testing the validity of an amendment to the Constitution authorizing the investment of moneys pledged to educational purposes in bonds of any state of the United States. The Constitution provided that if a proposed amendment be agreed upon by a majority of all the members of each of the two houses, such amendment should be entered in their respective journals. The court held that failure to enter the proposed amendment in full rendered it void, saying: "If any provision of the Constitution should be regarded as mandatory, it is when it provides for its own amendment." But in the reported case (*EX PARTE MING*, ante, 1216) State ex rel. Stevenson v. Tuffy is distinguished on the ground that in that case it appeared that no entry whatever was made, and the court holds that an entry by identifying reference is sufficient.

II. Where Constitution requires "entry in full" of amendment.

Though the Constitution specifically provides that the amendment must be entered in full, slight irregularities in procedure will not be fatal. Thus, in *People ex rel. Elder v. Sours* (1903) 31 Colo. 369, 102 Am. St. Rep. 84, 74 Pac. 167, a proposed amendment to the Constitution was introduced in the senate, and, before final passage, was amended by striking out certain words, but was not materially changed in meaning. It was transmitted to the house, and the house journal showed that no amendment was made or offered in the house, but by a clerical error it was entered in full on the house journal as it was originally introduced in the senate. The court held that the constitutional provision requiring that proposed amendments should be entered in full upon the journal of both houses was satisfied, and the amendment was not invalid because of the difference between the journal entries of the two houses. The court said: "This amendment, as were the amendments in Kansas,

was discussed for nearly a year before its submission to the people; it bore the indorsement of every political party; it received at the polls more votes than were theretofore cast for any other amendment submitted to the people. It is shown beyond a reasonable doubt that the bill as amended passed the house; and if the will of the people is to be thwarted by the design or carelessness of an employee of the legislature, then are the foundations of our government unstable and unenduring."

In *Nesbit v. People* (1894) 19 Colo. 441, 86 Pac. 221, under a constitutional provision requiring amendments to be entered "in full" on the journals, it was held that an amendment was sufficiently entered where it was entered in full on the house journal as proposed, and there passed and entered in full on the senate journal as amended, the house journal showing concurrence with the senate amendments, but not containing the measure in full as finally passed. But in *Durfee v. Harper* (1899) 22 Mont. 354, 56 Pac. 582, the court held to be mandatory a constitutional provision that proposed amendments should be entered "in full" on the respective journals of the two houses of the assembly. It appeared that the amendment in controversy was never entered on the journals. The court held that the disobedience of the mandate of the Constitution nullified the amendment, saying: "We conclude, therefore, that the failure to enter on the legislative journals the proposed amendment under which Judge Henry was invited to sit was a disobedience of the Constitution itself, and that our duty is expounding the supreme law compels us to decide that the proposed amendment never was proposed as required, and therefore never ought to have been submitted. It was a nullity before it reached the people, and was not animated by them, because their own solemn commands empowering its proposal, and specifying the mode thereof, had been entirely ignored by the proponent."

M. J. Q.

WALLACE L. SCHAMBS, Trustee, etc., of H. D. Fowler, Bankrupt, Appt.
and Plff. in Err.,

v.

FIDELITY & CASUALTY COMPANY of New York.

(Two cases.)

United States Circuit Court of Appeals, Sixth Circuit—April 8, 1919.

(259 Fed. 55.)

Insurance — judgment — as loss within indemnity policy.

1. Insolvency through a judgment for malpractice in which the estate pays only a small percentage of the claims against it is within a policy insuring against loss from liability imposed by law upon insured for malpractice, and imposing upon insurer the duty of defending suits brought against insured until final decision, or settlement and recovery may be had for the full amount of the policy if the judgment against assured reaches such amount.

[See note on this question beginning on page 1240]

Action — character — law or equity.

2. An action by a bankruptcy trustee to recover on a policy of indemnity insurance insuring the bankrupt against liability for certain acts is at law, and not in equity.

[See 10 R. C. L. 368; 14 R. C. L. 1412.]

Insurance — construction — against insurer.

3. Ambiguities in insurance policies are solved against the interest of the insurer.

[See 14 R. C. L. 926.]

APPEAL by plaintiff from, and error to, the District Court of the United States for the Eastern Division of the Northern District of Ohio (Westenhaver, J.) to review a judgment in favor of defendant in an action brought to recover on a policy of indemnity insurance. *Appeal dismissed; judgment reversed on writ of error.*

Statement by Denison, Circuit Judge:

The bankrupt, Fowler, was a surgeon. He carried with the appellee (hereinafter called the company) a policy of so-called liability insurance, limited to \$5,000. An action for malpractice was brought against him by one Rainsford. The company assumed the defense of the suit. Rainsford obtained judgment for \$10,000. The company, with the consent of the assured, decided not to prosecute any proceeding for review. Thereupon Dr. Fowler filed a voluntary petition and was adjudged a bankrupt. He scheduled this judgment as his only debt, and showed assets of some \$400. The trustee in bankruptcy, after provid-

ing for expenses, paid a 2 per cent dividend upon this claim,—the only one proved,—and thereupon brought this action in the court below to recover from the company the \$5,000 named in the policy. The company claimed it was liable only for what Dr. Fowler or his trustee had paid to Rainsford, viz., \$200. The trial court took this view, and from a judgment accordingly the trustee prosecutes both error and appeal.

That portion of the policy which directly imposes liability reads as follows: "[The company] does hereby agree: (1) To indemnify the . . . assured against loss from liability imposed by law upon the assured for damages on account of bodily injuries or death suffered

by any person or persons in consequence of any malpractice, error, or mistake of the assured. . . . (2) To defend, in the name and on behalf of the assured, any suit brought against the assured, etc."

Later clauses specifically provided (7) that the company would continue the defense of any such suit "until a final decision is rendered in the assured's favor, or until the case has been appealed to the highest court to which an appeal can be taken, or until the suit has been settled with the written consent of the assured," and (9) that the assured should not "voluntarily assume any liability nor incur any expense, . . . nor, except at his own cost, settle any claim, nor . . . interfere in any negotiations or legal proceedings conducted by the company on account of any claim."

Argued before Warrington, Knapen, and Denison, Circuit Judges.

Mr. Louis H. Winch for appellant and plaintiff in error.

Mr. H. M. Roberts for appellee and defendant in error.

Denison, Circuit Judge, delivered the opinion of the court:

The petition by which the action was begun did not undertake to classify itself as a declaration at law or a bill in equity. It was docketed as if in equity, but asked no specific relief of any kind, excepting a money judgment. The answer did not deny jurisdiction in equity. The

Action—character—law or equity. case was submitted to the district judge upon an agreed statement of facts. We fail to see any color of right to proceed in equity, which would be sufficient to support equity jurisdiction, even in the presence of as much of a waiver as the parties can make (*Toledo Computing Scale Co. v. Computing Scale Co.* (C. C. A. 6) 74 C. C. A. 89, 142 Fed. 919, 923, and we think the action must be considered to be at law. It follows that the appeal, No. 3232, must be dismissed, and the merits of the case will be considered under the error proceedings, No. 3236.

Upon the merits, the controlling question is this: Did the company indemnify against any part of the Rainsford judgment which Dr. Fowler or his estate had not paid? The question, in somewhat analogous cases, has been considered to be whether the indemnity was against liability or was only against ultimate loss, and there is supposed to be a sharp conflict of authority between the cases which classify such policies in one or the other category, although, when we come to consider the peculiar language of this policy, we do not find any embarrassing conflict.

In policies of this nature, the distinction was early recognized between insurance against liability and indemnity against damages. *Gilbert v. Wiman*, 1 N. Y. 550, 49 Am. Dec. 359. In view of this distinction, it became common to insert in such policies the provision known as the "no action" clause, which provided that (e. g.) "no action shall lie against the company as respects any loss under this policy, unless it shall be brought by the assured himself to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment after a trial of the issue."

Under such "no action" policy, it was held, in Massachusetts, that the plain and express language of the policy must be given effect, and that the duty to indemnify did not arise until the judgment was paid. *Connolly v. Bolster*, 187 Mass. 266, 72 N. E. 981. The result in this Massachusetts case has been quite generally adopted in cases involving "no action" policies; and the presence of this clause has usually been given the controlling force which it seems to merit.¹ On the

¹ *Frye v. Bath Gas & E. Co.* 97 Me. 241, 59 L.R.A. 444, 94 Am. St. Rep. 500, 54 Atl. 395; *Carter v. Aetna L. Ins. Co.* 76 Kan. 275, 11 L.R.A.(N.S.) 1155, 91 Pac. 178; *Cushman v. Carbondale Fuel Co.* 122 Iowa, 656, 98 N. W. 509; *Finley v. United States Casualty Co.* 113 Tenn. 592, 602, 83 S. W. 2, 3 Ann. Cas. 962; *Fidelity & C. Co. v. Martin*, 163 Ky. 12, L.R.A.1917F, 924, 173 S. W. 307; *Stenbom v. Brown-Corliss Engine Co.* 137 Wis. 564, 20 L.R.A.(N.S.)

other hand, it was held in *New Hampshire* that such a policy would be construed as indemnifying against liability as soon as the liability was fixed by judgment. *Sanders v. Frankfort Marine, Acci. & Plate Glass Ins. Co.* 72 N. H. 485, 101 Am. St. Rep. 688, 57 Atl. 655. This opinion has been followed in only one case involving the same kind of policy.²

The common intent of the parties must control, and there is, to say the least, serious difficulty in thinking that the parties intended that that duty to indemnify should arise before payment of the judgment, when they have, in express words, said that it shall not arise until after that event. However, this case does not require us to choose as between these conflicting views. This policy was drawn by the insurer; the company was presumably familiar with the common use and with the adjudged effect of this "no action" clause; and it omitted that clause from this policy. It chose rather to rely upon language which lacks that certainty and freedom from ambiguity which might have been had, and the language which it selected must be construed according to the usual rules for ascertaining its true intent.

The plaintiff contends that clause 2 and the later clauses, the substance of which has been stated, are inconsistent with clause 1, and so neutralize what might otherwise be thought the plain limitation of clause 1. We cannot find any substantial inconsistency. The phrase "loss from liability" necessarily contemplates the existence of two things: The precedent liability and the resulting loss. There can be no loss unless there is a liability. We may for the moment allow defendant its interpretation of the word "loss," and concede that it means only payment or collection,

and still it would be entirely natural that the company should have the right to intervene and take entire control of the proceedings which fix liability, and have the right to defeat that liability if it could,—even against the will of the assured. It would thereby only be protecting itself against that ultimate "loss" which it had insured. Nor can we think that the word "defend," in clause 2, rightly means "successfully defend." True, the covenant is to defend the suit, and judgment and execution are parts of a suit; but to say that an agreement to defend a suit carries a liability to pay the judgment that may be recovered would be an extension of the ordinary meaning of the word. If the plaintiff were at liberty to consider and rely upon clause 7 in this connection, it might argue that the meaning of the covenant to defend would be broader, and might be sufficient for its theory, because clause 7 agrees to continue the defense at least further than it was carried in this case; but Dr. Fowler expressly released the company from the performance of this clause. In so far as he represents Dr. Fowler, the trustee cannot deny the effect of this release; and since the failure to continue the defense further could not have prejudiced Rainsford, who was the only creditor, the trustee, as representing creditors, is equally without standing to complain.

However, the fact that the later clauses are not inconsistent with a limitation of the company's ultimate liability to that which is measured by the money paid by, or taken from, the assured, does not prevent these later clauses from serving to interpret clause 1. "Loss" is not a word of limited, hard and fast meaning. There are many kinds of loss, besides money out of pocket. No man would doubt that he might rightly call a "loss" that event

956, 119 N. W. 308; *Allen v. Aetna L. Ins. Co.* (C. C. A. 3) 7 L.R.A.(N.S.) 958, 76 C. C. A. 265, 145 Fed. 881.

² *Patterson v. Adan*, 119 Minn. 308, 315, 48 L.R.A.(N.S.) 184, 138 N. W. 281. The *New Hampshire* case is fully approved in 6 A.L.R.—78.

the dissenting opinion in *Fidelity & C. Co. v. Martin*, 163 Ky. 12, at page 31, L.R.A. 1917F, 924, 178 S. W. 807, and its principle seems to have ruled *Davies v. Maryland Casualty Co.* 89 Wash. 571, L.R.A. 1916D, 395, 398, 154 Pac. 1116, 155 Pac. 1035.

which changed his status from solvency to insolvency, and compelled him either to go through bankruptcy or else be unable to own any property as long as he lived. Indeed, in the strictest sense of the word, the business man against whom a judgment of this kind became final during a fiscal year, so that at the end of that period he must carry it on his books as a liability, would, according to all familiar systems of bookkeeping, enter it as a loss for that period, and treat it accordingly; and he would seem to have a right to deduct it from his gross income under the permission of the Income Tax Law to deduct "losses." It is clear to us that, as this word is used in clause 1, it is ambiguous, and may have attributed to it either of the meanings claimed by the respective parties here, according as the whole contract and the conceded circumstances may dictate.³

It is the familiar rule that ambiguities in such contracts are solved against the insurer.

Insurance—
construction—
against insurer.

"A policy of insurance, prepared with much care for the interests of the insurer, should be construed favorably to the other party if the language employed leaves the matter in doubt." *New Amsterdam Casualty Co. v. Cumberland Teleph. & Teleg. Co.* (C. C. A. 6) 12 L.R.A. (N.S.) 478, 82 C. C. A. 315, 152 Fed. 963. This thought has special force in a case where, as here, the insurer, in drafting the contract, discarded a form of contract which was in common use and which would have made the intent entirely clear according to its present claim, and used instead language which is capable of the construction claimed by plaintiff.

The inference which would naturally be drawn by the ordinary man is important to observe, in in-

terpreting such a contract. The assured, in this class of contract, unless the contrary is clearly brought to his attention, must suppose that he is getting protection against the results of an adverse judgment. That he should carry what is called indemnity on account of damage suits, and find it of no help unless he first raised the money to pay the judgment, perhaps by stripping himself of all his property and at a sacrifice, would surely be a surprise to the ordinary policyholder; nor is it reasonable to suppose, unless it is made very plain, that he would deliberately take such a contract.

The solvency of all parties is the normal thing with reference to which contracts are made, and in interpreting the language used, we must suppose the assured was expected to discharge the obligations which the law might impose. If it is intended to provide for the abnormal situation, where the assured refuses to perform his legal duty, and because of insolvency the law cannot compel performance, language should be used which clearly reaches the unusual condition.

The peculiar results which would flow from adopting the company's construction may be considered. If the insured, against whom a personal injury judgment is rendered, has no property, he may decline to pay anything, thereby making the company's liability depend upon the assured's future acquisition of property so that something may be collected, or he may borrow from friends as much as he can, perhaps giving the insurance policy as security, and then whatever he pays on the judgment becomes a claim under the policy. If the judgment against the assured is \$5,000, but only \$3,000 can be and is collected from him on the judgment, he may collect from the insurance company \$3,000, whereupon he will have further assets from which the balance of the judgment may be made; but he would apparently have no further recourse against the company, since the policy gives only one cause of

³ "In the parlance of the business of insurance . . . the liability is called a loss." *State ex rel. Sheets v. Pittsburg, C. C. & St. L. R. Co.* 68 Ohio St. 9, 30, 64 L.R.A. 405, 96 Am. St. Rep. 635, 67 N. E. 96.

action. Several such complications suggest themselves; and it is not likely that the parties intended to make a contract where liability would be dependent upon the whim of one party, or where it only partly covered the damage the whole of which it purported to reach. "A contract ought not to be construed to an absurd conclusion, if a reasonable one is possible." *New Amsterdam Casualty Co. v. Cumberland Teleph. & Teleg. Co.* supra, 12 L.R.A. (N.S.) at page 481.

Special difficulties to which the company's theory leads, in case of the insured's bankruptcy, are entitled to notice. Where, as here, there is only one creditor, the measure of damage is troublesome enough; but, in the ordinary case there seems no satisfactory way of computation. Some of the difficulties were stated by the present Mr. Justice Pitney in *Beacon Lamp Co. v. Travellers' Ins. Co.* 61 N. J. Eq. 59, 64, 47 Atl. 579, and though the appellate court in that case (*Travellers' Ins. Co. v. Moses*, 63 N. J. Eq. 260, 92 Am. St. Rep. 863, 49 Atl. 720), undertakes to formulate a measure of damages, we are unable to apply that formula satisfactorily to the facts of this case, and it impresses us as somewhat arbitrary. The presumptions are against any intent by the parties to make a contract leading into such byways.

Evidently, their minds were largely centered upon the judgment which should fix the assured's liability; a considerable part of the contract is devoted to that subject and to disposing of the attendant conditions, and this distinctly tends to show what sort of a "loss" was in contemplation. When we give

due weight to these portions of the contract and to each of the considerations which we have mentioned as bearing on the construction of the whole,

we are satisfied that ^{—judgment as loss within indemnity policy.} when the parties, in clause 1, referred to a "loss from liability," they intended that kind of a loss which, in ordinary nomenclature and thought, comes into existence when the liability of the assured becomes irretrievably fixed. A careful review of all the cases cited from the various courts discloses not one where the policy has indemnified against "loss from liability," has contained the obligation to assume and conduct the defense to a final judgment, and has not contained a "no action" clause, and yet where the company's liability has been limited to the assured's money out of pocket.⁴ On the contrary, our conclusion as to the true meaning of such a policy finds direct support in *Maryland Casualty Co. v. Peppard*, 53 Okla. 515, L.R.A.1916E, 597, 157 Pac. 106, and *Blanton v. Kansas City Cotton Mills Co.* 103 Kan. 118, L.R.A.1918E, 541, 172 Pac. 987. The numerous other cases cited as upholding the insurer's liability are all instances of clear and unquestionable indemnity against liability, rather than against loss.⁵

In No. 3236, the order will be that the judgment below be reversed, and the case remanded for a new trial in accordance with this opinion; in No. 3232, the appeal is dismissed.

NOTE.

The question of right of trustee in bankruptcy or assignee for creditors

⁴ *Lowe v. Fidelity & C. Co.* 170 N. C. 445, 37 S. E. 250, may be such a case, though the presence of the covenants to defend does not appear; and see *Atlas Hardwood Lumber Co. v. Georgia L. Ins. Co.* 129 Tenn. 477, 438, 187 S. W. 109, so holding, but plainly obiter.

⁵ *American Employers' Liability Ins. Co. v. Fordyce*, 62 Ark. 562, 568, 54 Am. St. Rep. 305, 38 S. W. 1051; *Fidelity & C. Co. v. Fordyce*, 64 Ark. 174, 41 S. W. 420; *Fenton v. Fidelity & C. Co.* 36 Or. 283, 48 L.R.A. 770, 56 Pac. 1096; *Lewinthan v.*

Travelers' Ins. Co. 61 Misc. 621, 113 N. Y. Supp. 1031; *Anoka Lumber Co. v. Fidelity & C. Co.* 63 Minn. 288, 292, 30 L.R.A. 689, 65 N. W. 353; *Hoven v. Employers' Liability Assur. Corp.* (*Hoven v. West Superior Iron & Steel Co.*) 93 Wis. 201, 207, 32 L.R.A. 988, 67 N. W. 46; *Shreehan v. Farwell*, 135 Mich. 196, 97 N. W. 728; *Ross v. American Employers' Liability Ins. Co.* 56 N. J. Eq. 41, 38 Atl. 22; *Fritchie v. Miller's Pennsylvania Extract Co.* 197 Pa. 401, 47 Atl. 351; *Pickett v. Fidelity & C. Co.* 60 S. C. 477, 38 S. E. 160, 629.

under indemnity policy is discussed in the annotation to *NORTH AMERICAN ACCL. INS. CO. v. NEWTON*, post, 1240. It will be observed that the provisions of the policy and the facts involved in the reported case (*SCHAMBS v. FIDELITY & C. Co.* ante, 1231) were rather distinctive, and that the words "loss from liability" were construed to mean a loss which comes into existence

when the liability of the insured becomes irretrievably fixed, and that the trustee of the insured, who became a bankrupt after judgment for malpractice was recovered against him, was held entitled to maintain an action against the insurer for the face of the policy, although the assets were sufficient to pay only a small part of the judgment.

NORTH AMERICAN ACCIDENT INSURANCE COMPANY

v.

CHARLES HENRY NEWTON et al.

Canada Supreme Court — December 9, 1918.

(57 Can. S. C. 577.)

Insurance — employer's liability — right of assignee for creditors.

By an employer's liability policy N. was insured against loss from liability on account of bodily injuries to, or death of, an employee. N. incurred such liability, but made an assignment for benefit of his creditors before he paid his employee's claim. With money advanced by a third party the assignee paid it and brought action against the insurer to be reimbursed.

Held, that the insurance company was liable; that the right of N. to pay his employee and collect the amount from the insurance company passed to his assignee; that payment to the employee before the assignment was not essential; that the insurer could not inquire into the source from which the money came to make the payment; and that the insurer's liability was not limited to the amount of the dividend which the insolvent estate would be able to pay the employee.

[See note on this question beginning on page 1240.]

Present: SIE LOUIS DAVIES, Ch. J., and IDINGTON, ANGLIN, and BRODEUR, JJ., and CASSELS, J., ad hoc.

APPEAL from a decision of the Court of Appeal for Manitoba affirming the judgment at the trial [1917] 2 West. Week. Rep. 1120, in favor of the plaintiff.

The facts are stated in the above headnote.

Chrysler, K. C., for the appellants.
E. K. Williams for the respondents.

The CHIEF JUSTICE: I concur with Mr. Justice Anglin.

Idington, J.:

The contract evidenced by the appellant's policy was a chose in action, and the benefit thereof clearly passed to respondent by virtue of the assignment of Nelson & Foster under and pursuant to the provi-

sions of the "Assignments, Act," Manitoba Rev. Stat. 1913, chap. 12, in the same plight and condition as it was held by the assignor at that time.

The respondent assignee was just as much entitled to comply with the condition which, being complied with, gave vitality and force to the appellant's obligation, as his assignor had been and would have had if no assignment had been made.

It matters not then where the money came from—the condition has been fulfilled.

It so turns out that the estate was in an insolvent condition. To-morrow the like case might arise under circumstances in which the insured, although driven to make an assignment, might be possessed of an ample estate which could liquidate all the obligations of the insured.

Are we to hold that such an unfortunate insured was deprived of the right to have his assignee recover on such an obligation? No case has been cited deciding any such thing or anything like it.

The case of Connolly v. Bolster, 187 Mass. 266, 72 N. E. 981, is the only one counsel claimed as being so. It, on examination, bears no resemblance to this.

What was attempted there was to get a receiver appointed in hope that by such means such steps could be taken as might place the party concerned in funds to raise the money to meet the condition, and give force, and thereby vitality, to the obligation.

That appointment was refused. And I venture with some confidence to think that, in the case of Collinge v. Heywood, 8 L. J. Q. B. N. S. 98, 9 Ad. & El. 633, 112 Eng. Reprint, 1352, 1 Perry & D. 502, 2 W. W. & H. 107, had someone been kind enough to lend or give the plaintiff, before action, the money to pay, and he then had paid the bill of costs there in question, the plaintiff, even if hopelessly bankrupt and his benefactor never likely to receive any return for his advance, must have succeeded. The motive for such generosity could not have been inquired into.

I think the case has been rightly decided by the court below, and that in doing so they have not had to rely upon any principles of equity, but upon the rigid common law. Everything nominated in the bond has been complied with.

The appeal should be dismissed with costs.

Anglin, J.:

I am disposed to agree with the appellant's contention that, under the terms of the policy sued upon, actual payment by the assured of a liability of the class insured against, imposed upon him by law, was not merely a condition precedent to his right of action, but the very thing against loss from which the insurance was effected. In other words, not only would no right of action against the insurer arise until such payment, but no actual or absolute liability on its part would exist.

Nevertheless, when his employee Fornell was injured, a contingent right arose in favor of the assured against the insurer, and there was a corresponding contingent liability on the part of the latter. Upon payment of whatever liability the law imposed in consequence of the injury sustained by Fornell, ascertained by due process, that contingent right, as well as the correlative contingent liability, would become absolute. This was the situation when the insured, having become insolvent, made an assignment for the benefit of his creditors under the "Assignments Act" (Manitoba Rev. Stat. 1913, chap. 12). I am satisfied that the contingent right of the assured against the defendant company thereupon passed to his assignee. Neither can there be any reasonable doubt that it was the intention of the parties to the insurance contract that this should happen. Condition 1 of the policy provides that, while the policy shall terminate upon an assignment by the insured for the benefit of his creditors, such termination shall not affect the liability of the company as to any accident theretofore occurring.

Insurance—
employer's liability—right of
assignee for
creditors.

This condition is not limited in its terms to cases in which the assured shall have actually paid the claim of an injured employee before the assignment, and it would, in my opinion, be unwarrantable to place such a restriction upon its applica-

tion. It follows that the parties to the contract sued upon must have contemplated that the assignee might make the payment (which the assured would, by the assignment, have divested himself of the means of making) necessary to convert the contingent right which passed by the assignment into an absolute right, and the corresponding liability of the insurer into an absolute liability.

Nor does this view do violence to the condition precedent to his client's liability of payment of the employee's judgment by, and loss thereby to, the assured, so much pressed by counsel for the appellant.

"An assignee for creditors is a trustee not only for the creditors, but also for the debtor. It is his duty to make the most of the estate and pay the debts; but it is the debtor's estate all the time; and when the debts are paid it is his duty to restore the surplus, or what is not required for debts, if there be any, to the debtor. The assignee is accountable to the debtor for his dealings with the estate, and if he is guilty of any wrongdoing or breach of trust, or if he neglects or refuses to do any duty in respect of the estate, he can be held to his duty and be compelled to perform it at the debtor's instance. The covenant in question was a counter security which the debtor possessed to protect him against the claim of the plaintiffs and others. . . . The debtor still had an interest in the covenant notwithstanding the assignment, and that interest was the right to have it enforced against the defendant the moment anything fell due on the mortgage. That beneficial right he could assign and transfer." *Ball v. Tennant*, 21 Ont. App. Rep. 602, at p. 610, per Maclellennan, J. A.

The fallacy in the appellant company's contention is that it ignores the assured-assignor's continued interest in its liability. Because of that interest payment by his trustee to his judgment creditor (Fornell) out of the assigned estate would be

payment by the assured-assignor, and to his loss. It would diminish the fund to meet his creditors' claims. In the event of a deficiency he would, in consequence of such payment, remain liable for a larger balance to his other creditors. Should there be a surplus returnable to him it would be less, pro tanto, than it would have been had the Fornell claim not existed.

Nor is the appellant entitled to inquire, or to base a defense upon, the source from which the money paid by the assignee to Fornell came, any more than he would be entitled to make a like inquiry or to raise such a defense if the payment had been made by the assured himself. It would be intolerable that a person bound to indemnify or reimburse a judgment debtor should escape liability because the latter had borrowed or had received as a gift from some kindly disposed friend, either of himself or of the judgment creditor, the money required to meet his obligation. The assignee has paid a judgment against the assured-assignor as he was entitled to do in the interest of all his *cestuis que trustent*—the other creditors as well as the debtor. He is accountable only to them for the money so expended. The source from which it came is their business, but not that of the insurer.

Moreover, the insurer's liability is not measured by the amount of the dividend to which the judgment creditor would ultimately have been entitled on a distribution of the debtor's estate had his judgment not been satisfied. It is the full amount of the judgment of which, when satisfied, it covenanted for reimbursement. The assured, as already pointed out, is directly interested in having the entire liability to his judgment creditor discharged. Were it not, he would remain personally liable for any unpaid balance of it. Since the payment of the judgment, the respective rights and liabilities of the parties in the present case are, in my opinion, indistinguishable from those dealt with

in such English cases as *Re Law Guarantee, Trust, & Acci. Soc.* [1914] 2 Ch. 617, 30 Times L. R. 616, 58 Sol. Jo. 704; *Cruse v. Paine*, L. R. 6 Eq. 641, 653, 37 L. J. Ch. N. S. 711, 19 L. T. N. S. 127, 17 Week. Rep. 44, L. R. 4 Ch. 441, 38 L. J. Ch. N. S. 225; *Re Perkins* [1898] 2 Ch. 182, 189, 67 L. J. Ch. N. S. 454, 78 L. T. N. S. 666, 5 Manson, 193, 14 Times L. R. 464, 46 Week. Rep. 595.

The appellant's contingent liability for the full amount of Fornell's judgment existed when the assured made his assignment. The correlative contingent right of the assured passed to his assignee, and payment of the judgment by him has converted the latter into an absolute right, enforceable for the benefit of the estate in which both creditors and debtor are alike interested, and the former into an absolute liability.

The appeal fails and should be dismissed with costs.

Brodeur, J.:

This is an action for the recovery under a contract commonly known as an employers' liability policy. That policy undertook to indemnify Nelson & Foster against loss from the liability for damages on account of bodily injuries suffered by an employee of the company. One condition of that policy was that no action could be instituted against the company to recover unless it shall be brought for loss actually sustained and paid in money by the assured, in satisfaction of a judgment after trial of the issue.

An accident occurred to an employee of Nelson & Foster and an action was instituted against them. While the case was pending, Nelson & Foster made an assignment under the provisions of the "Assignments Act" of Manitoba, Rev. Stat. 1913, chap. 12. Judgment having been rendered against Nelson & Foster in favor of that employee, the assignee paid the amount of the judgment with money which was handed over to him by a man named Brandon, who does not seem to have been a creditor, but who seems to be in-

terested in some way or other in the distribution of the assets of Nelson & Foster, or in the discharge of their liability with regard to that employee. An action was then instituted by the assignee, the respondent Newton, to recover from the insurance company for the loss which had been suffered and the reimbursement of the money which he had paid to that employee.

The applicant company claims that it should not be held responsible for a larger sum than the amount of dividend to which that employee was entitled. That question came up in a case which was decided in 1914 in England, viz., the case of *Re Law Guarantee, Trust, & Acci. Soc.* [1914] 2 Ch. 617, 30 Times L. R. 616, 58 Sol. Jo. 704. It was there held that in a contract of insurance or indemnity the insurance company was liable to pay to the liquidator the amount of the deficiency, and not merely the amount of dividend payable.

Lord Lindley, in his work on Partnership, 5th ed. p. 375, says that "where one person has covenanted to indemnify another, an action for specific performance may be sustained before the plaintiff has actually been indemnified; and the limit of defendant's liability to the plaintiff is the full amount for which he is liable; or if he is dead or insolvent, the full amount provable against his estate, and not only the amount of dividend which such estate can pay."

The contention of the appellant is that this contract is not only a contract of indemnity to, but also of previous payment by, the insured. But in this case there was a previous payment which had been made, and we are not concerned with the question whether that payment has been rightly or legally made by the assignee. The condition of previous payment has been fulfilled, and the insurance company cannot pretend now that it is not bound to reimburse the amount which has been paid by the assignee.

A question has been raised also with regard to the power of the assignee under the "Assignments Act" to recover. The contract of assignment disposes of that contention, since it is therein declared that the assignor has handed over to the respondent all his personal estate, rights and credits, choses in action, and all other personal estate.

I may say with the learned trial judge, Mr. Justice Prendergast, that the assignee was bound to protect the trust, to save all that could be saved of the estate, and to make out of it all that could be made. There was a chose in action that could be

left barren or could be made to develop into an actual asset. It was then the assignee's duty to do what was necessary to preserve or to enforce the claim which he now exercises against the appellant company.

The appeal should be dismissed with costs.

Cassels, J.:

I concur with Mr. Justice Anglin.

Appeal dismissed with costs.

Solicitors for the appellants:
Coyne, Hamilton, & Martin.

Solicitors for the appellants:
Murray & Noble.

ANNOTATION.

Right of trustee in bankruptcy or assignee for creditors under indemnity policy.

It will be observed that the decision in the reported case (*NORTH AMERICAN ACCI. INS. CO. v. NEWTON*, ante, 1236) was based on the ground that there had been a payment of the claim of an injured employee of the insured, where the latter's assignee for the benefit of creditors had paid the claim with money advanced by a third person, so that it was unnecessary for the court to decide whether the contract involved was one of liability or indemnity.

The decision in *Travellers Ins. Co. v. Moses* (1901) 63 N. J. Eq. 260, 92 Am. St. Rep. 663, 49 Atl. 720, was also on the ground that there had been a payment, it being held in that case, where an employee of one holding an indemnity policy was injured and recovered judgment against the insured, and the latter then filed a petition in bankruptcy, and a trustee was appointed, and the employee's claim was proved and allowed in the bankruptcy proceedings, that this amounted to a payment to the employee to the extent of her share of the assets which had passed to the trustee, and that the trustee was not precluded from recovering, to the extent of that share, against the insurer by a so-called "no action" clause, providing that no action should lie against the insurer unless it should be brought by the insured itself to reimburse it for loss

actually sustained and paid by it in satisfaction of a judgment. The court said: "By force of § 70 of the United States Bankrupt Act of July 1st, 1893, the property of the lamp company [the insured] was transferred to the trustee in bankruptcy on his appointment and qualification. This transfer was made for the satisfaction of all claims against the company provable under the act, and when the *Bardzik* judgment was so proved, it was for the satisfaction of that judgment. From that time the trustee became trustee for her to the extent of her share of the rights which had passed to him from the company, and to that extent the company had actually paid her trustee and agent by the transfer of its property. The contract of the insurance company does not require that payment should be made in cash, and this payment in property is sufficient compliance with its terms. Before payment was actually made by the lamp company, its right under the contract was substantial and valuable as an asset, but was immature. As soon, however, as payment was made, its right became perfect, and eodem instanti passed by operation of law to the trustee, and the trustee became at once entitled to enforce it."

In *Frye v. Bath Gas & E. Co.* (1908) 97 Me. 241, 59 L.R.A. 444, 94 Am. St. Rep. 500, 54 Atl. 395, an employer,

holding an indemnity policy containing a "no action" clause, became insolvent before an injured employee recovered judgment, and made a common-law assignment for the benefit of such creditors as became parties, and the employee, who did not become a party to the assignment, filed a suit in equity against his employer, the assignee, and the company issuing the policy, alleging that the employer and his assignee had neglected to enforce the policy, and praying that the insurer be compelled to pay the amount of the complainant's judgment. The policy, however, was construed to be one of indemnity, and it was held that notwithstanding the employer's assignment there had been no payment, and that the insurer was therefore not liable. The court, distinguishing *Travellers Ins. Co. v. Moses* (N. J.) *supra*, said: "In this case the court decided that the transfer of the employer's property to a trustee in bankruptcy, by operation of the United States Bankrupt Act, was payment within the requirement of this clause, and perfected the liability of the insurer for so much as the employee was entitled to receive out of the bankrupt's estate; that this liability of the insurer passed to the trustee in bankruptcy; and that the amount for which the insurer was liable would be determined by ascertaining what percentage all the assets of the bankrupt, outside of the insurance policy, would pay on all the debts proved against the estate, outside of the employee's judgment. But this doctrine is not applicable to the case under consideration for various reasons. The common-law assignment of the gas company was for the benefit of such of its creditors as became parties thereto within the time limited, long since elapsed, and neither the complainant, nor his intestate during his lifetime, became a party to this assignment. Again, it does not appear that any dividend has ever or will ever be paid; upon the contrary, it is said in argument that there were no assets to be divided."

In *Stenbom v. Brown-Corliss Engine Co.* (1909) 137 Wis. 564, 20 L.R.A. (N.S.) 956, 119 N. W. 308, where it

appeared that an employee's claim could not be proved in the bankruptcy proceedings of his employer, as his judgment was not recovered until the time allowed for filing claims had expired, it was held that the giving to the employee of a note of a receiver who had been appointed in supplementary bankruptcy proceedings to collect the judgment was not a satisfaction of the claim within the meaning of an indemnity policy held by the employer, providing that no action shall lie against the insurer unless brought by the insured himself to reimburse him for actual loss sustained and paid by him in satisfaction of a judgment; and it was consequently held to give the receiver no standing to enforce the policy.

An interesting question was involved in *Georgia Casualty Co. v. Bowron* (1916) L.R.A.1916F, 876, 147 C. C. A. 159, 233 Fed. 89, where it appeared that an employer's liability policy was assigned to a trustee in bankruptcy, that before the sale of the bankrupt's property, and while it was being operated by the trustee, an employee was injured, and a judgment was recovered against the trustee, and that this judgment was paid by a check given to the trustee by one who purchased the bankrupt's property on condition that he pay the judgment. It was held that, notwithstanding a provision of the policy that no action should lie against the insurer unless brought by the insured for loss actually sustained and paid in money by the insured in satisfaction of a judgment, a recovery might be had. The court said: "It resulted from the court's action that the sale of the bankrupt's property was a conditional one, that the amount of the judgment recovered by Sibert [the employee] was a part of the purchase price required to be paid, was made a charge on the property in the hands of the purchaser or a subvendee, and that the property remained under the control of the court and subject to administration as assets of the estate in bankruptcy so far as that charge upon it was concerned. The policy sued on insured to the benefit, not of James

Bowron, the individual, but of the bankrupt estate which the court was administering, and which was in his charge as the court's agent and trustee. It well may be inferred that the net amount realized from that estate was lessened—in other words, that the estate was subjected to a loss—by selling it conditionally and subject to the charge against it of the amount to be recovered as damages for a personal injury that had been sustained before the sale was made, instead of selling it unconditionally and free of any encumbrance. But, aside from that consideration, a vendor who brings about the payment of a demand of a third party against him by making it a charge upon the thing sold, which is worth greatly more than the amount of the demand so provided for, may well be regarded as in reality the payer of that demand, though the money used in making the payment is supplied by the conditional owner of the thing sold, who is practically coerced into making the payment for the vendor to save himself. In such a case it is at last the vendor who supplies the means of bringing about the payment. A result of the orders of the court above referred to, and what was done under them, was to put the bankrupt estate, represented by the assured, its trustee, in the position of such a vendor. The evidence as a whole was such as to require the con-

clusions that the bankrupt estate, while it was subject to administration under the orders of the court by the trustee, to whom the policy was payable, sustained a loss measured by the amount of the judgment recovered by Sibert, and that that judgment in reality was satisfied out of the bankrupt estate while it was still within the court's grasp. A contrary conclusion would be the result of considering only the form which the transaction assumed, and losing sight of the real nature and effect of it."

In *SCHAMBS v. FIDELITY & C. Co.* ante, 1231, where the policy undertook to indemnify the insured against "loss from liability" imposed by law for damages on account of injuries suffered in consequence of the insured's malpractice, and did not contain the "no action" clause, the words "loss from liability" were construed to mean that kind of a loss which comes into existence when the liability of the insured becomes irretrievably fixed; and it was accordingly held that the trustee of the insured, who had become a bankrupt after a judgment was recovered against him for malpractice, was entitled to maintain an action against the insurer for the face of the policy, although he had been able to pay from the assets of the insured but a small part of the claim of the judgment creditor, who was the only one who presented a claim for payment.

J. T. W.

SIMON M. BAUM, Plff. in Err.,
v.
INDUSTRIAL COMMISSION et al.

Illinois Supreme Court—June 18, 1919.

(288 Ill. 516, 123 N. E. 625.)

Master and servant — scope of employment — emergency act.

1. Performance by an employee, during emergency, of an act which he has reason to believe is in the interest of his employer, is not beyond the scope of his employment.

[See note on this question beginning on page 1247.]

Workmen's compensation — when injury arises out of employment.

2. For an injury to arise out of the employment within the meaning of the Workmen's Compensation Act there must be some causal relation between the employment and the injury, although it is not necessary that the injury be one which ought to have been foreseen or expected.

— origin in nature of employment.

3. An injury to an employee must, in order to arise out of the employment within the meaning of the Workmen's Compensation Act, be one which after the event may be seen to have had its origin in the nature of the employment.

Master and servant — duty to resist strikers.

4. A cutter in a factory employing women is under obligation, when rioting strikers from other establishments attempt to force themselves into the shop to the terror of employees and danger to the property, to assist the employer in defending himself, his employees, and his property from the strikers.

[See 18 R. C. L. 655.]

Workmen's compensation — injury by strikers — arising out of employment.

5. Injury to an employee in a factory when he attempts to assist his employer in defending himself, his property, and his employees from the attacks of rioting strikers from other establishments, who attempt to force their way into

the shop, arises out of his employment within the meaning of the Workmen's Compensation Act.

Evidence — contents of letter.

6. An arbitrator in a workmen's compensation case cannot receive oral proof of the contents of a letter making demands on the employer, failure to comply with which is alleged to have caused the injury, since the letter itself is the best evidence of its contents.

— character of evidence admissible.

7. The evidence which may be received by an arbitrator in a workmen's compensation case must be competent and legal as tested by the usual rules for producing evidence in any legal proceeding.

— opinion evidence — absence of prejudice.

8. Permitting the employer to state that when an employee was injured he was protecting the employer's life and property is not ground for reversing an award under the Workmen's Compensation Act, if there was testimony as to what the employee was actually doing, and there was sufficient competent evidence to sustain the finding of the Commission.

— power of court — ordering execution.

9. The court has no power to order execution upon affirming an award under the Workmen's Compensation Act, where the statute empowers it merely to affirm or set aside the decision, and the employer has given bond to pay the award if his appeal is not successful.

ERROR to the Circuit Court for Cook County (Torrison, J.) to review a judgment confirming an award of the Industrial Commission to claimant, in a proceeding by her under the Workmen's Compensation Act, to recover compensation for the death of her son. *Reversed.*

The facts are stated in the opinion of the court.

Mr. John Clark Baker, for plaintiff in error:

Oral testimony as to the contents of the letter should not have been admitted.

Victor Chemical Works v. Industrial Bd. 274 Ill. 11, 113 N. E. 173, Ann. Cas. 1918B, 627; **Morris & Co. v. Industrial Bd.** 284 Ill. 67, L.R.A.1918E, 919, 119 N. E. 944; **Chicago & A. R. Co. v. Industrial Bd.** 274 Ill. 336, 113 N. E. 629; **Young v. People**, 221 Ill. 51, 77 N. E. 536.

The employer should not have been required as a witness to express an

opinion as to whether the deceased was protecting the employer's property, and the evidence cannot be availed of to support the award.

American Car & Foundry Co. v. Hill, 226 Ill. 227, 80 N. E. 784.

The accident did not arise out of the employment.

Murray v. Denholm [1911] S. C. 1087, 48 Scot. L. R. 896, 5 B. W. C. C. 496; **Collins v. Collins** [1907] 2 Ir. R. 104; **Clark v. Clark**, 189 Mich. 652, 155 N. W. 507; **Mitchinson v. Day Bros.** [1913] 1 K. B. 603, 82 L. J. K. B. N. S. 421, 108 L. T. N. S. 193, 29 Times L.

R. 267, 57 Sol. Jo. 300, 6 B. W. C. C. 190.

Judgment directing the payment of money and the issuance of an execution should not have been entered.

Smith-Lohr Coal Min. Co. v. Industrial Bd. 279 Ill. 88, 116 N. E. 656; Sweeney v. Chicago Teleph. Co. 212 Ill. 475, 72 N. E. 677; Hart Bros. v. West Chicago Park, 186 Ill. 464, 57 N. E. 1036; Sanitary Dist. v. Chapin, 226 Ill. 499, 80 N. E. 1017, 9 Ann. Cas. 113; O'Brien v. Gooding, 194 Ill. 466, 62 N. E. 898.

Messrs. John H. McAuliffe and Joseph L. Lisack, for defendant in error:

In a proceeding under the Workmen's Compensation Act, mere error in the admission or exclusion of evidence is not sufficient ground for reversal.

Victor Chemical Works v. Industrial Bd. 274 Ill. 11, 113 N. E. 173, Ann. Cas. 1918B, 627; Morris & Co. v. Industrial Bd. 284 Ill. 67, L.R.A.1918E, 919, 119 N. E. 944.

The accident arose out of and in the course of the employment.

Ohio Bldg. Safety Vault Co. v. Industrial Bd. 277 Ill. 96, 115 N. E.149, 14 N. C. C. A. 224; Andrew v. Failsworth Industrial Soc. [1904] 2 K. B. 32, 73 L. J. K. B. N. S. 511, 68 J. P. 409, 52 Week. Rep. 451, 90 L. T. N. S. 611, 20 Times L. R. 429; Nisbet v. Rayne [1910] 2 K. B. 689, 80 L. J. K. B. N. S. 84, 103 L. T. N. S. 178, 26 Times L. R. 632, 54 Sol. Jo. 719, 3 B. W. C. C. 507, 3 N. C. C. A. 268; Anderson v. Balfour [1910] 2 Ir. R. 497, 44 Ir. L. T. 168, 3 B. W. C. C. 588; Weekes v. Stead [1914] W. C. & Ins. Rep. 434, [1914] W. N. 263, 83 L. J. K. B. N. S. 1542, 111 L. T. N. S. 693, 30 Times L. R. 586, 58 Sol. Jo. 633, 7 B. W. C. C. 398, 6 N. C. C. A. 1010; Trim Joint Dist. School v. Kelly [1914] W. C. & Ins. Rep. 359, 83 L. J. P. C. N. S. 220, 111 L. T. N. S. 305, 30 Times L. R. 452, 58 Sol. Jo. 493, 7 B. W. C. C. 274; 48 Ir. L. T. 141, Ann. Cas. 1915A, 104; McNichol's Case, 215 Mass. 497, L.R.A.1916A, 306, 102 N. E. 697, 4 N. C. C. A. 522; Challis v. London & S. W. R. Co. [1905] 2 K. B. 154, 74 L. J. K. B. N. S. 569, 53 Week. Rep. 613, 93 L. T. N. S. 330, 21 Times L. R. 486, 7 W. C. C. 28; Chicago Dry Kiln Co. v. Industrial Bd. 276 Ill. 556, 114 N. E. 1009, Ann. Cas. 1918B, 645; Dragovich v. Iroquois Iron Co. 269 Ill. 478, 109 N. E. 999, 10 N. C. C. A. 475; Pekin

Cooperage Co. v. Industrial Bd. 277 Ill. 53, 115 N. E. 128.

The judgment entered by the circuit court was authorized by law.

McMurray v. Peabody Coal Co. 281 Ill. 218, 118 N. E. 29; Chicago & International Traction Co. v. Industrial Bd. 282 Ill. 230, 118 N. E. 464.

Thompson, J., delivered the opinion of the court:

This writ of error is brought to review a judgment of the circuit court of Cook county, confirming an award by the Industrial Commission against Simon M. Baum, plaintiff in error, of compensation for the death of Edward Tomczyk, who died February 25, 1917, from injuries received February 16, 1917, in a difficulty caused by some strikers raiding the factory where deceased was working. The questions raised are whether the death of Edward Tomczyk arose out of his employment, whether there was error in the admission of certain evidence, and whether the circuit court, in confirming the award of the Industrial Commission, erred in entering a money judgment and ordering execution.

Deceased was employed by plaintiff in error, doing business as the Nora Shirt Waist Company, as an assistant cutter in his factory located at Milwaukee avenue and Oakley boulevard, in the city of Chicago. The workroom of this factory is triangular in shape, there being about 5,000 square feet of floor space in the room. The entrance to this workroom is from Milwaukee avenue through an outer door, down a passageway, and through a second door. At the right of the passageway between the avenue and the workroom was Baum's office. At the time of the difficulty there were employed in the workroom two men and about twenty-five women. Plaintiff in error manufactured wash dresses, shirt waists, and other like wash garments. As assistant cutter it was the duty of deceased to lay out goods and cut it with a knife or a power-driven machine. It appears that on Janu-

ary 13, 1917, plaintiff in error received a letter from the International Garment Workers' Union, demanding that he sign up with the union to avoid a strike and other difficulty. On February 14 a strike was called by this union, which strike was more or less general throughout the city of Chicago. None of the employees of plaintiff in error were members of this union, and there was no strike at this factory, and no trouble existed between employer and employees. Two days later, at about 11:45 A. M., twenty or thirty striking members of this union, men and women, rushed through the passageway, past the office, and into this workroom, calling upon the employees of plaintiff in error to strike. Plaintiff in error was in his office at the time, and when he saw the crowd rushing into his factory he ran to the rear of his office and tried to prevent the crowd from entering his workroom. He seized a hammer, which was taken away from him by the strikers. He then tried to reach his telephone to call the police, but was prevented by the strikers. As the crowd forced its way past plaintiff in error, Tomczyk walked around from his cutting table, where he was working, and tried to hold them back. The plaintiff in error was standing about 4 feet away from Tomczyk, and there were about six male strikers standing between them. The remaining strikers, men and women, were crowded around plaintiff in error, Tomczyk, and the forelady, all the women employees of the factory having fled in a panic. In the course of the riot Tomczyk was stabbed, and cried out, "Baum! I am cut!" It was from this wound that he died. The strikers left immediately, throwing bricks through the plate glass windows as they went.

The first question is whether Tomczyk's injury, which was received in the course of his employment, arose out of his employment. The words, "arising out of," have reference to the cause or origin of

the accident, and seem to indicate that the accident must happen out of the transaction of the business in which the workman is engaged. That would include any accident which might naturally result from the manner in which the business is carried on and which would be considered incidental to the employment itself. This injury was clearly a mishap, occurring outside of the usual course of events, and was an emergency which arose while Tomczyk was engaged in his work. It is well argued that such a situation could hardly have been contemplated by either the employer or the employee when Tomczyk entered the employment of plaintiff in error. On the other hand, when plaintiff in error failed to sign the agreement with the union, it was certain to cause the members of the union to use some measure to compel compliance with their demands. It was generally known that there was a strike in the city of Chicago, and this fact was known to the plaintiff in error. Unfortunately, during the course of a strike, and in the excitement of events which occur during a strike, trouble quite frequently arises. In view of the general conditions and events that were happening in the immediate vicinity of the factory of plaintiff in error, it can hardly be said he should not, as a reasonable person, expect some difficulty with the strikers.

While there must be some causal relation between the employment and the injury, it is not necessary that the injury be one which ought to have been foreseen or expected. It must, however, be one which, after the event, may be seen to have had its origin in the nature of the employment.

Workmen's compensation—when injury arises out of employment.

—origin in nature of employment.

Such was our holding in *Pekin Co-operative Co. v. Industrial Commission*, 285 Ill. 31, 120 N. E. 530. Where a workman voluntarily performs an

act, during an emergency, which he has reason to believe is in the interest of his employer, and is injured thereby, he is not acting beyond the scope of his employment.

Master and servant—scope of employment—emergency act.

It is conceded that Tomczyk was a peaceable and law-abiding citizen. It is also conceded that the strikers rushed into the workroom without any warning, and that plaintiff in error tried to eject them. The evidence shows that there was great excitement in the workroom, and that the women employees fled screaming to the back of the room. Nothing was said between the plaintiff in error and Tomczyk. Tomczyk, seeing his employer and his fellow employees in apparent danger, came to the rescue. He was assisting his employer in the defense of his person and his property, and was acting in defense of his fellow employees, all of whom were women. We have held that it is the duty of an employee to do what he can to save the lives of his fellow employees when all are at the time working in the line of their employment. *Dragovich v. Iroquois Iron Co.* 269 Ill. 478, 109 N. E. 999, 10 N. C. C. A. 475. That the fellow employees of deceased were not actually in danger of losing their lives cannot change the rule. The danger was clearly apparent to Tomczyk. He acted as any man would have acted under the circumstances. The rioters had rushed in without warning and threw the women employees into a panic. It was up to deceased to act, or to abandon the workroom and its occupants to trespassing strangers, apparently bent upon doing damage to whatever came in their path. The situation was an unusual and unforeseen one, and called for quick action. From every point of view it was the duty of deceased to defend himself and his employer, and to assist his employer in defending the persons of

—duty to resist strikers.

his women coworkers. Where the trouble arises out of the employer's work, and as a result of it one of the trespassers injures an employee who is defending his employer's business, it may be inferred that the injury arose out of the employment.

Workmen's compensation—injury by strikers—arising out of employment.

An assault arises out of one's employment in a case where the duties of the employee, under the particular situation, are such as are likely to cause him to have to deal with persons who, under the circumstances, are liable to attack him. *Ohio Bldg. Safety Vault Co. v. Industrial Bd.* 277 Ill. 96, 115 N. E. 149, 14 N. C. C. A. 224. Such was the situation in this case. Deceased was assaulted, not for anything he had done, but because he was in the employ of the plaintiff in error, who was in bad favor with the union on account of not having complied with its demands. We are, therefore, of the opinion that the injury, which occurred in the course of the employment, arose out of the employment.

It appears that plaintiff in error received a letter from the union demanding that he sign up with them to prevent a strike. It was attempted to prove the contents of this letter by oral testimony. This was error. When an arbitrator hears evidence, it must be evidence that is competent and legal, as tested by the usual rules for producing evidence in any legal proceeding. *Victor Chemical Works v. Industrial Bd.* 274 Ill. 11, 113 N. E. 173, Ann. Cas. 1918B, 627. There was, however, competent evidence showing the existence of the strike, and no damage was done plaintiff in error by this ruling. Neither was there any damage done when the plaintiff in error expressed the opinion that deceased was protecting the employer's life and property. He had

Evidence—contents of letter.

—character of evidence admissible.

testified as to what was being done by deceased, and there was sufficient competent evidence to sustain the finding of the Commission.

It is contended by plaintiff in error that the circuit court erred in entering a judgment which not only confirmed the award of the Commission, but also directed the payment of the amount of the award and ordered execution. The proceedings in cases of this character are purely statutory, and it is a settled rule that the requirements of the statute must govern and control them. These proceedings were under paragraph (f) of § 19 of the Compensation Act (Laws 1913, p. 349), and the only authority of the court under this paragraph is to confirm or set aside the decision of the Industrial Board. From a consideration of the whole act, it would appear that the legislature intended that the employer might protect himself against a judgment for payment of the award by performing certain optional conditions. Paragraph (g) of the same section provides that when the proceedings are under that section "no judgment shall be entered in the event the employer shall file with the said board its bond, with good and sufficient surety in double the amount of the award, conditioned upon the payment of said award in the event the said employer shall fail to prosecute with effect proceedings for review of

the decision, or the said decision upon review shall be affirmed." Paragraph (f) of the same section (the one under which these proceedings are brought) provides that the writ of certiorari shall not issue until the employer has filed with the circuit clerk "a bond conditioned that if he shall not successfully prosecute said writ or said suit he will pay the said award, and the costs of the proceedings in said court. The amount of the bond shall be fixed by any member of the Industrial Board and the surety or sureties on said bond shall be approved by the clerk of said court." [Laws 1917, p. 503.] Such a bond was filed in this case. These provisions to prevent judgments are made to avoid encumbering the employer's property with accumulative liens that, in many cases, would not be discharged for many years, and might run for the life of the employee. These judgments might accumulate until the defect in the title of the employer's real estate would make it unmarketable. The employee is fully protected by the bond required by the statute. The court in this case had only such power on certiorari as the statute gave, and that was to confirm or set aside the decision of the Commission. There is nothing in the statute to authorize a judgment directing the payment of the amount of the award and ordering execution to issue.

The judgment is reversed, and the cause remanded, with directions to enter an order confirming the decision of the Industrial Commission.

ANNOTATION.

Right of employee to compensation for injuries received while acting in an emergency.

As to compensation for death or injury from excitement and overexertion, see annotation to *Crosby v. Thorp-Hawley Co.* post, 1253.

While compensation under the statute ordinarily is not recoverable unless the injury arises out of the employment, the cases, almost without

exception, hold that an employee does not go outside his employment if, when confronted with a sudden emergency, he steps beyond his regularly designated duties in an attempt to save himself from injury, to rescue another employee from danger, or to save his employer's property.

California.—*Ocean Acci. & Guarantee Corp. v. Industrial Acci. Commission* (1919) — Cal. —, 182 Pac. 35; *United States Fidelity & G. Co. v. Industrial Acci. Commission* (1917) 174 Cal. 616, 163 Pac. 1013.

Illinois.—*Dragovich v. Iroquois Iron Co.* (1915) 269 Ill. 478, 109 N. E. 999, 10 N. C. C. A. 475; *Munn v. Industrial Bd.* (1916) 274 Ill. 70, 113 N. E. 110, 12 N. C. C. A. 652.

Massachusetts. — *Borin's Case* (1917) 227 Mass. 452, L.R.A.1918A, 217, 116 N. E. 817.

New York. — *Waters v. William J. Taylor Co.* (1916) 218 N. Y. 248, L.R.A. 1917A, 347, 112 N. E. 727; *Rist v. Larkin* (1916) 171 App. Div. 71, 156 N. Y. Supp. 875; *Rzepczynski v. Manhattan Brass Co.* (1917) 179 App. Div. 952, 165 N. Y. Supp. 1110.

Texas. — *Southern Surety Co. v. Stubbs* (1917) — Tex. Civ. App. —, 199 S. W. 343; *General Acci. Fire & Life Assur. Corp. v. Evans* (1918) — Tex. Civ. App. —, 201 S. W. 705.

England.—*Rees v. Thomas* [1899] 1 Q. B. 1015, 68 L. J. Q. B. N. S. 539, 47 Week. Rep. 504, 80 L. T. N. S. 578, 15 Times L. R. 301; *Hapelman v. Poole* (1908) 25 Times L. R. 155, 2 B. W. C. C. 48; *Yates v. South Kirkby, etc., Collieries* [1910] 2 K. B. 538, 79 L. J. K. B. N. S. 1035, 103 L. T. N. S. 170, 26 Times L. R. 596, 3 B. W. C. C. 418, 3 N. C. C. A. 225; *Matthews v. Bedworth Brick, Tile & Timber Co.* [1899; County Ct.] 106 L. T. Jo. 485, 1 W. C. C. 124.

Canada.—*Cameron v. Canadian P. R. Co.* (1918) 11 B. W. C. C. (Sask.) 486.

Scotland.—*London & E. Shipping Co. v. Brown* (1905) 7 Sc. Sess. Cas. 5th series, 488; *Devine v. Caledonian R. Co.* (1899) 1 Sc. Sess. Cas. 5th series, 1105, 36 Scot. L. R. 877, 7 Scot. L. T. 99.

Thus an employee on a crane in a river, who, on the breaking of one of the timbers of the crane, jumped into the river to save himself and suffered an injury therefrom, was injured by accident within the meaning of the New York statute. *Rist v. Larkin* (1916) 171 App. Div. 71, 156 N. Y. Supp. 875. The court said: "While the claimant jumped into the water, he did so to prevent a personal injury resulting from the accidental

breaking of the timber. The jumping into the river was, therefore, not a voluntary act, but was the result of the accident, which put the claimant in such peril that his getting wet must be considered accidental rather than voluntary."

So in *Borin's Case* (1917) 227 Mass. 452, L.R.A.1918A, 217, 116 N. E. 817, in reversing an award of compensation to a workman injured because he had unnecessarily gone into a dangerous place to open windows which the employer had nailed down purposely, to prevent such act on the part of the employee, the Massachusetts court said: "We do not intend, however, to intimate that an employee is not within the statute, where, being suddenly called upon to save himself from threatened loss of life or limb or serious bodily harm, he necessarily violates a rule appertaining to the sphere of his employment, and is injured."

This rule finds frequent application where the employee is injured while attempting to rescue fellow employees from threatened injury or death.

Thus, in *United States Fidelity & G. Co. v. Industrial Acci. Commission* (1917) 174 Cal. 616, 163 Pac. 1013, the court said that, if an employee was overcome by gas fumes when going to the aid of another employee who had been overcome, he was engaged in the employer's business.

And in *Yates v. South Kirkby, etc., Collieries* [1910] 2 K. B. (Eng.) 538, 79 L. J. K. B. N. S. 1035, 103 L. T. N. S. 170, 26 Times L. R. 596, 3 B. W. C. C. 418, 3 N. C. C. A. 225, it was held that it is clearly the duty of an employee to go to the aid of another employee who has been injured, and any injuries received while so acting may be found to arise out of and in the course of the employment.

So, an employee who is injured while attempting to rescue a fellow employee from a dangerous position, arising in the course of his employment, is within the protection of the Texas act, unless his act in attempting the rescue is in disobedience of the positive orders of his employer. *General Acci. Fire & Life Assur. Corp. v. Evans* (1918) — Tex. Civ. App. —, 201 S. W.

705. The court said that it had been held in several jurisdictions that it is the duty of every employee to undertake to prevent injury to fellow employees, and that in such attempts they are acting within the course of their employment.

So too, in *Dragovich v. Iroquois Iron Co.* (1915) 269 Ill. 478, 109 N. E. 999, 10 N. C. C. A. 475, it was held that a workman does not go out of his employment in attempting to rescue a fellow workman who has fallen into a quantity of hot water. The court said: "It is the duty of an employer to save the lives of his employees, if possible, when they are in danger while in his employment, and therefore it is the duty of a workman in his employ, when occasion presents itself, to do what he can to save the lives of his fellow employees, when all are at the time working in the line of their employment. Any other rule of law would be not only inhuman, but unreasonable and uneconomical, and would, in the end, result in financial loss to employers on account of injuries to their employees."

And fatal injuries to a workman while attempting to rescue a fellow workman, who had fallen down a shaft which they were engaged in cleaning out, arise out of and in the course of the employment. *Matthews v. Bedworth Brick, Tile & Timber Co.* (1899; County Ct.) 106 L. T. Jo. (Eng.) 485, 1 W. C. C. 124.

A laborer whose duties in unloading a vessel do not require him to go upon it does not go out of his employment in volunteering to go into the hold to rescue another laborer who has been overcome by gas. *London & E. Shipping Co. v. Brown* (1905) 7 Sc. Sess. Cas. 5th series, 488. The Lord Justice Clerk said: "I cannot doubt that in a sudden emergency, where there is danger, a workman does not go out of his employment, if he endeavors to prevent the danger from taking effect. For example, if, in a yard where a man is working, a horse suddenly runs off, and there is danger to others, I would hold that if the man did his best to stop the horse and met with an injury he suffered that injury in the course

6 A.L.R.—79.

of his employment. It would be a right thing to do, in the interest of the safety of those in the yard, and therefore in the interests of his master. The same would apply to the endeavor to sprag a runaway wagon which might cause loss of life. No doubt this case is somewhat unusual, and the endeavor was made to liken it to the case of persons arriving on the scene of a disaster, such as a coal-pit explosion, and deliberately volunteering to join a rescue party and who, therefore, could be held not to be acting as employees, but solely as individuals. I can conceive such a case, where it would be very difficult to make the act apply; but, in my view, any such case is distinguishable from the present one. Here the deceased was at the work that was going on. Had one of the men who was with him, engaged in work on the quay, come suddenly into danger, and he had instantly endeavored to save him, I could have no hesitation in saying that his doing so was an act in the course of his employment. I do not feel that his case falls into a different category because the man he tried to save was engaged at a different department of the same work in the factory."

The principle has been applied and recovery allowed in some cases, where the attempted rescue was of a person other than a fellow employee.

Thus an employee of a company, who at the time of the accident was engaged in stabling horses in the course of his employment, is entitled to compensation for injuries received in an attempt to rescue a child that was in danger of being run down, on the company's premises, by an automobile driven by the president of the company, who was there on company business. *Ocean Acci. & Guarantee Corp. v. Industrial Acci. Commission* (1919) — Cal. —, 182 Pac. 35. The court said: We have no hesitation in saying that upon these facts—and, as we have said, they are the most favorable that can be properly contended for by the insurance company—Nelson was injured in the course of his employment. To be sure, he was not employed to rescue children. But cer-

tainly it was reasonably within the course of his employment, within the scope of those things which might reasonably be expected of him as an employee, that he should attempt to prevent an accident on his employer's premises, particularly where the employer would not improbably be responsible for the accident. It is not difficult to imagine how summarily the services of an employee would be dispensed with, who, seeing that such an accident was about to happen, held back and did nothing to prevent it on the excuse that it did not come within the scope of his employment. If, in this case, Nelson, instead of being injured in an attempt to prevent a child being run over on his employer's premises by an officer of his employer, there on his company's business, had been injured in an attempt to put out an incipient fire accidentally started in the barn, it is hardly possible that any question would have been made. Yet there is no real distinction between the two cases. Nelson was no more employed to put out fires than he was to rescue children. The point is that the danger which threatened, and in attempting to remove which he was hurt, was one which threatened his employer and directly concerned it, and with which Nelson was confronted in the discharge of his customary duties."

So an employee of an employer having a contract for part of the construction work of a building, who is injured while attempting to rescue the employee of another employer having a contract for another part of the construction, suffers an injury arising out of and in the course of his employment. *Waters v. William J. Taylor Co.* (1916) 218 N. Y. 248, L.R.A.1917A, 347, 112 N. E. 727. The court said: "It must have been within the reasonable anticipation of his employer that his employees would do just as Waters did if the occasion arose, for it is quite inconceivable that any employer should expect or direct his employees to stand still while the life of a fellow workman, working a few feet away, was imperiled by such an accident as occurred here, and it seems to us that

the accident arose out of his employment."

Again, the fact that an employee steps outside of his regularly designated employment will not of itself prevent the recovery of compensation if he is injured in an attempt to save his employer's property.

Thus in *Rees v. Thomas* [1899] 1 Q. B. (Eng.) 1015, 68 L. J. Q. B. N. S. 539, 47 Week. Rep. 504, 80 L. T. N. S. 578, 15 Times L. R. 301, recovery of compensation was allowed where a fireman employed in a coal mine was, in the course of his duty, carrying a report of the state of the mine from the pit's mouth to the office, and the horse drawing the tramway truck in which he was riding ran away, and in endeavoring to stop it he fell and was killed.

Also recovery was allowed where a carter in the employment of a railway company was injured while he was endeavoring to stop a horse which had suddenly started off from some unexplained cause with the cart. *Devine v. Caledonian R. Co.* (1899) 1 Sc. Sess. Cas. 5th series, 1105, 36 Scot. L. R. 877, 7 Scot. L. T. 99.

So, in *Rzepczynski v. Manhattan Brass Co.* (1917) 179 App. Div. 952, 165 N. Y. Supp. 1110, the appellate division unanimously affirmed an award of compensation to the dependents of a man whose ordinary occupation was screening coal, but who was injured while assisting in putting out a fire which had occurred in the plant. Commissioner Lyon, in his opinion, said: "It is probably true that there was no active duty upon the deceased to be present at or assist in the putting out of the fire; but where fire occurs in a manufacturing plant, I do not think that an employee who leaves his actual place of duty for the time being, to assist or even be present at the attempt to quench the fire, by that act takes himself out of his employment. Surely, there are some things which an employee may do without forfeiting his right to compensation, even if his duties do not require the performance of the act; and I think it would be too harsh a rule to hold that an employee who goes to a place of a fire in the

plant by that act takes himself out from under the protection of the statute."

So, where a workman employed by a lion tamer was left in charge of the cages of lions, and was injured while attempting to get a lion back into the cage, recovery was allowed on the theory that, as he had been left in charge, he might properly attempt to drive the lion back. *Hapelman v. Poole* (1908) 25 Times L. R. (Eng.) 155, 2 B. W. C. C. 48.

And the fact that the emergency arose and the injury happened after the regular working hours will not preclude compensation.

Thus, an assistant engineer of a dredge boat, whose duties require him to remain on the boat while off duty, suffers injury arising out of his employment, where, at the time of his injury, he was off duty so far as dredging was concerned, but was attempting to save the vessel from shipwreck during a storm. *Southern Surety Co. v. Stubbs* (1917) — Tex. Civ. App. —, 199 S. W. 348.

So the death of an employee from suffocation by smoke and fumes, while he was engaged in attempting to extinguish a fire upon the employer's premises, may be found to have been caused by accident arising out of the employment, although the injury occurred after the hours of his regular employment. *Munn v. Industrial Bd.* (1916) 274 Ill. 70, 113 N. E. 110, 12 N. C. C. A. 652, the court said: "An employee should not be penalized for working overtime if he desires to do so, or for endeavoring to save his master's property."

The emergency doctrine, as laid down in the above cases, was also applied in the case of an injury to a railroad conductor received while climbing over a train which was standing across the pathway which he had to take to go to the yard office for orders, and he had but two or three minutes to spare before taking his train out. *Cameron v. Canadian P. R. Co.* (1918) 11 B. W. C. C. (Sask.) 486.

In a few cases it has been held that the emergency doctrine does not apply, and no recovery is allowable, where

the dangerous situation, moving the employee to action, did not itself arise out of the employment.

Thus, compensation must be denied in a case in which an employee goes to the rescue of his employer, who is being attacked by a gang of rowdies, and is stabbed to death. *Collins v. Collins* [1907] 2 Ir. R. 104.

So a workman is not injured by accident arising out of his employment where the injury is incurred in attempting to rescue a fellow workman, who, while engaged in hauling a bogie across a public street, indulged in some horseplay and became in danger of injury by the bogie. *Mullen v. D. Y. Stewart & Co.* (1908) 1 B. W. C. C. (Scot.) 204. Lord Ardwall said: "M'Ginlay [the workman rescued] had improperly begun to play with a rope by means of which another squad of men were hauling a bogie from the north to the south side of the street, and he had fallen across the rope, so that at the time of the accident M'Ginlay had not returned to his own working place. He was not engaged on his master's work. On the contrary, he was impeding another squad of men in their work, and he was in no different position as regards the respondents than he would have been if he had been a stranger who had fallen in the street in front of a lorry or a tramway car. And it is obvious that in neither of these cases could it have been said of Mullen, if he had tried to rescue M'Ginlay, that the accident arose out of and in the course of his employment."

Closely analogous to the emergency cases cited above are those cases in which the employee is injured, while doing some work which, though not assigned especially to him for performance, must be done before his own work can continue. In such a case, injury to the employee while doing such work may be found to have arisen out of and in the course of the employment. *Southern P. Co. v. Industrial Acci. Commission* (1918) 177 Cal. 378, 170 Pac. 822 (fireman in rolling mill went outside his regular place of work to procure proper material for his fur-

nace); *Elk Grove Union High School Dist. v. Industrial Acci. Commission* (1917) 34 Cal. App. 589, 168 Pac. 392, 15 N. C. C. A. 148 (school-teacher injured in moving heavy desk standing before a bookcase, which prevented the opening of the door); *Manning v. Pomerene* (1917) 101 Neb. 127, 162 N. W. 492 (employee injured in attempt to move beams out of the narrow passageway through which he is obliged to pass); *White v. Industrial Commission* (1918) 167 Wis. 488, 167 N. W. 816 (employee, charged with duty to receive mail from one train and carry it to another, injured in attempting to get onto the mail car to receive the mail); *William Baird & Co. v. Robson* (1914) 51 Scot. L. R. 747, 2 Scot. L. T. 92, 7 B. W. C. C. 925 (work done for other employee who was frequently absent from a quarter of an hour to an hour); *McCormick v. Kelliher Lumber Co.* (1918) 7 B. W. C. C. (B. C.) 1025 (fireman injured in attempting to put back upon a pulley the belt by means of which the fuel was carried to him).

A servant does not cease to be in the course of his employment merely because he is not actually engaged in doing what is specially prescribed for him, if in the course of his employment an emergency arises and, without deserting his employment, he does what he thinks necessary for the purpose of advancing the work in which he is engaged, in the interest of the employer. *Durham v. Brown Bros. & Co.* (1898) 1 Sc. Sess. Cas. 5th series, 279, 36 Scot. L. R. 190, 6 Scot. L. T. 239.

Again, an employee is not necessarily outside of his employment in going to the assistance of other employees so as to further the business of the employer. *Hartz v. Hartford Faience Co.* (1916) 90 Conn. 539, 97 Atl. 1021 (shipping clerk fatally injured in lifting a barrel in an attempt to further the employer's business); *Martucci v. Hills Bros. Co.* (1916) 171 App. Div. 370, 156 N. Y. Supp. 838 (syrup boiler in a canning factory injured in helping another employee to start a freight elevator); *M'Quibban v. Menzies* (1900) 2 Sc. Sess. Cas. 5th series, 732, 37 Scot. L. R. 526, 7 Scot. L. T. 432

(laborer injured in assisting to replace loose belting); *Whitehead v. Reader* [1901] 2 K. B. (Eng.) 48, 84 L. T. N. S. 514, 70 L. J. K. B. N. S. 546, 65 J. P. 403, 49 Week. Rep. 562, 17 Times L. R. 387, 3 W. C. C. 40 (carpenter injured while endeavoring to replace belt which had slipped from a grindstone which he was required to use in his work); *Goslan v. Gillies* [1907] S. C. 68, 44 Scot. L. R. 71, 14 Scott L. T. 466 (clerk at engineering work injured while helping workman carrying heavy article to a weighing machine); *Seller v. Boston Rural Dist. Council* (1914) 7 B. W. C. C. (Eng.) 99 (roadman injured in attempting to free traction engine which had gotten stuck in a ditch); *Newson v. Burstall* [1915] 84 L. J. K. B. N. S. (Eng.) 635, 112 L. T. N. S. 792, [1915] W. C. & Ins. Rep. 16, 59 Sol. Jo. 204, 8 B. W. C. C. 21 (casual agricultural laborer injured while assisting in moving a threshing machine from one farm to another); *Ferguson v. Brick & Supplies* (1914) 7 B. W. C. C. (Alberta) 1054 (common laborer in clay pit injured in helping to replace upon the track one of the cars used to carry the clay).

In *Hartz v. Hartford Faience Co.* (1916) 90 Conn. 539, 97 Atl. 1021, the court said: If a workman depart temporarily from his usual vocation to perform some act necessary to be done by someone for his master, he does not cease to be acting in the course of his employment. He is then acting for his master, not for himself. A rule of law, which put such an employee outside his usual course of employment, and so deprived him of his right to compensation for an injury suffered, would punish energy and loyalty and helpfulness, and promote sloth and inactivity in employees. It would certainly prove detrimental to industry, and such a spirit of disregard of the master's interest, if carried into all of the work, would, in time, cripple the industry. Besides, the rule would be impractical. One trade must occasionally overlap another, if the work is to go on expeditiously and productively."

A "handy man" employed at a warehouse to do, among other things, odd jobs of carpenter work, whose duty it was to close the large doors of the warehouse, was not outside his employment when he attempted to nail a block onto one of the doors in order to facilitate the closing of it, and was injured while so engaged, although he happened to be standing outside the warehouse at the time of the injury. *Holland v. Rumely Products Co.* (1916) — *Manitoba*, — 31 D. L. R. 426. The court said: "I think that the clear inference to be drawn from the evidence is that the applicant honestly believed that the nailing of the block to the door would expedite the work of closing the door, not only on that occasion, but whenever it might, at other times, be necessary to open or close it. He believed that he was acting in his master's interest in doing what he did."

Not every act of an employee, however, in furtherance of the employer's business, will be held to be within the scope of his employment, so that he will be entitled to compensation if injured.

Thus, a night watchman went outside of the employment contemplated by his employer, in making use of a

circular saw to cut a board with which to brace a door, the lock of which was defective. *Brusster v. Industrial Acci. Commission* (1917) 35 Cal. App. 81, 169 Pac. 258.

And a clerk in the auditing department of a railroad, who is traveling under orders to check up the accounts of an agent at a station on the road, is not acting in the course of his employment within the meaning of the Compensation Act, in leaving the train when an injured passenger attempts to board it, even though he intends to aid in caring for the injured man if called upon to do so, so as to be entitled to compensation, if injured when attempting to re-enter the train. *Northwestern P. R. Co. v. Industrial Acci. Commission* (1917) 174 Cal. 297, L.R.A.1918A, 286, 163 Pac. 1000.

And a night watchman, whose duties required him to stay at a locomotive during the night to keep the fire alive, was not acting within the scope of his employment, when he took charge of a steam shovel, which duty he assumed voluntarily at the request of a fellow employee. *Robert Sherer & Co. v. Industrial Acci. Commission* (1917) 175 Cal. 615, 166 Pac. 318.

W. M. G.

CHARLES CROSBY

v.

THORP-HAWLEY COMPANY et al., Plffs. in Certiorari.

Michigan Supreme Court — May 29, 1919.

(206 Mich. 250, 172 N. W. 535.)

Workmen's compensation — accident — paralysis.

Paralysis of a traveling salesman is an accident within the meaning of the Workmen's Compensation Act, when caused by his missing a conveyance to the train which his occupation required him to take, attempting to reach it on foot carrying heavy grips, and becoming excited and running when the train pulled in before he reached the station, resulting in the bursting of a blood vessel in the brain.

[See note on this question beginning on page 1256.]

(Brooke, Ostrander, and Steere, JJ., dissent.)

CERTIORARI to the Industrial Accident Board to review an award to claimant in a proceeding under the Workmen's Compensation Act to recover compensation for injuries sustained while in the employ of defendant. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Kerr & Lacey, for plaintiffs in certiorari:

Plaintiff's injury was not an accident within the meaning of the Workmen's Compensation Act.

Landers v. Muskegon, 196 Mich. 750, L.R.A.1918A, 218, 163 N. W. 43; *Kutschmar v. Briggs Mfg. Co.* 197 Mich. 146, L.R.A.1918B, 1133, 163 N. W. 933; *Stombaugh v. Peerless Wire Fence Co.* 198 Mich. 445, 164 N. W. 537; *Johnson v. Mary Charlotte Min. Co.* 199 Mich. 218, 165 N. W. 650; *Roach v. Kelsey Wheel Co.* 200 Mich. 299, 167 N. W. 33; *Tackles v. Bryant & D. Co.* 200 Mich. 350, 167 N. W. 37; *Guthrie v. Detroit Shipbuilding Co.* 200 Mich. 355, 167 N. W. 37.

Mr. Claude S. Carney, for defendant in certiorari:

Plaintiff sustained an accidental injury within the meaning of the act.

Schroetke v. Jackson-Church Co. 193 Mich. 616, L.R.A.1917D, 64, 160 N. W. 383; *Hurley v. Selden-Breck Constr. Co.* 193 Mich. 197, 159 N. W. 311; *LaVeck v. Parke, D. & Co.* 190 Mich. 604, L.R.A.1916D, 1277, 157 N. W. 72; *Bell v. Hayes-Ionia Co.* 192 Mich. 90, 158 N. W. 179.

Kuhn, J., delivered the opinion of the court:

The claimant, on June 21, 1917, had been in the employ of the defendant, wholesale candy merchants, for the period of twenty-four years. In the course of this employment, at the date aforesaid, it was necessary for him to take with him two sample cases and a grip containing his personal effects, the total weight of the cases and the grip being shown to be about 80 pounds. On the said 21st day of June, while at Sturgis, Michigan, the claimant was delayed by a customer, and as a result missed the conveyance which, it is his claim, he ordinarily used in going from the hotel to the railroad station. He thereupon hurried from the hotel toward the depot, carrying the three grips. Before he was very far from the hotel, he heard the train which he intended to take to Howe,

Indiana, claimed to have become excited, and ran the remainder of the way with his three grips. He arrived at the train before it started, but after he got onto the train it is his claim that a blackness passed over his face, and his head felt bad, and he felt dizzy. He left the train at Howe, Indiana, went to the hotel, and it is his claim that his hand became numb, and that he could not control his right arm, and felt a lack of control in his right leg, and was there attended by a physician. He returned to his home in Kalamazoo, and the next morning Dr. Rush McNair, his family physician, was called to attend him. He found that the claimant was suffering from paralysis caused by the breaking of a blood vessel in his brain.

The following is an excerpt from his testimony:

Q. What condition did you find him in?

A. I found Mr. Crosby suffering from nearly complete paralysis of his entire right side; he had very little power of grasp in his right hand. He could use his leg somewhat. His tongue also was affected and the side of his face; his voice was thick, as if he had something in his mouth. He was also mentally depressed; he was confused and crying. He was unable at that moment to care for himself. He gave me a description of his experience on the day before, and how he felt the evening before and during the night. I got enough out of him to get the history about as he has given it to-day.

Q. You have heard his description of it here?

A. Yes, sir.

Q. What caused this paralysis?

A. It was due to the rupture of a blood vessel in his brain.

Q. Did you treat him from time to time?

A. Yes, sir; from that time to the present time.

Q. Of course he was unable to work at that time?

A. Absolutely.

Q. Assuming that on the day before you saw him, he was in ordinary good health, about his business as a traveling salesman, which involved traveling by train from one city to another, through Michigan and Northern Indiana, and that while at Sturgis he was, because of being detained, made late for his train, and missed the bus, and on that account obliged to carry an unusual load of a third grip, which made it necessary for him to hold in one hand two grips, the left hand; on the way to the depot with this extra load occasioned by the third grip, he heard the train pull in about two blocks away, and he became excited and started to run for the train, and, on account of the over-exertion and excitement when he got to the train, he felt dizzy, and a black cloud crossed his face, as he put it, and this condition that found him in, and also he noticed, immediately following that running to the train, that he had lost partial control, at least, of the left side—that was the side that was paralyzed, was it not?

A. The right side.

Q. (resuming). The right side, the right arm, and noticed that his tongue was thick, and he noticed during the day that he had lost partial control of his right leg—what would you say, assuming the conditions he has testified to be true, and the history of the case, what would be your judgment as to what caused this accident?

A. There would be two factors in the case. First would be the unusual physical exertion.

Q. This extra load he was carrying?

A. The extra load and running for the train; secondly, and perhaps more important, would be the excitement of running to catch the train. The mental perturbation that occurs when one is afraid they

are going to miss a train, and runs to catch it.

Q. How would these matters cause a breaking of a blood vessel?

A. For the simple reason that under mental exertion the blood pressure rises in the blood vessels, and the heart has to pump harder to pump the blood into the muscles that are taut and contracted, consequently, under excitement, the blood pressure will also rise; so in this case there would be two factors, two active factors, to cause the rise of blood pressure, and if there was a weak place anywhere in the circulatory system that was unable to stand the strain, it would give way, and that is what happened in this case.

Q. As I understand you, then, the extra load, the unusual running to catch the train, and the excitement combined, those three things, caused the extra load on the blood vessels?

A. Absolutely.

Q. And caused this blood vessel to break?

A. Yes, sir.

Q. And that, in turn, caused the paralysis?

A. Yes, sir.

Whether or not, under these circumstances, the claimant can be said to have met with an accident, is the sole question presented upon this record. The Industrial Accident Board found that the facts here presented make out a stronger case than the facts involved in *Schroetke v. Jackson-Church Co.* 193 Mich. 616, L.R.A.1917D, 64, 160 N. W. 383, and relied upon that decision in awarding the claimant compensation. In my opinion, the conclusion of the Industrial Accident Board with reference thereto was fully warranted, and I am un-

presented from the situation here finding in the *Schroetke Case*, which case has not been overruled by this court, but, in fact, has been cited in the following decisions: *Van Gorder v. Packard Motorcar Co.* 195

Workmen's compensation—accident—paralysis.

Mich. 588, L.R.A.1917E, 522, 162 N. W. 107; *Stombaugh v. Peerless Wire Fence Co.* 198 Mich. 445, 164 N. W. 537; *Johnson v. Mary Charlotte Min. Co.* 199 Mich. 218, 165 N. W. 650; *Roach v. Kelsey Wheel Co.* 200 Mich. 299, 167 N. W. 33; *Tackles v. Bryant & D. Co.* 200 Mich. 350, 167 N. W. 36; *Guthrie v. Detroit Shipbuilding Co.* 200 Mich. 355, 167 N. W. 37.

The finding of the Industrial Ac-

cident Board should be affirmed, and compensation awarded in accordance therewith.

Bird, Ch. J., and Stone, Moore, and Fellows, JJ., concur with Kuhn, J.

Brooke, J., dissenting:

I am of opinion that the record contains no evidence of an accident.

Ostrander and Steere, JJ., concur with Brooke, J.

ANNOTATION.

Workmen's compensation: compensation for death or injury from overexertion and excitement.

As to rights of employees to compensation for injuries received while acting in an emergency, see annotation to *Baum v. Industrial Commission*, ante, 1247.

This annotation does not purport to cover cases of injury or death caused by overstraining of muscles which results in hernia, strains, etc., but is confined to cases in which, as in the reported case (*CROSBY v. THORP-HAWLEY Co.* ante, 1253), the employee is injured through excitement and overexertion when confronted with an emergency more or less serious.

In a number of cases the court has passed upon cases presenting a situation very similar to that appearing in the reported case (*CROSBY v. THORP-HAWLEY Co.*).

Thus a stroke of apoplexy, resulting in the death of a gateman, which was brought on by his running from his place of work to the scene of an accident, about 100 yards distant, and back again to give notice of the accident, is itself an accident within the meaning of the statute. *Aitken v. Finlayson, B. & Co.* [1914] S. C. 770, 2 Scot. L. T. 27, 51 Scot. L. R. 653, 7 B. W. C. C. 918.

So heart failure causing the death of a watchman with a weak heart, which is due to his exertion and excitement in performing his duty to give an alarm of fire, is within the Compensation Act, providing compensation for death by accident in the course of employment. *Schroetke v. Jackson-Church Co.* (1916) 193 Mich. 616, L.R.A.1917D, 64, 160 N. W. 383.

The death from heart disease of a cook upon a lighter, where he is required to live, due to exertions in saving his personal effects when the vessel begins to sink, arises out of and in the course of his employment within the operation of the Compensation Act. *Brightman's Case* (1914) 220 Mass. 17, L.R.A.1916A, 321, 107 N. E. 527, 8 N. C. C. A. 102. The court said that the standard to be applied is not that which now, in the light of all that has happened, is deemed to have been directly within the line of labor helpful to the master, but that which the ordinary man, unaccustomed to act in such an emergency, might do while actuated by the purpose to do his duty.

W. M. G.

THOMAS O'BRIEN
v.
ALBERT A. ALBRECHT COMPANY et al., Plffs. in Certiorari.

Michigan Supreme Court — May 29, 1919.

(206 Mich. 101, 172 N. W. 601.)

Workmen's compensation — refusal to submit to operation — effect.

1. The absolute refusal of an injured employee, not due to ignorance or misunderstanding, to submit to an operation for hernia, which can be performed without danger to life or health, and will restore his capacity to labor at his trade, deprives him of the right to compensation under the Workmen's Compensation Act, for diminished earning capacity due to such defect.

[See note on this question beginning on page 1260.]

— effect of former injury in other employment.

2. An employer cannot avoid liability under the Workmen's Compensation Act for injuries to one in his employment, on the theory that the accident resulted from a former injury received while in employment of another, if there is evidence justifying the finding of the Industrial Accident Board that the injury arose out of the employment

in which the employee was engaged at the time of the injury.

— amount of award — successive injuries.

3. One successively injured while working at his trade for different employers cannot recover for both injuries, under the Workmen's Compensation Act, an amount in excess of that allowed by statute for total disability in the trade in which he was employed.

CERTIORARI to the Industrial Accident Board to review an award to applicant in a proceeding by him under the Workmen's Compensation Act to recover compensation for personal injuries sustained while in the employ of the defendant company. *Award vacated.*

Statement by Fellows, J.:

On December 22, 1914, plaintiff, a carpenter then in the employ of Bryant & Detwiler Company, received a severe accidental injury to both feet and both ankles. Following the accident, the Bryant & Detwiler Company and its insurer entered into an agreement with plaintiff for compensation for total disability at the rate of \$9.45 per week. This agreement was approved by the board. This payment was continued for some time. It would appear that plaintiff's condition improved somewhat, and on January 18, 1916, the Bryant & Detwiler Company and its insurer entered into another agreement with plaintiff to thereafter pay for partial disability at the rate of \$7 per week. This agreement was likewise approved by the board.

The insurer of the Bryant & Detwiler Company continued payments under this agreement down to the time of the hearing of this case before the Industrial Accident Board, and, so far as this record discloses, are still making such payments. On September 27, 1917, plaintiff, while in the employ of defendant Albert A. Albrecht Company as a carpenter, and while earning \$30 per week, suffered another accidental injury, resulting in a hernia. The testimony clearly establishes the tender of an operation for the hernia, that it could be performed without administering a general anesthetic, by application of a local anesthetic, that it would not endanger life, and that plaintiff could not be cured of the hernia without it. The testimony also clearly establishes plain-

tiff's refusal to submit to the operation. At the time of the hearing before the committee of arbitration, plaintiff was wearing a truss, getting along fairly well with it, and was earning \$18 per week for work other than as a carpenter. The Industrial Accident Board awarded him \$10 per week against defendant here for total disability. To review this award this writ of certiorari was allowed.

Messrs. Kerr & Lacey, for plaintiff in certiorari:

The Albert A. Albrecht Company should not be held responsible in any amount for compensation, by virtue of the fact that the disability resulting from the injury of September 27, 1917, if any, was caused by a previous injury, which was the proximate cause of the second disability.

Stoll v. Laubengayer, 174 Mich. 701, 140 N. W. 532; Cook v. Charles Hoertz & Son, 198 Mich. 129, 164 N. W. 464; Reiss v. Northway Motor & Mfg. Co. 201 Mich. 90, 166 N. W. 840; Cramer v. West Bay City Sugar Co. 201 Mich. 500, 167 N. W. 843; Adams v. W. E. Wood Co. 203 Mich. 673, 169 N. W. 845; Weaver v. Maxwell Motor Co. 186 Mich. 588, L.R.A.1916B, 1276, 152 N. W. 993, Ann. Cas. 1917E, 238.

The Industrial Accident Board erred in holding the respondents liable, inasmuch as the accident may be said to have arisen in the course of, but may not be said to have arisen out of, the employment of Thomas O'Brien with the Albert A. Albrecht Company.

Van Gorder v. Packard Motorcar Co. 195 Mich. 588, L.R.A.1917E, 522, 162 N. W. 107; Bayer v. Bayer, 191 Mich. 423, 158 N. W. 109; Harper, Workmen's Comp. ¶¶ 47-61.

The Industrial Accident Board erred in not finding that an operation was tendered and refused, and that such refusal either constituted intentional and wilful misconduct, or operated to suspend payments of compensation until such a time as submission to the operation was had.

Kricinovich v. American Car & Foundry Co. 192 Mich. 687, 159 N. W. 862; Jendrus v. Detroit Steel Products Co. 178 Mich. 275, L.R.A.1916A, 381, 144 N. W. 563, Ann. Cas. 1915D, 476, 4 N. C. C. A. 864; Ramlow v. Moon Lake Ice Co. 192 Mich. 505, L.R.A.1916F, 955, 158 N. W. 1027; Poniatowski v. Stickley Bros. Co. 194 Mich. 294, 160 N. W. 569.

The Industrial Accident Board erred in awarding compensation at the rate of ten dollars (\$10) per week.

Weaver v. Maxwell Motor Co. 186 Mich. 588, L.R.A.1916B, 1276, 152 N. W. 993, Ann. Cas. 1917E, 238.

ari.

Messrs. Frederick T. Witmire and E. G. Martin for defendant in certiorari.

Fellows, J., delivered the opinion of the court:

Counsel for the defendants insist that the original accident, which occurred while plaintiff was in the employ of Bryant & Detwiler Company, was the proximate cause of the second injury, and that there can be no recovery against the defendants; that the recovery should be against the Bryant & Detwiler Company under the holdings of this court in Cook v. Charles Hoertz & Son, 198 Mich. 129, 164 N. W. 464; Reiss v. Northway Motor & Mfg. Co. 201 Mich. 90, 166 N. W. 840; Cramer v. West Bay City Sugar Co. 201 Mich. 500, 167 N. W. 843, and Adams v. W. E. Wood & Co. 203 Mich. 673, 169 N. W. 845. In each of these cases the Industrial Accident Board found as a fact that the original accident was the proximate cause of the subsequent injury. There being testimony in each case to sustain such finding, this court affirmed the awards. In the instant case, while there is testimony that would have justified the Board in finding that the original accident was the proximate cause of the second injury, there is also testimony justifying the finding that it was not. There is testimony in this record from which

the Board was justified in finding, as it did, that the accident arose out of and in the course of plaintiff's employment with the defendant.

The physician of the company and the one of plaintiff's selection both advised an operation for the hernia. Such operation is not attended with danger to life or health, and it appears to be undisputed that it

Workmen's compensation—effect of former injury in other employment.

affords the only reasonable prospect of restoration of plaintiff's capacity to labor at his trade, that of a carpenter. Without it he may be able to labor at such light occupation as the condition of his feet and ankles will permit, but he cannot do heavy lifting, as his trade of carpenter requires. During all the time he has refused, and still persists in his refusal, to submit to the operation advised by his own physician as well as the one in the employ of defendant. Plaintiff is an intelligent man, and whether such refusal is due to a defect of moral courage or not we are unable to say. The board did not find that his refusal was due to any ignorance or misunderstanding on his part, and no such finding would be justified on this record. Under such circumstances, the case is clearly distinguishable from *Jendrus v. Detroit Steel Products Co.* 178 Mich. 265, L.R.A. 1916A, 381, 144 N. W. 563, Ann. Cas. 1915D, 476, 4 N. C. C. A. 864; *Poniatowski v. Stickley Bros. Co.* 194 Mich. 294, 160 N. W. 569, and *Riley v. Mason Motor Co.* 199 Mich. 283, 165 N. W. 745.

We appreciate the timidity with which the average person contemplates an operation, minor as well as major. But we also appreciate that in thousands of cases operations, many of them of but minor degree, have restored incapacitated men to the army of wage earners, and put them in position to discharge their duty to their dependents, to themselves, and to society. We are impressed that under the undisputed evidence in the case it was the plaintiff's duty to accept the tendered operation. His unequivocal refusal to follow the advice and judgment of both physicians with reference to the operation relieved defendants from further activities in that direction, and for the time being, at least, absolved them from liability. As was said by this court, speaking through Mr. Justice Kuhn, in *Kricinovich v. American Car & Foundry Co.* 192 Mich. 687,

159 N. W. 362: "Before the defendant is to be charged, in law or morals, with the duty to compensate him, the claimant should first discharge the primary duty owing to himself and society to make use of every available and reasonable means to make himself whole."

In both this case and that of *Jendrus v. Detroit Steel Products Co.*, supra, this court quoted with approval the following language of Lord M'Laren in *Donnelly v. William Baird & Co.* 1 B. W. C. C. 95: "That if the operation is not attended with danger to life or health, or extraordinary suffering, and if, according to the best medical or surgical opinion, the operation offers a reasonable prospect of restoration or relief from the incapacity from which the workman is suffering, then he must either submit to the operation or release his employers from the obligation to maintain him."

In the *Jendrus Case* Mr. Justice Stone fully considers this question. That was a case of a major operation of a very serious character. The workman was an ignorant foreigner, who refused for some time to consent to the operation, but who finally did consent. Under all the circumstances of that case it was held that the refusal to consent to the operation was not an unreasonable one.

Applying, then, the rule announced by Lord M'Laren and adopted by this court, to the facts of the instant case, we are impressed that plaintiff's refusal was unreasonable. The operation was not as serious a one as in the *Jendrus Case*. Indeed, the record discloses that it was not a serious case of hernia. The operation is not attended with danger to life or health, and could be performed by the use of either a general or local anesthetic. The doctors agree that it is advisable, and it is not disputed that it is the only thing that can be done to effect a cure. Until the plaintiff submits to an operation, which should be at the

—refusal to submit to operation
—effect.

expense of defendants, he is not entitled to compensation from them.

On September 27, 1917, when plaintiff received the injury here involved, he was receiving \$7 for partial disability from the Bryant & Detwiler Company. From that date to the hearing of this case, he continued to receive this amount per week. Notwithstanding this fact, the board made an award against these defendants for the payment of \$10 per week for the same period. So far as we are advised, plaintiff is still drawing \$7 per week from Bryant & Detwiler Company, and has this award for \$10 per week against these defendants. Both injuries occurred while plaintiff was following his trade as a carpenter. His disabilities are disabilities to continue in that line of employment.

The maximum of compensation for total disability fixed by the statute is \$10 per week. Comp. Laws 1915, § 5439. It must be obvious that a man cannot be more than totally disabled. It should be equally obvious that he cannot receive compensation for more than total disability. Our statute does not provide for concurrent compensation. It fixes a maximum for total disability of \$10 per week, and it cannot exceed that sum, whether it is paid by one employer or by several.

—amount of
award—successive
injuries.

The award will be vacated, and the case remanded for such proceedings as may be had not inconsistent with this opinion.

Bird, Ch. J., and Ostrander, Moore, Steere, Brooke, Stone, and Kuhn, JJ., concur.

ANNOTATION.

Workmen's compensation: duty of injured employee to submit to operation or to take other measures to restore earning capacity.

As to the duty of an injured employee to submit to an examination, see annotation to United States Fidelity & G. Co. v. Wickline, post, 1270.

It is a settled rule that an injured workman will be denied compensation for incapacity which may be removed or modified by an operation of a simple character, not involving serious suffering or danger.

Illinois.—Joliet Motor Co. v. Industrial Bd. (1917) 280 Ill. 148, 117 N. E. 423, 15 N. C. C. A. 75.

Indiana.—Enterprise Fence & Foundry Co. v. Majors (1918) — Ind. App. —, 121 N. E. 6.

Michigan.—Kricinovich v. American Car & Foundry Co. (1916) 192 Mich. 687, 159 N. W. 362.

Wisconsin.—Lesh v. Illinois Steel Co. (1916) 163 Wis. 124, L.R.A.1916E, 105, 157 N. W. 539.

England.—Gilbert v. Fairweather (1908; C. C.) 1 B. W. C. C. 349; Warnken v. Richard Moreland & Son [1909] 1 K. B. 184, [1908] W. N. 252, 25 Times L. R. 129, 53 Sol. Jo. 134, 78 L. J. K. B. N. S. 332, 100 L. T. N. S.

12; Paddington v. Stack (1909) 2 B. W. C. C. 402; Walsh v. Lock (1914) 110 L. T. N. S. 452, [1914] W. C. & Ins. Rep. 95, 7 B. W. C. C. 117.

Scotland.—Anderson v. Baird & Co. (1903) 5 Sc. Sess, 5th series, 373, 40 Scot. L. R. 263, 11 Scot. L. T. 525; Donnelly v. William Baird & Co. [1908] S. C. 536, 45 Scot. L. R. 394, 1 B. W. C. C. 95.

Thus in Enterprise Fence & Foundry Co. v. Majors (Ind.) supra, the court said: "The law seems to be well settled that an injured employee seeking compensation must submit to an operation which will cure him, when so advised by his attending physician, when not attended with danger to life or health, or extraordinary suffering, and if as a result of such refusal on his part he suffers a permanent impairment, the employer will not be required to compensate him for the resulting permanent impairment."

Continuing disability of a workman injured in the course of his employment, due to his refusal to submit himself to safe and simple medical treat-

ment, is not proximately caused by the accident so as to bring him within the operation of the act. *Lesh v. Illinois Steel Co. (Wia.) supra*. The court said: "Where, as in this case, the applicant under the Workmen's Compensation Act unreasonably refuses to undergo a safe and simple surgical operation which is fairly certain to result in a removal of the disability, and is not attended with serious risk or pain, and is such as an ordinarily prudent and courageous person would submit to for his own benefit and comfort, no question of compensation being involved, the disability which the claimant suffers thereafter, a reasonable time being allowed for recovery, is not proximately caused by the accident, but is the direct result of such unreasonable refusal."

So the refusal of an injured employee to submit to a simple operation which would be accompanied by but little danger and suffering justifies the employer in discontinuing compensation, where the evidence showed that the operation was not an experiment, but cured the condition in the majority of cases. *Kricinovich v. American Car & Foundry Co. (Mich.) supra*.

A workman receiving compensation is not entitled to refuse to undergo an operation on the ground that he might risk his capacity to do other work, where the medical evidence was to the effect that the operation would not be attended with much pain or risk, and would in all probability restore the workman's capacity fully for doing work. *Walsh v. Lock (1914) 110 L. T. N. S. (Eng.) 452, [1914] W. C. & Ins. Rep. 95, 7 B. W. C. C. 117*.

A workman by refusing to undergo an operation precludes himself from any right to receive further compensation, where the proposed operation is a simple or minor operation, not attended with appreciable risk or serious pain, and is likely to restore to the workman in large measure, or altogether, the use of his hand for the purpose of his former work. *Donnelly v. William Baird & Co. 1 B. W. C. C. (Scot.) 95*. Lord M'Laren said: "There is, of course, no question of compelling the party to submit to an operation.

The question is whether a party who declines to undergo what would be described by experts as a reasonable and safe operation is to be considered as a sufferer from the effect of an injury received in the course of his employment, or whether his suffering and consequent inability to work at his trade ought not to be attributed to his voluntary action in declining to avail himself of reasonable surgical treatment. . . . In view of the great diversity of cases raising this question, I can see no general principle except this, that if the operation is not attended with danger to life or health, or extraordinary suffering, and if, according to the best medical or surgical opinion, the operation offers a reasonable prospect of restoration or relief from the incapacity from which the workman is suffering, then he must either submit to the operation or release his employer from the obligation to maintain him. In other words, the statutory obligation of the employer to give maintenance during the period of incapacity resulting from an accident is subject to the implied condition that the workman shall avail himself of such reasonable remedial measures as are within his power."

In *Gilbert v. Fairweather (1908; City Ct.) 1 B. W. C. C. (Eng.) 349*, the arbiter refused to vary the award or to terminate the compensation of a workman because he refused to submit to an operation which was of trivial character, and practically certain to prove successful; the court said that, as a reasonable man, the workman should submit to the operation, but the matter was one for the court of appeal to pass upon.

The rule, however, is different where the proposed operation is a serious one and refusal to submit to such an operation will not defeat compensation.

Thus in *Rothwell v. Davies (1903) 19 Times L. R. (Eng.) 423*, compensation was held not to be barred because of the refusal of a workman to undergo an operation, which, although probably successful, would be attended with a certain amount of risk.

And in *Vonnegut Hardware Co. v.*

Rose (1918) — Ind. App. —, 120 N. E. 608, an award of compensation for the death of a workman was sustained, notwithstanding his refusal to submit to an operation, where some of the evidence tended to show that the operation contemplated was a dangerous one; that if it was requested the request came too late, and at a time when the condition of decedent was such that recovery therefrom would have been doubtful and uncertain.

So in *McNally v. Hudson & M. R. Co.* (1915) 87 N. J. L. 455, 95 Atl. 122, 10 N. C. C. A. 185, the court stated that it could not be properly said that, where it appears that a risk of life is involved, the refusal of the prosecutor to submit to an operation is unreasonable. In speaking of the duty of an employee to submit to an operation, the court said: "Although the peril to life seems to be very slight, —48 chances in 23,000,—nevertheless the idea is appalling to one's conscience that a human being should be compelled to take a risk of death, however slight that may be, in order that the pecuniary obligation created by the law in his favor against his employer may be minimized."

In *Braithwaite v. Cox* (1911) 5 B. W. C. C. (Eng.) 77, *Cozens-Hardy, M.R.*, said that it was not reasonable to require a workman to submit to an operation to remove a dead eye merely because there was danger from possible suppuration from it, affecting the other eye.

In case the workman's own doctor advocates an operation, he should submit to it. *Enterprise Fence & Foundry Co. v. Majors* (1918) — Ind. App. —, 121 N. E. 6; *Paddington v. Stack* (1909) 2 B. W. C. C. (Eng.) 402.

On the other hand, an injured workman cannot be said to be acting unreasonably where he, in good faith, follows the advice of his own doctor in refusing to submit to an operation.

Thus in *Gracie v. Clyde Spinning Co.* (1915) 52 Scot. L. R. 706, the court said: "Save in very special circumstances, the proximate cause of incapacity never can be the unreasonable refusal of a workman to undergo

an operation, if his own medical adviser advises him against undergoing that operation."

So the refusal of an injured workman to undergo an operation which his own medical adviser, an eminent surgeon, had advised him not to submit to, is not a bar to compensation. *Sweeney v. Pumpherston Oil Co.* (1908) 5 Sc. Sess. Cas. 5th series, 972, 40 Scot. L. R. 721, 11 Scot. L. T. 279.

And in *Tutton v. The Majestic* [1909] 2 K. B. (Eng.) 54, 78 L. J. K. B. N. S. 530, 100 L. T. N. S. 644, 25 Times L. R. 482, 53 Sol. Jo. 447, it was held that a workman who, in good faith and upon the advice of his own doctor, refuses to have an operation performed, cannot be said to be acting unreasonably.

Again, there is no unreasonable refusal to submit to an operation precluding compensation, where the evidence shows that but little, if any, benefit would result therefrom.

Thus the refusal to submit to a slight operation, although unreasonable, will not preclude an award of compensation to the workman for the loss of his finger, where it is not clear that the operation would have saved it. *Marshall v. Orient Steam Nav. Co.* [1910] 1 K. B. (Eng.) 79, 79 L. J. K. B. N. S. 204, [1909] W. N. 225, 101 L. T. N. S. 584, 26 Times L. R. 70, 54 Sol. Jo. 50, 3 B. W. C. C. 15.

So, an injured workman cannot be said to refuse unreasonably to undergo an operation where the medical referee, to whom the case was remitted to report whether there would be any risks more than ordinary to the injured employee in undergoing an operation under an anesthetic, reported that there was not any more than ordinary risk, but that he considered that an operation would be of little benefit, and that the injury was permanent. *Gracie v. Clyde Spinning Co.* [1915] S. C. 906, 52 Scot. L. R. 706, 8 B. W. C. C. 630.

And it is not ground for terminating compensation that an injured employee refuses to submit to an operation, where he has already submitted to two operations without any material advantage to him, he has no money,

and is in debt for previous services, and the doctors are not in agreement as to the beneficial results to be obtained by the proposed operation. *Marshall v. Ransome Concrete Co.* (1917) 33 Cal. App. 782, 166 Pac. 846.

If a workman is not to be subjected to unusual risk and danger arising from the anesthetic to be employed, or from the nature of the proposed operation, it is his duty to submit, if it fairly and reasonably appears that the result of such operation will be a real and substantial physical gain. But it would be unreasonable to require an injured workman to submit to an operation upon his hand, where, according to the expert testimony, it would be "pretty close to being permanently incapacitated for use even after this operation," and there was doubt as to the time within which some uncertain and indeterminate degree of benefit reasonably might be expected. *Floccher's Case* (1915) 221 Mass. 54, 108 N. E. 1032.

It cannot be said that a workman's refusal to undergo the operation of trephining was unreasonable, where it is admitted that it would not have effected a total cure. *Hawkes v. Coles* (1910) 3 B. W. C. C. (Eng.) 168.

But the arbitrator may find that the incapacity of a workman is due to his refusal to have an operation performed, and not to the original accident, where three doctors believed that the operation would be successful, but the refusal was upon the advice of two doctors, who, although they said that the operation was slight and there would be no danger attached to it, nevertheless considered that it would not remove the incapacity. *O'Neill v. John Brown & Co.* [1913] S. C. 653, [1913] W. C. & Ins. Rep. 235, 50 Scot. L. R. 450, 6 B. W. C. C. 428. The court pointed out that the ground upon which the medical men were against the operation had nothing to do with the risk or pain involved, agreeing with the three other medical men that the operation was an exceedingly simple one, with no appreciable risk or danger, but that their view simply was that it would not be of any use:

Nor can a workman be held to have unreasonably refused to submit to an operation, where the physician or surgeon believes the operation unnecessary in order to recover his earning capacity.

Thus an employee's insistence that his injured finger be saved if possible, when taken with a statement made by the surgeon that he had saved fingers as badly injured as that of the employee, is not such unreasonable or wilful misconduct as will prejudice the allowance of reasonable compensation. *Enterprise Fence & Foundry Co. v. Majors* (1918) — Ind. App. —, 121 N. E. 6.

And the fact that the second application of an anesthetic, which proved fatal, would not have been necessary if the workman had permitted his hand to be amputated, instead of having skin grafted onto it, which would have preserved the hand, does not preclude the widow from compensation where the operations were performed by a skilful surgeon. *Shirt v. Calico Printers' Asso.* [1909] 2 K. B. (Eng.) 51, 3 B. R. C. 62, 78 L. J. K. B. N. S. 528, 100 L. T. N. S. 740, 25 Times L. R. 451, 53 Sol. Jo. 430, 2 B. W. C. C. 342.

A workman cannot be held to have unreasonably refused to have an operation performed, where there was no proof that the operation alleged had been refused, although the workman had refused to take an anesthetic for another operation, and an anesthetic was necessary for the performance of the operation proposed. *Hays Wharf v. Brown* (1909) 3 B. W. C. C. (Eng.) 84.

The refusal of an injured workman, a foreigner, unable to speak or understand the English language, and suffering great pain, to submit to a serious operation until fifteen or sixteen hours after it is first found necessary, is not, as a matter of law, so unreasonable and persistent as to amount to the refusal of medical attendance and defeat his widow's right to compensation. *Jendrus v. Detroit Steel Products Co.* (1913) 178 Mich. 265, L.R.A. 1916A, 381, 144 N. W. 563, Ann. Cas. 1915D, 476, 4 N. C. C. A. 864.

The view has been taken that the only interest which the employer can have in requiring the employee to submit to an operation is that the amount of compensation to be paid would thereby be lessened.

Thus a workman cannot be claimed to be unreasonable in refusing to undergo an operation, where there is no evidence that the operation could lessen the amount of compensation payable by the employers. *Molamphy v. Sheridan* [1914] W. C. & Ins. Rep. 20, 47 Ir. L. T. 250, 7 B. W. C. C. 957.

In New Jersey, it has been held that if the trial judge finds as a fact that the injury from which the workman is suffering is permanent in its nature, he should allow compensation on that basis, with leave to the employer to apply to the court for a modification of the order if it is subsequently made to appear that the workman refused unreasonably to submit to an operation. *McNally v. Hudson & M. R. Co.* (1915) 87 N. J. L. 455, 95 Atl. 122, 10 N. C. C. A. 185; *Feldman v. Braunstein* (1915) 87 N. J. L. 20, 93 Atl. 679.

Whether or not a workman is unreasonable in refusing to undergo an operation is a question of fact, and the findings of the Accident Board or of the arbitrators will not be disturbed if there is any evidence to support them. *Vonnegut Hardware Co. v. Rose* (1915) — Ind. App. —, 120 N. E. 608; *McNally v. Hudson & M. R. Co.* (N. J.) *supra*; *Dolan v. Ward* (1915) 8 B. W. C. C. (Eng.) 514; *Ruabon Coal Co. v. Thomas* (1909) 3 B. W. C. C. (Eng.) 32.

In *Close v. Lucky O. K. Min. Co.* (1919) 105 Kan. 257, 182 Pac. 392, wherein it was contended that the workman's capacity to work would be fully restored by a simple surgical operation, the court, in sustaining the award, said that it should be observed that, while the evidence on this point seems to be all set forth in the abstract, it was not harmonious, nor was its effect or meaning conceded or agreed upon; therefore, the court could not go into it to determine its significance.

The appellate court will not interfere with the judgment of the county court judge that a man's incapacity was due to the operation performed by his own doctor, rather than to the injury, where the medical testimony was conflicting and a specialist called by the workman's doctor had decided that an operation was unnecessary. *Lakey v. Blair & Co.* (1916) 10 B. W. C. C. (Eng.) 58.

The objection to an award of compensation that the injured workman unreasonably refused to undergo an operation should be raised before the Industrial Commission, and cannot be raised for the first time on appeal to the supreme court. *Chicago Steel Foundry Co. v. Industrial Commission* (1919) 286 Ill. 544, 122 N. E. 150.

Although the facts may substantiate the respondent's claim that the incapacity could be removed by a slight operation, which the applicant refused to have performed, the award of the arbiter will be affirmed, and the respondent's relief lies not in an appeal from the award, but in an application to have the award varied. *O'Neil v. Ropner* (1908) 42 Ir. L. T. 3, 2 B. W. C. C. 334.

Where, on appeal, the superior court has found that a workman suffered a rupture, known and classified in surgery as a "permanent partial disability," and the Industrial Commission was ordered to determine and fix the compensation according to law, the Industrial Insurance Commission cannot refuse or suspend compensation until the workman submits to an operation in accordance with the rules of the Commission. *Kline v. Industrial Ins. Commission* (1918) 101 Wash. 365, 172 Pac. 343.

In a number of other cases the question has arisen whether or not a workman has forfeited his right to compensation, on the ground that he has failed to follow medical advice with respect to his injury.

Thus compensation need not be paid to an employee if he refuses to undergo massage, recommended by his own doctor and every other doctor connected with the case. *Wright v. Sneyd Collieries* (1915) 84 L. J. K. B. N. S.

(Eng.) 1332, 113 L. T. N. S. 633, 8 B. W. C. C. 537.

So an employer is not bound to continue weekly payments to an injured workman, when the continuance of his incapacity is due to his neglect to comply with certain simple medical directions which had been given to him. *Dowds v. Bennie* (1902) 5 Sc. Sess. Cas. 5th series, 268, 40 Scot. L. R. 219, 10 Scot L. T. 489.

And where an injured workman refuses to follow a reasonable and safe course of conduct which would, in all probability, enable him to regain his usual health and strength, and his continued incapacity is attributed to such refusal, he is not entitled to receive further compensation under the act. *Gormley v. Brisbane Tramways Co.* [1909] *Queensl. St. Rep.* 329.

An employee is not entitled to compensation under the British Columbia act for any period after the time he would have been cured had he followed the instruction of his medical advisers. *Gorgnigiani v. Welch* (1918) 8 West. Week. Rep. (B. C.) 797.

Compensation is not recoverable for incapacity caused by failure to take proper exercise after injury. *Upper Forest & W. Steel & Tinplate Co. v. Grey* (1910) 8 B. W. C. C. (Eng.) 424; *David v. Windsor Steam Coal Co.* (1911) 4 B. W. C. C. (Eng.) 177.

But a workman may be found not to have acted unreasonably in failing to exercise his hand, where his own doctor was of the opinion that the exercise would not benefit it. *Moss v. Akers* (1911) 4 B. W. C. C. (Eng.) 294.

So the county court judge is not justified in holding that a workman was unreasonable in not going to work, where a part of his little finger had been amputated and slight adhesions were made, and the employer maintained that by using the hand the adhesions would break down, but the workman, three days before the application to review was heard, had undergone a second amputation upon the advice of a doctor. *Burgess & Co. v. Jewell* (1911) 4 B. W. C. C. (Eng.) 145.

An employee will not be denied com-
6 A.L.R.—80.

pensation upon the ground of his refusal to accept medical treatment because he failed to return to the doctor's office on the following day, as he had been directed, where it is not entirely clear that he understood the doctor's directions. *Poniatowski v. Stickley Bros. Co.* (1916) 194 Mich. 294, 160 N. W. 569.

The question whether an injured employee neglected to take the proper means for recovery from the injuries is a question of fact for the justice of the superior court, and his conclusions will not be reviewed, where the employee presented testimony as to his conduct with reference to the injuries, the diligence which he had used in obtaining the treatment of the injuries by a physician, the nature of such treatment, and the care that he had taken in the matter to follow the instructions of his physician. *Gorral v. William H. Hamlyn & Son* (1915) 38 R. I. 249, 94 Atl. 877.

In a case in which there was an admitted accident arising out of the employment, but it was claimed by the employer that the man's incapacity was due to improper treatment at the hospital, and not to the accident, the burden of proof is upon the employer to sustain his contention. *Bower v. Meggitt* (1916) 10 B. W. C. C. (Eng.) 146. To the same effect, *Harrison v. Ford* (1915) 8 B. W. C. C. (Eng.) 429.

Again, it has been contended that the incapacity suffered by the employee was not caused by the accident, but was rather caused by his own misconduct in failing properly to care for the injury.

Thus an additional injury caused by using an injured arm too soon does not arise out of the employment. *Pacific Coast Casualty Co. v. Pillsbury* (1915) 171 Cal. 319, 153 Pac. 24.

So the aggravation by a boxing match of a wound received in the course of employment, which had practically healed and would have caused no further trouble had it been given a little more rest, so that blood poisoning and permanent injury to a hand result, is the proximate cause of such injury, and no recovery can be had under a Workman's Compensation

Act, providing compensation for injuries received in the course of employment. *Kill v. Industrial Commission* (1915) 160 Wis. 549, L.R.A.1916A, 14, 152 N. W. 148.

The failure to continue treatment of an injured eye, which results in a permanent loss thereof, precludes compensation. *Powell v. Crow's Nest Pass Coal Co.* (1916) 22 B. C. 514, 26 D. L. R. 317.

But in *Bailey v. Industrial Commission* (1919) 286 Ill. 623, 122 N. E. 107, in sustaining an award of compensation for an additional injury received before the original injury had entirely healed, the court said: "It is not urged by the plaintiff in error, nor does the evidence show or tend to show, that Wolford persisted in unsanitary or injurious practices which tended to either imperil or retard his recovery, nor did he refuse to submit to such medical or surgical treatment as was reasonably essential to promote his recovery, by either of which practices the compensation would, at the discretion of the Industrial Commission, on application therefor, be reduced."

Compensation will not be denied to an employee for failure to seek medical advice after an injury, where there was nothing in the conduct of the employee to indicate that he wilfully or negligently failed to care for his wound, and to give it such attention and treatment as it seemed to require, and his disability was not in any way heightened or aggravated by wilful misconduct. *Hall v. J. La Courciere Co.* (1918) 93 Conn. 1, 104 Atl. 348.

An employee's right to compensation is not affected by his act in putting himself in charge of his own physician after receiving the services of the employer's physician for

a number of days, where there is no evidence at all that his incapacity was in any way increased by the change in the physician. *Nearby v. Philadelphia & R. Coal & I. Co.* (1919) 264 Pa. 221, 107 Atl. 696. After setting out the provisions of the statutes to the effect that, if the employee shall refuse reasonable medical aid tendered by the employer, he shall forfeit all right to compensation for any injury to or decrease in his capacity shown to have resulted from such refusal, the court said: "The manifest purpose is to protect the master from any loss that might result because of the servant's refusal to accept the tendered assistance, not to penalize the latter for exercising the important privilege of employing his own physician. However, by so doing, the employee assumes the responsibility for his own treatment, and must bear the loss resulting from neglect or lack of skill therein."

Under the New Jersey statute, the failure of an injured employee promptly to seek medical aid may result in a suspension of all right of compensation "during such refusal or failure," but does not justify a denial of any compensation whatever, unless his refusal amounts to "serious and wilful misconduct." *Rainey v. Tunnel Coal Co.* (1918) 93 Conn. 90, 105 Atl. 333.

If the workman has proved the liability of the employer and resulting injuries to the employee, and the employer claims that the disability had been aggravated and cure prevented by the neglect of the employee, he must show the facts as matters of defense. In regard to such questions it is proper to resolve all doubt in favor of the employee. *Gorral v. William H. Hamlyn & Son* (1915) 38 R. I. 249, 94 Atl. 877.
W. M. G.

UNITED STATES FIDELITY & GUARANTY COMPANY et al.
v.

EMMA WICKLINE, Appt.

Nebraska Supreme Court — December 14, 1918.

(— Neb. —, 170 N. W. 193.)

Workmen's compensation — refusal to submit to X-ray — effect.

1. A claimant for compensation under the Employers' Liability Act pursuant to § 3675, Rev. Stat. 1913, cannot be denied a recovery because of a refusal to submit to an X-ray examination, or to have an X-ray photograph taken of the person, where the uncontradicted evidence shows that neither was necessary.

[See note on this question beginning on page 1270.]

Costs — attorney's fee — workmen's compensation.

2. In an action under the Employers' Liability Act in which a recovery is had, the district court cannot tax an attorney's fee as a part of the costs.

[See 7 R. C. L. 792.]

Workmen's compensation — penalty for delinquent payments — construction.

3. A provision in a statute requiring payments under the Employers' Liability Act to be made periodically, in accordance with the methods of payment of wages, that 50 per centum should be added for waiting time for all delinquent payments, refers to such payments as are contemplated or created by the terms of the act, and is applic-

able thereto if the added penalty does not make the aggregate amount exceed the maximum compensation fixed by the statute.

Constitutional law — due process — penalty for failure to pay award.

4. A provision of a penalty for failure promptly to pay an award under the Employers' Liability Act does not violate the constitutional guaranty of due process of law.

Master and servant — liberal construction of Employers' Liability Act.

5. The Employers' Liability Act, being remedial, should be liberally construed.

[See 18 R. C. L. 836.]

Headnotes 1 and 2 by DEAN, J.

APPEAL by defendant from a judgment of the District Court for Lancaster County (Morning, J.) overruling her motion for new trial and denying her demand for an allowance of overtime compensation, and for attorney's fees as part of the costs, in a suit for relief from an award made by the compensation commissioner to defendant. *Reversed.*

The facts are stated in the opinion of the court.

Mr. R. J. Greene, for appellant:

Courts are disinclined to extend beyond the terms of the statute the power to require a physical examination.

14 R. C. L. Inspection & Physical Examination, § 16, p. 704; Southern R. Co. v. Tift, 11 Ann. Cas. 846, note.

One may not be compelled to submit his body to the X-rays until it is so well established, as a fact in science, that the process is harmless, that the courts will take judicial notice of it.

14 R. C. L. Inspection & Physical Examination, § 18, p. 708; Wittenberg v.

Onsgard, 78 Minn. 342, 47 L.R.A. 141, 81 N. W. 14.

Even when within the discretion of the court to order an X-ray examination of a plaintiff in a physical injury case, the request therefor must be denied unless it be made to appear that the photographer has the necessary skill and experience to apply the rays without injury to the plaintiff.

Wittenberg v. Onsgard, supra; Dean v. Wabash R. Co. 229 Mo. 425, 129 S. W. 953; Boelter v. Ross Lumber Co. 103 Wis. 324, 79 N. W. 243.

Even under a statute held to grant discretion to the court to order an X-ray examination, the scope of the examination is not to be extended beyond the terms of the statute, and X-ray photographs may not be taken without consent.

State ex rel. Carter v. Call, 64 Fla. 144, 41 L.R.A. (N.S.) 1071, 59 So. 789.

Messrs. Strode & Beghtol, for appellees:

The legislature cannot take the property of one person and give it to another in excess of the actual amount of damages sustained.

Atchison & N. R. Co. v. Baty, 6 Neb. 37, 29 Am. Rep. 356; *Roose v. Perkins*, 9 Neb. 305, 31 Am. Rep. 409, 2 N. W. 715; *Riewe v. McCormick*, 11 Neb. 261, 9 N. W. 88; *Leese v. Courier Pub. & Printing Co.* 75 Neb. 391, 106 N. W. 443.

Dean, J., delivered the opinion of the court:

This action originated in the office of the compensation commissioner, before whom Mrs. Wickline, who is defendant here, recovered an award on August 7, 1918, in the sum of \$81, as compensation for personal injuries sustained while in the employ of the Northwestern Iron & Metal Company. Plaintiffs here answered jointly before the commissioner, denying liability and asserting matter of affirmative defense. On August 8, 1918, they filed with the commissioner a notice of appeal to the district court, where they appeared as plaintiffs and where judgment was rendered against them for \$18 and costs. Defendant's motion for a new trial was overruled, and a demand for an allowance of "overtime" compensation and for attorney's fees to be taxed as costs was denied. Defendant appealed.

The findings and decree of the district court fairly reflect the material issues. The court found that defendant was injured on January 25, 1918; that the employer was insured against liability for such injuries by the guaranty company; that the guaranty company paid defendant compensation for eight weeks, at \$6 a week, which was in full to March 22, 1918; that on April 10, 1918, the guaranty company re-

quested defendant "to submit to a further physical examination, the same to include the taking of an X-ray photograph of the injured portion of her body;" that she expressed willingness to submit to a physical examination, but "refused, and still refuses, to submit to the taking of an X-ray photograph, and that the compensation herein sought to be recovered has all accrued since the said request and refusal, with the exception of that portion which accrued between the 22d day of March, 1918, and the date of the request for said X-ray photograph, viz., April 10, 1918, or about three weeks; that there was due her and unpaid at the time of said request, April 10, 1918, slightly less than three weeks' compensation at \$6 per week, amounting, with interest, to \$18, to which amount I find she is entitled to a judgment against plaintiffs. I further find that the request upon said Emma Wickline to submit to the taking of said X-ray photograph was a reasonable request, which was advised by the physician of her own choice as well as by the physician furnished by her employer, and that she should have complied therewith, and that by failing so to comply she has forfeited her right to all of the compensation sued for, except that which accrued prior to April 10, 1918, and which is still unpaid, to wit, the sum of \$18."

Section 3675, Rev. Stat. 1913, so far as here applicable, follows: "After an employee has given notice of an injury, . . . he shall, if so requested by the employer or the insurance company carrying such risk, submit himself to an examination by a physician or surgeon . . . furnished and paid for by the employer, or the insurance company carrying such risk, as the case may be. . . . The refusal of the employee to submit to such examination shall deprive him of the right to compensation under this article during the continuance of such refusal, and the period of such refusal shall be deducted from the period during

which compensation would otherwise be payable."

Defendant was the only witness who testified respecting the nature of the injury. Upon being called by plaintiffs' counsel she testified that she and one or more women in the employ of plaintiff Northwestern Iron & Metal Company were ordered by the employer to lift a bale of paper from the floor to a table, and that in doing so she, as informed by her physician, Dr. Hanson, "tore the lining in my right side loose, and tore the kidney." Plaintiffs' contention that Dr. Hanson, defendant's lady physician, advised her to submit to the taking of an X-ray photograph, is not supported by the record.

On this point defendant testified in response to a question by the opposite party:

Q. And she said you ought to have an X-ray picture taken?

A. She didn't really say I ought to have it; she said it would give more satisfaction to my home folks; and I went to talk with Dr. Bogan, and he laughed at the idea of my having an X-ray picture taken, he said—(interrupted.)

In answer to a question by the court defendant said: "Dr. Bogan examined me twice and Dr. Hanson twice. . . . Dr. Bogan was the company doctor."

Defendant was asked if Dr. Hanson suggested the X-ray.

She answered: "No. Dr. Bogan wanted the X-ray first; he thought it was necessary. Afterwards I proposed an X-ray to him, too; when I was to him in his office, I proposed an X-ray picture, and he said it wasn't necessary."

Q. (by court). Why did you change your mind?

A. I didn't feel as though I wanted an X-ray after I got up again, because I talked with several, and they said it was dangerous; they said there had to be medicine injected into my kidney.

Under the statute the request for an examination must be reasonable,

but it does not appear to have been so in this case. The testimony before us

shows affirmatively that neither an X-ray examination

Workmen's compensation—refusal to submit to X-ray—effect.

nor an X-ray photograph was necessary. No physician nor other person testified that either was necessary, nor does it appear that a request was made by plaintiffs to the court to require defendant to submit to either. In the present advanced state of the science of X-ray examinations and X-ray photographs of the person, there appears to be no reason why such examination or photograph should not be permitted by a claimant for compensation under the Employers' Liability Act, upon request by the employer or insurer, unless the request is shown to be unreasonable.

The defendant, under § 8666, Rev. Stat. 1913, as amended in Laws 1917, chap. 85, § 116, demanded extra compensation for "waiting time." The statute follows: "Except as hereinafter provided, all amounts of compensation payable under the provisions of the article shall be payable periodically in accordance with the methods of payment of the wages of the employee at the time of the injury or death. Provided fifty per centum shall be added for waiting time for all delinquent payments after thirty days' notice has been given."

Plaintiffs say that this section is ambiguous. When the scope of the Employers' Liability Act is considered in its entirety, it seems that the legislature intended by the language creating a penalty to make it thereby reasonably certain that the payments would not be delayed for trivial reasons and the act be thereby nullified. When the section under consideration is considered together with all the other parts of the act, it seems

reasonable to believe that the delinquent payments therein mentioned mean such pay-

—penalty for delinquent payments—construction.

ments as are contemplated or created by the terms of the act.

Plaintiffs argue that "in other portions of the statute it is stated that the compensation paid shall in no event be more than \$12 per week," and that to impose the 50 per cent penalty would conflict with the Compensation Act. Section 3662, Rev. Stat. 1913, as amended, Laws 1917, chap. 85, § 112. This objection seems to be inapplicable because the 50 per cent additional payment that is provided by the act does not make the payment in the present case more than \$12 a week. The compensation for "waiting time" seems to be reasonable. Complaint is also made that the statute violates the constitutional guaranty that no person shall be deprived of

Constitutional
law—due process
—penalty for
failure to pay
award.

property without
due process of law.
We cannot sustain
the plaintiffs' argu-
ment on this point.

Speaking generally, it may be borne in mind that an injured person who comes within the purview of the act is deprived of the right to have a jury pass upon any of the questions that pertain to the injury or to pass

Master and
servant—liberal
construction of
Employers' Lia-
bility Act.

upon the measure
of damages, and for
this reason, among
others, the statute,
which is remedial

in its nature, should be liberally construed. *Parson v. Murphy*, 101 Neb. 542, L.R.A.1918F, 479, 163 N. W. 847, 16 N. C. C. A. 174 (*Wuotilla v. Duluth Lumber Co.* 37 Minn. 153,

5 Am. St. Rep. 832, 33 N. W. 551, 16 Am. Neg. Cas. 173). The act is not apparently open to the objection that it is violative of the Constitution in the particular noted by plaintiffs.

The court properly declined to assess an attorney's fee as costs under § 3212, Rev. Stat.

1913, that was in-
voked by defendant.
The Compensation

Costs—attor-
ney's fee—work-
men's compen-
sation.

Act as amended (Laws 1917, chap. 85, § 24) provides: "It shall be the duty of the county attorneys of the several counties and the attorney general of the state to appear as counsel for claimants for compensation and benefits under this article, and to assist and act in advisory capacity to the compensation commissioner, upon his request."

The Employers' Liability Act in its entirety is a summary proceeding. One of its main objects is to facilitate an inexpensive and speedy settlement of controversies between employer and employee that arise out of personal injuries. It does not appear that the county attorney was requested to appear as counsel for claimant, or that he refused to appear. That such official would perform his duty in the premises when called upon to act in his official capacity is presumed.

The judgment of the District Court is reversed, and the cause remanded for a new trial in harmony with the views herein expressed.

Petition for rehearing denied, February 15, 1919.

ANNOTATION.

Workmen's compensation: duty of injured employee to submit to an examination.

As to the duty of an injured employee to submit to an operation or to take other measures to restore earning capacity, see annotation to *O'Brien v. Albert A. Albrecht Co.* ante, 1257.

It would seem to be a wholly reasonable rule that an injured employee should submit, upon the request of the employer, to a physical examina-

tion to be made under proper conditions, when such examination is necessary, either to show the extent of the injury or to show the measures necessary to remove the incapacity.

The principle enunciated in the reported case (*UNITED STATES FIDELITY & G. Co. v. WICKLINE*, ante, 1267), to the effect that a claimant for compen-

sation should, upon the request by the employer or insurer, subject his person to an X-ray examination, unless the request is shown to be unreasonable, was reasserted when the case came before the court again in *United States Fidelity & G. Co. v. Wickline* (1919) — Neb. —, 178 N. W. 689. It was held, however, that when a woman employee, who has suffered an injury to one of her kidneys, offers to permit an X-ray photograph to be taken, but refuses to permit the injection of colorogol for the purpose of rendering the kidney opaque, she does not necessarily, by such refusal, forfeit her right to compensation under the act.

And the claim that the employee refused to submit to a medical examination at the trial is not substantiated where, although, before the arrival of the employer's physician, the employee's counsel announced that they would not consent to an examination, no demand was made after the physician's arrival, and the anticipatory refusal did not lead the employer to countermand the call to the physician to attend the trial and be sworn as a witness. *Birmingham v. Lehigh & W. B. Coal Co.* (1915) — N. J. L. —, 95 Atl. 242.

So, too, an injured workman cannot be found to have refused to be examined and to have obstructed an examination, merely because he remained outside the state, where he wrote to the insurance carrier, asking whether it would be necessary for him to come to the place of the injury for an examination, and whether he would be obliged to remain there for any length of time, and to this letter the insurance carrier made no reply. *McLean's Case* (1916) 223 Mass. 342, 111 N. E. 788.

But an employee's right to compensation should be suspended under the provisions of the Michigan act, where the evidence was conflicting as to whether or not he had recovered from his injury, and it was a fair consensus of the opinions expressed by the medical witnesses that any doubts existing about his condition might be resolved by an expert X-ray examina-

tion, to which the employee refused to submit himself. *Rose v. Desmond Charcoal & Chemical Co.* (1919) 206 Mich. 294, 172 N. W. 415.

The first schedule of the English act provides that the employer may require a workman to submit to a medical examination under two different situations: First, under § 4, when he has given notice of an accident and asserts a claim to compensation; second, under § 14, where he has been receiving compensation. *Major v. South Kirkby, F. & H. Collieries* [1913] 2 K. B. (Eng.) 145, 82 L. J. K. B. N. S. 452, 108 L. T. N. S. 538, 29 Times L. R. 223, 57 Sol. Jo. 244, [1913] W. N. 17, [1913] W. C. & Ins. Rep. 305, 6 B. W. C. C. 169, Ann. Cas. 1914C, 81.

Paragraph 15 covers the practice in either case. Upon the refusal of the workman to be medically examined, the county court judge is authorized to suspend proceedings pending examination, provided he finds the refusal to be unreasonable. *Longhurst v. The Clement* [1913] W. C. & Ins. Rep. (Eng.) 312, 6 B. W. C. C. 218.

The court of appeal laid down the rule that § 4 applied in every case in which the workman's right to compensation had not been fixed by an agreement or by an award of an arbitrator. *Major v. South Kirkby F. & H. Collieries and Longhurst v. The Clement* (Eng.) supra.

But the House of Lords held that this paragraph applies in every case in which compensation was not actually being paid at the time of the application, although such payments had been made, but had been discontinued. *Smith v. D. Davis & Sons* [1915] A. C. (Eng.) 528, 84 L. J. K. B. N. S. 1125, 118 L. T. N. S. 250, 31 Times L. R. 356, [1915] W. N. 152, 59 Sol. Jo. 397, 8 B. W. C. C. 313, Ann. Cas. 1915C, 914.

In each of these decisions it was held that the paragraph applies to a case where the employers had been voluntarily paying full compensation, had terminated such payment, and the workman had then commenced proceedings.

The House of Lords further held that, under § 4, the right to require

the workman who has given notice of an accident, to submit to an examination, is not confined to a single examination. *Ibid.* It was here held that the county court judge is justified in making an order suspending a workman's right to compensation, where he refused to submit to a medical examination under ¶ 4 of the first schedule, at the time when he took proceedings to enforce his claim for compensation, although he had submitted to an examination at the time of making his claim, about three months previously.

The mere fact that an employer has made no objection to the commencement of proceedings, on the ground that no notice of the accident was given by the workman, does not warrant the inference of a waiver by the employer of his right to compel the workman to submit to a medical examination, nor justify the arbitrator in imposing terms upon the employer, as a condition of his obtaining an order that the workman shall be examined. *Osborn v. Vickers* [1900] 2 Q. B. (Eng.) 91, 69 L. J. Q. B. N. S. 606, 82 L. T. N. S. 491, 16 Times L. R. 338.

The English court of appeal had taken the view that the words, "receiving weekly payments," as used in ¶ 14 of schedule 1, mean not only payments to a man who, up to the moment of his refusal, was getting week by week the money paid into his hands, but also to a man who, whether receiving it in money or not, is entitled to receive it under some enforceable right. *Major v. South Kirkby, F. & H. Collieries* (Eng.) *supra*.

The House of Lords subsequently, however, laid down the rule that ¶ 14 does not apply in a case in which payments were not being made at the time of the request for an examination, whether payments had formerly been made or not, and whether or not there was any award or agreement as to such payment.

Thus in *Smith v. D. Davis & Sons* [1915] A. C. (Eng.) 528, Lord Loreburn, L. C., said: "I cannot see why they are not applicable to the case of a man who is receiving weekly payments by oral agreement, just as much

as if a memorandum had been recorded, or as if the sums were payable under an award. The purpose seems to me to be exactly what the words say. If the employer for any reason . . . does not make the weekly payment, he has no right to have a medical examination under these provisions, and he and the workman are left to their rights without the obligation on the workman of submitting to the examination imposed by these provisions. If, on the other hand, the workman is receiving weekly payments under the act, it does not signify whether there is a memorandum or an award or an unrecorded agreement, provided that the man is in fact being paid in respect of the rights conferred upon him by the act. It would be different if the money were being paid as an act of mere charity or benevolence, for in that case no part of the act has any application."

Under the Act of 1897, a workman, who, while receiving compensation, submits to an examination by a medical practitioner provided by the employer, need not submit to an examination by one of the referees appointed under the second schedule of the act, but may file a request for arbitration upon the employer's discontinuing the compensation. *Niddrie & B. Coal Co. v. M'Kay* (1908) 5 Sc. Sess. Cas. 5th series, 1121, 40 Scot. L. R. 798, 11 Scot. L. T. 275; *Neagle v. Nixon's Nav. Co.* [1904] 1 K. B. (Eng.) 339, 73 L. J. K. B. N. S. 165, 68 J. P. 297, 52 Week. Rep. 356, 90 L. T. N. S. 49, 20 Times L. R. 160; *Strannigan v. Baird* (1904) 6 Sc. Sess. Cas. 5th series, 784, 41 Scot. L. R. 609, 12 Scot. L. T. 152. The case of *Davidson v. Summerlee & M. Iron & Steel Co.* (1903) 5 Sc. Sess. Cas. 5th series, 991, 40 Scot. L. R. 764, 11 Scot. L. T. 269, was disapproved in the other two Scotch cases which were decided in the other division of the court.

A workman is not entitled as a matter of right to have his own doctor present at the examination. *Morgan v. William Dixon* [1912] A. C. (Eng.) 74, 81 L. J. P. C. N. S. 57, 105 L. T. N. S. 678, 28 Times L. R. 64, 56 Sol. Jo. 88, (1912) S. C. (H. L.) 1, 49 Scot.

L. R. 45, 5 B. W. C. C. 184, [1911] W. N. 220, [1912] W. C. Rep. 43.

But in *Devitt v. The Bainbridge* [1909] 2 K. B. (Eng.) 802, 78 L. J. K. B. N. S. 1059, 101 L. T. N. S. 299, it was held that a workman did not refuse to be examined in telling a medical man sent by the employers to examine him that he did not object to a physical examination, provided his own physician was present.

So there is no refusal to submit to an examination where the workman offers to submit to an examination at the surgery of his doctor. *Harding v. Royal Mail Steam Packet Co.* [1911] 4 B. W. C. C. (Eng.) 59. The court held that the workman's request was not unreasonable.

But the refusal to be examined except at the office of the workman's solicitor, or in his presence, is a refusal to submit to an examination within the meaning of the statute. *Warby v. Plaistowe* (1910) 4 B. W. C. C. (Eng.) 67. *Cozens-Hardy, M. R.*, said that a solicitor's office is not, under ordinary circumstances, a proper place in which to hold a medical examination of a workman.

A workman does not necessarily obstruct a medical examination, within the meaning of the act, by going into another country and refusing to return for an examination unless his expenses are paid. *Wm. Baird & Co. v. Kane* (1905) 7 Sc. Sess. Cas. 5th series, 461, 42 Scot. L. R. 347, 12 Scot. L. T. 697. In this case the workman had twice submitted himself for examination, and had been certified not to have recovered, and immediately after the second examination went to Ireland to reside with his father, and it was held that he did not obstruct an examination by refusing another examination unless his expenses were paid, where he offered to submit himself for examination to a medical man near the place where he was residing.

Nor does a workman who is receiving compensation obstruct the holding of a medical examination within the meaning of § 14, schedule 1, of the act, by enlisting and going with his regiment to India, since he was acting under military orders, and was

not intending to reside permanently outside of the United Kingdom. *J. & C. Harrison v. Dowling* [1915] 3 K. B. (Eng.) 218, 31 Times L. R. 486, 84 L. J. K. B. N. S. 1412, 113 L. T. N. S. 622, 8 B. W. C. C. 544.

But an injured workman who is in receipt of weekly payments, and who goes to Australia without intimating to his employers that he is going, and without leaving his address, obstructs the medical examination in the sense of the statutory provision. *Finnie v. Duncan* (1904) 7 Sc. Sess. Cas. 5th series, 254, 42 Scot. L. R. 192, 12 Scot. L. T. 557.

The employer is entitled to have an injured workman examined by a physician of his own choice, notwithstanding the workman has already been examined by a physician in support of his case. *Catzo v. Canadian P. R. Co.* (1916) 17 Quebec Pr. Rep. 302.

The report of a medical practitioner, appointed for the purpose of the act, is conclusive upon the question whether the incapacity arising from the injury has ceased. *Ferrier v. Gourley Bros.* (1902) 4 Sc. Sess. Cas. 5th series, 711, 39 Scot. L. R. 453, 9 Scot. L. T. 517; *M'Avan v. Boase Spinning Co.* (1901) 3 Sc. Sess. Cas. 5th series, 1048, 38 Scot. L. R. 772, 9 Scot. L. T. 152; *Arnott v. Fife Coal Co.* [1911] S. C. 1029, 48 Scot. L. R. 828, 4 B. W. C. C. 361; *Cruden v. Wemyss Coal Co.* [1913] S. C. 534, 50 Scot. L. R. 344, [1913] W. C. & Ins. Rep. 188, 6 B. W. C. C. 393; *Sapcote v. Hancock* (1911) 4 B. W. C. C. (Eng.) 184; *Bryce v. Connor* (1904) 7 Sc. Sess. Cas. 5th series, 193, 42 Scot. L. R. 154, 12 Scot. L. T. 539.

And the county court judge is justified in following the report of the medical referee. *Parry v. Rhymney Iron & Coal Co.* (1912) 5 B. W. C. C. (Eng.) 632.

Although the medical report is final so far as it relates to the physical capacity of the workman, it may be in such a form as to entitle him to proof of his wage-earning capacity.

Thus where a medical referee has reported that a miner who has lost an eye is as fit to work underground as

any one-eyed man is, the miner is entitled to a proof of his earning capacity. *Arnott v. Fife Coal Co.* [1911] S. C. 1029, 48 Scot. L. R. 828, 4 B. W. C. C. 361. Upon a subsequent appeal [1912] S. C. 1262, 49 Scot. L. R. 902, 6 B. W. C. C. 281, it was held that proof that the miner had done no work underground since the accident, and had made various unsuccessful applications for work; that it was impossible to say whether, if he had returned to work underground, he would have regained his former earning capacity; that the earning capacity of a one-eyed miner must be judged on each individual case; that his weekly salary was reduced more than 50 per cent after the accident; and that it was not proved by the employers that if the miner had been working underground he would have been earning more than he was above ground,—justifies the dismissal of the employer's application for a review of the compensation. To the same general effect see *Cruden v. Wemyss Coal Co.* [1913] S. C. 534, 50 Scot. L. R. 344, [1913] W. C. & Ins. Rep. 188, 6 B. W.

C. C. 393, which was also the case of a one-eyed miner.

But the rule is different where the report of the medical referee covers both the physical capacity and the wage-earning ability of the workman.

Thus, where the fitness of an injured miner had been referred to a medical referee under schedule 1, ¶ 15, and the medical referee said that the man was in good health and quite fit to resume his employment as a coal miner, having recovered from the accident, it is not error for the arbitrator to end the compensation, and refuse to admit evidence to show that the workman's earning ability had been reduced, notwithstanding the fact that he had, from a medical point of view, recovered from the accident. *Gray v. Shotts Iron Co.* [1912] S. C. 1267, 49 Scot. L. R. 906, 6 B. W. C. C. 287.

When the report of the referee is unintelligible, the arbitrator may send back the report for an explanation as to its meaning. *Kennedy v. William Dixon* [1913] W. C. & Ins. Rep. 333, [1913] S. C. 659, 50 Scot. L. R. 453, 6 B. W. C. C. 434. W. M. G.

ERGO A. MAJORS

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF ALAMEDA et al.

California Supreme Court (In Banc) — September 24, 1919.

(— Cal. —, 184 Pac. 18.)

Costs — who should be permitted to sue in forma pauperis.

1. Discretion in permitting one to continue to sue in forma pauperis should be exercised with a view to confining the privilege most strictly to those who, having a substantial right to enforce or preserve, are absolutely unable otherwise to do so, and who, having once been admitted to proceed in that form, diligently pursue a course free from unreasonable delay or vexatious conduct of any kind.

[See note on this question beginning on page 1281.]

— duty to pay jury fees — in forma pauperis.

2. The preservation in a statute dealing with costs of a provision that, in case a jury is discharged without finding a verdict, no further proceeding

shall be had in the case until the jury fees are paid, when requiring a payment of such fees at the beginning of each day's session, does not apply to cases prosecuted in forma pauperis, so as to prevent a person suing in that

(— Cal. —, 184 Pac. 18.)

form from proceeding with his suit without payment of jury fees, but will be regarded as mere unintentional inclusion in the statute of a former provision which has become inapplicable.

— intent to dispauperize.

3. An intention to dispauperize one suing in forma pauperis upon permitting discharge of the jury without reaching a verdict is not shown by a statutory provision that in case of such discharge no further proceedings shall be allowed in the action until the jury fees are paid.

— discretion to permit suit in forma pauperis.

4. Whether or not one permitted to sue in forma pauperis should, on account of vexatious conduct or delay, be deprived of further benefit of uncompensated service, rests in the sound discretion of the trial court.

— exclusion of unworthy person.

5. The discretion to permit one to sue in forma pauperis should be used with the utmost care to the end that unworthy persons, who are neither indigent nor possessed of substantial rights, may not enjoy the privilege.

PETITION for a writ of prohibition to prohibit respondents from proceeding with the trial of a certain civil action until the plaintiff therein shall have paid the fees of the jury. *Writ denied.*

The facts are stated in the opinion of the court.

Messrs. H. F. Peart, D. C. Dutton, and Green Majors, for petitioner:

Statutes giving the right to prosecute actions in forma pauperis must be strictly construed, and the same rule would apply to court decisions declaring such right.

Bradford v. Southern R. Co. 195 U. S. 245, 248, 49 L. ed. 178, 181, 25 Sup. Ct. Rep. 55; Ex parte Hassan Abdu, 247 U. S. 27, 62 L. ed. 966, 38 Sup. Ct. Rep. 447.

The California Statute of 1917 applies directly to civil actions in forma pauperis.

Morand v. Hoyerdaahl, 27 Cal. App. Dec. 250.

Where the jury is discharged on the granting of a nonsuit in a civil case, no further proceedings are allowable unless the jurors be paid.

Lukes v. Logan, 66 Cal. 83, 4 Pac. 883; Fairchild v. King, 102 Cal. 320, 36 Pac. 649.

The same rule applies when the jury is discharged for failure to agree upon a verdict.

Carpenter v. Jones, 121 Cal. 362, 53 Pac. 842.

Messrs. Ezra W. Decato and T. P. Wittschen for respondents.

Messrs. C. A. Linn and Milton T. U'Ren for Andrew Martin.

Melvin, J., delivered the opinion of the court:

When this case was in the district court of appeal of the first appellate district, division No. 1, Mr. Justice Waste prepared the opinion of the court, which was as follows:

"Application for writ of prohibi-

tion prayed to be directed against the superior court of the state of California in and for the county of Alameda, Honorable T. W. Harris, judge thereof, staying proceedings in a civil action therein pending, until plaintiff therein shall have paid the fees of the jurors in the first trial; the jurors having been discharged without finding a verdict.

"Andrew Martin, as plaintiff, commenced an action against the defendant Majors (petitioner here) to recover damages for the death of plaintiff's minor daughter, alleged to have been occasioned by the wrongful acts of said defendant. When the case was at issue and ready for trial, Martin demanded a trial by jury and sought to be allowed to further prosecute the action in forma pauperis. The superior court denied him that right and refused to proceed to trial without prepayment of the fees for the jury, as required by the then-existing statutes and the rules of the court.

"On application to the supreme court that tribunal issued its peremptory writ of mandate directing the lower court 'immediately upon receipt of the writ to issue an order, in due form of law, granting petitioner leave to prosecute his said suit . . . in forma pauperis . . . without being required to pay any costs.' Martin v. Superior Ct. 176

Cal. 289, L.R.A.1918B, 313, 168 Pac. 135.

"Thereafter, pursuant to the direction of said writ, respondents set the action for trial, a jury was impaneled and sworn, and the trial of the cause proceeded in forma pauperis. During the trial, the jury having been in attendance two days, the plaintiff Martin obtained leave to amend his complaint. Defendant, petitioner here, was given time to answer and the jury was discharged. The fees for the jury were not, and have not been, paid.

"On motion of the plaintiff in the action, and over the objection of the defendant (petitioner here), the lower court has reset the cause and is about to proceed with the trial on the day set. Respondents in their return admit, or allege, the foregoing facts 'and in this connection allege that there is no provision in the statutes of this state or in the law of this state, providing for the payment of jurors serving in civil cases, where the action is being prosecuted by the plaintiff in forma pauperis.'

"In this contention respondents are correct and the action of the trial court must be upheld.

"In opposition to the respondents, petitioner relies upon provisions of the California statutes establishing fees of trial jurors, and decisions of the highest courts in this and other jurisdictions, which he contends by analogy and parity of reasoning support his views. In the most recent legislative enactment on the subject it is provided:

"If in any trial in a civil case the jury be for any cause discharged without finding a verdict, the fees of the jury shall be paid by the party who shall have announced that a trial by jury is required, but may be recovered as costs if he afterwards obtain judgment; *and until they are paid no further proceedings shall be allowed in the action.*' Stat. 1917, pp. 788, 789. The italics are ours for illustration.

"Section 17 of the Act of March 28, 1868 (Stat. 1867-68, p. 436), provides: 'If in any trial, in a civil case,

the jury be for any cause discharged without finding a verdict, the fees of the jury shall be paid by the plaintiff, . . . and until they are paid no further proceedings shall be allowed in the action.' This language is almost identical with the provision of the section of the Statute of 1917, already quoted by us, and petitioner cites *Lukes v. Logan*, 66 Cal. 33, 4 Pac. 883, referred to and approved in *Fairchild v. King*, 102 Cal. 320, at page 323, 36 Pac. 649, and *Carpenter v. Jones*, 121 Cal. 362, 53 Pac. 842, construing the language of the early statutes quoted, and squarely upholding refusals by trials courts to proceed where fees of jurors have not been paid after nonsuit or disagreement. But counsel for petitioner fails to note the vital distinction between those cases and the case in interest here. In none of the earlier decisions was the question presented as to the rights of the parties in a cause in forma pauperis. Neither did the court in any of these cases consider the vital question of the right of a litigant in a civil case to have the benefit of a jury trial regardless of his financial inability to prepay the fees for such service.

"But the whole question of the rights of a litigant in forma pauperis so recently engaged the attention of the supreme court of this state in this very case (*Martin v. Superior Ct. supra*), that we do not need to look elsewhere for authority on which to decide the question presented by the proceeding now before us. 'The fundamental question thus presented,' says the court in its opinion, 'is of the right of the petitioner [*Martin*] to proceed with the prosecution of his action in the superior court in forma pauperis, and therefore without the payment in advance of the legal fees.' The court points out that this privilege, so far as regards the exemption from court fees, was conceded to litigants at common law, and holds that the power to grant such exemption, in proper cases, now exists in our courts of general jurisdiction with-

out the declaration of express statute.

"Continuing, the court says: 'With the power in our superior courts thus declared, to admit suitors to commence, or, having commenced, to prosecute, their actions in forma pauperis in all proper cases, the next consideration is whether or not the legislature has by its enactments designed to curtail that power. Quite aside from the question as to the power of the legislature to do this thing, it is obvious that only the plainest declaration of legislative intent would be construed as even an effort to do this thing. We find no such expressed intent. All of the statutes dealing with the payment and prepayment of fees, such as § 4295 of the Political Code, are general in their nature and have to do with the orderly collection and disposition of the fees, payment or prepayment of which is prescribed by law. Neither individually nor collectively are they even susceptible of the construction that the design of the legislature was to deny to the courts the exercise of their most just and most necessary inherent power. They have applicability to all cases where the court has not, in the exercise of that power, remitted the payment of the fees on behalf of a poor suitor, and in every instance the court's order to this effect is sufficient warrant to every officer charged with the collection of fees to omit the performance of that duty in the specified case.'

"Petitioner seeks to render the decision of the supreme court inapplicable by his assertion that in the opinion the aforementioned section of the Statute of 1917 (*supra*) was not referred to, and, so far as the language of the court discloses, was not considered. However, the earlier statutes, containing language so similar as to be almost identical, were before the court and were referred to in the opinion. Furthermore, the Statute of 1917 had been passed and was in effect previous to the rendition of the decision, and

the decision and the statute must be considered together.

"We fail to see a distinction between the status of a litigant in forma pauperis before a trial by a jury, and the same litigant after a partial trial, and discharge of the jury without finding a verdict. The Act of 1917 refers to and regulates only the payment of fees where they can be and are paid by litigants. It nowhere refers to or relates to actions in forma pauperis. It is silent on the subject. We can see in it no declaration of legislative intent to curtail the inherent power of the superior court to admit suitors to commence, or, having commenced, to prosecute their actions in forma pauperis in proper cases."

Subsequently, the matter was transferred to this court in order that we might further examine the petitioner's contentions that, in view of the peremptory provision whereby the clerk of the superior court was commanded to collect all jury fees each day in advance, the language requiring settlement of unpaid fees as a prerequisite to further proceedings could apply only to persons prosecuting actions in forma pauperis, and that the language quoted by Mr. Justice Waste from the Statute of 1868, although reproduced in substance in the Act of 1917, could apply in the latter statute only to fees earned by jurors in criminal cases. Petitioner calls our attention to the facts that juries in criminal cases are paid by the counties in which the trials take place; that in ordinary civil actions fees must be paid each day in advance; and that the only causes in which jurors remain uncompensated when for any reason they are discharged are actions in which the trial is conducted under an order in forma pauperis. He argues, therefore, that there is no case in which the provision of the Statute of 1917 that, until the jury fees are paid, "no further proceedings shall be allowed in the action," could possibly operate or be at all applicable excepting

in civil actions proceeding in forma pauperis. He therefore insists that the Statute of 1917 unequivocally applies to the trial of *Martin v. Majors*, and that, the jury having been discharged without finding a verdict, "no further proceedings shall be allowed in the action" until the jurors are paid.

To this argument respondents answer that for many years the law had been in virtual accord with the quoted section of the Act of 1917, yet this court in *Martin v. Superior Ct.* announced no exception to the rule that in all stages of a trial a poor suitor shall have all of the benefits of uncompensated service from jurors and court officers.

There was no substantial change in the statutes amendatory of the Act of 1868 with reference to the compensation of jurors until the Statute of 1917 was adopted. Stat. 1869-70, pp. 148-176; Stat. 1871-72, p. 188. Section 631, subd. 5, Code of Civil Procedure, provides that a trial by jury may be waived in certain actions by the several parties to an issue of fact, "by failing, at the beginning of each day's session, to deposit with the clerk the jury fees and . . . mileage for such day;" but this subdivision (adopted in 1915) throws no light upon the problem presented to the court in the matter at bar. Petitioner declares that there is a wide and fundamental difference between the fee bill of 1868 and its early successors and that of 1917. In the act last framed, while there is a provision for payment of jurors by the county, all of their compensation in civil cases must come from the daily prepayment of the proper fees. By the earlier acts the fees were payable, in civil cases, by the prevailing party, before the entry of the verdict. There was also the provision that, if the sum received by each juror should be found at the end of the term to be less than the legal per diem and mileage, the difference should be paid by the county.

But it is argued by respondents

that, inasmuch as actions prosecuted in forma pauperis were not specified in terms by the statute, and because the legislature was dealing with the general practice in jury cases, the lawmakers only had in mind the situation which might arise in a suit or proceeding in which solvent litigants might be engaged. Respondents, in short, contend that the apparent restricted meaning of the requirement for payment of fees prior to further proceedings after discharge without verdict of a jury arises from unintentional inclusion in a statute adopting a new rule for prepayment of fees in ordinary cases of language which had been applicable to all litigants when used in earlier enactments. It is also asserted on behalf of respondents that in giving to the fee bill the interpretation suggested by petitioner this court would be going contrary to the spirit, if not the letter, of the decision in *Martin v. Superior Ct.* With reference to the point last stated we agree with respondents that a very liberal view of the rights of poor litigants was adopted by this court in the *Martin Case*. There it was decided that only the plainest declarations of legislative intent would be construed as an effort to curtail the authority of courts given by the common law to admit litigants to sue in forma pauperis. In view of the language of the opinion in *Martin v. Superior Ct.* and of an examination of the various fee bills themselves, we are constrained to agree with respondents.

Costs—duty to pay jury fees—in forma pauperis.

Since the submission of the cause it has been suggested by a member of the court that perhaps the legislators who enacted the Statute of 1917 might have had in mind the fact that at common law a vexatious suitor in forma pauperis or one who unnecessarily delayed or otherwise damaged his adversary might be dispaupered and prevented from having further benefit of uncompensated service of jurors. This leads to an inquiry whether or not it is

reasonable to suppose that the new matter in the Act of 1917 was an attempt automatically and without the intervention of a court to dispauperize anyone who had failed of a verdict from the jury first drawn. Such a result might follow the enforcement of the letter of the Law of 1917.

Common-law courts, it is true, were jealous of extending the privilege of suing in this form. In Lilly, Abr. 1735 ed. p. 851, we are informed that Rolle, Chief Justice, said "that he did not use to admit anyone generally to sue in forma pauperis, that is, to sue in all causes, but only to sue so in one cause by virtue of that admittance, 1654. B. S. So that if he had other cause to shew, he must petition again to be admitted to sue in forma pauperis, & sic toties quoties."

The same author in the same article uses the following language: "If one that is admitted to sue in forma pauperis, will not proceed according to the rules of the court, but useth delays to vex his adversary, the court will dispauper him. Mich. 22 Car. B. R. For the law doth not favor the poor to do injury to others, but to help them to recover their right, while they want ability of themselves to do it."

There was a rule also that if a pauper gave notice of trial and did not proceed he should be dispaupered. A note of this rule is found in Anonymous, 2 Salk. 506, 91 Eng. Reprint, 433.

However, the rule seems to have been enforced, generally speaking, only upon some showing of vexatious conduct on the part of the pauper. In Blood v. Lee, 3 Wils. 24, 95 Eng. Reprint, 912, we find the following interesting matter: "Wilmot, Ch. J., cited, from his own manuscript notes, the following cases relating to paupers and costs: Winter v. Slow, Mich. 4 Geo. II. B. R., was trover by a pauper; at the trial, the plaintiff proved a demand and refusal at the time of serving the writ, which being after the commencement of the action, he became

nonsuited; and having brought a second action for the same thing, it was moved that he might pay the costs of the nonsuit in the former action, before he proceeded in the second action; but the court refused to grant the motion, because they thought the plaintiff had not been vexatious. In Taylor v. Lowe, Trin. 7 & 8 Geo. II. B. R. the plaintiff being a pauper, and having given five or six notices of trial and thereby vexed the defendant, it was moved that he might pay costs of former notices, or be restrained from proceeding to trial; but while the admission to sue in forma pauperis stood they would make no rule about costs, but made a rule to shew cause why he should not be dispaupered, which was made absolute upon an affidavit of service thereof."

In Hullock's Law of Costs, 1796 ed. 213, a case is cited where a single nonsuit made costs at once due, and it was ruled that the pauper might not thereafter proceed without paying costs, or showing, according to the act of Parliament, that he was whipped. The same learned author, at the same page, cites Winter v. Slow, supra, where it appeared that the nonsuit was not upon the merits, but occasioned by a mistake of plaintiff's attorney, and therefore in the court's opinion not vexatious. In Noaks v. Watts, 1 Strange, 421, 93 Eng. Reprint, 609, it was decided that a pauper shall not pay costs for not going on to trial, as other plaintiffs do; but if the costs are taxed the court would prevent his being vexatious by obliging him to pay them before going to trial.

It was declared in Doe ex dem. Leppingwell v. Weake, 2 J. P. Smith, 676, that withdrawing the record at the third day of the assizes, after giving notice of trial, was vexatious conduct meriting dispaupering of the plaintiff, but in that case it was decided that defendants had waived their right to complain.

In Britain v. Greenville, 2 Strange, 1122, 93 Eng. Reprint, 1072, the court denied a motion to

tax costs after a lessor admitted in forma pauperis had a verdict against him. The purpose was to ground a further motion to stay his proceedings in a second ejectment. The decision seems to be grounded, in part at least, upon the failure of the moving party to proceed in the usual way to dispauper his adversary. It was held, however, that plaintiff's conduct was not vexatious.

In *Doe ex dem. Leppingwell v. Trussell*, 6 East, 504, 102 Eng. Reprint, 1881 (probably a companion to *Doe ex dem. Leppingwell v. Weake*, *supra*), it was found that the plaintiff suing in forma pauperis had caused much delay by twice setting the case for trial and afterwards countermanding the notice, in one instance before the term, and in the other withdrawing the record on the third day of the assizes. The defendant had incurred above £100 costs in procuring evidence, and his attorney swore that he believed the merits to be in favor of the defendant. The reporter describes the proceedings and their result as follows:

"To shew that the proper course was to move that the party should be dispaupered in case of vexatious delay. *Anonymous*, 2 Salk. 506, 91 Eng. Reprint, 433; *Taylor v. Lowe*, 2 Strange, 983, 93 Eng. Reprint, 983; *Brittain v. Greenville*, *supra*, and 2 Tidd, Pr. 893, were cited. It was contended that the lessor of the plaintiff ought at least to have countermanded his notice, and thereby saved a great part of the expense which the defendant had sustained.

"On this day Lawes shewed cause upon an affidavit, which stated that, the lessor of the plaintiff having about thirty copies of registers to procure, and several witnesses to collect, among whom was an old and infirm man, was unable to get to the assizes in time, and therefore was under the necessity of withdrawing the record.

"The court, however, made the rule absolute for dispaupering the lessor of the plaintiff, but dis-

charged it as to the payment of costs."

Under the heading "*Forma pauperis*" in 1 General Index to the English Common-Law Reports (*Biddle & McMurtrie*, 1882 ed.) at page 373, we find the two following notes: "Amendment without costs not mandable of right. *Foster v. Bank of England*, 6 Q. B. 878, 115 Eng. Reprint, 331. Withdrawing record to amend must pay costs of the day. *Thompson v. Hornby*, 9 Q. B. 978, 115 Eng. Reprint, 1549, 16 L. J. Q. B. N. S. 152, 11 Jur. N. S. 169."

In *Weston v. Withers*, 2 T. R. 511, 100 Eng. Reprint, 275, it was held that after nonsuit in trespass the court will stay proceedings in a second action between the same parties for the same cause until payment of the costs of nonsuit, notwithstanding the fact that the plaintiff suing in forma pauperis was a prisoner at the time of bringing the second action.

It will be at once evident from the above citations that the common-law courts were not very ready to extend the privileges of a second trial to one suing in forma pauperis if there were circumstances indicating vexatious conduct. It will be also apparent that no very definite nor fixed rule was followed. But even the practice at the common law did not in general dispauperize one who merely failed to obtain a verdict, or who by the action of his counsel in securing a postponement of the cause for correction of pleadings permitted a jury to be discharged before submission of the issues of fact. We cannot justly decide, therefore, that a rule analogous to that for dispaupering litigants at common law was intended by the legislature of 1917.

Besides, there could be no good reason for requiring a plaintiff excused from paying jury fees at the first trial to pay on a second trial the fees from which he was so excused. Some reason might exist for failing to extend the privilege to a

second trial without fees, but that would be accomplished, not by forcing him to pay the charges from which he had been exempted, but by exacting the usual charges for a second trial.

The question whether one once admitted to sue in *forma pauperis* should, on account of vexatious conduct, delay, etc., be prevented from having further benefit of uncompensated service, is one for the court having jurisdiction in the case or proceeding to determine in the exercise of a wise discretion. Its discretion here, as in the case of one originally seeking to be admitted to sue in *forma pauperis*, should be exercised with a view to confine the privilege most strictly to those who, having a substantial right to

enforce or preserve, are absolutely unable otherwise to so do, and who, once having been admitted to proceed in *forma pauperis*, diligently pursue a course free from unreasonable delay or vexatious conduct of any kind.

—who should be permitted to sue in *forma pauperis*.

In conclusion, we wish most emphatically to declare our conviction that such discretion should be used with the utmost care, to the end that unworthy persons who are neither indigent nor possessed of substantial rights may not enjoy this privilege.

—exclusion of unworthy person.

Petition denied. Alternative writ discharged.

We concur: Angellotti, Ch. J.; Lennon, J.; Wilbur, J.; Olney, J.; Lawlor, J.

ANNOTATION.

Financial circumstances which will enable one to sue in *forma pauperis*.

- I. Historical, 1281.
- II. General considerations, 1282.
- III. The English practice, 1283.
- IV. American practice:
 - a. In general, 1285.
 - b. Under various statutes:
 1. Owing to poverty not able to bear expense of action, 1286.
 2. Not sufficient means to prosecute or defend the action, 1286.

IV.—continued.

3. A poor person unable to prosecute his suit and pay the costs and expenses thereof, 1287.
4. Unable to pay or secure costs on account of poverty, 1287.
5. Not able to secure costs, 1288.
6. New York, 1288.
7. Texas, 1290.

V. Miscellaneous, 1291.

This note does not include the questions whether an infant and his next friend or guardian ad litem must both be poor to sue in *forma pauperis*, nor whether a poor person may so sue who has contracted with an attorney for a contingent fee, nor whether suits may be so brought in a representative capacity.

I. Historical.

There seems to be no doubt that some indulgence to poor persons in bringing their actions existed from a very early period.

It is said in Britton, bk. 1, chap. 14, Views on Disseisin, p. 117B, that "it 6 A.L.R.—81.

is the sheriff's duty to take pledges, two at least, distrainable to himself, that the plaintiff will prosecute his plaint, except where, on account of his poverty, we have permitted him to sue his plaint upon the pledge of his promise only; and then he shall find no other security to the sheriff."

It is stated in the *Mirror of Justices*, chap. 1, § 3, that "it was ordained that no action was receivable to judgment, if there was not a present proof by witnesses or other things; and that none was bound to answer to any suit, nor to appear to any action in the King's courts before the King's justices, before they found

sureties to answer damages and the costs of suit, if damages lay in the case, except in four offenses,—disseisins, certification of disseisins, attainments, redisseisins, and other cases. To which ordinance King Henry the First put this mitigation in favor of poor plaintiffs, that those who had not sufficient sureties present should make satisfaction according to their ability, according to a reasonable taxation."

In *Brunt v. Wardle* (1841) 3 Mann. & G. 534, 138 Eng. Reprint, 1254, Tindal, Ch. J., said: "But, after all, is the 11 Hen. VII. chap. 12, anything more than confirmatory of the common law? In the learned report of the Serjeant's case by my brother Manning, p. 41, note (d), a case is referred to that occurred in the 15 Edw. IV., twenty years before the passing of that act, from which it appears that at common law if a party would swear that he could not pay for entering his pleadings, the officer was bound to enter them gratis; and that in this court there was a presignator pur les poers." Maule, J., in the same case took a similar view.

So at an earlier stage of the reported case (*MAJORS v. SUPERIOR CT.* ante, 1274) reported sub nom. *Martin v. Superior Ct.* (1917) 176 Cal. 289, L.R.A.1918B, 313, 168 Pac. 135, it was held that the power of the courts to remit fees in forma pauperis was inherent at common law.

But some of the authorities have taken the view that the right to sue in forma pauperis originated in statute. Thus, in *Oldfield v. Cobbett* (1845) 1 Phill. Ch. 613, 41 Eng. Reprint, 765, Lyndhurst, Ld. Ch., said that "the right to sue in forma pauperis originated in the statute of Hen. VII." So it is stated that the right originated in statute in *Roy v. Louisville, N. O. & T. R. Co.* (1888) 34 Fed. 276; *Bristol v. United States* (1904) 63 C. C. A. 529, 129 Fed. 87; *Hoey v. McCarthy* (1890) 124 Ind. 464, 24 N. E. 1038; *Harrison v. Stanton* (1896) 146 Ind. 366, 45 N. E. 582. The last of these cases cites the authority of *Tidd's Practice*, but *Tidd* makes no such statement. On the other hand

in *Ferguson v. Dent* (1883) 15 Fed. 771, the court apparently gives *Tidd* as authority for the statement that the common law allowed poor persons to sue in forma pauperis.

In *Campbell v. Chicago & N. W. R. Co.* (1868) 23 Wis. 490, the court affirmed a dismissal of an action because the plaintiff, through inability, failed to give security for costs, stating that there was no statute authorizing a person to sue in forma pauperis, and that the matter was one for the legislature.

By the statute 11 Hen. VII. chap. 12, it was provided "that every poor Person or Persons, which have, or hereafter shall have Cause of Action or Actions against any Person or Persons within this Realm, shall have by the Discretion of the Chancellor of this Realm for the time being, Writ or Writs Original, and Writs of Subpœna, according to the Nature of their Causes, therefore nothing paying to your Highness for the Seals of the same, nor to any Person for the writing of the same Writ and Writs to be hereafter sued;" etc., etc.

The statute 23 Hen. VIII. chap. 15, as to costs in case of nonsuits or verdicts against the plaintiffs, provided that all and every such poor person or persons admitted by discretion of the judges to have their process and counsel of charity, without any money or fee paying for the same, shall not be compelled to pay any costs by virtue and force of this statute, but shall suffer other punishment as by the discretion of the judge shall be thought reasonable.

II. General considerations.

It is not necessary that the applicant be a pauper. *People ex rel. Barnes v. Chytraus* (1907) 228 Ill. 194, 81 N. E. 844; see also *McNamara v. Nolan* (1895) 13 Misc. 76, 34 N. Y. Supp. 178, *infra*, IV. b, 6. See also in this connection *Gallerstein v. Manhattan R. Co.* (1899) 26 Misc. 853, 55 N. Y. Supp. 444, affirmed in (1899) 58 N. Y. Supp. 1141, *infra*, IV. b, 6.

It has been held that the applicant must be an object of charity. *Isnard v. Cazeaux* (1828) 1 Paige (N. Y.)

37; *Zeimmer v. Schmalz* (1882) 1 N. Y. City Ct. Rep. 435, *infra*, IV. b., 6.

In *Isnard v. Cazeaux* (N. Y.) *supra*, the court vacated an order allowing the complainant to prosecute his suit as a pauper, where he had considerable sums of money under his control in the bank, occupied a house at \$400 rent, and kept a servant, etc. The chancellor said: "Applications of this kind are not to be encouraged in this state, where every healthy and industrious citizen can earn sufficient to support himself, and also to enable him to pay the moderate fees of the officers of this court. . . . In this country the court must be convinced that the party is really an object of charity before it will grant him this privilege."

But on the contrary it was held in *Perry v. Walker* (1842) 1 Younge & C. Ch. Cas. 672, 62 Eng. Reprint, 1066, 6 Jur. 846, that one would not be dispaupered because he was not an object of charity. And see also *McNamara v. Nolan* (1895) 13 Misc. 76, 34 N. Y. Supp. 138, *infra*, IV. b, 6.

That the applicant works to provide for his family will not cause him to be dispaupered (*Perry v. Walker* (Eng.) *supra*); nor will an application be denied because the applicant earns \$15 per week (*McNamara v. Nolan* (N. Y.) *supra*); or because she earns \$15 per month as a domestic (*Feier v. Third Ave. R. Co.* (1896) 9 App. Div. 607, 41 N. Y. Supp. 621).

That the applicant is able-bodied and may earn the necessary money is no answer to his statement that he has not sufficient means to prosecute the action or to secure the costs. *Kerr v. State* (1871) 35 Ind. 288; *Kruegel v. Johnson* (1906) — Tex. Civ. App. —, 93 S. W. 483. But compare *Zeimmer v. Schmalz* (N. Y.) *supra*, as to a broker.

In *Walker v. Walker* (1834) 1 Curt. Eccl. Rep. (Eng.) 560, the brief report of the case is that one, though without property, capable of earning a livelihood in his business or profession, is not entitled to proceed in *forma pauperis*. This case is distinguished in *Spratt v. Spratt* (1857) 5 Week. Rep. (Eng.) 323, on the ground

that it related to an artisan, and not to a professional person. It was held in the *Spratt Case* that a physician who swears he has no patients and no income will not be dispaupered because his opponents swear he is capable of earning a living.

III. The English practice.

Under the aforesaid statutes of Hen. VII. and Hen. VIII. it was the practice that the applicant should make affidavit that he was not worth the sum of £5, his wearing apparel and the matters in the cause only excepted. *Perry v. Walker* (1844) 1 Colly. Ch. Cas. 229, 63 Eng. Reprint, 396, 13 L. J. Ch. N. S. 75, 8 Jur. 680.

The statutes 11 Hen. VII. chap. 12, and 23 Hen. VIII. chap. 15, were repealed by chap. 49, of 46 & 47 Vict. (1883), and the matter is now provided for by the rules of the supreme court of judicature under which the person must not be worth £25, excluding the subject matter of the action and wearing apparel. See *Re Atkin* [1909] 1 Ch. (Eng.) 471, 78 L. J. Ch. N. S. 307, 99 L. T. N. S. 877, 53 Sol. Jo. 61.

The court refused an order to a defendant having an annuity of £20 and who was tenant at will of a cottage worth £10 a year. *Burry Port Co. v. Bowser* (1857) 26 L. J. Ch. N. S. (Eng.) 319, 5 Week. Rep. 325.

And an order nisi to dispauper was granted where it appeared that the plaintiff was a housekeeper paying £28 per annum house rent, and the furniture in the house was worth £40. *Clarke v. Pyke* (1706) 1 Colly. Ch. Cas. 234, note, 63 Eng. Reprint, 398, note.

So the party was dispaupered—when at the time of the original order he was entitled to furniture worth £20, *Goldsmith v. Goldsmith* (1846) 5 Hare, 123, 67 Eng. Reprint, 853, 15 L. J. Ch. N. S. 264, 10 Jur. 561, defendant;

—where he was an insolvent naval officer whose alienable half pay amounted to £150 a year, *Boddington v. Woodley* (1842) 5 Beav. 555, 49 Eng. Reprint, 693, 12 L. J. Ch. N. S. 15, 6 Jur. 960, defendant;

—where it appeared that he "is

seised of an estate of inheritance of 40s. annual value, and hath been in possession thereof twenty years, and that he hath household furniture to the value of £10", *Tunstall v. Freeney* (1702) 1 Colly. Ch. Cas. 233, note, 63 Eng. Reprint, 398, note, plaintiff;

—where it was sworn that he had been for two years past a coach builder, employing men, and was "now possessed of a carriage, trade implements, furniture, and other goods worth £20 and upwards," although he swore in reply that he had "been out of a situation for some time past, and was unable to earn sufficient to support himself and family, and would be glad to obtain £3 or £4 for all the furniture and working tools in his possession," and "that he was not worth more than £5 over and above his wearing apparel", *Mather v. Shelmerdine* (1844) 7 Beav. 269, 49 Eng. Reprint, 1068, plaintiff.

So the plaintiff was dispaupered where it appeared that "he is a man under very good circumstances, and follows the employment of a doctor for the cure of ruptures and other things mentioned in printed bills by him given out, and in that employment gets a good living, and keeps a house of £20 per annum in Goodman's Fields, and another apartment near Fleet Bridge, of £11 per annum, for the exercise of his profession, and hath good lodgings at Greenwich, and, according to the way of living, doth not spend less than £100 per annum." *Bartlett v. Smith* (1705) 1 Colly. Ch. Cas. 233, note, 63 Eng. Reprint, 398, note.

In *Kydd v. Watch Committee* (1902) 24 Times L. R. (Eng.) 257, the court refused leave to prosecute an appeal in forma pauperis to a retired police constable with a pension of £1 8s. per week, although he swore that this amount was not adequate to provide the necessities of life for himself and wife after paying 8s. 6d. rent.

And a woman plaintiff in receipt of a yearly income of £52 from trustees was dispaupered in *Re Atkin* (Eng.) *supra*.

Whether debts might be excepted in making the affidavit seems somewhat uncertain.

In *Anonymous* (1699) 2 Salk. 506, 91 Eng. Reprint, 433, it is said: "Mr. Northey moved to dispauper a parson who was plaintiff in an action, because he had a living of £40 per annum. Turton and Gould, Justices, contra, because he swore he was in debt more than it was worth. Holt, Ch. J., differed from them; for his being indebted, or his estate being mortgaged, is no reason; it is enough that he has a considerable estate in possession."

In *Raxworthy v. Raxworthy* (1837) 7 L. J. Ch. N. S. (Eng.) 136, a plaintiff was dispaupered who had an annuity of £50, although he swore that he believed that if he had power to dispose of the annuity for his life it would not produce enough to pay his just debts,—his specification of them not being satisfactory.

In *Romilly v. Grint* (1839) 2 Beav. 185, 48 Eng. Reprint, 1151, the defendant having obtained, ex parte, an order to defend in forma pauperis on an affidavit "that his just debts being first paid, and his wearing apparel and the matters in question in this cause only excepted, he was not worth the sum of £5," he was dispaupered on a showing that he was carrying on business as a boot and shoe maker, and was apparently in good circumstances, although he repeated his statement "that he was not possessed of property of the value of £5 beyond his wearing apparel, and that he was very largely indebted."

In *Perry v. Walker* (1842) 1 Younge & C. Ch. Cas. 672, 62 Eng. Reprint, 1066, 6 Jur. 846, it was held that the plaintiff would not be dispaupered because he was working for money to provide for his family, and not living on charity; but some two years later in the same action (1844) 1 Colly. Ch. Cas. 229, 63 Eng. Reprint, 396, 13 L. J. Ch. N. S. 75, 8 Jur. 680, the plaintiff was dispaupered, it appearing that by his employment he had acquired substantial property, and the court considering that in making the affidavit debts ought not to be excepted.

The English cases are somewhat confused on the question as to what

is meant by the exception of the matters in the cause.

In *Allen v. M'Pherson* (1841) 5 Beav. 469, 49 Eng. Reprint, 660, the court declined to dispauper the plaintiff, who was claiming legacies revoked by a codicil under which he was given a smaller interest.

Where the object of the suit was to foreclose an equitable mortgage for securing a debt from the defendant to a joint stock bank of which the plaintiff was the suing officer, the fact that the defendant owned five shares in the bank which might be retained by the bank on the debt would not suffice to dispauper him, as they were to be considered as "in question in the cause." *Dresser v. Morton* (1847) 2 Phill. Ch. 285, 41 Eng. Reprint, 952.

But in *Ridgeway v. Edwards* (1874) L. R. 9 Ch. (Eng.) 143, 29 L. T. N. S. 906, 22 Week. Rep. 288, it was held that a tenant of a farm owing rent would not be permitted to defend in forma pauperis where he has crops, although he had been enjoined from selling or removing them, as they were not the subject of the suit.

The two following cases are not easy to understand.

In *Spencer v. Bryant* (1805) 11 Ves. Jr. 49, 32 Eng. Reprint, 1006, the court dispaupered the defendant, where the object of the bill was the specific performance of an agreement by the defendant to sell a small cottage of which he was in possession to the plaintiff, and the defendant had obtained an order to defend in forma pauperis, for that purpose stating by affidavit that he was not worth more than £5, except the matters in question.

And in a suit to compel the defendant to grant to the plaintiff a lease of property, upon which the plaintiff, on the faith of an agreement to that effect, had erected a house, the plaintiff was dispaupered on its appearing that he was in possession and enjoyment of the property in question, which was worth £140 and £10 a year. *Taprell v. Taylor* (1846) 9 Beav. 493, 50 Eng. Reprint, 434.

In the obscurely reported case of *Butler v. Gardener* (1850) 12 Beav.

525, 50 Eng. Reprint, 1162, 19 L. J. Ch. N. S. 473, the plaintiff was dispaupered where she brought a suit in relation to an annuity to her of £20 under her brother's will, which had been paid to her up to two days before she brought the suit.

IV. American practice.

a. In general.

There are one or two cases in which the general right of a poor man to prosecute is considered.

In *Hickey v. Rhine* (1856) 16 Tex. 576, where it was held that it was error to dismiss a case for want of security for costs if the plaintiff was willing to make the affidavit of his inability to give security for costs in the terms of the statute, the court said: "And it is further believed that the court could and ought, under its general powers, independent of the statute, to have permitted the case to proceed on a satisfactory showing of the inability of the plaintiff to give the security, as no man should be prevented from prosecuting a suit, seeking redress for an outrage upon his person, on the ground of his poverty."

In *Spalding v. Bainbridge* (1879) 12 R. I. 244, in holding that a statute peremptory in terms did not require that the court should make an order that the plaintiff give surety for costs where he was too poor to procure a surety, the court said: "To dismiss the suit in such a case would amount to a denial of justice and would be inconsistent with the Constitution. . . . art. 1, § 5." The section referred to provides: "§ 5. Every person within this state ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property or character. He ought to obtain right and justice freely and without purchase, completely and without denial; promptly and without delay; conformably to the laws."

In some of the American cases it has been held that the English statute was in force.

Thus the statute of Hen. VII. was held in force in North Carolina in *M'Clenahan v. Thomas* (1813) 6 N. C.

(2 Murph.) 247, holding that "persons may sue in this state, in forma pauperis, upon satisfying the court that they have a reasonable ground of action, and from their extreme poverty are unable to procure security."

In *Sears v. Tindall* (1836) 15 N. J. L. 399, in denying an application for leave to proceed in forma pauperis where the applicant stated "that she is poor, and not of ability to sue according to law for the redress of injuries and wrongs, or the recovery of her demands and rights," the court said: "Our statute, Rev. Laws, p. 393, is, in principle, the same as that of 11 Hen. VII. chap. 12, and the practice of the courts at Westminster Hall, under that, must regulate ours until a new course shall be prescribed by the legislature, or until this court shall feel itself authorized to lay down new rules upon the subject. But if, as insisted by the counsel in support of the application, we ought to adopt a more liberal practice, and extend the relief contemplated by the statute to poor persons, though not so indigent as to swear they are not worth £5 sterling, excepting their wearing apparel, and the matter in question, yet this is not a case to justify the court in establishing a new rule. The applicant says, 'She is poor, and not of ability to sue according to law.' But 'poor' is a relative term. She may be rich, compared to others; and though she says that she is not of 'ability to sue,' yet that is only her opinion. It is plain that the court must require something specific as to the degree of poverty, to enable it to exercise its 'discretion' intelligently upon such applications. For, if we admit every person to sue in forma pauperis who will make oath that he is 'poor' and not of 'sufficient ability,' we shall encourage litigation, and the bar will have more poor clients than ever. Five pounds sterling may be too small a sum, but there should be some limit, and I am not sure that sound discretion would prescribe a much larger sum than the old rule requires."

The substance of the requirements of several of the American statutes is given in following subdivisions. Oth-

er statutes, for example, require that by reason of his poverty the applicant be unable to give security for costs (*Barnett v. Lark* (1891) 45 Kan. 428, 25 Pac. 869); that the court "be satisfied that the plaintiff is a poor person, and unable to prosecute his or her suit, and pay the costs and expenses thereof" (*Carrier v. Missouri P. R. Co.* (1903) 175 Mo. 470, 74 S. W. 1002); that the court might permit any poor person who was unable to pay the costs of a suit to prosecute, etc. *St. Louis & S. F. R. Co. v. Farr* (1893) 6 C. C. A. 211, 12 U. S. App. 520, 56 Fed. 994). In *Bearup v. Coffey* (1898) 9 N. M. 500, 55 Pac. 289, the statute provided that if the person "shall make oath that he is too poor to pay costs, he shall have any and all process of the court free of charge." In *Jones v. Wisner Circuit Judge* (1895) 105 Mich. 664, 63 N. W. 976, the statute provided that security for costs should not be required in cases in which claims for labor are involved, when the claimant is unable to give the security.

b. Under various statutes.

1. Owing to poverty not able to bear expense of action.

Under a statute providing for suing in forma pauperis where, owing to poverty, one is not able to bear the expense of action, a plaintiff was held to be rightly dispaupered where it appeared that a man who had been at first his surety and later discharged owed him \$400. *Moyers v. Moyers* (1872) 11 Heisk. (Tenn.) 495.

In *Bradford v. Bradford* (1878; W. D. Tenn.) 2 Flipp. 280, Fed. Cas. No. 1,766, the court ordered that "the usual oath required under the state law as to insolvency and poverty be first made."

2. Not sufficient means to prosecute or defend the action.

A statute requiring that, to proceed as a poor person, one should not have sufficient means to prosecute or defend the action, is satisfied by a person wholly without property or money of any kind. *Pittsburgh, C. C. & St. L. R. Co. v. Jacobs* (1893) 8 Ind. App. 556, 36 N. E. 301.

Where the court is satisfied under the statute that a poor person "has not sufficient means to prosecute the action," it is no answer to say that the person is able-bodied and may earn the necessary money. *Kerr v. State* (1871) 35 Ind. 288.

An infant was properly allowed to prosecute as a poor person under such statute "after the removal of her next friend, upon a showing that she could not obtain a responsible person to act in such capacity, and that she only possessed a bed and sewing machine, of the value of \$50." *Wright v. McLarinan* (1883) 92 Ind. 103.

The discretion of the court in refusing leave to a nonresident to prosecute as a poor person was not disputed when she averred that she was poor, and not worth \$10 over and above her wearing apparel and the claim she was prosecuting against the defendant, and it did not appear that any other evidence was heard, or that any statement was made by any attorney or other person than the petitioner, concerning the merits of the claim. *Hoey v. McCarthy* (1890) 124 Ind. 464, 24 N. E. 1038.

3. A poor person unable to prosecute his suit and pay the costs and expenses thereof.

Under a statute providing that "if any court shall, before or after the commencement of any suit, be satisfied that the plaintiff is a poor person, and unable to prosecute his suit and pay the costs and expenses thereof, the court may, in its discretion, permit him to commence and prosecute his action, as a poor person," "it is unnecessary that either the applicant's attorney or the court should be satisfied that the applicant is a pauper." *People ex rel. Barnes v. Chytraus* (1907) 228 Ill. 194, 81 N. E. 844.

Under the foregoing statute a motion was granted for leave to prosecute as a poor person where it appeared that the plaintiff and her next friend were each insolvent and unable to give security for costs of suit. *Consolidated Coal Co. v. Gruber* (1901) 188 Ill. 584, 59 N. E. 254.

4. Unable to pay or secure costs on account of poverty.

Where the statute (27 Stat. at L. 252, chap. 209, Comp. Stat. § 1626, 2 Fed. Stat. Anno. 2d ed. p. 647) provided that a citizen may prosecute an action "without being required to prepay fees or costs or give security therefor before or after bringing suit or action, upon filing in said court a statement under oath, in writing, that because of his poverty he is unable to pay the costs of said suit or action which he is about to commence or to give security for the same," and "that after any such suit or action shall have been brought the plaintiff may answer and evade a demand for fees or security for costs by filing a like affidavit," it was held that the plaintiff's affidavit was not sufficient where it declared "that demand has been made upon her by the defendant to give security in the sum of \$1,000 for the payment of the costs of said action, and that by reason of her poverty she is unable to give security for said costs," as the affidavit related to the amount demanded; and the court required security of \$250. *Woods v. Bailey* (1901) 111 Fed. 121.

A person having a salary of \$20 per week and paying \$200 a year rent is not within the United States Statute (*Wickelman v. A. B. Dick Co.* (1898) 29 C. C. A. 436, 57 U. S. App. 196, 85 Fed. 851); nor is an allegation of poverty sustained under it by a plaintiff who has a house and lot worth \$1,600, encumbered by a mortgage of \$600 (*Woods v. Bailey* (1903) 122 Fed. 967).

In *Fils v. Iberia, St. M. & E. R. Co.* (1919) 145 La. —, 82 So. 697, it was held that the plaintiffs, three negro children, were unable to pay or secure costs on account of poverty, where they owned nothing except household effects left by their father, inventoried at \$194, and the costs of the suit were \$425. The court said: "For being entitled to sue in forma pauperis, it is not necessary that the would-be-litigant should be destitute even of a mattress upon which to lie, or a table upon which to eat, or a chair upon which to sit. Moreover, in the pres-

ent case, the household furniture would not suffice for meeting the costs bill, even if sold at full value. And because friends or sympathetic or charitable persons are willing to come to his assistance, rather than see him deprived of legal recourse, detracts in no way from his poverty within the intendment of the *Forma Pauperis Act*. . . . We think that the plaintiffs were 'poor' within the meaning of said act."

An inability to furnish security on account of poverty appears when, though the assessment roll showed that the plaintiff was assessed for \$70, he states "that the property belonged to his wife; that he had no property of any kind; that when required to give security for costs in justice court, he applied to several persons, and failed to make the bond; that he did not ask his wife to go on his bond because she only had 60 acres of land and a little personal property that was encumbered." *Walker v. Smith* (1895) — *Miss.* —, 19 So. 102.

5. Not able to secure costs.

Under a statute which provides for cases where a party is not able to secure the costs, the plaintiff need not state in his affidavit that he did not have real estate which he could mortgage to secure the costs, when that is not required by the statute. *State ex rel. Maggett v. Roberts* (1891) 108 N. C. 174, 12 S. E. 890.

Where the defendants moved "to dismiss for that it appeared that the feme plaintiff owned 50 acres of land worth more than \$200," the judge found that the "plaintiffs were not able to give a prosecution bond and refused to dismiss," and the appellate court declined to interfere. *Rich v. Morisey* (1908) 149 N. C. 37, 62 S. E. 762.

But where, after an action was commenced in *forma pauperis*, upon a motion by the defendant that the plaintiff give security, it appeared that he was the owner of two small tracts of land worth from \$120 to \$150, a part of which was involved in the action. It was ordered that the plaintiff must file a mortgage on this land to secure the costs, in the penalty of \$100, or his

action would be dismissed. On appeal the order was affirmed except that the part of the land involved in the action was not required to be included in the mortgage. *Dale v. Presnell* (1896) 119 N. C. 489, 26 S. E. 27.

When the plaintiff, allowed to sue in *forma pauperis*, was later found to own real estate worth from \$350 to \$600, and an offer was made that he give security, make deposit, or execute a mortgage with his wife on the property to secure the costs, or that the action be dismissed, the court dismissed the action, although the plaintiff filed an affidavit to the effect that he was unable to make the required deposit or give the bond for costs, and that his wife had refused to sign the mortgage. The appellate court, in affirming the judgment of dismissal, said, *inter alia*: "We cannot tell in the present state of the record whether the judge has found as a fact that plaintiff cannot give the bond or make the deposit to secure the costs. If he had found that, by reason of his poverty, he could do neither, a serious question might be presented as to whether, if the plaintiff had, in good faith, made effort to secure the joinder of his wife in the execution of the mortgage, he should not be entitled to go on with his suit upon giving a mortgage on his own interest in the land and paying the probate and registration fees, as this is all he could do. Whether in that event he would be entitled, as matter of law, to continue the prosecution of the action, or whether it would still be a matter of discretion, we do not decide, as the question, in that form, is not before us." *Alston v. Holt* (1916) 172 N. C. 417, 90 S. E. 434.

6. New York.

The New York statute requires that a petition for leave to sue as a poor person must state, *inter alia*, "that the applicant is not worth \$100, besides the wearing apparel and furniture, necessary for himself and his family, and the subject-matter of the action." *Code Civ. Proc.* § 459.

It was held that the plaintiff should be permitted to prosecute as a poor person, although it appeared that he

resided with his wife and child upon a second floor consisting of four or five rooms neatly and comfortably furnished, and received wages of \$15 per week. The court, before referring to the statute, said: "True, a 'poor person' is one who is indigent, dependent upon charity, a pauper; but the words 'also comprehend one who, though not a pauper, is not rich.'" *Mc-Namara v. Nolan* (1895) 13 Misc. 76, 34 N. Y. Supp. 178.

An infant ought to have leave to sue as a poor person, where it appears that she is a domestic in the employ of her guardian ad litem, earning \$15 per month; and she states that she "is not worth the sum of \$100, besides wearing apparel, and the subject-matter of this action; that, in fact, your petitioner has no means whatever." *Feier v. Third Ave. R. Co.* (1896) 9 App. Div. 607, 41 N. Y. Supp. 821.

An infant plaintiff was allowed to prosecute as a poor person on an affidavit of the guardian ad litem that he was unable to procure security for costs, and was not worth \$100 besides his necessary wearing apparel and furniture, and one by the infant stating that she "has no relatives in this country, and is obliged to earn a livelihood by working as a seamstress, nurse, or chambermaid; that your petitioner has for many months past been incapacitated from earning any money, owing to" disease; that she "is not worth \$100 besides her necessary wearing apparel, furniture, and the subject-matter of this action, and is unable to prosecute said action, unless permitted to do so as a poor person." *Erickson v. Poey* (1884) 5 N. Y. Civ. Proc. Rep. 379, affirmed in (1884) 96 N. Y. 669.

It may be noted that in *Perlmutter v. Stern* (1902) 87 App. Div. 160, 84 N. Y. Supp. 58, an infant was allowed to prosecute as a poor person where the circumstances of his father, his guardian ad litem, had changed for the worse since he was appointed such guardian.

On the other hand in *Zeimmer v. Schmalz* (1882) 1 N. Y. City Ct. Rep. 435, the court denied the application of plaintiff, a broker, as there was no

evidence that he was an object of charity or that he could not by proper exertion earn sufficient to pay the fees and expenses.

It was held that the application was improperly granted where the "petitioner merely says that she has not now the means to prosecute the action, but she does not say she cannot get them, nor that she will be unable to present her cause unless the order should be granted. She receives wages, but what her earnings are, or whether she is compelled to support herself, does not appear, nor is it shown that her parents are not able to support her." *Kaufmann v. Manhattan R. Co.* (1902) 68 App. Div. 94, 74 N. Y. Supp. 146.

In *Weinstein v. Frank* (1900) 56 App. Div. 275, 67 N. Y. Supp. 746, in refusing an order to an infant, the court said: "It is not every person who does not own \$100 of property that is entitled to the order, but only those who otherwise would be unable to prosecute their action."

In affirming an order requiring an infant plaintiff to give security for costs the court said: "He is a pauper, just as all infants are paupers who have no estate, real or personal, given them or bequeathed or inherited by them. It was surely not the intention of the statute referred to to declare all infants paupers except those just referred to, but was calculated to enable infants to carry on a litigation without cost to themselves if they could not do so in the usual way." *Gallerstein v. Manhattan R. Co.* (1899) 26 Misc. 853, 55 N. Y. Supp. 444, affirmed in (1899) 58 N. Y. Supp. 1141.

It was held that the motion of an infant should not be granted where he does not show that he cannot furnish security for costs, but he merely states that he will be unable to prosecute his action unless he is allowed to sue in forma pauperis, and yet at the same time he says that if his motion is denied he "desires ten days' additional time" in which to furnish security for costs, although he states that he was a poor person, and was not worth the sum of \$100 besides the wearing apparel and furniture neces-

sary for himself and family, and the subject-matter of this action, of which he is not in possession, and that he has no rich relatives or friends who have left money for him in trust or otherwise, and that he has made diligent efforts to secure an undertaking, but has been unable to do so; and unless the motion be granted vacating the order requiring him to furnish security for costs and permitting him to continue the action in forma pauperis, he will be unable to proceed with this action. *Berkman v. Wolf* (1901) 65 App. Div. 79, 72 N. Y. Supp. 661.

7. *Texas.*

Where the statute in effect provided that, where the party is unable to secure the costs, he may, by taking the oath required by law, prosecute his suit, it was error to dismiss the plaintiff's suit on his refusal to execute a bond for costs or to secure them, where he had an interest in some town lots and lands, but it was so encumbered, and was in such a condition, that he could not readily handle and procure money upon it; and he was unable to dispose of the property, and could not procure anyone to advance money upon it, or to execute with him a bond for the costs. The court said: "The contestants did not prove that anyone was willing to go upon the bond of plaintiff in error, or assist him in securing the costs; and, upon this branch of the case, the evidence satisfactorily shows that he was unable to execute such a bond. But the contention of the contestants is that, as he owned the property, he should be required to secure the costs. The facts as pointed out demonstrate clearly that, so far as the property owned by the plaintiff in error was concerned, he occupied no better position than if he did not own the property, because clearly, under the facts, he was unable to handle and use it in a way serviceable in securing the costs." *Meyer v. Weber* (1897) — Tex. Civ. App. —, 40 S. W. 627.

There was no error in overruling a motion to dismiss plaintiffs' suit on account of their failure to comply with the rule for costs, where the person

who sued as next friend for the plaintiffs made oath in forma pauperis, in which he swore that "plaintiffs, and each of them, are too poor to pay the costs of court, and that said plaintiffs, and each of them, are unable to give security therefor." *St. Louis & S. F. R. Co. v. Williams* (1896) — Tex. Civ. App. —, 37 S. W. 992.

The plaintiff's affidavit was held to be a sufficient answer to the rule for costs, where, as the court said: "He swore that he was unable to give security for or to make a deposit of a sufficient amount of money to pay the costs, but stated that he could not swear that he was unable to pay the costs as they accrued. He also deposed that he had paid all costs that had been incurred up to that time, except a small balance, and that to cover this he had made a deposit with the clerk, who had failed to give him the exact amount. We think that this was a reasonable and substantial compliance with the statute." *Long v. McCauley* (1887) — Tex. —, 3 S. W. 689.

It was held to be error to dismiss a suit for the plaintiff's failure to secure the costs, where it appeared that he was a carpenter who had been able at times to earn \$5 a day, that he was not in good health, that some years before he had been adjudged a bankrupt. He stated: "I have not followed my profession for the last two or three years. I have spent a great deal, if not most, of my time in the past two or three years lawing in the courts, attempting to recover property that was embezzled from me prior to three years ago. . . . I have not given any bond for costs in any of my suits. In some of them I have made a cash deposit of ten or fifteen dollars when I had it, and filed an affidavit for the balance, and in others, including this suit, when I did not have any money, I filed an affidavit in lieu of cost bond, without any cash deposit." The court observed: "That plaintiff in error was a skilled mechanic, and had or could earn as much as \$5 per day at his trade, and preferred to devote his time to the prosecution of lawsuits, would not alone sustain, in our opinion, the judgment of the lower

court." *Kruegel v. Johnson* (1906) — Tex. Civ. App. —, 93 S. W. 483.

V. Miscellaneous.

Although the statute provided that "a guardian, committee, or next friend, suing for an infant . . . when insolvent may be required to give security for costs," it was held that the infant plaintiffs should be allowed to prosecute as poor persons where each of them filed an affidavit setting forth her right of recovery, and stating that she could obtain no one who would appear as her next friend or agree to be substituted in room of J. Westerfield; that Westerfield is insolvent and unable to give security for costs; that all the property owned by her is an interest in a small lot of ground worth \$100. *Westerfield v. Wilson* (1876) 12 Bush (Ky.) 125.

In an earlier stage of the reported case (*MAJORS v. SUPERIOR CT.* ante, 1274), reported sub nom. *Martin v. Superior Ct.* (1917) 176 Cal. 289, L.R.A.1918B, 313, 168 Pac. 135, it was held error to refuse to allow the plaintiff to prosecute in forma pauperis, where it appeared that saving for the chose in action he was not possessed of more than \$25.

Where the plaintiff has been ordered to furnish surety for costs, an affidavit is sufficient as to poverty, which states that she made diligent effort to procure some competent person to give surety for her; that she had asked several persons, naming them, to be surety for her, and that they had declined, and also that she was unable, by reason of poverty, to furnish surety for costs, and had no means to em-

ploy a surety company to do so. *Lewis v. Smith* (1899) 21 R. I. 324, 43 Atl. 542.

The court granted an application for relief from the condition that the plaintiff should pay the accrued costs on an affidavit stating that "the plaintiff in the above case is utterly insolvent; that affiant is his assignee for the benefit of creditors; that the sale of all the plaintiff's real estate has disclosed the fact that it is not nearly sufficient to pay the liens on record against the same; that he is absolutely without any personal property; that he is an old man, over eighty years of age, greatly infirm, without any means of livelihood or of earning any money; and that he is entirely without means to pay the costs of the above case." *Eakert v. McCord* (1898) 21 Pa. Co. Ct. 333.

It has been held to be error for the court to dismiss a case on the ground that the allegation of poverty was untrue, unless he took testimony capable of being embodied in a bill of exceptions, where the statute provided that "the court may dismiss an action commenced or continued on affidavit of poverty, if satisfied that the allegation of poverty was untrue." The court said: "The judgment of the court in dismissing a cause under this statute must be based on testimony capable of being embodied in a bill of exceptions and made a part of the record in the case. Such a judgment is reviewable by this court on appeal. The question must be heard and determined on testimony adduced before the court in the regular way." *Feazell v. Staltzfus* (1910) 98 Miss. 886, 54 So. 444. B. B. B.

WILLIAM FELDMAN, Plff. in Certiorari,
v.
CHICAGO RAILWAYS COMPANY et al.

Illinois Supreme Court—June 18, 1919.

(289 Ill. 25, 124 N. E. 334.)

Carrier — status of transferring passenger.

1. A street car passenger retains his relation of passenger to the carrier while performing necessary acts of transferring from one car to

another in a public street under the rules of the carrier, for continuation of his journey to destination.

[See note on this question beginning on page 1301.]

— termination of relations.

2. When a passenger alights into a public street from a street car at the end of his journey he ceases to be a passenger.

[See 4 R. C. L. 1047.]

Evidence — res ipsa loquitur — statement of doctrine.

3. The doctrine of *res ipsa loquitur* is that when a thing which has caused an injury is shown to be under the management of the party charged with negligence, and the accident is such as in the ordinary course of things will not happen if those who have such management use proper care, the accident itself affords reasonable evidence, in the absence of an explanation by the parties charged, that it arose from the want of proper care.

[See 5 R. C. L. 74.]

Pleading — when doctrine of res ipsa loquitur applies.

4. The doctrine of *res ipsa loquitur* applies only where the charge of negligence is general, not when it is specific.

[See 5 R. C. L. 84.]

Evidence — negligence — presumption — proof of circumstances.

5. While negligence will never be presumed, yet where the doctrine of

res ipsa loquitur applies proof of the surrounding circumstances amounts to evidence from which the fact of negligence may be found.

[See 5 R. C. L. 74-76.]

Carrier — swinging car against passenger by splitting switch — negligence.

6. Where the rear trucks of a street car from which a passenger has alighted to change cars split a switch and carry the rear of the car out of its proper course against such passenger, to his injury, the doctrine of *res ipsa loquitur* applies.

[See 5 R. C. L. 77.]

Appeal — erroneous admission of evidence — nonreversible error.

7. The admission of evidence of the danger of an operation to an injured person is not reversible error, although the operation is not contemplated, if the injury is permanent and the evidence could only affect the amount of the verdict.

[See 2 R. C. L. 247.]

— reversal — necessity of new trial.

8. Reversal of a judgment in the intermediate appellate court, which reversed that of the trial court, does not require a new trial if the judgment of the trial court was right.

(Dunn, Ch. J., and Cartwright, J., dissent.)

CERTIORARI to the Appellate Court, First District, to review a judgment reversing a judgment of the Circuit Court for Cook County (Tuthill, J.) in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendants' negligence. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Stein, Mayer, & Stein and Sigmund W. David for plaintiff in certiorari.

Messrs. Harry P. Weber, George W. Miller, Arthur J. Donovan, John R. Williams, and Franklin B. Hussey, for defendants in certiorari:

The appellate court can reverse without remanding only where it finds the facts different from the finding of the trial court, and recites the ultimate facts so found in its judgment, or when it reverses for errors of law which cannot be obviated on another trial.

Harty Bros. & H. Co. v. Polakow, 237 Ill. 559, 86 N. E. 1085.

When the appellate court reverses

for errors of law which may be obviated on another trial its judgment is not final.

Clarke v. Supreme Lodge, K. P. 189 Ill. 639, 60 N. E. 39; *W. H. Purcell Co. v. Sage*, 189 Ill. 79, 59 N. E. 541; *Morton v. Robinson*, 256 Ill. 629, 100 N. E. 200.

A recovery cannot be justified on this record, because of submission to the jury on the second, third, and fourth counts of the declaration, regardless of the question whether under the law plaintiff was or was not a passenger, and regardless of the question whether the doctrine of *res ipsa loquitur* did or did not apply.

Lake Street Elev. R. Co. v. Shaw, 203 Ill. 39, 67 N. E. 374; Ebbery v. Chicago City R. Co. 164 Ill. 518, 45 N. E. 1017, 1 Am. Neg. Rep. 16; Ratner v. Chicago City R. Co. 233 Ill. 169, 84 N. E. 201; Crane Co. v. Hogan, 228 Ill. 338, 81 N. E. 1032; Lyons v. Joseph T. Ryerson & Son, 242 Ill. 409, 90 N. E. 288; Peterson v. Sears, R. & Co. 242 Ill. 38, 89 N. E. 696; Wende & Chicago City R. Co. 271 Ill. 437, 111 N. E. 275, Ann. Cas. 1918A, 222.

The doctrine of *res ipsa loquitur* cannot be invoked under the pleadings.

Midland Valley R. Co. v. Conner, 133 C. C. A. 628, 217 Fed. 956; Barnes v. Danville Street R. & Light Co. 235 Ill. 566, 126 Am. St. Rep. 237, 85 N. E. 921; West Chicago Street R. Co. v. Martin, 154 Ill. 523, 39 N. E. 140, 11 Am. Neg. Cas. 364; Ingles v. Metropolitan Street R. Co. 145 Mo. App. 241, 129 S. W. 493; Ft. Worth & R. G. R. Co. v. Neal, — Tex. Civ. App. —, 140 S. W. 398; Chicago & E. I. R. Co. v. Driscoll, 176 Ill. 330, 52 N. E. 921; Ratner & Chicago City R. Co. 233 Ill. 169, 84 N. E. 201.

To state a cause of action a declaration must allege three things: First, a duty; second, breach of duty; third, resulting injury. Each of these elements is essential.

McAndrews v. Chicago, L. S. & E. R. Co. 222 Ill. 232, 78 N. E. 603; Milauskis v. Terminal R. Asso. 286 Ill. 547, 122 N. E. 78; Gillman v. Chicago R. Co. 268 Ill. 305, 109 N. E. 181; Bahr v. National Safe Deposit Co. 234 Ill. 101, 84 N. E. 717; Hackett v. Chicago City R. Co. 235 Ill. 116, 85 N. E. 320.

Negligence in the management and operation of the car in question does not include possible negligence in the maintenance and repair of the track and switch, and, therefore, is not a charge of general negligence.

Chicago, B. & Q. R. Co. v. Magee, 60 Ill. 529; Toledo, W. & W. R. Co. v. Foss, 88 Ill. 551; Ebbery v. Chicago City R. Co. 164 Ill. 518, 45 N. E. 1017, 1 Am. Neg. Rep. 16.

Plaintiff was not a passenger at the time of the accident.

Chicago & E. I. R. Co. v. Jennings, 190 Ill. 484, 54 L.R.A. 827, 60 N. E. 818; Illinois C. R. Co. v. O'Keefe, 168 Ill. 115, 39 L.R.A. 148, 61 Am. St. Rep. 68, 48 N. E. 294, 4 Am. Neg. Rep. 48; Deatrick v. Lake Erie & W. R. Co. 164 Ill. App. 34; O'Donnell v. Chicago & N. W. R. Co. 106 Ill. App. 287; Spannagle v. Chicago & A. R. Co. 31 Ill. App. 460,

2 Am. Neg. Cas. 506; Creamer v. West End Street R. Co. 156 Mass. 320, 16 L.R.A. 490, 32 Am. St. Rep. 456, 31 N. E. 391; Donovan v. Hartford Street R. Co. 65 Conn. 201, 29 L.R.A. 297, 32 Atl. 350; Chattanooga Electric R. Co. v. Boddy, 105 Tenn. 666, 51 L.R.A. 885, 58 S. W. 646, 8 Am. Neg. Rep. 555; Louisville R. Co. v. Meglemery, 25 Ky. L. Rep. 1587, 78 S. W. 217; Welsh v. Spokane & I. E. R. Co. 91 Wash. 260, L.R.A. 1916F, 484, 157 Pac. 680; Powers v. Connecticut Co. 82 Conn. 665, 26 L.R.A. (N.S.) 405, 74 Atl. 931; Murray v. Cumberland County Power & Light Co. 117 Me. 165, 103 Atl. 66; Haskins v. St. Louis & S. R. Co. 193 Ill. App. 437; Stewart v. East St. Louis R. Co. 173 Ill. App. 477; Robertson v. West Jersey & S. R. Co. 79 N. J. L. 186, 74 Atl. 300; Hanson v. Urbana & C. Electric Street R. Co. 75 Ill. App. 474; Smith v. City & Suburban R. Co. 29 Or. 539, 46 Pac. 136, 780; Bigelow v. West End Street R. Co. 161 Mass. 393, 37 N. E. 367; Gannaway v. Puget Sound Traction, Light & P. Co. 77 Wash. 655, 138 Pac. 267; Conroy v. Boston Elev. R. Co. 188 Mass. 411, 74 N. E. 672; Thompson v. Gardner, W. & F. Street R. Co. 193 Mass. 133, 118 Am. St. Rep. 459, 78 N. E. 854; Garvey v. Rhode Island Co. 26 R. I. 80, 58 Atl. 456, 16 Am. Neg. Rep. 581; Buzby v. Philadelphia Traction Co. 126 Pa. 559, 12 Am. St. Rep. 919, 17 Atl. 895; Dunn v. Puget Sound Traction, Light & P. Co. 89 Wash. 36, 153 Pac. 1059; Columbus R. Co. v. Asbell, 133 Ga. 573, 66 S. E. 902; Poland v. United Traction Co. 107 App. Div. 561, 95 N. Y. Supp. 498; Indianapolis Street R. Co. v. Tenner, 32 Ind. App. 311, 67 N. E. 1044; Baltimore Traction Co. v. State, 78 Md. 409, 28 Atl. 397, 3 Am. Neg. Cas. 724; Lee v. Boston Elev. R. Co. 182 Mass. 454, 65 N. E. 822, 13 Am. Neg. Rep. 319; Welsh v. Concord, M. & H. Street R. Co. 223 Mass. 184, 111 N. E. 693.

The presumption of negligence does not arise from the mere happening of the accident, but from the nature of the accident and the circumstances surrounding it.

Barnes v. Danville Street R. & Light Co. 235 Ill. 566, 126 Am. St. Rep. 237, 85 N. E. 921.

The burden of proof does not shift, but remains with the plaintiff throughout the case.

Vischer v. Northwestern Elev. R. Co. 256 Ill. 572, 100 N. E. 270; Barnes v. Danville Street R. & Light Co. supra;

Ferrier v. Chicago R. Co. 185 Ill. App. 326; *Heimberger v. Elliott Frog & Switch Co.* 165 Ill. App. 316.

Stone, J., delivered the opinion of the court:

This cause comes to this court by certiorari to the appellate court for the first district, which court heard the cause on appeal and reversed the judgment of the circuit court of Cook county without remanding the cause.

The declaration filed consisted of four counts. The first count alleged that on February 26, 1915, the defendants, the Chicago Railways Company and others, were then and there the owners of and in possession, control, and management of divers lines of street railways in Chicago, and had in their possession, use, control, and management, for the purpose of operating the street railways, certain cars, machinery, power houses, tracks, switches, and other devices and instrumentalities, and were engaged in the business of common carriers of passengers for hire; that on said date, at a point on the line of the street railway owned by the defendants on Cicero avenue, to wit, at Harrison street, the plaintiff boarded one of the cars, paid his fare, and received a transfer coupon for transfer at the intersection of Cicero avenue and Twelfth street; that by reason of the premises it then and there became the duty of defendants to use the highest degree of care to carry safely plaintiff in their cars to his place of destination and there deliver him uninjured, and to that end and for that purpose to exercise and use the highest degree of care and caution in the control, operation, management, and state of repair of their cars, wheels, tracks, brakes, trucks, and switches, but therein the defendants wholly failed; that after the car in which plaintiff had been riding as a passenger arrived at the intersection of Twelfth street and Cicero avenue, and while he was proceeding as such passenger from said car to the proper place near the southwest corner of Twelfth street

and Cicero avenue, there to wait for a car east-bound on Twelfth street to proceed on his journey, and while he was in the exercise of due care and caution for his own safety, and without fault or negligence on his part, he was struck by, run into and over by the defendants, who then and there so carelessly, negligently, and improperly managed and operated said electric car that by reason thereof the car then and there left the track, and struck and collided with and ran with great force and violence into and upon the plaintiff, whereby he was then and there thrown with great force and violence upon the ground, and was thereby greatly bruised, etc. Following the foregoing are allegations of injuries and damage.

The second count, after alleging ownership and control as in the first count and the duty of the defendants to exercise due care and caution in operating their cars so as not to collide with or run into pedestrians then and there rightfully upon the public highway, charges that, while the plaintiff was then and there standing upon and walking on Cicero avenue, going in a southeasterly direction at the intersection of said street with Twelfth street, in the public highway in Chicago, and while he was then and there in exercise of ordinary care and caution for his own safety, the defendants, through their servants in charge of one of said cars, so carelessly, negligently, and improperly managed and operated the electric car that by reason thereof said car then and there struck, collided with, and ran with great force and violence against and upon the plaintiff, etc.

The third count alleges ownership, etc., as set forth in the first count, and that it was the duty of the defendants to keep said car and all the parts thereof, including the wheels, trucks, brakes, and trolleys, in good and safe repair and condition, and to operate said car, and all parts thereof, with due skill, care, and caution for the safety of others, yet defendants carelessly and negli-

gently failed to keep said car in repair, so that the same did not work properly, and the defendants then and there so negligently, carelessly, and improperly operated said car that by reason thereof and by reason of the premises the car collided with plaintiff.

The fourth count charges a defective track, and that the switches and tracks were out of repair, and that by reason of the negligence of defendants in not keeping the same in repair, and the careless operation of the car, the plaintiff was injured.

To the four counts of the declaration the defendants in error filed the general issue, to which a replication was filed by the plaintiff in error.

It is conceded and admitted by the plaintiff in error and the defendants in error that there is no contradiction in the testimony relative to the facts and circumstances surrounding the happening of the accident in question. On the morning of the accident the plaintiff in error took the south-bound car of defendants in error on Cicero avenue, entering the same at Harrison street. His journey was to Douglas boulevard and Turner avenue, which necessitated his transfer to another car of defendants in error going east, at the corner of Twelfth street and Cicero avenue. Upon boarding the car he paid his fare and called for and received from the conductor in charge a transfer which would entitle him to a continuous ride by transferring at Twelfth street and Cicero avenue to Douglas boulevard and Turner avenue. The car upon which he was riding came to a complete stop on the north side of Twelfth street. At this point the north and south bound tracks of defendants in error on Cicero avenue intersected with their east and west tracks on Twelfth street. A switch extended from the west side of the south-bound track on Cicero avenue to the north side of the west-bound track on Twelfth street, connecting said tracks. The front trucks of the

car stopped. The plaintiff in error thereupon left the car, alighting at the rear end thereof, and started toward the southwest corner of the intersection, which was the usual and customary place for passengers to wait for cars going east, one of which cars would take him to his journey's end. When he reached a point 5 or 6 feet west of the car and in the neighborhood of the north curb or crosswalk of Twelfth street, the car from which he had alighted was started by the motorman, but instead of going south the rear end of the car suddenly swung around to the west, completely out of its course of travel, so that the end of the car almost touched the west curb of Cicero avenue, striking plaintiff in error and knocking him down. It is apparent from the evidence that after the front trucks had passed over the switch, for some reason not found in the evidence the switch had changed its position so as to guide the rear trucks onto the switch in a southwesterly direction, thereby throwing the car around, as above described, to such an extent that at the time of the injury to the plaintiff in error the car was in a position extending almost east and west. The plaintiff in error was removed to a hospital, where an examination disclosed a fracture of the clavicle or collar bone into three parts, one part of which (a little triangular piece) was directed downward and entirely out of line of the fractured ends. After being operated upon it was found that the plaintiff in error had developed an enlargement of the artery extending from the heart into the region of the collar bone.

The jury returned a verdict for the plaintiff in error in the sum of \$5,500. Motions for new trial and in arrest of judgment were overruled, and an appeal was prayed and perfected to the appellate court for the first district by the defendants in error. The appellate court held as a matter of law that the plaintiff in error at the time of the accident was not a passenger of the defend-

ants in error; that when plaintiff in error alighted from the Cicero avenue car upon which he had been traveling the relation of passenger and carrier ceased. That court also held that the doctrine of *res ipsa loquitur* was not applicable under the pleadings in this case; that each count of the declaration alleged negligence in special and not in general terms; that the plaintiff in error had failed to support his cause of action with evidence of special negligence, as charged in the declaration; that the evidence in the record is not sufficient to support the third and fourth counts of the declaration. For those reasons the judgment was reversed, and the cause remanded by the appellate court. The plaintiff in error thereupon stated by affidavit that he had relied upon the doctrine of *res ipsa loquitur* and would be unable to produce further evidence of special negligence upon the second trial. Thereupon the appellate court upon motion, changed its original judgment, reversed the case without remanding, and gave judgment of *nil capiat* in favor of the defendants in error, from which judgment the cause is brought to this court on writ of certiorari.

It is contended by the plaintiff in error that the judgment of the trial court was correct and should have been affirmed; that the plaintiff in error was, at the time of the accident, a passenger of the defendants in error; that if he was not such a passenger, such fact affects only the degree of care which it was the duty of defendants in error to exercise toward the plaintiff in error; that the pleadings and the facts in evidence bring this case within the doctrine of *res ipsa loquitur* under the first and second counts of the declaration. It is contended by defendants in error that plaintiff in error was not a passenger at the time of the accident; that the doctrine of *res ipsa loquitur* cannot be invoked under the pleadings in this case; that the trial court committed reversible error by submitting the cause to the

jury on the second, third, and fourth counts of the declaration. Errors were also assigned on the ruling of the trial courts as to instructions and admission of evidence.

The principal questions involved in this case are: First, was plaintiff in error a passenger at the time of the injury? If he was, defendants in error owed him the highest degree of care. If, on the other hand, he was not, but was a pedestrian, defendants in error owed him but ordinary care. Second, does the doctrine of *res ipsa loquitur* apply in this case? It is not contended that that doctrine applies under the pleadings of the third and fourth counts, nor is it contended by plaintiff in error that the special negligence charged in the third and fourth counts has been sustained by the proof; therefore that question will be considered with its relation to the first and second counts of the declaration.

As we have seen, the first count charges that plaintiff in error was a passenger. While the decisions of the courts of the various states have not been uniform as to this rule, it has been before this court in earlier cases. In *Chicago City R. Co. v. Carroll*, 206 Ill. 318, 68 N. E. 1087, the appellee Carroll was a passenger on a street car of appellant. He took the car at Sixty-third street and Wentworth avenue and rode to Thirty-fifth street, where appellant had a line crossing the line on which appellee was riding. Appellee, upon reaching Thirty-fifth street, alighted from the Wentworth avenue car to go to the Thirty-fifth street car. The trolley pole from the Wentworth car, from which he had just alighted or was alighting, fell and struck him on the head and knocked him down. This court held that the appellee was a passenger on both lines of appellant while making a continuous journey to his destination. It is urged that the court there based its decision on other grounds, and that the only reference to the relation of carrier and passenger was incidental, and not nec-

essary to the decision; also that the court's treatment of the subject of the relation of carrier and passenger was based on the evidence in that case that appellee was just alighting from the car. A reading of the opinion in that case discloses that these contentions cannot be sustained. While there were other features in the case, and while the relation of parties was not discussed at length, the court in its opinion makes no distinction between circumstances where the person claiming to be a passenger is alighting or has alighted from the car, but holds that by reason of the fact that appellee was on a continuous journey the relation of carrier and passenger existed. Nor is it true that such holding was not necessary to the determination of the case. Instructions were given in that case based on the theory that appellee was a passenger, and the opinion sustains those instructions. We think it clear from the decision in that case that the doctrine is there laid down that where a passenger, in pursuance of a continuous journey, transfers from one car to another under circumstances such as shown in this record, the relation of carrier and passenger continues throughout the necessary acts of such transfer. To the same effect is *North Chicago Street R. Co. v. Kaspers*, 186 Ill. 246, 57 N. E. 849, 8 Am. Neg. Rep. 28. In that case the appellee had alighted from one street car, had crossed over the street, and was in the act of taking another car to which he was to transfer, when the same started up and threw him to the ground. It was there held that he was a passenger. In *Chicago & A. R. Co. v. Winters*, 175 Ill. 293, 51 N. E. 901, the appellee was a passenger on a stock train. When that train stopped at one of its stations appellee was obliged to alight from the caboose in which he was riding in order to get into another caboose which was to be attached to a new train more than a block north of the point where the train on which he was riding had stopped. When he

alighted and was on his way to a lunch counter to get lunch, and thereafter to take the other caboose, he was struck by another train and injured. It does not appear that he was walking upon a platform or any part of the appellant's premises provided for passengers to alight from trains, but it was nevertheless held that the relation of carrier and passenger continued.

While the holdings of the courts of this country have not been uniform upon this question, notably those of Massachusetts and Tennessee holding that the relation of carrier and passenger ceases where one alights from a car in a public street for the purpose of transfer (*Creamer v. West End Street R. Co.* 156 Mass. 320, 16 L.R.A. 490, 32 Am. St. Rep. 456, 31 N. E. 391; *Chattanooga Electric R. Co. v. Boddy*, 105 Tenn. 666, 51 L.R.A. 885, 58 S. W. 646, 8 Am. Neg. Rep. 555), we are of the opinion that the weight of authority in this country sustains the view that where, as here, a passenger who is making a continuous journey alights from a street car for the purpose of making a transfer, the relation of carrier and passenger continues while he is in the necessary act of making said transfer, and that, if he be injured through the negligence of the carrier while making such transfer, the carrier is liable. *Keator v. Scranton Traction Co.* 191 Pa. 102, 44 L.R.A. 546, 71 Am. St. Rep. 758, 43 Atl. 86, 6 Am. Neg. Rep. 187; *Wilson v. Detroit United R. Co.* 167 Mich. 107, 132 N. W. 762; *Colorado Springs & C. C. Dist. R. Co. v. Petit*, 37 Colo. 326, 86 Pac. 121, 20 Am. Neg. Rep. 496; *Whilt v. Public Service Corp.* 76 N. J. L. 729, 72 Atl. 420, 74 Atl. 568; 10 C. J. 630.

Carrier—
status of
transferring
passenger.

It is urged by defendants in error that plaintiff in error was no more a passenger than was another man named Burke, who had alighted from the front end of the car and was injured at the same time. This contention, however, overlooks the

fact, as appears from the record, that Burke had finished his journey and had left the car. There is no doubt, under all the authorities, that where a passenger alights —termination of into the public relations. street from a street car at the end of his journey he ceases to be a passenger. The distinction between Burke and plaintiff in error lies in the fact that the plaintiff in error was engaged in a continuous journey, while Burke's journey, so far as the carrier was concerned, had ended. As was held in *Chicago City R. Co. v. Carroll*, supra, the ticket of transfer itself was not what established the relation of carrier and passenger, but was merely the evidence of the fact that plaintiff in error was engaged in a continuous journey. This fact affords the test whether or not plaintiff in error was a passenger, and while it is true that during such transfer the carrier could exercise no control over the movements of the passenger, so as to render the carrier liable in case of injury received from some other source than the carrier, still that fact does not change the relation of carrier and passenger in the case of such transfer, nor lessen the degree of care which the carrier was bound to use to avoid injury to such passenger, through the negligence of its own servants or agencies, while such passenger is engaged in the necessary acts of such transfer.

The next question involved here is whether or not the doctrine of *res ipsa loquitur* applies. It is admitted by the plaintiff in error that it does not apply as to the third and fourth counts, in that they contain special charges of negligence, but it is earnestly urged by him that this doctrine does apply to the first and second counts. The doctrine of *res ipsa loquitur* may be stated thus: When a thing which has caused an injury is shown to be under the management of the party charged with negligence, and the accident is such

as in the ordinary course of things will not happen if those who have such management use proper care, the accident itself affords reasonable evidence, in the absence of an explanation by the parties charged, that it arose from the want of proper care. *Chicago Union Traction Co. v. Giese*, 229 Ill. 260, 82 N. E. 232. In the case just cited the first and second counts of the declaration charged that the defendant, by its servants, carelessly, improperly, and negligently drove and managed a train consisting of two coaches, so that the rear car struck the wagon of the plaintiff in which he was riding and thereby he received the injury complained of. In those two counts the charges of negligence were held to be general, and it was held that the doctrine of *res ipsa loquitur* applied. The same rule is laid down in *O'Callaghan v. Dellwood Park Co.* 242 Ill. 336, 26 L.R.A. (N.S.) 1054, 134 Am. St. Rep. 331, 89 N. E. 1005, 17 Ann. Cas. 407. The charges of negligence in the first two counts in the case at bar are in substantially the same language as those in *Chicago Union Traction Co. v. Giese*, supra. It is charged by the first count that plaintiff, without fault or negligence on his part, was struck by and run into and over by defendants, who then and there so carelessly, negligently, and improperly managed and operated said car that by reason thereof the car left the track and struck and collided with the plaintiff. The second count charges that the defendants so carelessly, negligently, and improperly managed and operated the electric car that by reason thereof the car then and there collided, struck, and ran against the plaintiff. The charges of negligence in these counts were general, and the doctrine of *res ipsa loquitur* applies. The rule is that negligence is never presumed, but that the circumstances surrounding the case where

Evidence—*res ipsa loquitur*—statement of doctrine.

Pleading—when doctrine of *res ipsa loquitur* applies.

the maxim of "res ipsa loquitur" applies amount to evidence from which the facts of negligence may be found; that is, in a case within the maxim of "res ipsa loquitur," proof of the circumstances of such case and of the injury constitutes a prima facie case of negligence, and will justify a verdict unless such prima facie case is overcome by proof showing that the party charged is not at fault. Chicago Union Traction Co. v. Giese, supra; Chicago Union Traction Co. v. Newmiller, 215 Ill. 383, 74 N. E. 410, 18 Am. Neg. Rep. 380; Chicago City R. Co. v. Rood, 163 Ill. 477, 54 Am. St. Rep. 478, 45 N. E. 238, 9 Am. Neg. Cas. 240; New York, C. & St. L. R. Co. v. Blumenthal, 160 Ill. 40, 43 N. E. 809; Hart v. Washington Park Club, 157 Ill. 9, 29 L.R.A. 492, 48 Am. St. Rep. 298, 41 N. E. 620. The burden rested upon defendants in error to overcome the presumption of negligence arising from the circumstances in this case. The record contains no evidence explaining the cause of the accident or overcoming the presumption of negligence. We are of the opinion, therefore, that the plaintiff in error was at the time of the injury a passenger, to whom defendants in error owed the highest degree of care, and that, under the first and second counts of the declaration and the circumstances in this case, a prima

Carrier—swinging car against passenger by splitting switch—negligence.

gence was made out under the doctrine of res ipsa loquitur.

There was no explanation of why the injury occurred. It follows that there was no evidence on the part of the defendants in error to overcome this presumption, and the jury were therefore justified in returning a verdict finding defendants in error guilty of negligence.

Defendants in error also complain of the admission of testimony offered by plaintiff in error concern-

ing the danger of a certain operation, upon the ground that such operation was not contemplated, urging that under the rule recognized in this state the dangers of an operation not contemplated are not elements of damages. We are of the opinion, however, that in view of the fact that the permanency of the plaintiff's injury is not disputed, the testimony could only affect the amount of the verdict, and that under the circumstances of this case the error complained of should not, of itself, reverse the judgment.

Appeal—erroneous admission of evidence—nonreversible error.

It is also urged by defendants in error that, even though the judgment of the appellate court be reversed, the cause should be remanded for a new trial under the Practice Act (Hurd's Rev. Stat. 1917, chap. 110). Under the views of this case as here expressed, however, the contention of the defendants in error is not applicable, as the judgment of the trial court must be affirmed.

—reversal—necessity of new trial.

Objections are also urged as to instructions given to the jury, but these objections appear to be based principally upon the theory that plaintiff in error was not a passenger. Under the rule as stated here the instructions are not open to this objection.

The appellate court erred in holding that the doctrine of res ipsa loquitur does not apply, and that plaintiff in error was not a passenger upon defendants in error's railway.

The judgment of the Appellate Court will therefore be reversed, and the judgment of the Circuit Court of Cook county affirmed.

Dunn, Ch. J., and Cartwright, J., dissenting:

We do not agree with the conclusion that the plaintiff, as a matter of law, was a passenger while walking on the public street. The rule of law as to what will constitute the

relation of passenger and carrier has been firmly established by textbooks and decisions, which were carefully reviewed and considered in the case of *Chicago & E. I. R. Co. v. Jennings*, 190 Ill. 478, 54 L.R.A. 827, 60 N. E. 818. Upon such review and consideration it was said to be uniformly held that the condition must be such that the passenger is under the care of the carrier, and must be at some place under the control of the carrier, provided for passengers, so that it may exercise the high degree of care exacted from it. The plaintiff, having safely alighted from the defendant's car, started to the place where he expected to take another car, and while walking on the street was not under the care of the defendant, nor on any place provided for passengers, or using any of the facilities furnished for passengers, but was exercising his right as one of the general public by crossing the street, as he lawfully might. In the *Jennings* Case the doctrine of the Massachusetts court, which is now abandoned, was indorsed and adopted. This court has never decided that the relation of carrier and passenger existed under the facts of this case. In *Chicago & A. R. Co. v. Winters*, 175 Ill. 293, 51 N. E. 901, the plaintiff was accompanying his carload of sheep to Chicago, and at Bloomington the car was placed in another train being made up for Chicago. The plaintiff was walking on the east side of the freight train toward the switchyards on the grounds of the railroad company, intending to continue his journey in the caboose of the new train. There is no resemblance between this case and that of *North Chicago Street R. Co. v. Kaspers*, 186 Ill. 246, 57 N. E. 849, 8 Am. Neg. Rep. 28, except that the plaintiff had a transfer ticket. That ticket entitled him to ride on the cable-car line to his destination, and he had got on the step at the front end of the car, and was stepping up on the front platform, when the speed of the train was increased, and he fell off and

suffered the injury for which he sued. In *Chicago City R. Co. v. Carroll*, 206 Ill. 318, 68 N. E. 1087, a trolley pole on the Wentworth avenue car, from which the plaintiff had alighted or was alighting, fell from that car and struck him on the head. He had not got away in safety from the car, as the plaintiff had in this case, in which the plaintiff was not within the care or control of the defendant or on a place provided for passengers, and therefore was not a passenger. *Illinois C. R. Co. v. O'Keefe*, 168 Ill. 115, 39 L.R.A. 148, 61 Am. St. Rep. 68, 48 N. E. 294, 4 Am. Neg. Rep. 48.

Upon the trial of an issue of fact the plaintiff obtained a verdict and judgment for \$5,500, and the defendant appealed to the appellate court, which held that the plaintiff was not a passenger, that the doctrine of *res ipsa loquitur* was not applicable to the pleadings in the case, and that the trial court committed errors of law as to both those questions. For such errors the judgment was reversed, and the cause remanded to the circuit court for a new trial. The plaintiff then stated that he had relied upon the doctrine of *res ipsa loquitur*, and would be unable to produce further evidence of the special negligence upon another trial, and moved the court to reverse the cause without remanding, which was done. If the appellate court was wrong both upon the question whether the plaintiff was a passenger and also whether the doctrine of *res ipsa loquitur* applied, that fact does not justify an affirmance of the judgment of the trial court. If plaintiff was a passenger, that fact would not entitle him to a verdict for every injury sustained, but would only affect the degree of care exacted by law from the defendant. The doctrine of *res ipsa loquitur* is that, when a thing which has caused an injury is shown to be under the management of the party charged with negligence, and the accident is such as in the ordinary course of things does not happen if those who have the management use

proper care, the accident itself affords reasonable evidence, in the absence of an explanation of the party charged, that it arose from the want of proper care. It is but a rule of evidence, under which a charge of negligence is established *prima facie* by proof of facts within the rule, and which will justify a verdict unless the *prima facie* case is met by proof showing that the carrier was not at fault. *Chicago Union Traction Co. v. Giese*, 229 Ill. 260, 82 N. E. 232. On the trial the defendant introduced evidence that the switch which carried the rear trucks around to the west was in proper condition, that there had never been any trouble with it, and that an examination immediately after the accident showed nothing the matter with it. The fact that the front trucks passed over the switch in the usual way tended to prove that the rear trucks swinging around was caused by some condition which the defendant was not bound to anticipate. The defendant also offered

evidence that the running apparatus and equipment of the car were all in good condition and not defective, and had been running since 5:30 that morning without any indication of anything wrong. If the appellate court was right in holding that the trial court misapplied the law, it was the duty of the appellate court to remand the cause for another trial, at which such errors could be corrected. The plaintiff could not deprive the defendant of the right to present on another trial any evidence it might have to relieve itself from the charge of negligence, by stating to the appellate court that he would be unable to produce further evidence of special negligence upon such trial. This court cannot decide questions of fact in controversy, and on a review of the judgment of the appellate court has merely held that that court was wrong in its rulings on questions of law.

Petition for rehearing denied, October 9, 1919.

ANNOTATION.

Status as street car passenger of person transferring from one car to another.

- I. Introductory, 1301.
- II. Majority rule:
 - a. Rule stated, 1301.
 - b. Application of rule, 1302.
- III. Minority rule, 1304.

I. Introductory.

This note is confined to a consideration of the decisions discussing the status of street car passengers while transferring, and does not include those cases dealing with the status of passengers transferring from steam, elevated, or subway trains. The cases are also excluded which discuss at what time the status of a passenger terminates after leaving the car, where there is no intention of transferring.

II. Majority rule.

a. Rule stated.

The weight of authority is to the effect that, when a passenger who is making a continuous journey alights

from a street car for the purpose of making a transfer, the relation of carrier and passenger continues while he is in the necessary act of making the transfer, and the carrier owes to him the same high degree of care which it owes to passengers on board of its cars.

Colorado.—*Colorado Springs & C. C. Dist. R. Co. v. Petit* (1906) 37 Colo. 326, 86 Pac. 121, 20 Am. Neg. Rep. 496.

Connecticut.—*Baldwin v. Fair Haven & W. R. Co.* (1897) 68 Conn. 567, 37 Atl. 418, 2 Am. Neg. Rep. 808.

District of Columbia.—*Washington & G. R. Co. v. Patterson* (1896) 9 App. D. C. 423.

Illinois.—*Chicago City R. Co. v. Carroll* (1903) 206 Ill. 318, 68 N. E. 1087. And see the reported case, *FELDMAN v. CHICAGO R. Co.* ante, 1291.

Indiana.—*Citizens' Street R. Co. v. Merl* (1893) 134 Ind. 609, 33 N. E.

1014, 3 Am. Neg. Cas. 287; *Louisville & S. I. Traction Co. v. Walker* (1911) 177 Ind. 38, 97 N. E. 151.

Kansas. — *Koran v. Metropolitan Street R. Co.* 85 Kan. 707, 118 Pac. 875.

Michigan. — *Wilson v. Detroit United R. Co.* (1911) 167 Mich. 107, 132 N. W. 762.

Missouri. — *Wood v. Metropolitan Street R. Co.* (1904) 181 Mo. 433, 81 S. W. 152.

New Jersey. — *Walger v. Jersey City H. & P. Street R. Co.* (1904) 71 N. J. L. 356, 59 Atl. 14, 17 Am. Neg. Rep. 322; *Whilt v. Public Service Corp.* (1908) 76 N. J. L. 729, 72 Atl. 420, 74 Atl. 568.

New York. — *Miller v. Brooklyn Heights R. Co.* (1908) 124 App. Div. 537, 108 N. Y. Supp. 960.

North Carolina. — *Clark v. Durham Traction Co.* (1905) 138 N. C. 77, 107 Am. St. Rep. 526, 50 S. E. 518.

Pennsylvania. — *Keator v. Scranton Traction Co.* (1899) 191 Pa. 102, 44 L.R.A. 546, 71 Am. St. Rep. 758, 43 Atl. 86, 6 Am. Neg. Rep. 187.

Washington. — *Cameron v. Union Trunk Line* (1895) 10 Wash. 507, 39 Pac. 128, 7 Am. Neg. Cas. 96; *Bugge v. Seattle Electric Co.* (1909) 54 Wash. 483, 103 Pac. 824.

West Virginia. — *Killmyer v. Wheeling Traction Co.* (1913) 72 W. Va. 148, 48 L.R.A. (N.S.) 683, 77 S. E. 908, Ann. Cas. 1915C, 1220.

b. Application of rule.

In *Colorado Springs & C. C. Dist. R. Co. v. Petit* (1906) 37 Colo. 326, 86 Pac. 121, 20 Am. Neg. Rep. 496, it appeared that the plaintiff, a passenger on the defendant's line, was directed to change from one car to another. While so doing, he fell in the darkness and was injured. The court said: "The relation of carrier and passenger existed between plaintiff and defendant when he was passing from one car to the other, and it was the duty of defendant to use reasonable care to have the way over which plaintiff was to pass in a reasonably safe condition."

In *Baldwin v. Fair Haven & W. R. Co.* (1897) 68 Conn. 567, 37 Atl. 418, 2 Am. Neg. Rep. 308, it appeared that the plaintiff, while alighting from one car

to transfer to another, was pushed from the platform and injured. The court said: "In testing the legal sufficiency of these averments, it must be remembered that Mrs. Baldwin, while stepping down from the car in which she had been riding, was still a passenger of the defendant. That transfer was a part of her trip, for the whole of which the defendant had agreed to convey her in safety, and because she was so a passenger the duty of the defendant to protect her from danger continued."

In *Washington & G. R. Co. v. Patterson* (1896) 9 App. D. C. 423, it was held that the relation of passenger and carrier had not ceased where the plaintiff was a passenger of one of defendant's cars and, obtaining a transfer, attempted to board the second car, when she was thrown and injured by reason of the car starting.

In *Chicago City R. Co. v. Carroll* (1903) 206 Ill. 318, 68 N. E. 1087, it appeared that the plaintiff left one of the defendant's cars to transfer to another, and while passing behind the car the trolley pole fell from the car, seriously injuring him. The court held that the defendant company was liable, as the passage was a continuous one.

In the reported case (*FELDMAN v. CHICAGO R. Co.* ante, 1291), it is held that the relation of carrier and passenger continues while the latter is transferring, and that the carrier is liable for any injury it may inflict on the passenger at that time.

In *Citizens' Street R. Co. v. Merl* (1898) 184 Ind. 609, 33 N. E. 1014, 3 Am. Neg. Cas. 287, it appeared that the plaintiff was injured while transferring as a passenger from one car to another, on the defendant's line of street railway. The court, after discussing the degree of care to be exercised by a carrier of passengers, said: "The appellee in this case was a passenger on appellant's line of street railway, and was doing just what was required of him to complete his journey. He was making a necessary change of cars at a point where, and in the manner that, a vast number of passengers were transferred each day,

and the company was bound to use the degree of care incumbent upon a common carrier of passengers, in guarding against injury and for the security of the passengers."

In *Louisville & S. L. Traction Co. v. Walker* (1911) 177 Ind. 38, 97 N. E. 151, an action was brought for personal injuries. It appeared that the plaintiff, while riding on defendant's line, was required to transfer from one car to another by reason of repairs in progress on defendant's line, and while so transferring fell and was injured. The court held the defendant to be liable.

In *Koran v. Metropolitan Street R. Co.* (1911) 85 Kan. 707, 118 Pac. 875, it appeared that the plaintiff was transferring on the defendant's line of street railway, and had mounted the steps of the car to which he had transferred, when he was struck by a car on the next track. The court said: "There is no doubt that the plaintiff was a passenger and entitled to the protection due a passenger."

In *Wilson v. Detroit United R. Co.* (1911) 167 Mich. 107, 132 N. W. 762, it appeared that the plaintiff, while transferring at one of the regular transfer points on the line of defendant's railway, was struck and injured. The plaintiff was blind, and the court held that, while the relation of passenger and carrier had not ceased, the plaintiff could not recover because of his contributory negligence.

In *Wood v. Metropolitan Street R. Co.* (1904) 181 Mo. 433, 81 S. W. 152, it appeared that the defendant, a street railway company, maintained a platform at one of the transfer points, where passengers could wait for their car. The platform collapsed while the plaintiff was on it, and she was seriously injured. The court said: "Bearing the relation which plaintiff did to the defendant, having purchased a through ticket to Independence, and required, as she was, to transfer at the Fifteenth street station to get on the electric car, and in so doing to go upon defendant's platform provided for that purpose, she was entitled to the care which defendant owed to a passenger."

In *Walger v. Jersey City, H. & P.*

Street R. Co. (1904) 71 N. J. L. 356, 59 Atl. 14, 17 Am. Neg. Rep. 322, it appeared that the plaintiff was a passenger upon one of the defendant company's cars. He disembarked from that car for the purpose of transferring to another car of the company, a ticket enabling him to do so having been furnished him on the car upon which he first took passage. The point at which he alighted was the proper transfer point. After getting off the first car, and as he was about to cross over to the other car, or while he was doing so, the car which he had left started to go around what was described in the case as "the loop," and its rear end struck him, knocked him down, and injured him. It was held that the relation of passenger and carrier had not ceased.

In *Whilt v. Public Service Corp.* (1908) 76 N. J. L. 729, 72 Atl. 420, 74 Atl. 568, it appeared that the defendant, as a common carrier, undertook to transport the plaintiff from Merchantville to Westmont on its trolley cars, and in order to carry out this undertaking it was necessary to transfer the plaintiff from one car to another; to accomplish this he was required to leave the first car at Market and Seventh streets, in the city of Camden, and walk along the latter street to Federal street, at which point he would meet another of defendant's trolley cars, on which he expected to be carried to his destination. The plaintiff left the car at Seventh street, and immediately started to pass behind it, in order to reach the sidewalk, but so near that he struck a fender which projected from the rear of the car a distance of about 4 feet, and fell into it, and was injured. The court held that the plaintiff was a passenger at the time of the accident.

In *Miller v. Brooklyn Heights R. Co.* (1908) 124 App. Div. 537, 108 N. Y. Supp. 960, it appeared that the plaintiff was a passenger on the front platform of one of the defendant's cars, and on paying his fare demanded a transfer, and was promised one by the conductor. On reaching his transfer point the passenger left the car from

the front platform, and walked to the rear platform, where he was assaulted by the conductor. It was held that the passenger had not lost his status by alighting, and that the company was liable for the assault by its servant.

In *Clark v. Durham Traction Co.* (1905) 138 N. C. 77, 107 Am. St. Rep. 526, 50 S. E. 518, it appeared that the plaintiff was transferring on defendant's line from one car to another, and while so doing was injured by reason of the car which he was boarding being prematurely started. The court followed the general rule in holding that the relation of passenger and carrier had not ceased, saying: "These facts plainly make him a passenger."

In *Keator v. Scranton Traction Co.* (1899) 191 Pa. 102, 44 L.R.A. 546, 71 Am. St. Rep. 758, 43 Atl. 86, 6 Am. Neg. Rep. 187, it appeared that the plaintiff transferred on the defendant's line, and after leaving one car walked a block to her point of transfer, and while boarding the second car she was hit by a piece of the trolley pole and injured. The court, holding the defendant liable, said: "Surely, in such situation, under such circumstances the carrier's duty to her was what it owed to a passenger."

In *Cameron v. Union Trunk Line* (1895) 10 Wash. 507, 39 Pac. 128, 7 Am. Neg. Cas. 96, it was held that a recovery could be had where the plaintiff was injured while transferring from one car to another on defendant's line. It was said: "Undoubtedly the negligence of the appellant lay in the fact that the motorman, without waiting for the conductor to return to the rear of the car, which was suddenly converted into the front, started the car back at its ordinary speed; and, no one being there to give warning or stop the car, the respondent was taken by surprise and run down before she had time to consider any means of escape. Considering the fact that the jury had before it competent evidence of the almost universal method of transferring passengers at this point, we think it no error to hold it to be the duty of the carrier to maintain a lookout when, upon an exceptional occasion, it proposed to back up its

car, with knowledge that there were passengers to be transferred, and who were likely to proceed toward the electric car in the usual way."

In *Bugge v. Seattle Electric Co.* (1909) 54 Wash. 483, 103 Pac. 824, it appeared that the plaintiff took passage on one of the defendant's cars. Before reaching her destination the car was stopped at a trestle, and the passengers were informed that no car would cross the trestle because of a washout, and they could either walk across and take a car at the other end, or go around another way. Plaintiff elected to transfer and walk across the trestle, and while doing so was run down by another of defendant's cars and seriously injured. The court held that the plaintiff was a passenger at the time of the injury, and held the defendant liable.

In *Killmyer v. Wheeling Traction Co.* (1913) 72 W. Va. 148, 48 L.R.A. (N.S.) 683, 77 S. E. 908, Ann. Cas. 1915C, 1220, it appeared that the plaintiff was a passenger on defendant's traction lines, and as such entitled to transportation from Moundsville to Wheeling, he having paid the necessary fare for the trip. On the arrival of the car at an intermediate point, those in charge thereof, finding the tracks submerged by reason of a freshet, directed the plaintiff and other passengers to alight and to proceed on foot by a way designated by the employees to another of the defendant's cars, then or soon to arrive at a point on its lines beyond the obstruction, which would carry them to their destination without further charge. While transferring to the second car the plaintiff was injured, and it was held that the relation of passenger and carrier had not ceased, and that the defendant was liable.

III. *Minority rule.*

In at least two jurisdictions the rule obtains that the relation of passenger and carrier ceases when a transferring passenger leaves the first car, and is not resumed until he enters the second car, or that the carrier is only required to exercise reasonable care towards the passenger while transferring, and

not the high degree which is necessary when the passenger is aboard the car. *Powers v. Old Colony Street R. Co.* (1909) 201 Mass. 66, 87 N. E. 192; *Niles v. Boston Elev. R. Co.* (1917) 225 Mass. 570, 114 N. E. 730; *Finseth v. City & Suburban R. Co.* (1897) 32 Or. 1, 39 L.R.A. 517, 51 Pac. 84, 3 Am. Neg. Rep. 464.

In *Powers v. Old Colony Street R. Co.* (Mass.) supra, it appeared that the plaintiff was injured while changing from one car to another on the defendant's line, which was rendered necessary by the work of the municipal authorities in abolishing a grade crossing. The trial judge ruled that the plaintiff was not a passenger while passing from one car to another. The court, in passing on this ruling, said: "It is questionable whether there was not evidence from which the jury might have found that the relation of passenger and carrier was continued while the passengers were passing from one car to the other. However that may be, there was evidence that the defendant voluntarily provided and pointed out a way for them, over which it invited them to pass, and thereby assumed an obligation to make reasonable provision for their safety, having reference to existing conditions. . . . Whether the defendant properly performed its duty to make reasonable provision for the safety of the plaintiff, in view of its implied invitation to walk across private land, was a question of fact for the jury. It was for them to consider all the circumstances of the case and determine what was reasonable."

In *Niles v. Boston Elev. R. Co.*

(1917) 225 Mass. 570, 114 N. E. 730, it appeared that the plaintiff was a passenger on one of defendant's cars, and it was necessary for her to transfer to reach her destination. While so doing she was struck and injured by the car from which she had alighted. It was held that the relation of passenger and carrier had ceased, the court saying: "The plaintiff, when injured, was not on the defendant's premises, nor at a station or platform in use for the purpose of transferring passengers and within the control of the carrier; neither was she under its direction and within its care. She was upon a public highway, where she was exposed to dangers not caused by the defendant. In passing from one car to the other she could go on either side of the car, she could choose her own way, and her movements were entirely under her own guidance. While so walking on a public highway and in transferring from one car to the other as a matter of law, she was not a passenger."

In *Finseth v. City & Suburban R. Co.* (Or.) supra, it appeared that a portion of the defendant's line was submerged by water, and a temporary sidewalk was erected over the flooded street so that passengers might transfer to another car by crossing on the temporary sidewalk. The plaintiff, while transferring in this manner, fell on the walk and was injured. The court held that it was the duty of the defendant to maintain the walk in a reasonably safe condition, but that it did not owe the passenger that degree of care which it is incumbent upon the defendant to exercise while in the car. E. C. B.

DAVID MACKENZIE et al.

v.

FRANK M. PAULI COMPANY, Appt.

Michigan Supreme Court—October 6, 1919.

(207 Mich. 456, 174 N. W. 161.)

Highway — right to display goods upon.

1. A merchant, trader, or manufacturer has no right to use any part of the highway for the deposit, exhibit, or sale of his goods, nor can he

keep goods or teams standing upon the highway for any considerable portion of time, to the inconvenience of the public.

[See note on this question beginning on page 1314.]

Injunction — against manufactory — unlawful use of street.

2. A manufactory should not be enjoined because the adjoining highway is used for storing materials and wagons to the exclusion of its use by the public generally, if such use is not an essential part of the business.

[See 13 R. C. L. 216, 220.]

— against legitimate business.

3. The conducting of a lawful business upon unrestricted private property should not be enjoined, except as a last resort to restrain an otherwise unavoidable nuisance existing in violation of the rights of the complaining party.

[See 20 R. C. L. 438.]

— inconvenience of neighbors.

4. Injunction will not lie against a woodworking business which, when properly conducted, is not unhealthy or disagreeable and offensive to persons generally, because it is not acceptable as a near neighbor to the complaining party, and may produce some discomfort or inconvenience to those near by.

[See 20 R. C. L. 438.]

— to banish business from block.

5. Injunction will not lie to banish business from a city block at the instance of persons investing in unrestricted property after the business had been established.

[See 20 R. C. L. 495.]

Nuisance — act of employees.

6. The congregating of employees of a factory in an adjoining alley, and their use of loud, profane, and indecent language to the annoyance of the occupants of neighboring property, is a nuisance.

[See 20 R. C. L. 428.]

Injunction — against use of whistle in factory.

7. Injunction lies against the sounding of a gong or whistle in a factory to indicate the starting or stopping of work, and for other purposes, and the use of machinery making loud penetrating noises, to the annoyance of neighboring property owners.

[See 20 R. C. L. 428, 446;] see also annotation 4 A. L. R. 1843.

— against sawdust.

8. Injunction lies against permitting sawdust and other light refuse to escape from a factory to the annoyance of neighboring property owners.

[See 20 R. C. L. 447, 448;] see also annotation 3 A.L.R. 312.

— elimination of offensive portions of business.

9. The operation of a factory will not be enjoined merely because some portions of its operation constitute a nuisance, if the offensive portions can be eliminated.

[See 20 R. C. L. 481.]

APPEAL by defendant from a decree of the Circuit Court for Wayne County in Chancery (Gilday, J.) in favor of plaintiffs in a suit brought to enjoin defendant from maintaining and operating a mill and lumberyard in the vicinity of plaintiffs' property. *Modified and affirmed.*

The facts are stated in the opinion of the court.

Messrs. Sherman D. Callender and T. A. E. Weadock for appellant.

Messrs. Oxtoby & Wilkinson, and Oscar C. Hull, for appellees:

Defendant's mill is a nuisance.

Grand Rapids v. Weiden, 97 Mich. 82, 56 N. W. 233; Baker v. Bohannon, 69 Iowa, 60, 28 N. W. 435; Robinson v. Baugh, 31 Mich. 290; McMorran v. Fitzgerald, 106 Mich. 649, 58 Am. St. Rep. 511, 64 N. W. 569; People v. Detroit White Lead Works, 82 Mich. 471, 9 L.R.A. 722, 46 N. W. 735; Whittemore v. Baxter Laundry Co. 181 Mich. 564, 52 L.R.A.(N.S.) 930, 148 N. W. 437, Ann. Cas. 1916C, 818; Saier v. Joy, 198

Mich. 295, L.R.A.1918A, 825, 164 N. W. 507.

Steere, J., delivered the opinion of the court:

The above-named twelve plaintiffs are separate owners and occupants of lots in the eastern part of the city of Detroit, Michigan, either within the territory bounded by Van Dyke, Lafayette, Shipherd, and Agnes avenues, in said city, or in the immediate vicinity thereof, and have united in this bill of complaint to obtain an injunction for abatement

of a private nuisance they charge defendant has developed and is maintaining in said territory, to their annoyance and damage.

The Frank M. Pauli Company, defendant, is a corporation engaged in general contracting, principally confined to carpenter contracts and woodwork, in connection with which it maintains and operates on lots in the above-bounded block, fronting on Shipherd avenue, about halfway between Agnes and Lafayette, a lumberyard and planing mill, or "interior trim factory," as defendant prefers to name the mill portion of the plant. The relief asked in plaintiffs' bill and granted by the trial court is an injunction perpetually and absolutely restraining defendant from "maintaining its mill and lumberyard on the land where it is situated, and from operating its mill and using the property for the purpose of a mill and lumberyard."

There are no restrictions to use or kind of buildings resting upon defendant's land, where the activities objected to are carried on. The whole block was originally unrestricted, though restrictions are found in a few transfers of recent date. Various portions of the block have been and are yet more or less used for business purposes. Plaintiffs base their claim of right to relief solely upon the proposition that the operation of defendant's mill, or factory, is to them a nuisance, as and where operated and located near their homes and property in a residential section of the city, which they are entitled to have abated as such.

The specific allegations in plaintiffs' bill as to the objectionable features in defendant's factory and business as operated and conducted in that locality are, in brief, disturbing and distracting noises from the machinery, loud shouting of or to the workmen and sounding of a heavy gong at certain hours as notice to employees of resumption and discontinuance of work, sawdust and smoke which at times are emit-

ted from the mill and blown by the wind over that neighborhood, extra fire risk from the nature of the business and manner of conducting it, using for private purposes and obstructing Shipherd avenue and the alley running north and south through said block at the rear of defendant's property, and the noisy offensive congregation in and use of said alley by defendant's employees, who often gather there and loudly indulge in profane and foul language close at the rear of the homes of certain of the complaining parties, to their annoyance.

Plaintiffs emphasize the fact that the general locality in which defendant's plant is maintained is not a manufacturing or factory district; that the surrounding section of Detroit, covering an area of about $\frac{1}{2}$ of a mile east and west by $\frac{1}{2}$ mile north and south, bounded by East Grand boulevard on the west, Jefferson avenue on the south, Burns avenue on the east, and Kercheval avenue on the north, is in its prevailing characteristics distinctly a large residential district of the city.

This district is bounded and traversed by some fifteen north and south streets or boulevards, and by five running east and west, named Jefferson, Lafayette, Agnes, St. Paul, and Kercheval avenues. It is now a populous, well-built-up portion of the city, fairly shown to be in its general character a residential district east of Grand boulevard and south of Kercheval avenue. There are scattered through it business places on certain of the streets, consisting as a rule of small shops, stores, and other lines of business to supply local trade, such as meat markets, groceries, bakeries, drug stores, shoe repair, tailor, and bicycle shops, public garages, etc. Kercheval avenue, on its north, has a double-track car line along it, and is concededly a business street, as are certain portions of Jefferson and Lafayette avenues.

The quality and character of neighborhoods and streets vary materially in different portions of

that part of Detroit. Burns, Iroquois, and Seminole avenues, in the so-called "Indian village," are recognized as amongst the finest and most desirable residential streets in the city, and Seyburn avenue, 70 feet wide, running north and south less than 175 feet west of Shipherd, is described as an attractive, strictly residential street, with many fine homes upon it. The lots on its east side extend through to Shipherd, with the residences upon them fronting west on Seyburn. Other parts of the district are of a different quality and less attractive, having flats, apartment houses, and tenements mixed with private residences and occasional business activities. The small block in question, surrounded by Agnes, Van Dyke, Lafayette, and Shipherd avenues, is of the latter character. According to the plat furnished with this record, its size is approximately 640 feet north and south by 350 feet east and west, with an alley running centrally through it north and south, 20 feet in width, from Agnes street south for about 450 feet, where it crosses an east and west 10-foot alley, and, with a jog to the east, continues south 18 feet in width to Lafayette avenue. North of the east and west alley are, as originally platted, fourteen lots 60 feet wide, seven fronting east on Van Dyke avenue and seven west on Shipherd, with their rears on the 20-foot alley. Some of these lots have in times past been subdivided, and parts sold, mostly in 30-foot lots. Agnes avenue on the north is 60 feet wide, Van Dyke on the east 66 feet, Lafayette on the south 50 feet, while Shipherd on the west is of a disputed width, which the record leaves uncertain; defendant claiming it to be only 22 feet wide and in effect an alley, while plaintiffs claim a width of 30 feet, and the blueprint furnished the court, on which it is marked "Shipherd avenue" with no width given, would indicate, in proportion to the other streets, nearer 40 feet. It is paved with concrete, has a cement side-

walk along it, and residences fronting upon it; there being several between Agnes and Lafayette avenues.

Plaintiffs Oostdyk, Mackenzie, Bridge, Dempsey, Trybon, and O'Brien own lots in the east half of this block, fronting on Van Dyke and extending back to the alley; those of the three last mentioned being directly across the alley from defendant's factory, which extends about 90 feet along it. Plaintiffs Craig and Mackenzie own land on the east side of Van Dyke avenue, the Beckwith Company owns land on the east side of Shipherd avenue, extending from Lafayette avenue north to within about 60 feet of defendant's property, while plaintiff Young owns land on the west side of Shipherd. Two belated participants, named Nehls and the Parker Estate Company, not named as plaintiffs in the bill, but who subscribed to it, own land on the east side of Van Dyke avenue. Except that of Young and the Parker estate, the holdings of all plaintiffs have residences upon them.

Frank M. Pauli, who testified to being engaged in the building business in Detroit for thirty-five years, was in the employ of others during the earlier period of his activities, and just when he became a building contractor for himself is not disclosed; but in 1909 he purchased a 30-foot lot in this block fronting on Shipherd avenue, extending east a depth of 168 feet to the alley, from two contracting carpenters named Brown and Farr, who had some time before erected upon the alley a comparatively small one-story wooden building, 50x30 feet, used by them in their contracting business as a carpenter shop, or interior trim factory, which was equipped with a shaper, band saw, and rip saw. For some time Pauli used this building and equipment as it was when purchased, employing in it "about six" men. The following year he bought a 30-foot half lot just north of his first purchase, which had upon it a cottage fronting Shipherd avenue,

with a barn at the rear upon the alley, and began to expand his business in that locality.

The so-called Frank M. Pauli Company had been in existence about eight years, and was incorporated about five years prior to the hearing of this case, in May, 1918. Its stockholders were principally members of the elder Frank Pauli's family; his son, Frank G., who had previously worked for his father, becoming a member of the organization and active in its management. As its contracting business expanded, defendant gradually increased its real estate holdings and enlarged its plant, until at the time this suit was begun it had acquired five adjacent 30-foot lots and constructed additional buildings upon them, both brick and wood; the whole constituting a mill or factory equipped with various kinds of woodworking machinery operated by electric motors of different sizes, in which it employed over thirty men, and was then employing in its contracting activities in the city a force of about 150. The brick factory building in which is located most of its machinery is 30x97 feet, two stories high, located on the rear of the lots directly across the alley from the rear of lots owned and occupied for residential purposes by plaintiffs Bridge, O'Brien, Dempsey, and Trybon. North of its factory building is a lumber shed, 45x168 feet, with a storage capacity of twenty-seven carloads. It uses five motor vehicles, the largest being a 3-ton truck, 21½ feet long, with a 12-foot body, and has five lumber wagons for handling material. Its increased capacity was not only sufficient to keep up with requirements of its building contracts, but to do factory woodwork for others, including a contract to make "liberty cases" for the government, and defendant was planning to further enlarge when this suit was begun.

When Pauli, Sr., made his first purchase, that portion of the city was sparsely settled and scantily improved in comparison with its pres-

ent condition. He for some time employed but few men and used but little machinery, the business being conducted with comparatively little noise, dust, or confusion; but after the company was incorporated men, material, and machinery were increased, with a marked increase of dust, smoke, noise, and obstruction of the street and alley, until objections and complaints began to be made by those living in the vicinity, which were apparently resented and treated with scant consideration, until a somewhat belligerent status developed between certain of plaintiffs and Pauli, Jr., and the employees under him. Plaintiff Bridge testified that the men were a "noisy bunch," and the sound of the mill became such that when unwell he could not remain in his own home, and on several occasions had to go over to his sister's home and stay there to escape it; that when he complained to Pauli, Jr., about it, the latter seemed to take delight in telling him "that they were going to put in new machinery and other things." Certain of the women living near by, who complained of the dust, noises, and conduct of the workmen when congregated in the alley back of their homes, indulging in profane and indecent language, were answered at times, as they claimed, with abuse and insult, which some of the more militant sought to suppress by turning a camera and the hose on Pauli, Jr., and some of his men, giving rise to admittedly unparliamentary reflections by the latter.

Amongst its varied equipment of mechanical appliances for shaping wood defendant has about twenty saws for different purposes—such as a jig saw, rip saw, swing saw, cut-off saw, etc. A swing saw put in operation in 1915, and a gong installed to signal employees, are particularly dwelt upon by plaintiffs as producing penetrating sounds which they found intolerable. The loud ring of this particular saw is emphasized by various witnesses as the culminating annoyance from defend-

ant's factory, being described by them as "fierce," such that "no one can stand it," resembling "the last squeal of a dying pig," or the note of "these peanut stand whistles, which the city stopped," magnified "about a thousand times," a "high pitched, screeching, whistling" sound, which "goes through the house, whether the windows are closed or not, and you cannot get away from it." It was shown that defendant's factory work starts at 7 o'clock A. M., when the gong is sounded; that the employees commence to gather before that time, often as early as 6:30, and usually in the alley when weather permits, where they indulge in loud and offensive language, to the disturbance of those living near by, and again at the noon hour to eat their lunches there, the refuse of which they throw around in the alley, and sometimes into some of the plaintiffs' near-by back yards; that defendant has monopolized said alley to a large degree for use in connection with its factory, piling refuse, lumber, and other material there, leaving its wagons in the alley overnight, and occupying it for other purposes of its business; that the men working there in the open frequently throw down boards and other articles from above, shout orders, and curse, to the annoyance and often exclusion of plaintiffs and the public generally from said alley, which defendant uses as though it were its private property. It was shown that defendant also now produces in its factory a large amount of wood refuse and sawdust which it at times dumps from the second story of its factory into wagons in the alley; that when the sawdust pit is full the dust is allowed to run out into the alley and be carried by the wind about the neighborhood and into plaintiffs' houses and yards.

Without further details, it may be said that the evidence well supports the conclusion of the trial court that in the conduct of its business defendant has, in several of the particulars complained of, been guilty of main-

taining a private nuisance, against the rights of plaintiffs, which it is within the jurisdiction of a court of equity to enjoin at their instance. The trend of the story as a whole indicates that under Pauli, Jr.'s, management the business has been enlarged, and conducted largely on the theory that the owner has a right to do as he pleases with his own, forgetful of the fact that defendant was not the exclusive owner of the street in front or alley at the rear of its property, and in disregard of the principle underlying the law of nuisances, concisely embodied in the old legal maxim, "Sic utere," etc., which enjoins upon each the duty to so make use of its own as not to injure another.

That defendant's business, as conducted at the time this suit was begun and tried, had developed into a private nuisance in certain of the particulars complained of, which should be and properly was enjoined by the trial court, we are well satisfied. The more serious question for consideration is just how far the injunction should go, for the restraining decree issued by the trial court, from which defendant appeals, completely and perpetually closes down its factory and destroys its established business in that locality. Application was made to the trial court for a rehearing and modification of the decree, limiting it to enjoining the claimed objectionable features complained of, without absolutely prohibiting the business to be continued. Insisting that the matters complained of were greatly exaggerated, defendant claimed and proposed to further show that by abandoning certain usages, changes in machinery, and resort to more careful management and modern methods, the business can be continued without being a legal nuisance. As the case now stands there is a measure of showing that the objectionable features constituting a nuisance can largely be avoided by alterations, discontinuance of certain objectionable things, and improved appliances. Pauli, Sr., is not shown to have

actively participated in the hostilities which developed, and was apparently a fair and candid witness as to the situation when on the stand. In the application for a rehearing he offers, with suggestion of method, to do whatever the court may direct to eliminate the particular things complained of and held by the court a legal nuisance, which the trial court, when deciding the case, found consisted principally of "smoke from the smokestack of the factory, dust and sawdust from the planing mill, noise from the machinery, and the manner in which defendant conducts its business, namely, doing a large portion of their work upon the public alley and street on either side of their factory." While the latter usage has at times amounted to a nuisance

**Injunction—
against manu-
factory—unlaw-
ful use of
street.**

proper to enjoin, it does not follow from it that the continuance of a legitimate business on defendant's private premises should be suppressed also, because of the nuisance in the highway, though, if such practice was essential to the business, it is conceivable such might be the indirect result.

The pertinent law upon that subject is plainly stated in Wood on Nuisances, 3d ed. 314, as follows: "Neither has a merchant, or trader, or manufacturer, or any person, no matter how great the necessity of

**Highway—right
to display goods
upon.**

his business, any right to use any part of the highway for the deposit, exhibition, or sale of his goods. Neither has he a right to conduct his business in such a way as to keep goods constantly standing on the walk, or teams constantly or for any considerable portion of the time employed in front of his premises, engaged in loading or unloading goods, and the fact that the same is necessary in the course of his business is no excuse. It is his duty to carry on his trade where he will produce no serious annoyance to the people, as public convenience and necessity are para-

mount to the ends of trade or individual necessity."

Upon the question of whether the injunction goes too far in the first instance, we start with the universally recognized rule

**Injunction
against legiti-
mate business.**

that equity courts ought not to prohibit the conduct of a lawful business by a defendant on his own unrestricted premises, except as a last resort to restrain an otherwise unavoidable nuisance existing in violation of a complaining party's rights.

"Where a business can be so carried on that it will not constitute a nuisance, an injunction restraining the carrying on of such business will not be issued; but the court will so frame its order that the business may be continued, provided it is so conducted as not to create a nuisance." Joyce, Nuisances, § 90.

The duty of the court in that particular is thus well summarized from abundant authority in 14 Enc. Pl. & Pr. 1148: "A court of equity is always reluctant to grant a perpetual injunction against the carrying on of a legitimate business. Where the court finds that such an establishment, as conducted, is a nuisance, it should allow the defendants to show, if they can, that by the use of proper methods and appliances it is possible to continue the business in the same place without its being a nuisance. Where this can be done, a decree absolutely enjoining the defendants from further conducting such business is too broad. The injunction should be limited to such uses as create the nuisance, leaving the right to carry on the business in a proper manner."

In Chamberlain v. Douglas, 24 App. Div. 582, 48 N. Y. Supp. 710, involving an injunction restraining the operation of machinery in a planing mill by steam power, the court said: "Injunctions restraining the carrying on of a legitimate and lawful business should go no further than is absolutely necessary to protect the rights of the parties seeking such injunction.

When a person is engaged in carrying on such business, he should not be absolutely prohibited from doing so, unless it appears that the carrying on of such business will necessarily produce the injury complained of. If it can be conducted in such a way as not to constitute a nuisance, then it should be permitted to be continued in that manner."

In *Green v. Lake*, 54 Miss. 540, 28 Am. Rep. 378, where the nuisance complained of was the noise and refuse from a mill, interdiction of which by the trial court was modified to restraining certain offensive features, it was said: "A perpetual injunction against the lawful use of property in a city ought not to be decreed, if the owner can apply to his steam power and machinery such alterations and appliances as will relieve them from the special and unusual annoyances complained of in this case. . . . If the grievances can be removed by the aid of science and skill, a court of equity will go no further than to require those things to be done. The legislature and the local municipal authorities have ample power to regulate the business of the city, so as to produce as little inconvenience and annoyance to the different classes of its population as possible. Noisome and offensive trades may be assigned certain limits."

To like effect, see also *Collins v. Wayne Iron Works*, 227 Pa. 326, 76 Atl. 24, 19 Ann. Cas. 991; *McCarthy v. Natural Carbonic Gas Co.* 189 N. Y. 40, 13 L.R.A.(N.S.) 465, 81 N. E. 549, 12 Ann. Cas. 840; *Miller v. Webster City*, 94 Iowa, 162, 62 N. W. 648; *Windfall Mfg. Co. v. Patterson*, 148 Ind. 414, 37 L.R.A. 381, 62 Am. St. Rep. 532, 47 N. E. 2, 18 Mor. Min. Rep. 674; *McMenomy v. Baud*, 87 Cal. 134, 26 Pac. 795; *Lorenzi v. Star Market Co.* 19 Idaho, 674, 35 L.R.A.(N.S.) 1142, 115 Pac. 490; *Weaver v. Kuchler*, 17 Okla. 189, 87 Pac. 600. This court has consistently recognized such to be the general rule. *Gilbert v. Showerman*, 23 Mich. 448; *Edwards v. Allouez Min. Co.* 38 Mich. 49, 31

Am. Rep. 301, 7 Mor. Min. Rep. 577; *Shepard v. People*, 40 Mich. 487; *Ballentine v. Webb*, 84 Mich. 38, 13 L.R.A. 321, 47 N. W. 485; *Northwood v. Barber Asphalt Paving Co.* 126 Mich. 284, 54 L.R.A. 454, 85 N. W. 724; *Washington Lodge v. Frelinghuysen*, 138 Mich. 353, 101 N. W. 569.

In *Ballentine v. Webb*, 84 Mich. 38, 13 L.R.A. 321, 47 N. W. 485, where this court modified a decree perpetually enjoining the maintenance of a slaughterhouse, devoted principally to butchering hogs received in carload lots to the number of about 300 a week, it was held that defendant's business, when properly conducted, was not of such a character as to constitute a nuisance in the neighborhood where situated, and complainants were not entitled to an injunction because its existence there depreciated the value of their property, and directed that the decree should be modified to elimination of specific objectionable features in conduct of the business, found by the court to constitute nuisances, saying in part: "Defendant's business, established under the circumstances of this case, and conducted by him on his own premises, will not be enjoined because it cannot be carried on without some degree of offense and annoyance to those living near it. It is only when it reaches the point of discomfort where it becomes injurious to health that the injury can be said to be irreparable, so as to call forth the extraordinary power of a court of chancery to destroy it."

It is not claimed that defendant's woodworking industry is a nuisance per se. Inherently, it is not, when properly conducted, unhealthy, filthy, or unwholesome, nor disagreeable and offensive to persons generally. The bare fact it may not be acceptable as a near neighbor to plaintiffs, and may produce some discomfort or inconvenience to those near by, will not in itself justify its total elimination by injunction. The court has no

—inconvenience
of neighbors.

concern with the indicated effort of plaintiffs to banish business from this block. Most of them invested in this unrestricted subdivision some time after defendant's and other business enterprises of more or less magnitude were established there, purchasing advantageously and at an opportune time. Those nearest defendant's plant conceded their holdings have much advanced in value since they purchased. None of them expressed a desire to sell at the admittedly handsome profit obtainable, or were willing to name a price they would accept. This unrestricted property had been purchased to a marked extent by those who did and do use their lots for residence and business purposes in combination; the business generally being at the rear of lots, with the residences on the front. The block is not and never has been a high-class exclusively residential district. Tenements, flats, and apartment houses predominate. All plaintiffs owning property in the block, except Miss O'Brien, have at times rented a part or all of it to tenants, as a business matter. Miss O'Brien bought her lot in 1913, directly across the alley from defendant's plant, and adjacent to a property which had cottages in front and a long-established wholesale bakery upon the alley at its rear. This bakery ran four ovens, had at times baked as high as 12,000 loaves of bread per day, employed at the time of the trial fourteen persons in the bakery proper, had seven salesmen and thirty-two automobiles, which were preceded by the use of from eighteen to twenty-five horses. Across the alley from the bakery, and north of defendant's property, Mr. Dyar, a riding master by vocation, owns, as he described it, "90 feet frontage and 165 feet depth;" his residence, 56 Shipherd, and two tenement houses, being on the front, with a riding academy located at its rear, on the alley. He testified that during the nine years he had conducted the business he

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kept from ten to fifty-eight horses stabled on the premises, with the feed for them there; that he was then reducing his riding school business, having constructed on the property a public garage, 90x70 feet, which would be used for strictly business purposes. At 46 Shipherd, between Dyar's and Pauli's places of business, is the home of a philosophic colored citizen named Buster, who appeared as a cheerful witness for defendant. He testified that he owned his home, had resided there with his family for about five years in peace with his immediate neighbors, defendant's operations had not injured his health or bothered him, nor had there been any trouble between him and the lumber shed next to his place; that he was content with existing conditions, having in mind that if a private residence was substituted as his immediate neighbor there was a possibility, as he stated, "I might be undesirable to them, and they might be undesirable to me."

Defendant's machinery is exclusively operated by electrical power, each machine by an independent motor. No fuel is consumed for power purposes. The smoke problem, in connection with its heating plant, would be no different than that of any business building or apartment of equal size. That, and the matter of fire risk, are proper subjects in the first instance for municipal control. A smoke consumer has been installed by defendant under direction of the city authorities and an extension of its chimney or change of fuel may, and defendant claims will, obviate the charged smoke nuisance.

The offensive conduct of employees and use of the highways amounting to nuisances can and must be eliminated.

Nuisance—act of employees.

The sounding of a gong or whistle on defendant's premises to indicate the starting or stopping of work, or for other purposes, as was the custom, can and must be discontinued, as must also the noisy use of the

swing saw or other appliances more recently installed in the enlargement of defendant's plant, which occasioned the shrill, penetrating, and disturbing sounds complained of. The escape of sawdust and other light refuse from defendant's mill, to be carried by the wind around the neighborhood and upon plaintiffs' premises, must be prevented, and, in fine, the offensive things in the conduct of the business specifically pointed out, and found by the trial court to constitute legal nuisances, will be enjoined.

It is claimed for defendant that by change of construction, methods, and appliances which it proposes, these objectionable features can be eliminated. Defendant's business, as originally and for some years conducted, occasioned little, if any, complaint, and cannot be held to have been a legal nuisance. Plaintiff Trybon, a recent advent, who moved into the block in 1914, and first complained of the noise to Pauli, Jr., in 1915, told him: "You were not a nuisance when we came but you are going to be a great nuisance with your heavier machinery."

Plaintiffs' counsel says: "It is

difficult to say just when defendant's mill became a nuisance."

That during its expansion certain features and usages in its operation became such is clearly evident. Its cramped locality, character, and the history of its management are such that threatened further enlargement there, either in buildings, machinery, or force, must be restrained.

We conclude that upon the record the decree in the first instance should be modified to imposing correction of and enjoining those offensive features in the conduct of defendant's business particularly complained of and found to be nuisances, in harmony with the course adopted in *Ballentine v. Webb*, supra, and *Northwood v. Barber Asphalt Paving Co.* 26 Mich. 284, 54 L.R.A. 454, 85 N. W. 724. The modified decree prepared for settlement may in form and general outline follow defendant's proposed substitute in the printed record.

So modified, the decree of injunction will stand affirmed, with costs to defendant in this court.

Bird, Ch. J., and Moore, Brooke, Fellows, and Stone, JJ., concur.

Kuhn, J., did not sit.

The late Justice Ostrander took no part in this decision.

ANNOTATION.

Right of abutting owner to use street including sidewalk, for the deposit, exhibition, or sale of goods.

- I. General rule, 1314.
- II. Permissive power of city, 1317.
- III. Miscellaneous, 1320.

Scope.

Cases involving merely the deposit of goods as incident of loading and unloading are not included.

I. General rule.

An abutting owner has no right to use the street or sidewalk for the deposit, exhibition, or sale of goods.

Alabama.—*Costello v. State* (1895) 108 Ala. 45, 35 L.R.A. 303, 18 So. 820 (fruit stand).

Colorado.—*Denver v. Girard* (1895) 21 Colo. 447, 42 Pac. 662 (fruit stand).

Idaho.—*Keyser v. Boise* (1917) 30 Idaho, 440, L.R.A. 1917F, 1004, 165 Pac. 1121 (gasoline pump).

Illinois.—*Ryan v. Allen* (1907) 133 Ill. App. 52 (lunch stand).

Michigan.—*Pastorino v. Detroit* (1914) 182 Mich. 5, 148 N. W. 231, Ann. Cas. 1916D, 768 (fruit stand); *MACKENZIE v. FRANK M. PAULI Co.* (reported herewith) ante, 1305.

Missouri.—*Dougherty v. St. Louis* (1913) 251 Mo. 514, 46 L.R.A. (N.S.) 330, 158 S. W. 326 (storage of lumber).

Nebraska. — *Chapman v. Lincoln* (1909) 84 Neb. 584, 25 L.R.A.(N.S.) 400, 121 N. W. 596.

New York. — *Hallock v. Scheyer* (1884) 38 Hun, 111 (show case) *People ex rel. Bentley v. New York* (1885) 18 Abb. N. C. 123 (show case); *Lavery v. Hannigan* (1885) 20 Jones & S. 463; *People ex rel. Comatus v. Willis* (1896) 9 App. Div. 214, 41 N. Y. Supp. 168; *People ex rel. Mullen v. Newton* (1887) 20 Abb. N. C. 387 (meat rack); *Simis v. Brookfield* (1895) 13 Misc. 569, 34 N. Y. Supp. 695.

Pennsylvania. — *Com. v. Passmore* (1814) 1 Serg. & R. 217 (show case); *Com. v. Wentworth* (1823) 4 Clark, 324 (stall for selling fruit and confectionery).

The courts will not restrain the authorities from removing show cases from the sidewalk, they being unauthorized and illegal. *Simis v. Brookfield* (1895) 13 Misc. 569, 34 N. Y. Supp. 695, *supra*.

The permission of the abutting owner is of no avail to one who uses the public street for his trade and business. *Hontros v. Chicago* (1904) 113 Ill. App. 318.

An abutting owner may not use a part of the street for the storage of lumber. *Dougherty v. St. Louis (Mo.)* *supra*, holding the defendant liable for injuries to a boy.

In *Gerdes v. Christopher & S. Architectural Iron & Foundry Co.* (1894) 124 Mo. 847, 27 S. W. 615, the plaintiff recovered judgment against the company and the city for injuries on account of negligence in obstructing the street by the deposit thereon by the company of iron pillars, outside its premises where such pillars were manufactured. The court said: "The manufacturing company had the right to make reasonable use of these streets for the deposit of its manufactured goods, for the purpose of loading and unloading them, though not directly authorized by an ordinance of the city. But it had no right to make a permanent use of the street for storing its property, or to make such temporary use as would unreasonably interfere with travel. The reasonableness of the use should be measured by the charac-

ter of the articles to be handled. It appeared from the evidence that some of the iron pillars, which caused the obstruction in question, had been on the streets for a number of days, and it was a proper question for the jury to say whether they were allowed to remain an unreasonable length of time. We think that defendants could fairly have been charged with negligence under the evidence."

Where a box had been in the street from 8 o'clock in the morning till about 9:30 P. M., when, as the abutter's employee was moving it across the sidewalk to the building, a pedestrian's clothing was torn by a nail projecting from the box, it was held that the evidence justified the finding that the obstruction was not necessary in the transaction of the defendant's business, nor reasonable in regard to the rights of the public. *McCarten v. Flagler* (1893) 69 Hun, 184, 23 N. Y. Supp. 263.

A manufacturer who uses the sidewalk in front of his building to store stone slabs which are used in his business is liable for injuries thereby occasioned to any person lawfully using the walk, and who is himself without fault, and if a space inside the building line is permitted by the abutting owner to remain open, and to be used as part of the sidewalk, he must exercise due care not to place there dangerous obstructions which may result in injuries to persons lawfully on the walk, including children who may be attracted to, and enter upon, the premises. *Rachmel v. Clark* (1903) 205 Pa. 314, 62 L.R.A. 959, 54 Atl. 1027, 14 Am. Neg. Rep. 208.

But it may be noted that where it was urged that, if land used as a wharf had been dedicated to the public, it was as a street only, and that if the plaintiff's rights "are subject to the public uses, they are so subject to the use of it only as a street or highway, and not as a wharf, and that it is named and called a street and not a wharf," the court said: "He claims that the object of a street is for passage, for traveling over, and not to land or deposit goods upon. This is taking a very narrow and close view.

The streets of a town are fairly subject to many purposes to which a highway in the country would not be. More regard should be paid to the object and purpose than to the name. The ways of a town would be of comparatively little use if the citizens and traders could not deposit their goods in them temporarily, in their transit to the storehouse, and so of other things; and so it is of the wharf. . . . The name street is sufficiently accurate, and sufficiently opens it to all the public uses manifestly intended." *Haight v. Keokuk* (1856) 4 Iowa, 199.

The use by or under the abutting owner of a part of the street or sidewalk for the deposit, exhibition, or sale of goods is a nuisance. *Costello v. State* (1895) 108 Ala. 45, 35 L.R.A. 303, 18 So. 820; *Denver v. Girard* (1895) 21 Colo. 447, 42 Pac. 662 (stating the rule); *Ryan v. Allen* (1907) 138 Ill. App. 52; *Pastorino v. Detroit* (1914) 182 Mich. 5, 148 N. W. 231, Ann. Cas. 1906D, 768; *MACKENZIE v. FRANK M. PAULI Co.* (reported herewith) ante, 1305; *Chapman v. Lincoln* (1909) 84 Neb. 534, 25 L.R.A.(N.S.) 400, 121 N. W. 596; *Hallock v. Scheyer* (1884) 33 Hun (N. Y.) 111 (show case); *People ex rel. Mullen v. Newton* (1887) 20 Abb. N. C. (N. Y.) 387 (meat rack); *Com. v. Passmore* (1814) 1 Serg. & R. (Pa.) 217; *Com. v. Wentworth* (1823) 4 Clark (Pa.) 324.

It is a public nuisance for one to place a stall for the selling of fruit and confectionery in a public street, although he paid rent to the owner of the adjoining house. *Com. v. Wentworth* (Pa.) supra.

A fruit stand on the sidewalk is a public nuisance, and it is within the police power of the city of Detroit, under its charter, to summarily remove in a reasonable manner, after proper previous notice, "any person so found doing business," and any obstructions found on the public streets in connection with said business. *Pastorino v. Detroit* (1914) 182 Mich. 5, 148 N. W. 231, Ann. Cas. 1916D, 768, supra.

A lunch stand on a sidewalk is a public nuisance, and a lease by an abutter for such purpose is void. *Ryan v. Allen* (1907) 138 Ill. App. 52, supra,

where the court stated that an ordinance authorizing such a stand would be ultra vires.

A public auctioneer was convicted of committing a nuisance where he deposited goods to be exposed to sale at public auction, in the public street, on the footway and cartway opposite to his own store and the adjoining houses; there to remain during the sale, and for some time before and afterwards. *Com. v. Passmore* (1814) 1 Serg. & R. (Pa.) 217, supra, where Tilghman, Ch. J., said: "A merchant may have his goods placed in the street, for the purpose of removing them to his store in a reasonable time. But he has no right to keep them in the street for the purpose of selling them there, because there is no necessity for it. This is granted to be the law with respect to a private merchant. But it is said that the case of a public auctioneer is different, because he is obliged to sell all that is brought to him, and therefore it would be difficult to find stores to contain all his goods, and because the commonwealth draws a commission on his sales, and therefore everything which tends to increase those sales is for the public good. It is said, too, that there is a necessity to have many of the articles sold at auction viewed in the open street, or, at least, that this kind of view is advantageous to the purchasers, and therefore will tend to promote sales. I can easily perceive that it is for the convenience and the interest of an auctioneer to place his goods in the street, because it saves the expense of storage. But I see no more necessity in his case than that of a private merchant. It is equally in the power of the auctioneer and the merchant to procure warehouses and places of deposit, in proportion to the extent of their business. But the auctioneer has this advantage, that he may often make his sale at the house of the person who employs him."

In *Rex v. Jones* (1812) 3 Campb. (Eng.) 230, the defendant was indicted and found guilty of depositing, hewing, and sawing logs of wood in the street, where it appeared that he occupied a small timber yard close by,

and that, from the narrowness of the street and the construction of his own premises, he had in several instances necessarily deposited long sticks of timber in the street and had them sawed into shorter pieces there before they could be carried into his yard. Lord Ellenborough said: "He is not to eke out the inconveniences of his own premises by taking in the public highway into his timber yard; and if the street be narrow, he must remove to a more commodious situation for carrying on his business."

In *People v. Cunningham* (1845) 1 Denio (N. Y.) 524, 43 Am. Dec. 709, the defendants were convicted of a nuisance in obstructing a highway, where they were constantly selling and delivering in the street the grains remaining after distillation, called swill or slops, to their customers from their distillery. On the defendants' premises there were vats or reservoirs, and running from them several 12-inch pipes, extending over the sidewalk sufficiently high for persons to walk under them into the street. Persons wishing to take away the slops came with their carts and wagons, and, driving under the ends of these pipes, received their loading, which was let off by means of faucets in the ends of the pipes, thus conducting the contents of the vats into tubs or hogsheads standing in the carts or wagons brought to take it away, and the street was frequently blocked by their customers from morning to night, making great disorder and disturbance, and there was much accumulation of filth.

In *State v. Berdetta* (1880) 73 Ind. 185, 38 Am. Rep. 117, where the use to which the building was put does not appear, it was held that it is a public nuisance to occupy and maintain on the sidewalk a building of a permanent nature.

It will be seen that in the reported case (*MACKENZIE v. FRANK M. PAULI CO.* ante, 1305) it was held to be a nuisance for the defendant company, in operating its "trim factory," to do a large portion of their work upon the public alley and street on either side of their factory, and that it appeared, among other things, that it used the

alley for piling refuse, lumber, and other material.

An adjoining proprietor may complain when he suffers special damage.

Thus an adjoining owner may enjoin his neighbor from maintaining a show case, sign, and fence in front of such neighbor's premises, lessening the light which reaches the plaintiff's show windows, as such things are a nuisance. *Hallock v. Scheyer* (1884) 33 Hun (N. Y.) 111.

So in *Lavery v. Hannigan* (1885) 20 Jones & S. (N. Y.) 463, an adjoining proprietor obtained an injunction against his neighbor from placing any goods, wares, or merchandise, or other materials and articles, upon the sidewalk in front of the defendant's premises, and from hanging or suspending any goods, wares, articles, or materials in front of said premises or over said sidewalk, and from doing, causing, or permitting to be done any act or thing to encumber or obstruct said sidewalk, or the area and space above the same, where there was obstruction of the plaintiff's light, air, and view, and also infringement of the space in front of the plaintiff's store, particularly at morning and night, in setting out and taking up the articles complained of.

So a merchant may have an order directing the authorities to remove show cases on the sidewalk of his adjoining neighbors, even though permits have been issued therefor. *People ex rel. Bentley v. New York* (1885) 18 Abb. N. C. (N. Y.) 123.

On an application by an adjoining owner for a mandamus compelling the authorities to remove a meat rack projecting from the abutting premises, obstructing the view of the neighbor's store, it was admitted by the city's counsel that the meat rack was a nuisance, and the mandamus was granted. *People ex rel. Mullen v. Newton* (1887) 20 Abb. N. C. (N. Y.) 387.

II. Permissive power of city.

The city has as a rule no power to license the use of streets or sidewalks for the deposit, exhibition, or sale of goods. *Costello v. State* (1895) 108 Ala. 45, 35 L.R.A. 303, 18 So. 820; *Keyser v. Boise* (1917) 30 Idaho, 440,

L.R.A.1917F, 1004, 165 Pac. 1121; *Heineck v. Grosse* (1902) 99 Ill. App. 441; *Pagames v. Chicago* (1904) 111 Ill. App. 590; *Chicago v. Pooley* (1904) 112 Ill. App. 343; *Cordatos v. Chicago* (1906) 129 Ill. App. 471; *Ryan v. Allen* (1907) 138 Ill. App. 52 (stating the rule); *Chapman v. Lincoln* (1909) 84 Neb. 534, 25 L.R.A.(N.S.) 408, 121 N. W. 596; *People ex rel. Bentley v. New York* (1885) 18 Abb. N. C. (N. Y.) 123; *People ex rel. Mullen v. Newton* (1887) 20 Abb. N. C. (N. Y.) 387; *People ex rel. Comatus v. Willis* (1896) 9 App. Div. 214, 41 N. Y. Supp. 168.

It has been held that the city of Chicago had no power to authorize the use of any part or portion of the sidewalks for private purposes. *Heineck v. Grosse* (1902) 99 Ill. App. 441; *Pagames v. Chicago* (1904) 111 Ill. App. 590 (stands for fruit and flowers under leases from abutting owners; bill to restrain the city from interference denied); *Cordatos v. Chicago* (1906) 129 Ill. App. 471 (stands for fruit, flowers, and confectionery). So the court reversed an injunction against the interference by the city with the display of wares within 3 feet of the building occupied by the plaintiff (*Chicago v. Verdon* (1905) 119 Ill. App. 494), and with a candy and lemonade stand carried on with the consent of the abutting owner (*Chicago v. Pooley* (1904) 112 Ill. App. 343).

The permanent and exclusive appropriation of a portion of a sidewalk next to a building for a fruit stand constitutes an indictable nuisance, although it is erected on the covering of an open way to a cellar which had existed without objection for several years, and was erected under a license from the city, the charter not giving the city such power. *Costello v. State* (1895) 108 Ala. 45, 35 L.R.A. 303, 18 So. 820 (where the defendant had a lease from the owner of the abutting building).

A municipal corporation having, in the absence of statute, no authority to permit the erection of a gasoline pump in a street, its purported license for that purpose may be revoked at pleasure, although expense has been in-

curred on the faith of it. *Keyser v. Boise* (1917) 30 Idaho, 440, L.R.A. 1917F, 1004, 165 Pac. 1121.

One renting from an abutting owner may not complain that the city, after permitting by ordinance the occupation of part of the sidewalk for four years for a fruit stand, being at best but a mere revocable license, prohibited such use by ordinance. *Denver v. Girard* (1895) 21 Colo. 447, 42 Pac. 662, where the court, while not deciding the case on this ground, said: "A decision in this case might have been placed upon the ground that the stand of the defendant in error was a public nuisance erected in one of the highways of the city, which even the city could not maintain without authority expressly conferred upon it by the legislature, or impliedly arising out of some express power granted; that it was not competent for the city council while it continued to maintain its sidewalks as part of its public highways, to grant to private persons for private purposes any portion of the same."

The charter of the city of Lincoln, giving the mayor and council supervision and control of all public highways and public ground within the city, does not authorize them to enact ordinances for the leasing of space on the streets or sidewalks in front of business houses for use by produce dealers or other merchants; such use of the streets and sidewalks being unlawful, and constituting a nuisance per se. *Chapman v. Lincoln* (1909) 84 Neb. 534, 25 L.R.A.(N.S.) 400, 121 N. W. 596.

A grant in the charter of a city, of power to regulate matters connected with business conducted upon the streets, does not empower it to pass an ordinance authorizing permits to use a portion of the sidewalk for displaying goods and merchandise on stands, booths, or tables. *People ex rel. Comatus v. Willis* (1896) 9 App. Div. 214, 41 N. Y. Supp. 168.

While it is not intended to include cases of the obstruction of streets by permanent buildings, it may be noted that it was held in *John Anisfield Co. v. Edward B. Grossman & Co.* (1901) 98 Ill. App. 180, that the city of Chi-

cago had no power to authorize show windows projecting 18 inches over the sidewalk.

There are at least two village cases where the court apparently considered that the village had the power to license, but which do not refer to any authorizing statute.

In *Barling v. West* (1871) 29 Wis. 307, 9 Am. Rep. 576, it was held that a village ordinance relating to the erection of a block of stores for business purposes, which provided that the sidewalk in front thereof should be of a designated width, and that the outside or traveled portion should be kept clear of obstructions, permanent or temporary, impliedly left the remaining portion of the inside, next the buildings, to be occupied for the use of the stores, and an occupant of one of the stores might lawfully use such inside portion for a lemonade stand.

Where the plaintiff installed modern gasoline apparatus, consisting of a tank buried beneath the surface of the ground, and a pump connected therewith, in the space between the sidewalk and the graded part of the street, in front of his place of business, and the village board adopted a resolution directing plaintiff to remove his tank and pump, and on the same street, but a block and a half distant from plaintiff's place of business, a competitor, with the sanction of the village board, installed and maintained similar apparatus in a like position, it was held that the right of a private party to occupy part of a public street in front of his place of business must yield to public necessity or convenience, and ordinarily the question of public necessity or convenience is for the governing body of the municipality, but such body cannot act arbitrarily and deny to one citizen privileges which it grants to another under like conditions. *Kenney v. Dorchester* (1917) 101 Neb. 425, 163 N. W. 762.

There seems to be no doubt that the legislature may empower a municipality to grant to an abutting owner a limited private use of part of the street in front of his premises, which does not interfere with the rights of his neighbor.

Where a statute restricted persons from making or setting up in any street of 50 feet wide or upwards, any porch, cellar door or step which shall extend beyond 4 feet 3 inches into such street, or a proportionate distance into a narrower street, under a penalty, it was held that an ordinance of Philadelphia was invalid which provided that "they shall not place their goods, etc., on any porch, or on or over a cellar door, or suspend them from a penthouse, if they project more than 6 inches towards the street." *Carlisle v. Baker* (1795) 1 Yeates (Pa.) 473.

In *Philadelphia v. Sheppard* (1893) 158 Pa. 347, 28 Atl. 972, where a statute had given the city power to regulate the whole subject by ordinance, and the ordinance in question did not clearly prohibit the acts complained of, it was held that the city ought not to come into a court of equity for the purpose of restraining the appellees from maintaining their candy and fruit stand, and of compelling them to take it down and remove it, where such stand was erected and maintained by them under and in accordance with its own ordinances. The court said: "If the city by its ordinance declares that it shall be unlawful to place any goods, wares, or merchandise for sale, upon part of the footway in front of any house or premises from the line of any street 50 feet and upwards in width, to a greater distance than 4 feet and 3 inches, there is a reasonable if not a necessary implication from the ordinance that the city will permit the goods, etc., to be placed for sale on the footway within such limit. . . . We find, too, that by the ordinance of December 6, 1871, the city, with the consent of the commissioners of markets and city property, and with the approval of the committee on city property, allows cake, fruit, and other stands to be erected adjoining or in front of its own property; and we will not presume that it intended thereby to forbid a like use of the footway in front of individual property, if the owner thereof consented to it."

That the legislature has power to confer authority upon a municipality to grant a permit to install a gasoline

station in a street was conceded in *New Orleans v. Shuler* (1916) 140 La. 657, 73 So. 715, the question being as to whether it had done so. It was there held that the authority of a city to adopt an ordinance forbidding, unless by permission of the council, the placing of a gasoline pump on the outer edge of a sidewalk, and requiring, as one condition of such permission, the payment of an annual fee to the city, was delegated to the city by the following provisions of its charter: "The city shall also have all powers, privileges and functions which, by or pursuant to the Constitution of this state, have been or could be granted to or exercised by any city. The legislative, executive and judicial powers of the city shall extend to all matters of local and municipal government, it being the intent thereof that the specifications of particular powers by any other provision of this charter shall never be construed as impairing the effect of the general grant of powers of local government hereby bestowed."

In *Cunningham v. Entrekin* (1894) 3 Pa. Dist. R. 291, the court does not refer to any enabling statute in holding that the tenant of the ground floor might not enjoin the tenant of the second floor from having a show case on the sidewalk.

III. Miscellaneous.

It is negligence per se for the abutting owner of a planing mill to pile lumber in the street, and thus violate an ordinance forbidding obstructions upon the streets. *McKune v. Santa Clara Valley Mill & Lumber Co.* (1895) 110 Cal. 480, 42 Pac. 980.

In *New York v. Leef* (1911) 128 N. Y. Supp. 676, the defendants suffered a penalty for violation of an ordinance for obstructing the sidewalk in front of their place of business without a permit, by leaving barrels of apples thereon.

So in *People v. Van Houten* (1895) 13 Misc. 603, 35 N. Y. Supp. 186, the defendant, who obstructed the sidewalk in front of his store with boxes, barrels, bags, produce, and other material, was convicted of a violation of a

village ordinance, authorized by a statute empowering trustees of villages to prevent encumbering streets, sidewalks, etc., with any material.

So in *Truchelut v. Charleston* (1818) 10 S. C. L. (1 Nott & M'C.) 227, a penalty was recovered from the defendant for a violation of a city ordinance ratified by the legislature, for placing on a bench before his door, jars, pots, etc., for the purpose of offering them for sale.

Anything in *Marine Ins. Co. v. St. Louis, I. M. & S. R. Co.* (1890) 41 Fed. 643, is of no moment, as it was reversed without the ground appearing in (1893) 154 U. S. 515, 38 L. ed. 1081, 14 Sup. Ct. Rep. 1152.

In *Kessler v. Berger* (1903) 205 Pa. 289, 61 L.R.A. 611, 54 Atl. 887, 14 Am. Neg. Rep. 203, the court does not inform us whether the defendant was the abutting owner.

The following cases, while not strictly within the scope of this note, are of interest in this connection:

In *Holly v. Bennett* (1891) 46 Minn. 386, 49 N. W. 189, the defendant was held negligent in extending piles of lumber in his lumberyard into the street, from which a stick fell and injured a child, there being an ordinance prohibiting such encumbering of the streets.

In *McCloughry v. Finney* (1885) 37 La. Ann. 27, the defendant was held liable for injuries to a boy caused by a fall of a sack of corn from the top of a pile of corn that had been placed on the banquette in front of his store in the evening.

In *Busse v. Rogers* (1904) 120 Wis. 443, 64 L.R.A. 183, 98 N. W. 219, 15 Am. Neg. Rep. 743, it was held that one who, in using the street adjoining his property as part of his lumberyard, piles lumber there in an unstable manner, is liable for injuries caused by its fall upon a child, who, while traveling along the street, follows its inclination to play, and attempts to climb upon the pile, and thereby causes the timber to fall.

Where an injury occurred owing to the blocking of the sidewalk by malt boxes placed there by the abutting defendants, who were brewers, the court

said: "The defendants had the right to use temporarily the sidewalk in front of their place of business for the purpose of sending out and receiving any articles or commodities from their business house, provided it was done with the care required by all the circumstances. But they had no right to obstruct the pavement for any greater length of time than was reasonably necessary for the purpose, and if they did so it was negligence. . . . Whether they exercised the care required of them on this occasion, we think was for the jury under the evidence in the case." *Stahle v. Poth* (1908) 220 Pa. 335, 69 Atl. 864.

It may be noted that in *Garibaldi v. O'Connor* (1904) 210 Ill. 284, 66 L.R.A.

73, 71 N. E. 379, 16 Am. Neg. Rep. 309, it was held that merchants who use a portion of the sidewalk adjoining their place of business for receiving and shipping goods, to such an extent that travelers are limited to the use of a narrow passageway during most of the business hours of the day, are bound to use reasonable care to see that such passageway is kept safe, and cannot be regarded as having done so if they have permitted it to be strewn with straw and loose bananas.

In *Ross v. Smith* (1919) — Wash. —, 182 Pac. 582, the piling of boxes and crates of fruit and vegetables by a merchant on the sidewalk was held not to have been a proximate cause of an injury to a pedestrian. B. B. B.

LUVICEY D. MCDANIEL, Appt.,

v.

GREENVILLE-CAROLINA POWER COMPANY, Respt.

South Carolina Supreme Court—July 22, 1918.

(95 S. C. 268, 78 S. E. 980.)

Trespass — casting water on neighboring property — legislative authority — effect.

Legislative authority to place a dam across a navigable stream does not absolve its owner from liability for injury to upper riparian property by the filling of the stream with mud and sand until the water is cast upon such property, although he is guilty of no negligence, where the Constitution prohibits the taking of property for public use without compensation.

[See note on this question beginning on page 1326.]

APPEAL by plaintiff from a judgment of the Common Pleas Circuit Court for Pickens County (Shipp, J.) in defendant's favor in an action to recover damages for the casting of water on plaintiff's property. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Ansel & Harris, for appellant:

The legislature has no power under the Constitution to make over to any individual or corporation any right save those of the public, without securing a just compensation.

Lee v. Pembroke Iron Co. 57 Me. 481, 2 Am. Rep. 64; *White v. Whitney Mfg. Co.* 60 S. C. 265, 38 S. E. 456; *Ward v. Ford*, 58 S. C. 557, 36 S. E. 916; 40

Cyc. 565; *Yates v. Milwaukee*, 10 Wall. 497, 19 L. ed. 984; *Eastman v. Amoskeag Mfg. Co.* 44 N. H. 143, 82 Am. Dec. 201; *Trenton Water Power Co. v. Raff*, 36 N. J. L. 335; *Hogg v. Zanesville Canal & Mfg. Co.* 5 Ohio, 410; *Pumpelly v. Green Bay & M. Canal Co.* 13 Wall. 177, 20 L. ed. 560; *Ingliside Mfg. Co. v. Charleston Light & Water Co.* 76 S. C. 100, 56 S. E. 664.

One has no more right to injure an-

other with the water of a navigable stream than with that of a non-navigable, private stream.

Fulmer v. Williams, 122 Pa. 191, 1 L.R.A. 603, 9 Am. St. Rep. 91, 15 Atl. 726; *Holyoke Water Power Co. v. Connecticut River Co.* 52 Conn. 570; *Brooks v. Cedar Brook & S. C. River Improv. Co.* 82 Me. 17, 7 L.R.A. 460, 17 Am. St. Rep. 459, 19 Atl. 87; *Green Bay & M. Canal Co. v. Kaukauna Water Power Co. (Patten Paper Co. v. Kaukauna Water Power Co.)* 90 Wis. 370, 23 L.R.A. 423, 48 Am. St. Rep. 941, 61 N. W. 1171, 63 N. W. 1019.

The legislature may authorize the erection of dams for the improvement of navigation without providing compensation for mere consequential injuries, where no private property is appropriated.

Holyoke Water Power Co. v. Connecticut River Co. 52 Conn. 570; *Brooks v. Cedar Brook & S. C. River Improv. Co.* 82 Me. 17, 7 L.R.A. 460, 17 Am. St. Rep. 459, 19 Atl. 87; *State ex rel. Columbia Bridge Co. v. Columbia*, 27 S. C. 146, 3 S. E. 55; *Grand Rapids & I. R. Co. v. Butler*, 159 U. S. 87, 40 L. ed. 85, 15 Sup. Ct. Rep. 991; *United States v. Chandler-Dunbar Water Power Co.* 209 U. S. 452, 52 L. ed. 887, 28 Sup. Ct. Rep. 579.

Private property cannot be taken for either public or private use without due compensation.

Tompkins v. Augusta & K. R. Co. 37 S. C. 387, 16 S. E. 149; *Ingleside Mfg. Co. v. Charleston Light & Water Co.* 76 S. C. 98, 56 S. E. 664; *Burnett v. Postal Teleg. Cable Co.* 71 S. C. 146, 50 S. E. 780; *Mason v. Postal Teleg. Cable Co.* 71 S. C. 150, 50 S. E. 781; *Phillips v. American Teleph. & Teleg. Co.* 71 S. C. 571, 51 S. E. 247; *Dobson v. Postal Teleg. Cable Co.* 79 S. C. 431, 60 S. E. 948; *Wilson v. D. W. Alderman & Sons Co.* 69 S. C. 185, 48 S. E. 81; 40 Cyc. 581; *McKee v. Delaware & H. Canal Co.* 125 N. Y. 353, 21 Am. St. Rep. 740, 26 N. E. 305; *Glass v. Fritz*, 148 Pa. 324, 23 Atl. 1050; *Hollenbeck v. Dingwell*, 16 Mont. 335, 50 Am. St. Rep. 502, 40 Pac. 863; *Moore v. North & South Carolina R. Co.* 94 S. C. 243, 77 S. E. 926.

Messrs. Haynsworth & Haynsworth, for respondent:

The remedy as provided by statute allowing condemnation is exclusive, and the ordinary action for damages does not lie.

Tompkins v. Augusta & K. R. Co. 37

S. C. 385, 16 S. E. 149; *Rankin v. Sievern & K. R. Co.* 58 S. C. 534, 36 S. E. 997; *Lietzey v. Columbia Water Power Co.* 47 S. C. 464, 34 L.R.A. 215, 25 S. E. 744; *Moore v. North & South Carolina R. Co.* 94 S. C. 243, 77 S. E. 926.

The statutory authority to erect the dam is free from constitutional infirmity, and affords full protection to the defendant in this case.

Bellinger v. New York C. R. Co. 23 N. Y. 42; *Pixley v. Clark*, 85 N. Y. 520, 91 Am. Dec. 72; *Northern Transp. Co. v. Chicago*, 99 U. S. 635, 25 L. ed. 336; *Gibson v. United States*, 166 U. S. 269, 41 L. ed. 996, 17 Sup. Ct. Rep. 578; *Scranton v. Wheeler*, 179 U. S. 141, 45 L. ed. 126, 21 Sup. Ct. Rep. 48; *Payne v. Kansas City, St. J. & C. B. R. Co.* 112 Mo. 6, 17 L.R.A. 631, 20 S. W. 322; *Union Bridge Co. v. United States*, 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. Rep. 367; *Mills v. United States*, 12 L.R.A. 677, 46 Fed. 738; *High Bridge Lumber Co. v. United States*, 16 C. C. A. 460, 37 U. S. App. 234, 69 Fed. 324; *Black River Improv. Co. v. LaCrosse, Boom & Transp. Co.* 54 Wis. 659, 41 Am. Rep. 66, 11 N. W. 443; *Garraux v. Greenville*, 58 S. C. 575, 31 S. E. 597; *Wallace v. Columbia & G. R. Co.* 34 S. C. 62, 12 S. E. 815; *Lampley v. Atlantic Coast Line R. Co.* 71 S. C. 156, 50 S. E. 773; *Touchberry v. Northwestern R. Co.* 83 S. C. 315, 65 S. E. 341.

Messrs. Carey & Carey also for respondent.

Watts, J., delivered the opinion of the court:

This action was brought to recover damages. The complaint alleges that in 1907 the defendant power company erected across Saluda river a dam, which obstructed the natural flow of sand and water in the channel, causing the channel to fill with sand and mud, and thus causing the plaintiff appellant's land lying above the dam to be overflowed with mud and sand and water. There is no allegation that the dam was wrongfully or negligently constructed. The respondent interposed a demurrer to the complaint on the ground that the same did not state facts sufficient to constitute a cause of action, "in that the defendant was authorized by the statutes of this state to construct the

dam in question across Saluda river, which is navigable at said point, and inasmuch as the complaint does not charge that the said dam was negligently constructed." His Honor, Judge Shipp, sustained the demurrer and dismissed the complaint, and from this order appellant appeals, and by eleven exceptions questions the correctness of this ruling.

The first three exceptions question the correctness in holding that the acts of the legislature of this state make Saluda river a navigable stream. These exceptions are overruled, as the acts of the legislature declare Saluda river to be a navigable stream as far up as McElhaney ford (Act December 16, 1797, 5 Stat. at L. p. 322), and it is conceded that McElhaney's ford is several miles above the land alleged to be damaged. The other exceptions raise the question that the building of the dam, even under authority of the legislature, did not excuse or exempt it from liability for damages to riparian landowners above the dam for injuries done to their land by reason of the erection of the dam, and that the legislature only had the power over the stream to allow dams and locks built for navigation purposes, and that the respondent is a private corporation, engaged in the business of generating electric power for sale, and liable for all damages done to lands above it which naturally flow from the erection of the dam, even though the act of the legislature authorizing the building of the dam did not provide for such compensation.

We think these exceptions should be sustained. The legislature had the authority to authorize and allow the respondent to build the dam in question across Saluda river, which had been declared to be a navigable stream; but it had no right to give them the power to build the dam and exempt from liability to any landowners on the stream, either above or below the dam, that might suffer any injury to their property by reason of the erection of the dam, even though by authority of the state.

They could only be permitted to put the dam across the river, and, if by so doing they injured any landowners on the stream, they should be required to respond in damages for such injury. If in the erection of the dam they exercised the highest degree of care, and were in no manner negligent, and conducted it in the most skilful manner, yet, if by the building and maintenance of the dam they injuriously affect their neighbors, they are liable in damages. In other words, the legislature had the right to grant permission to erect the dam, and respondent had the right to build and maintain the dam, yet if by so doing they injure the landowners on the stream, and the erection and maintenance of the dam is the direct and proximate cause of the injury to the landowners, they must pay damage; otherwise it would deprive property holders of their property and take it from them without compensation, and would be unlawful, unjust, and contrary, not only to all law, but all reason and justice. It may be that when a dam is first built that it will not injuriously affect land some distance from it, and for a long time there will be no cause for them to complain, but when the pond made by the dam fills with mud, sand, trash, and other things, causes overflows and injury to lands, then the parties injured have a cause of action, if the buildings and maintenance of the dam is the direct and proximate cause of their injury.

The complainant in this case alleges that the water from this dam backed up on her lands, and overflowed them with water, mud, sand, and other deleterious deposits. The complaint states a good cause of action. The fact that respondent's act in building the dam was sanctioned by the state, and it did it under authority of law, and committed no fault in the erection of its dam, does not relieve it, if by so doing it injures or destroys other people's property, without compensating them. I know of no law that will permit a corporation or an officer

thereof, even though he is authorized by the state, to take the property of an individual for any purpose whatsoever, however beneficial it may be to the public, without compensation; such pretended authority would be void and could afford no protection to anyone. If the appellant has been injured as a natural result by the erection and operation of this dam, and the operation of the same is the direct and proximate cause of injury to her land, then she is entitled to such damages as would compensate her for such injury. My views are that it does not make any difference whether Saluda river is navigable or not, as the same rule of damages follows as laid down in *Ward v. Ford*, 58 S. C. 560, 36 S. C. 916, and *White v. Whitney Mfg. Co.* 60 S. C. 265, 38 S. E. 456. When the dam in question was erected, the waters from the pond in no manner affected appellant's land. She was at that time in no manner affected, and could not foresee that later she would suffer damage, and for that reason could not demand compensation, for she then suffered no injury, and any claim made would have been conjectural and speculative on her part; but when she suffered injury from the erection and operation of the dam in question, then, and not until then, did a cause of action accrue to her, and not until then was she in a position to maintain an action. Any action brought by her until her rights were injuriously affected, or her rights invaded, would have been premature, and she would have had no status in court.

"The legislature has no power under the Constitution to make over to any individual or corporation any right save those of the public without securing a just compensation." *Lee v. Pembroke Iron Co.* 57 Me. 481, 2 Am. Rep. 64.

"The rights of a riparian proprietor on a navigable stream are substantially the same as those attaching to riparian ownership on a non-navigable watercourse, except that in some respects they are en-

larged by the greater size and capacity of the stream, and that there are some additional privileges connected with its navigable character. Such an owner has the right of access to the navigable part of the stream from the front of his lot, and, provided he does not impede or obstruct navigation, to build private wharves, landings, or piers, or use the water of the stream for any proper purpose." 40 Cyc. 565, *Yates v. Milwaukee*, 10 Wall 497, 19 L. ed. 984.

"While a dam in a navigable stream, if authorized by the act of the legislature, cannot be indicted as a public nuisance for obstructing the stream, still the act is no protection against injuries to a private owner." 8 Am. & Eng. Enc. Law, 2d ed. 704.

"In the case of a private stream, no one would doubt the right of an injured owner to maintain an action for the damages suffered by him by reason of a change in the current. But one has no more right to injure another with the water of a navigable stream than with that of a non-navigable, private stream." *Fulmer v. Williams*, 122 Pa. 191, 1 L.R.A. 603, 9 Am. St. Rep. 88, 15 Atl. 726.

"The right of the state to improve the stream as a highway, and for the purpose of aiding its navigation, is superior to the rights of the riparian owners. It may take and divert absolutely and without compensation so much of the water of the stream as may be required to improve its navigation. But that is the limit of its right." *Green Bay & M. Canal Co. v. Kaukauna Water Power Co.* (*Patten Paper Co. v. Kaukauna Water Power Co.*) 90 Wis. 370, 28 L.R.A. 443, 48 Am. St. Rep. 987, 61 N. W. 1121.

It was held in *State ex rel. Columbia Bridge Co. v. Columbia*, 27 S. C. 140, 3 S. E. 55, "that the riparian proprietor had title to the soil covered by the stream as far as the center of the stream, subject to the right of the public to use of the stream for transportation as a highway,

when such streams are navigable or may be made so by the removal of obstructions."

To allow the respondent to escape paying compensation to the appellant, if appellant has been injured as she alleges in her complaint, would nullify and wipe out article 1, § 17, of the Constitution of 1895. We have no doubt that the respondent should be liable for all damages,

Trespass—casting
ing water on
neighboring
property—
legislative au-
thority—effect.

if any, caused by the building of said dam, even though they were authorized to build. We

think that the order appealed from should be reversed. We are of the opinion that the complaint alleges a wrongful trespass upon the lands of the appellant and invasion of her rights. The court of common pleas has jurisdiction to try such cases, and even where condemnation is the proper procedure, it is tried in that court, and an order must be first obtained from the resident circuit judge, and from the first finding appeal may be had to court of common pleas. We see no reason why the issues as made in this case cannot be tried in the court of common pleas, as in other cases of trespass and damages. The appellant alleges she has been damaged for the wrongful invasion of her property rights by the respondent, and demands damages as compensation. The respondent denies that she is entitled to compensation. The issues as made are simple and should be disposed of in the court of common pleas, without having to resort to the statute providing for condemnation proceedings. Appellant's counsel at the hearing stated that they did not care whether they had to seek damages under the Condemnation Statute, or proceed in the case as made out by the pleadings in the court of common pleas. This court is of the opinion that even if appellant could have pursued the course granted by the statute in condemnation proceedings, that remedy was not exclusive in this

case, and appellant not necessarily limited to that remedy.

The judgment is reversed, and case remanded for new trial.

Gary, Ch. J., and Hydrick, J., concur.

Fraser, J., concurring:

I concur in the result. The act of incorporation gives a right of action for injury, not for negligence. The defendant cannot escape liability by pleading its own wrong in failing to condemn.

Hydrick, J., concurring:

The sole question made by the demurrer, and therefore the only question properly before this court, is whether the complaint failed to state a cause of action in failing to allege that defendant's dam was negligently constructed. The complaint was not demurrable for that reason, because the act authorizing the construction of the dam imposes upon the corporation liability for damages caused thereby to riparian owners. True, such liability is not imposed in express terms, but it is by a necessary implication; if not, why was the power of condemnation conferred upon the corporation? And why was the express provision inserted in the act that any landowners should have the right to sue for and recover, even after condemnation, such damages as might thereafter accrue, which were not considered or contemplated by the appraisers in condemnation proceedings? No doubt the legislature had in mind the possibility, under the well-known natural law of running waters, that damages might accrue many years after the building of the dam, by the deposit of sediment in the bed of the stream and the consequent raising thereof, which could not be foreseen with reasonable certainty at the time of condemnation. Therefore, notwithstanding the authority to build the dam conferred upon the defendant by the statute, the plaintiff is entitled to compensation for any damage to her land caused by the dam.

It is unnecessary, therefore, to

decide in this case the other questions discussed in the opinion, and as they are questions of some gravity, and as they have not heretofore been decided by this court, I prefer to reserve my opinion.

The defendant should not be allowed to shift ground and contend

here—a point not raised or decided on circuit—that the complaint is demurrable because the remedy by condemnation, afforded by the statute, is exclusive.

For these reasons, I concur only in reversing the order sustaining the demurrer.

ANNOTATION.

Power of legislature to relieve one authorized to construct a dam from liability for damages to adjoining property.

There has been considerable discussion as to the effect of legislative authority to do an act, upon the liability of the one authorized for damages caused by the doing thereof. A large part of this discussion has taken place in case of acts which have resulted in nuisances. When the courts are confronted with a statute which authorizes an act, which but for the statute would amount to a private nuisance, without making any provision for the payment of damages on account thereof, they have in some cases (for example, see argument in *Payne v. Kansas City, St. J. & C. B. R. Co.* (Mo., *infra*) declared that what is authorized by statute cannot amount to a nuisance; in other cases they have declared that a statutory authority is only a defense to a public nuisance, and not to a private nuisance. The conflict between these statements is more apparent than real, for each must be taken with limitations. The question suggested in the foregoing is much broader than the statutes authorizing the construction of dams, but the statutes relating to dams are governed by the same general principles. Where a statute is urged as a defense to an act which results in damages to another, or to a private nuisance (a) the view may be taken that the statute does not authorize the doing of the act in the way it was done; (b) assuming that the statute does authorize the doing of the act in the way it was done, the view may be taken that the legislature did not intend to confer immunity from damages; (c) assuming that the legislature did intend to confer immunity

from damages, the question is still left—and this seems to be the only question—as to the power of the legislature to enact the statute. This last is the only question under consideration herein. If the legislature has conferred immunity from damages for the doing of an act which, in the absence of the statute, would have afforded a basis for an action in damages or amounted to a nuisance, the act of the legislature must be tested by constitutional limitations. Unless it comes in conflict with some constitutional limitation it must be given effect, whatever hardship or injustice may be worked thereby. Assuming—now without regard to compensation—that the injury complained of might be lawfully authorized at all, if the doing of the authorized act results in an injury which amounts to a taking or damaging of property, then the statute conflicts with the constitutional prohibition against taking or damaging of property without compensation. If it does not amount to a taking or damaging within this constitutional provision, some other constitutional prohibition must be found, or the person authorized must be held immune from liability. In the cases within the scope of this note, no other constitutional limitation has been found, hence the person authorized to construct the dam has been held immune where the resulting injuries do not amount to a taking or damaging of property within the constitutional provision. See *Payne v. Kansas City, St. J. & C. B. R. Co.* (1892) 112 Mo. 6, 17 L.R.A. 631, 20 S. W. 322, *infra*; and see *Valparaiso v. Hagen* (1899)

153 Ind. 337, 48 L.R.A. 707, 74 Am. St. Rep. 305, 54 N. E. 1062. Applying the foregoing to the statements of the courts in regard to the effect of legislative authority upon liability for a nuisance, the statement that what is authorized by law cannot be a nuisance rests upon the hypothesis that the law is a valid one and open to no constitutional objection, while the contrary statement that statutory authority is no defense to an action for damages for maintaining a private nuisance must,—assuming that the statute not only authorized the act, but declared that there should be no liability for damages from the doing thereof,—necessarily rest upon the hypothesis that the statute is invalid.

The decision in the reported case (*MCDANIEL v. GREENVILLE-CAROLINA POWER Co. ante*, 1821) is a correct application of the foregoing principles. This principle that legislative authority to construct a dam is no defense to an action for injuries resulting therefrom to adjoining owners, if the injury amounts to a taking or damaging of property, finds support in other cases under Constitutions which prohibit the taking or damaging of property without compensation. *Pumpelly v. Green Bay & M. Canal Co.* (1871) 13 Wall. (U. S.) 166, 20 L. ed. 557; *Lee v. Pembroke Iron Co.* (1869) 57 Me. 481, 2 Am. Rep. 59; *Weaver v. Mississippi & R. River Boom Co.* (1881) 28 Minn. 534, 11 N. W. 114; *McKenzie v. Mississippi & R. River Boom Co.* (1882) 29 Minn. 233, 13 N. W. 123; *Payne v. Kansas City, St. J. & C. B. R. Co.* (1892) 112 Mo. 6, 17 L.R.A. 631, 20 S. W. 322; *Trenton Water Power Co. v. Raff* (1873) 36 N. J. L. 335. Without determining whether the flowage of land from the construction of a dam erected under legislative authority amounted to a taking, the court in *Cobb v. Smith* (1863) 16 Wis. 662, states that the legislature cannot authorize the grantees of the power to construct a dam, to overflow and injure the lands of others without making just compensation. It seems, however, that the court regarded the flowage of land as a taking, as this is the view taken in *Newell v. Smith*

(1862) 15 Wis. 102, a case which is overruled in *Cobb v. Smith*, so far as it holds the provisions of the General Milldam Law to apply to a dam on a navigable stream.

See *Cogswell v. Essex Mill Corp.* (1827) 6 Pick. (Mass.) 94; *Hooksett v. Amoskeag Mfg. Co.* (1862) 44 N. H. 105; *Eastman v. Amoskeag Mfg. Co.* (1862) 44 N. H. 143, 82 Am. Dec. 201; and *Silver Creek Nav. & Improv. Co. v. Mangum* (1887) 64 Miss. 682, 2 So. 11, *infra*.

That the legislature cannot authorize an individual to construct a dam and relieve him of liability for injury to adjoining property is the opinion of *Nevius, J.*, in *Sinnickson v. Johnson* (1839) 17 N. J. L. 129, 34 Am. Dec. 184. The statute in this case was construed as not intended to relieve the grantee of the power to construct a dam, of liability for damages.

The legislature cannot authorize a stranger to construct a dam across a navigable stream without making compensation to the riparian owner for the use of the bank against which the dam rests. *State ex rel. Wausau Street R. Co. v. Bancroft* (1912) 148 Wis. 124, 88 L.R.A. (N.S.) 526, 134 N. W. 330.

The principle that a party constructing a dam under legislative authority is not liable for damages caused by overflow or percolation in its use was held to have no application to the rights and liabilities of a party, where it appeared that the defendant had constructed a dam above the land of the plaintiff, through which a small stream ran, and intentionally poured water into this stream in such quantities that the channel of the stream could not carry it away. Accordingly, the defendant was restrained from thus discharging the water. A provision in the defendant's charter for assessing damages was held not to deprive the plaintiff of his remedy by suit at law or in equity. *McKee v. Delaware & H. Canal Co.* (1891) 125 N. Y. 353, 21 Am. St. Rep. 740, 26 N. E. 305.

The constitutional limitation against taking or damaging property for public use without compensation binds

the legislature; it is a limitation upon legislative power, and it is clear that the legislature cannot authorize another to do an act in excess of legislative power. The rules governing this question are very clearly stated in *Payne v. Kansas City, St. J. & C. B. R. Co.* (1892) 112 Mo. 6, 17 L.R.A. 631, 20 S. W. 322 (an action against a railroad company for injuries resulting from a dam constructed by a county under legislative authority upon the railroad company's right of way, and with the company's knowledge and consent), as follows: "The dam being a public improvement, the defendant insists that the act of the legislature constituted a complete justification, and that the plaintiff has no remedy for any injuries which he may have sustained. On the other hand, the plaintiff insists that the act, and work done thereunder, amount to a taking of his property for public use without compensation, and for this reason the act is void. That cannot be a nuisance so as to give a common-law right of action, which the law authorizes. To the extent which a person has a right to act, others must suffer. These propositions have been laid down by high authority, and are not questioned; but they are based upon the assumption that the act of the legislature which authorizes the thing to be done is a valid law. If it violates the Constitution it is not a valid law, and of course constitutes no justification for the acts done thereunder. The act of the legislature in question is to be tested, not by the present Constitution, but by the provision in force when the act was passed; which provided that private property ought not to be taken or appropriated to public use without just compensation. This act does not provide for the payment of damages to persons whose property may be injured by the dam, and the question is whether the act and work done thereunder amount to a 'taking' within the meaning of the Constitution." In *Lee v. Pembroke Iron Co.* (1869) 57 Me. 481, 2 Am. Rep. 59, it is stated that "the legislative authority to do the act which, however carefully done, will naturally result

in damage to private property, must be coupled with provisions for ascertaining such damage and securing an indemnity to the injured party, in order to prevent those who act under it from being dealt with at common law as wrongdoers. The legislature has no power under the Constitution to make over to any individual or corporation any right save those of the public, without securing a just compensation. It is but just to presume that they have no intention to exceed their powers, and that where no specific mode of ascertaining damages is provided they design to leave the parties to the common-law method of ascertaining them." In *Grand Rapids Booming Co. v. Jarvis* (1874) 30 Mich. 308, an action against a booming company for damages for flowing back water in a river upon the land of the plaintiff, in which the defendant relied upon legislative authority to construct the boom, the court states that the legislature has no constitutional power to give to the company the right to flow lands against the will of the owner, without compensation at least. The court in *Weaver v. Mississippi & R. River Boom Co.* (1881) 28 Minn. 534, 11 N. W. 114, thus discusses the power of the state in this regard: "The state itself cannot take private property for a public use without making compensation therefor, and consequently cannot grant such power to anyone else. It cannot do so under the plea of improving the navigation of a public river any more than any other public purpose. Riparian owners upon a public watercourse did not acquire and do not hold their property burdened by any such reservation or implied right on the part of the state. Undoubtedly, like every other person, they hold their property subject to the right of the state to take it by paying for it whenever it becomes necessary for a public purpose, and it must rest in the wisdom of the legislature to determine when such necessity exists. The improvement of the navigation of a public river is a public purpose. The floating or rafting of logs upon a public stream is a legitimate use of it as a highway, and the

taking of property bordering upon the Mississippi river for boom purposes, in order to improve and utilize the river for that purpose, may be a taking for public use. This court so held in *Cotton v. Mississippi & R. River Boom Co.* (1876) 22 Minn. 372. But private property cannot be taken without compensation for that purpose, any more than for any other. The state has not the right, without making compensation, to take or destroy the property of riparian owners in making a water-course navigable, when it is not so by nature, or in appropriating such watercourse to the public use by artificial erections or improvements. Angell, *Watercourses*, § 541. We are aware of a class of cases to be found in New York, Pennsylvania, and elsewhere, in which it has been held there can be no recovery of damages on account of certain injuries sustained by the proprietors of lands bordering on navigable rivers in consequence of acts done by the public for the improvement of navigation. These cases, if sustainable, will be found to be so upon the principle that the bed of the stream, with all the water passing in it, is strictly public property, to be used by the public within the banks and below high-water mark, just as the interest and necessities of navigation may dictate or require, and that within those limits the public may, for this purpose, do as it pleases with the water, without being required to answer to contiguous proprietors for consequential damages. And we think that, upon an examination of the facts, it will be found that in all these cases the acts done by the public were thus confined to the bed of the stream, and below high-water mark. But we find no case where the public was held to have the right to overflow, or otherwise take or use, private property, or property outside of the bed of the stream, for any such purpose, without making compensation therefor. . . . It has been again and again decided to be the doctrine that overflowing land by backing water on it from dams built below constitutes a taking, within the meaning of the Constitution, and that when real estate is actually invaded by

superinduced additions of water, earth, sand, or other material, so as to effectually destroy or impair its usefulness, it is a taking within the meaning of the Constitution." The court concludes that what the state cannot do it cannot authorize another to do; therefore a statute authorizing the construction of a boom was no defense to an action for damages resulting therefrom.

If, as just shown, the injuries resulting from the construction of the dam amount to a taking or damaging of property, the legislative authority is no defense. There are very few authorities which expressly consider the question whether, in case of injuries which do not amount to a taking or damaging of property, the legislative authority is a defense to an action for injuries which, but for the legislative authority, would have furnished a cause of action. It has been expressly held that the legislative authority is a defense in such a case. *Payne v. Kansas City, St. J. & C. B. R. Co.* (1892) 112 Mo. 6, 17 L.R.A. 631, 20 S. W. 322. The court here states that "the books are full of cases which show that many acts done under legislative sanction, which are injurious to others, do not amount to a taking of private property; and this, too, though the same acts would be actionable at the suit of the persons injured, if not done under legislative authority. It is generally held that acts done by virtue of statute law, which do not directly encroach upon the property of an individual, or disturb him in his possession or enjoyment, will not entitle him to compensation, or give him a right of action."

In the cases discussed in the succeeding paragraphs, there is held to be no right of action for injuries arising from the construction of a dam under legislative authority, where such injuries do not amount to a taking, or a taking and damaging, where this is the constitutional provision. These courts have not expressly considered whether there would have been a right of action in the absence of legislative authority. It seems, however, that this must have been assumed, else

there was no necessity for considering the effect of legislative authority.

Thus it has been held that damage to rice fields by the construction of a government dam in harbor improvements, which raised the low-water level in a navigable river, thus destroying the drainage of the fields and increasing their liability to overflow in time of freshet, does not constitute a taking of property within the meaning of a constitutional provision for compensation, on the theory that rights of riparian owners are subordinate to the power of the government to control and improve navigation. *Mills v. United States* (1891) 12 L.R.A. 673, 46 Fed. 738.

A temporary flooding of land due to the erection of a cofferdam by a municipality, which was proceeding under authority to construct a bridge, was held not to be a taking of property for which compensation was required, in *Atwater v. Canandaigua* (1891) 124 N. Y. 602, 27 N. E. 385.

In *Durham v. Lisbon Falls Fibre Co.* (1905) 100 Me. 238, 61 Atl. 177, a town was held to have no right of action for injuries to a highway below the defendant's dam, resulting at freshet season from an increase in the volume, momentum, and velocity of water which was deflected by the dam against the shore on which the highway was situated, where the dam was reasonably and properly located, and rightfully constructed by the defendant company on its own land, in accordance with the express authority of statute, for the purpose of propelling a mill.

In *Waggoner v. Jermaine* (1843) 7 Hill (N. Y.) 357, one who erected a dam under authority of canal commissioners was held not liable for injury to lands which were overflowed thereby, the court stating that the consequential injury, if any, flowing from the elevation of the dam by the direction of the canal officers, and for canal purposes, ought not to be charged against the defendant.

A boom company has been held not liable for consequential damages resulting from the backing up of water due to the erection of a boom under

legislative authority. *Lawler v. Baring Boom Co.* (1869) 56 Me. 443.

Damages arising from the backing up of water caused by the erection of a dam have been held to be consequential, for which the state need not make compensation. *Delaware Div. Canal Co. v. McKeen* (1866) 52 Pa. 117. The court states that compensation for consequential damages is a matter of grace, and not of right. That a company which succeeded to the right of the state to construct a dam was not liable for consequential damage caused by backed water from the dam is held also in *Freeland v. Pennsylvania R. Co.* (1870) 66 Pa. 91, 5 Am. Rep. 329. In other cases in this state in which injury resulted from backed water from a dam, the freedom of the state from liability for damages is expressly based upon the right of the state to improve the waters for navigation. *McKeen v. Delaware Div. Canal Co.* (1865) 49 Pa. 424.

In *High Bridge Lumber Co. v. United States* (1895) 16 C. C. A. 460, 37 U. S. App. 234, 69 Fed. 320, a proceeding by the United States for the condemnation of certain lands necessary to the erection and maintenance of a lock and dam for the improvement of a river, it is stated to be a well-settled rule, in respect of consequential injuries resulting from the prudent and skilful construction of public works by the government or the state, or those acting under legislative authority, that no action will lie for such damages unless expressly conferred by statute.

The flooding of land consequent upon the private erection of a dam under the authority of legislation enacted in the exercise of the police power, to subserve the drainage of low land, has been held not to amount to a taking which requires compensation to be made to the owner in order to afford the due process of law guaranteed by the 14th Amendment to the United States Constitution, when such flooding is only to a minor extent, and can be prevented by raising the heights of the dikes around the land. *Manigault v. Springs* (1905) 199 U. S. 473, 50 L. ed. 274, 26 Sup. Ct. Rep. 127.

A power company which has constructed a dam under a contract with the United States government, under circumstances which make its liability the same as that of the United States, is not liable for an unhealthy condition created by the overflowing of land by water which was backed up by the dam, and consequent injuries to adjoining residents. *Chattanooga & T. River Power Co. v. Lawson* (1917) 139 Tenn. 354, 201 S. W. 165.

It has been held that the legislature may authorize the level of the water of a public lake to be drawn down for manufacturing purposes, although public rights of navigation are thereby impaired, and the shore line in front of private riparian property is changed. The inconvenience to the owners of land on the shore in reaching the water, because of the lowering of the water level, and the lessening thereby of the enjoyment of residences upon or near the shore, are held to furnish no legal ground of complaint, being *damnum absque injuria*. *State v. Sunapee Dam Co.* (1901) 70 N. H. 458, 59 L.R.A. 55, 50 Atl. 108.

It has been stated, however, that the injuries to which immunity from responsibility attaches are "such only as arise incidentally from acts done under a valid act of the legislature in the execution of a public trust for the public benefit, by persons acting with due skill and caution within the scope of their authority. If the injury be direct or the work be done for the benefit of an individual or corporation, with private capital and for private emolument, the principle which absolves the parties from liability to action at the suit of persons injured does not apply, even though the public be incidentally benefited by the improvement." *Trenton Water Power Co. v. Raff* (1873) 36 N. J. L. 335.

What is a taking or damaging of property is a question beyond the scope of this note. Some very contradictory results have been reached upon this question, but the conclusion of the court is accepted without discussion in the present note.

To summarize the foregoing, it ap-

pears that legislative authority is not a defense to injuries to adjoining property from the construction of a dam, where such injuries amount to a taking,—or damaging, where the Constitution prohibits this,—but is a defense to injuries which do not amount to a taking or damaging.

In some cases the foregoing principles have been adhered to where, so far as appears, no constitutional provision was involved. *Nichols v. Pixly* (1789) 1 Root (Conn.) 129 (license from a town); *Cogswell v. Essex Mill Corp.* (1827) 6 Pick. (Mass.) 94. In *Hooksett v. Amoskeag Mfg. Co.* (1862) 44 N. H. 105, an action by a town to recover damages for the loss of a bridge which, it was alleged, the defendant had carried away by erecting a stone dam across the river, and thereby raising the water in the river so as to throw it back around the piers and abutments of the bridge, and to pond the water there about the piers and abutments so as to cause the ice to freeze thicker and more extensively about them than it had before done, so that the bridge in consequence was carried away, the defendant pleaded charter authority to construct the dam, but this was held to be no defense to this action, the court stating that, "although their charter might protect the defendants from an indictment for nuisance, it gives them no right to throw back the water upon the lands of others to their injury, and for such flowage the defendants are liable notwithstanding their charter." The defendants were accordingly held liable for the destruction of the bridge. A similar statement appears in *Eastman v. Amoskeag Mfg. Co.* (1862) 44 N. H. 143, 82 Am. Dec. 201, an action by an adjoining landowner against the same defendant for overflowing the plaintiff's land. In *Silver Creek Nav. & Improv. Co. v. Mangum* (1887) 64 Miss. 682, 2 So. 11, an action against an improvement company which constructed a dam under legislative authority, and as a result of which the plantation of the plaintiff was covered with water, and a ford which he had theretofore enjoyed was destroyed, the court states that the utmost ex-

tent of the plaintiff's right is to be compensated for the damages sustained by the overflowing of her land and the cost of providing convenient means of crossing the creek, and the court adds: "We do not decide that she is entitled to recover because the fordability of the creek at certain seasons of the year has been destroyed by authority of the legislature, but if this is ground for recovery its measure must be the cost of providing a crossing. It may be that the legislature has authority to provide for changing a shallow stream into a deep one, and that they who are inconvenienced by it have no right to recover anything for it."

A right conferred by a lesser authority than the legislature has been held not to relieve the grantee of the right of liability for damages. Thus a light and power company which used water power at a dam which had been constructed for canal purposes was held liable for damages caused by a rise in water due to flashboards put on the dam by the light and power company, although the flashboards were put on under authority of the canal superintendent, in *Economy Light & P. Co. v. Cutting* (1893) 49 Ill. App. 422. It is stated that the flashboards were not put on for any purpose of navigation, nor for any public purpose, but at the instance of and by the light and power company in order to get more power for its use; that the evidence did not show that the canal commissioners did anything, and the canal superintendent merely controlled the manner in which the defendant did the work, which it was permitted to do for its own benefit, and the court concludes that the defendant was not relieved of responsibility by the consent of the canal superintendent.

It is a theory of some cases that a riparian owner holds his land subject to improvements in navigation. No recovery can be had under this theory for damages from the construction of a dam erected to improve navigation. *Holyoke Water Power Co. v. Connecticut River Co.* (1884) 52 Conn. 570; *Monongahela Nav. Co. v. Coons* (1843) 6 Watts. & S. (Pa.) 101; *McKeen v.*

Delaware Div. Canal Co. (1865) 49 Pa. 424; *Falls Mfg. Co. v. Oconto River Improv. Co.* (1894) 87 Wis. 135, 58 N. W. 257. In *Brooks v. Cedar Brook & S. C. River Improv. Co.* (1889) 82 Me. 17, 7 L.R.A. 460, 17 Am. St. Rep. 459, 19 Atl. 87, an action by a riparian owner against one who had constructed a dam above the plaintiff's property for the passage of logs, which resulted, when the gates were opened for the passage of logs, in an increase in the height of the river where it passed through the plaintiff's land, the action of this increased flow of water, and the logs borne along upon it, having tended to widen and deepen the stream by gradually wearing away the soil of the banks and bottom across the plaintiff's land, the court, in denying recovery for such damages to the plaintiff's land, states that riparian owners on all public streams hold their riparian lands subject to the paramount right of navigation of such streams by the public. The court, in answer to the argument that the legislature could not authorize the improvement of the navigation of the public streams of the state without providing compensation to riparian owners for such injuries as were involved in this case, states that "it may be at once conceded fully that the legislature cannot authorize the taking of any property of a riparian owner for use in improving the navigation without providing compensation. If riparian land is taken for storage of water, or for a receptacle for discharged waters, or for dams, lots, etc., the owner is entitled to compensation for the injury caused by such taking. This concession, however, does not include incidental injuries, where no land is appropriated and no water is diverted."

It is held in *Canal Appraisers v. People* (1836) 17 Wend. (N. Y.) 571, that if, in the improvement of the navigation of a public river, the waters of tributary streams are so much raised as to destroy a valuable mill site situated thereon, and the stream be generally navigable, although not so at the particular locality of the mill site, the owner is not entitled to damages

within the provisions of the Canal Laws, directing compensation to be made for private property taken for public use.

It is held in *Green Bay & M. Canal Co. v. Kaukauna Water Power Co.* (*Patten Paper Co. v. Kaukauna Water Power Co.*) (1895) 90 Wis. 370, 28 L.R.A. 443, 48 Am. St. Rep. 937, 61 N. W. 1121, 63 N. W. 1019, that riparian rights of the lower owners of land upon the bank of a stream are property such as cannot be taken by the state even for a public use, except in aid of navigation, without compensation to the owner, and cannot be taken at all, or impaired, for a private use. It is further held in this case that surplus water of a dam lawfully made in a river to supply a canal past rapids in aid of navigation, although under a statute declaring that the water power created should belong to the state, cannot be diverted from its natural channel to the detriment of the lower riparian proprietors, by the state or its grantees, through the canal and sluiceway therefrom, for the operation of mills on the canal bank.

On the other hand, it has been held that riparian owners upon a public watercourse do not hold their property burdened by any implied reservation or right of the state to improve navigation. *Weaver v. Mississippi & R.*

River Boom Co. (1881) 28 Minn. 534, 11 N. W. 114, see *supra*.

Some cases hold legislative authority to construct a dam no defense to an action for damages caused thereby, on the theory that the legislature did not intend to relieve the grantee of such liability, but authorized the construction of the dam, with the burden on the grantee of paying any damages caused thereby. *Sinnickson v. Johnson* (1839) 17 N. J. L. 129, 34 Am. Dec. 184; *Crittenden v. Wilson* (1825) 5 Cow. (N. Y.) 165, 15 Am. Dec. 462.

This is a principle, however, that is not considered generally in this note, which has been confined to the power of the legislature to relieve the one authorized to construct a dam, of liability for injuries; and the note does not consider the question whether the legislature has attempted to confer this immunity.

That the remedies provided by the act of incorporation of a company which by its charter was authorized to construct a dam, for the injuries arising from the construction of the dam, do not exclude the common-law remedies for injuries arising from an abuse of the privileges granted to the company, or for the neglect of its duties, is held in *Schuylkill Nav. Co. v. McDonough* (1859) 33 Pa. 73.

W. A. E.

INTERSTATE BUSINESS MEN'S ACCIDENT ASSOCIATION, Appt.,
v.
MARY S. DUNN.

Kentucky Court of Appeals—December 4, 1917.

(178 Ky. 193, 198 S. W. 727.)

Insurance — death by murder — liability.

Liability under an insurance policy for death by murder through the use of a firearm is not relieved by a provision in the policy that it shall not cover any loss due to the act of any person done to injure the insured, or to death resulting from an injury produced by the discharge of a firearm.

[See note on this question beginning on page 1338.]

APPEAL by defendant from a judgment of the Circuit Court for Henderson County in favor of plaintiff in an action brought to recover an amount alleged to be due under an accident insurance policy. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. R. M. Haines, Dunshee, Haines, & Brody, and Yeaman & Yeaman, for appellant:

The validity of the principle of the exception in the policy has been sustained by this court.

Hutchcraft v. Travelers' Ins. Co. 87 Ky. 300, 12 Am. St. Rep. 484, 8 S. W. 570; American Acci. Co. v. Carson, 99 Ky. 441, 34 L.R.A. 301, 59 Am. St. Rep. 473, 86 S. W. 169; Continental Casualty Co. v. Fleming, — Ky. —, 124 S. W. 821; Casualty Co. v. Taylor, 164 Ky. 786, 176 S. W. 194; Interstate Businessmen's Acci. Asso. v. Atkinson, 165 Ky. 532, L.R.A.1915E, 656, 177 S. W. 254; Continental Casualty Co. v. Morris, 46 Tex. Civ. App. 394, 102 S. W. 773.

Messrs. Henson & Taylor for appellee.

Carroll, J., delivered the opinion of the court:

In April, 1916, the appellant association issued to Dr. M. C. Dunn a certificate of membership, in which it agreed, in the event of the death of the insured "from bodily injuries effected solely and independently of all other causes or conditions concurring, contributing, or intervening, through external, violent, and accidental means," to pay his wife, the beneficiary named in the policy, the sum of \$5,000. In the schedule of injuries for which compensation would be paid, and the amount thereof, we find, for example, these, among others: "For loss of both eyes, \$5,000; for loss of either hand, \$1,250; for the loss of either eye, \$1,250; for loss of life, \$5,000."

It will thus be seen that, unless the company was exempt from liability by other provisions in the policy, it was obliged by the clauses we have set forth to pay to the beneficiary, in the event of the death of the insured, the sum stipulated, as it is agreed that his death came within the protective features of the policy. In another part of the policy there is a paragraph exempting the

company from liability in certain described states of case, and this paragraph reads, in part: "This certificate shall be in suspension, and the insurance herein provided shall not extend to or cover any loss due to . . . the act of any person done to *injure* the insured."

After the death of Dr. Dunn, in a suit by the appellee beneficiary to recover from the association \$5,000, and after the association had filed its answer denying liability, the case was submitted upon the following agreed statement of facts:

"(1) The policy upon which this suit commenced was in full force and effect at the time of the injury and death of Dr. M. C. Dunn.

"(2) The plaintiff is the beneficiary named in the policy, and as such has done and performed the conditions preliminary to maturing her claim.

"(3) Dr. M. C. Dunn was intentionally shot and murdered by one Charles M. Wyne at Henderson, Kentucky, on August 10, 1916, and the said shooting and killing of the said Dr. M. C. Dunn by the said Charles M. Wyne was not done in any affray or mutual encounter, nor brought on or caused by any demonstration, threat, or menace by the said Dunn; but the said Dunn at said time was unarmed and attempting to escape from the said Charles M. Wyne, and said attack upon the said Dr. M. C. Dunn at said time was wholly unprovoked, unexpected, and unforeseen upon the part of the said Dunn, and the said Charles M. Wyne at said time shot the said Dr. M. C. Dunn with the fixed purpose and intention to kill the said Dr. M. C. Dunn.

"(4) Plaintiff is entitled to a judgment for \$5,000, with interest and costs, unless the court shall hold as a matter of law that the company is not liable for a death so occurring by reason of the following provisions of paragraph 6 of part E, to

wit: "This certificate shall be in suspension and the insurance herein provided shall not extend to or cover any loss due to the act of any person done to injure the insured or another, or to cause the insured or another to desist from doing any lawful act, whether the person be irresponsible by reason of any form or degree of mental derangement or any other cause; disability or death resulting from an injury produced by the discharge of a firearm, unless the claimant shall establish the accidental cause of the discharge by the testimony of a person other than the insured or the claimant, who actually saw the accidental cause in operation."

On this statement of facts and the contract of insurance the lower court entered a judgment in favor of Mrs. Dunn for \$5,000 with interest, and the association appeals.

It will be seen from the stipulation of facts and the terms of the policy that the only point of disagreement between the parties to this litigation falls within a very narrow compass; counsel for the association contending that, as Dr. Dunn was intentionally shot and killed, the association is relieved from liability by so much of paragraph 6 of part "E" as provides that the insurance "shall not extend to or cover any loss due to the act of any person done to *injure* the insured." In other words the argument is that the word "injure" includes the word "kill," and that this exemption clause should be so construed as to read that the insurance "shall not extend to or cover any loss due to the act of any person done to injure or kill the insured;" while counsel for Mrs. Dunn insist that the clause relied on by the association exempts it from liability only in respect to injury, and not death, intentionally inflicted by another person. It is plain that, if the policy had not contained this exemption clause, there could be no question raised as to the liability of the association; and this is conceded. And so we repeat, the only point in controversy is: Does

the word "injure," in the connection in which it was used in this exemption clause, cover and include the word "death?" If it does, the judgment should be reversed; otherwise, it should be affirmed.

Just why there was not inserted in this part of the exemption clause now under consideration the words "to kill," after the words "to injure," we do not of course know; but we do know that the insertion of the words "to kill" would have made plain a provision that without these words is involved in some doubt and probably susceptible of two interpretations. But it cannot be assumed that the omission of these words was by inadvertence or mistake, because insurance companies, in writing policies of insurance, do not omit or insert words by mistake or inadvertence. When an important word, or a word that would affect the meaning of a policy, is either inserted or omitted, it is safe to assume that the insurance company had good reason for the omission or the insertion. It will be seen that in the last clause of paragraph 6 the words "disability or death" are used, the effect of which is that the policy does not cover any loss due to "disability or death resulting from an injury produced by the discharge of a firearm." And so it is plain that under this condition there could be no recovery by the insured for disability or for death resulting from an injury produced by the discharge of a firearm. In this clause the association carefully protected itself from liability, not only against disability, but against death, showing that it recognized the necessity for using the word "death" in addition to the word "disability," although the disability might result in death; but, when it came to protect itself against loss due to an intentional, violent act committed by another person against the insured, it omitted the word "death," or any word of like meaning, and stipulated only that it should not be liable for any loss due to the act of any person done to injure the insured.

The word "injure" is not a technical word. It is in common use, has a popular and well-understood meaning, and from the context we take it for granted it was intended to have its popular meaning in this contract. It is defined by Webster as meaning: "To do harm to; to hurt; to damage, as to hurt or wound." See also 16 Am. & Eng. Enc. Law, 499; 22 Cyc. 1062. And this is its commonly understood meaning in ordinary usage. It is not referable to nor is it used in describing, fatal injuries, but is customarily confined to injuries that are not fatal. For example, if a man is shot and killed instantly, we would not say that he was injured, but that he was killed. But if he was merely wounded, we would not, of course, say that he was killed, but that he was injured or wounded. If a man should fall from the top of a house and die instantly, no person would say, in speaking of the accident, that he fell from the top of the house and was injured. They would say that he fell from the top of the house and was killed; but, if he was not killed, it would be said that he fell from the top of the house and was injured.

Considering, now, these parts of the policy to which we have called attention, in connection with the well-established rule that "in the construction of policies the same rules obtain as do in the construction of other contracts, with the exception that a policy will be construed in favor of the insured so as not to defeat, without plain necessity, his claim to the indemnity which in taking the insurance it was his object to secure; and, when the words are fairly susceptible of two interpretations, that which will sustain his claim and cover the loss must by preference be adopted. It may also be said that ambiguities, and words, sentences, or clauses of doubtful meaning, will be construed against the insurer; and this for the reason so often declared that the companies themselves prepare the policies with great care and deliberation, and, as the insured has no election,

except to accept them as prepared and presented to him, it is fair that they should be construed most strongly against the insurer and most liberally in favor of the insured, so that the purpose for which the insurance was obtained may be effectuated, if this can be done without doing violence to the contract" (Spring Garden Ins. Co. v. Imperial Tobacco Co. 132 Ky. 7, 20 L.R.A.(N.S.) 277, 136 Am. St. Rep. 164, 116 S. W. 234)—we find little difficulty in reaching the conclusion that the clause relied on does not exempt

the association <sup>Insurance—
death by
murder—
liability.</sup> from liability. In

adopting this construction, we have not overlooked the argument that in the insuring clause it is provided that the association "does agree to pay at its home office in Des Moines, Iowa, compensation for loss resulting from bodily injuries effected solely and independently of all other causes or conditions concurring, contributing, or intervening, through external, violent, and accidental means," or the fact that one of the injuries insured against is "loss of life." Now it is said that as the word "injuries" in the insuring clause was intended to and did cover "loss of life," and as the exemption clause was intended to exempt the association from all liability for the injuries therein mentioned, the word "injury" in the exemption clause should be given the same meaning as the word "injuries" in the insuring clause, or, to put it in another way, that as the word "injuries" in the insuring clause included "loss of life," so should the word "injury" in the exemption clause, because by the exemption clause the association intended to relieve itself from liability, in the cases therein mentioned, from the operation of the insuring clause. In support of this argument we are referred to the case of Continental Casualty Co. v. Morris, 46 Tex. Civ. App. 394, 102 S. W. 773, which fully sustains it.

But we do not agree with the con-

struction of the policy contract approved by the Texas court. The association had the right in any clause of its policy to give well-understood words a broader meaning than their natural and ordinary import would imply, by specifying what meaning they should have in the contract or what acts they should include, and this is what the association did in its insuring clause by providing that "loss of life" should be included in the word "injuries;" but when it came to the exemption clause it did not in that clause attempt to give the word "injury" any broader meaning than it has in common usage, or any meaning that would enlarge it to include "loss of life."

Nor does it follow at all that the association intended by the exemption clause to cover all the cases of liability assumed in the insuring clause. Whether the association wanted to do this or not rested with it, and according to our view of the contract it did not do so. The exemption clause provides that "this certificate shall be in suspension and the insurance herein provided shall not extend to or cover any loss due to . . . the act of any person done to injure the insured," thus plainly, as we think, confining the particular exemption to injury not including death. The contract specifically insured against and provided for compensation if the insured should lose his life, and also insured against and provided compensation for a great number of injuries, and we think it clear that if the contract had not specified loss of life as one of the conditions entitling the insured to compensation, and had limited its liability to the specific injuries mentioned in the contract, it could not be contended that the contract covered death, or loss of life, or anything other than the injuries specifically mentioned. In short, the association, in writing the contract, had the right to describe the acts that would create liability on its part, and to describe the acts that would exempt it from liability, and

in the exercise of this privilege it saw proper to enlarge its liability by providing for compensation for loss of life, but did not provide for exemption in case the loss of life was caused by accident. Fully supporting the construction we have given the contract is the opinion of this court in the case of American Acci. Co. v. Carson, 99 Ky. 441, 34 L.R.A. 301, 59 Am. St. Rep. 473, 36 S. W. 169. In that case the accident company issued a policy to Carson, insuring him against certain named accidents, stipulating that, in the event he sustained one of these accidents and death resulted, it would pay the estate of the insured or his beneficiary the amount of the insurance contracted for. On the back of the policy there was an exemption clause similar to the exemption clause in this contract, for the benefit of the company, which provided that "this insurance does not cover disappearances nor suicide while sane or insane, . . . nor extend to or cover intentional injuries inflicted by the insured or any other person, or injury or death happening while the insured is insane or under the influence of intoxicating drinks or narcotics."

Carson, while this policy was in force, was intentionally killed by one Jesse Burton, and the question in the case was whether the word "injuries" in the exemption clause included the word "death." It was contended by the company in that case, as it is by the association in this, that it was not liable because Carson was intentionally killed, and its express exemption from liability in the event he was injured exonerated it from liability for his death, although the word "death" was not used in the clause covering intentional injury, notwithstanding it was used in the succeeding clause relating to "injury or death" happening while the insured was insane or under the influence of intoxicating drinks or narcotics. In considering this argument for the company, and in holding that the clause did not exempt it, the court said:

"The significant omission of the word 'death' in this particular clause requires us to hold that the exception referred only to nonfatal injuries intentionally inflicted by the insured or any other person."

Counsel for the association attempt to make a distinction between

the contract in the Carson Case and the contract in this case, but there is no ground upon which these contracts can be distinguished so far as the matter now under investigation is concerned.

Judgment affirmed.

Petition for rehearing denied.

ANNOTATION.

Death as within provision exempting insurer, or limiting liability in case of "injury" intentionally inflicted.

Most accident policies expressly provide for exemption or limitation in the event of "death or injury" intentionally inflicted, or provide that the insurer shall not be liable in case of injuries, "fatal or otherwise," inflicted intentionally. This note does not include cases involving such express provisions, but is confined to those which pass upon the question whether the exemption or limitation extends to cases of death where the policy merely provides for exemption or limitation in case of injuries intentionally inflicted, without specifying further.

The question involved obviously depends on the context in which the word "injury" is used. Such clauses, in accordance with the general rule of construction, are construed most strongly against the insurer. *INTERSTATE BUSINESS MEN'S ACCL. ASSO. v. DUNN* (reported herewith) ante, 1338; *Gavula v. United States Health & Accl. Ins. Co.* (1903) 15 Pa. Dist. R. 432.

It will be observed that in the reported case (*INTERSTATE BUSINESS MEN'S ACCL. ASSO. v. DUNN*) a provision that the policy should "not extend to or cover any loss due to . . . the act of any person done to injure the insured" was held not to relieve the insurer from liability for death by murder, the court holding that the word "injure" did not include the word "death."

The court in the *DUNN CASE* relied upon *American Accl. Co. v. Carson* (1896) 99 Ky. 441, 34 L.R.A. 301, 59 Am. St. Rep. 473, 36 S. W. 169, in which the policy provided that it did not cover "accidental injuries or death

resulting from . . . hernia, . . . nor extend to or cover intentional injuries inflicted by the insured or any other person, or injury or death happening while the insured is insane," and where the court held that as the word "death" was omitted from the provision as to intentional injuries, the insurer was not relieved from liability in case the insured was murdered, and said: "In the present case, as we have seen, the policy is not to extend to or cover intentional injuries inflicted by the insured or any other person. Here we find a difference between the policy under consideration and all others we have examined. The words 'death or injury' are used in all of them, and, indeed, in this policy we find those words separated for the first time in the clause under discussion. We find it provided in the preceding clause that 'this policy does not cover accidental injuries or death resulting from hernia,' etc., and immediately succeeding the clause in dispute the language is, 'or injury or death happening while the insured is insane,' etc. We notice, too, that the policy is not to cover injuries, whether fatal or otherwise, of which there are no visible marks upon the body. And it appears well settled that this exception, without the words 'fatal or otherwise,' has reference only to cases of bodily injury which do not result fatally; that is, the word 'injury' is used in its usual sense, as implying a hurt not resulting in death. *McGlinchey v. Fidelity & C. Co.* (1888) 80 Me. 251, 6 Am. St. Rep. 190, 14 Atl. 13. The words 'injury or death,' and 'injured or killed,' are used in this

policy some eight times or more, and seemingly in sharp contrast, and the significant omission of the word 'death' in this particular clause requires us to hold that the exception referred only to nonfatal injuries intentionally inflicted by the insured or any other person."

The Carson Case was also followed in *Gavula v. United States Health & Acci. Ins. Co.* (1903) 15 Pa. Dist. R. 432, where a policy provided that "In event of injuries, fatal or otherwise, except drowning . . . or injuries, fatal or otherwise, or disability resulting . . . from inhalation of any gas, . . . or from any intoxicant . . . exposure to obvious danger, . . . from injuries intentionally inflicted upon the insured by himself or by any other person," the insurer's liability shall be limited to a certain amount, and the court held that the word "injuries," being used alone in the clause relating to intentional injuries, did not extend the exemption from liability to fatal injuries.

In *Continental Casualty Co. v. Morris* (1907) 46 Tex. Civ. App. 394, 102 S. W. 773, it was held that the word "injury" included fatal as well as nonfatal, where the third part of the policy provided that in any of the losses specified in parts 1 and 2, where the accidental injury resulted from the intentional act of the insured or any other person, the insurer's liability should be limited to a certain percentage, "loss of life" being one of the losses specified in part 1 of the policy. The decision in *American Acci. Co. v. Carson* (Ky.) *supra*, was here distinguished on the ground that in that case the words "death or injury" were used in the other clauses of the policy, but were omitted from the one referring to intentional injuries. The court said: "No such case is here presented. The policy in the case at bar declares, as before stated, that, 'in any of the losses covered by this policy and specified in parts 1 or 2, where the accidental injury results from the intentional act of the insured or any other person, the amount payable shall be one tenth of the amount which otherwise would be payable.' Referring to part

1 of the policy we see that 'loss of life' is one of the losses specified therein, and to except such loss from the operation of the provisions contained in part 3 would be doing violence to the obvious meaning of the language employed to express the terms of the contract between the parties. There is little, if any, room for construction; the language in part 3 and above quoted is unambiguous and sufficiently specific to leave no doubt that it applies to all of the losses mentioned in part 1, and when taken in connection with the language found in part 1, as it must be, it is tantamount to a provision that 'where the "injury" is intentionally inflicted by the insured or any other person, and results in the loss of the life of the insured, the amount payable shall be one tenth of the amount which otherwise would be payable under the terms of the policy.' This view is strengthened by the language used in subdivision 6 of part 3 of the policy, wherein the appellant's liability is again limited to one tenth of the principal sum in case of an accidental injury resulting fatally, which is as follows: 'Wherein the accidental injury makes no visible contusion or wound on the exterior of the body of the insured (except in case of drowning).'"

And in *Brown v. United States Casualty Co.* (1898) 88 Fed. 38, intentional injuries resulting in death, as well as nonfatal injuries, were held to be excluded from the risk assumed by a policy providing that it should not cover "death sustained while the insured is bereft of reason, sight, or hearing, or while mining, blasting, wrecking, . . . or resulting from or caused, directly or indirectly, wholly or in part, or while so affected, by vertigo, somnambulism, bodily infirmities, deformities, or disease of any kind, gas or poison in any form or manner, contact with poisonous substances, surgical or medical treatment, dueling, fighting, wrestling, war, riot, lifting, overexertion, suicide (sane or insane), sunstroke, freezing, riding or driving races, voluntary exposure to unnecessary danger, or intentional injuries inflicted by any person."

And in *General Acci. Fire & L. Assur. Corp. v. Stedman* (1912) — *Tex. Civ. App.* —, 153 S. W. 692, where a policy limited the insurer's liability "in event of injury, fatal or otherwise, if which there shall be no external and visible marks on the body; or injury, fatal or otherwise, or disability, wholly or in part, due to, or resulting directly or indirectly from, any gas, vapor, narcotic, anesthetic, or poison, or from rioting or strikes, or from exposure to obvious risk of injury or known danger, or from injuries intentionally inflicted upon the assured by any person other than himself; or received by him while insane,"—it was held that the words "fatal or otherwise" related to the provision limiting liability for injuries intentionally inflicted and that that clause was applicable both to fatal and nonfatal injuries.

And in *Dunn v. Physicians' Casualty Assn.* (1919) — *Neb.* —, 173 N. W. 599, where the policy provided that the in-

surer "shall not be liable . . . for injuries, fatal or nonfatal, of which injuries there are no visible external marks upon the body . . . voluntary exposure to obvious danger, intentional injuries inflicted by the member while sane or insane or by any other person, assaults by burglars or highway robbers excepted," it was held that the language was unambiguous, and clearly excluded liability in case of intentional injuries, whether fatal or nonfatal.

And in *National Life & Acci. Ins. Co. v. De Lopez* (1918) — *Tex. Civ. App.* —, 207 S. W. 160, where the policy insured against loss of life, limb, sight, speech, etc., resulting from accidental means, and provided that it did not cover injuries intentionally inflicted upon the insured by himself or any other person, except by burglars and robbers, it was held that the policy excluded liability for death caused by the insured's being shot by one not a burglar or robber. J. T. W.

WALTER K. MARTIN

v.

ALEXANDER OTIS et al.

Massachusetts Supreme Judicial Court — September 11, 1919.

(238 Mass. 491, 124 N. E. 294.)

Evidence — foreign law — expert testimony.

1. Testimony of an expert as to the law of a sister state is not binding on the court.

[See note on this question beginning on page 1344.]

Reference — findings of master — conclusiveness.

2. The findings of a master of the nonexistence of a marriage must be accepted by the court, in the absence of the evidence upon which it was based. [See 23 R. C. L. 299.]

Marriage — absence of license — effect.

3. Failure to procure the license required by statute in the place where the marriage is to be solemnized does not render the marriage void, where the statute provides that noncompliance with the requirements of the statute shall not render the marriage void if it was performed with the full belief of

the parties that they were lawfully joined in marriage.

[See 18 R. C. L. 399.]

— necessity of consummation.

4. The consummation of a marriage by coition is not necessary to its validity.

[See 18 R. C. L. 394.]

— effect of impotency.

5. Impotency does not render a marriage void, but only voidable at the suit of the party wronged.

[See 18 R. C. L. 443.]

Executor and administrator — eligibility of husband.

6. A man residing in a foreign city

who uses liquor to excess, has been convicted of misdemeanor, and knowingly gives false testimony, is not a proper administrator for his wife's

estate, in which persons to whom he is antagonistic are interested, and which is subject to state and Federal taxes.
[See 11 R. C. L. 47, 49.]

RESERVATION by the Supreme Judicial Court for Suffolk County for the determination by the full court of a question arising upon appeal by the heirs at law of Emma A. Martin, deceased, from a decree of the Probate Court appointing petitioner administrator of her estate. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Dunbar, Nutter, & McClen-
nen and J. Butler Studley, for the
heirs at law:

The marriage was not a good cere-
monial marriage.

Mansfield v. Secretary of Common-
wealth, 228 Mass. 262, 117 N. E. 311;
Adams v. Dick, 226 Mass. 46, 115 N.
E. 227.

A master has no authority to report
conclusions of law.

Clark v. Seagraves, 186 Mass. 430, 71
N. E. 813; Adams v. Young, 200 Mass.
588, 86 N. E. 942; New England Founda-
tion Co. v. Reed, 209 Mass. 556, 95
N. E. 935; Cornellier v. Haverhill Shoe
Mfrs. Asso. 221 Mass. 554, L.R.A.
1916C, 218, 109 N. E. 643.

The testimony of an expert in re-
gard to the Rhode Island law was
rightly admitted.

Electric Welding Co. v. Prince, 200
Mass. 386, 128 Am. St. Rep. 434, 86
N. E. 947.

The determination of the law of
Rhode Island was not for the court, be-
cause the evidence of the law of Rhode
Island was not contained in a single
statute.

Kline v. Baker, 99 Mass. 253; Ely
v. James, 123 Mass. 36; Hackett v. Pot-
ter, 135 Mass. 849; Shoe & Leather
Nat. Bank v. Wood, 142 Mass. 563, 8
N. E. 753; Ufford v. Spaulding, 156
Mass. 65, 30 N. E. 360; Bride v. Clark,
161 Mass. 130, 36 N. E. 745.

The marriage in question is not with-
in the purview of § 22 of the Rhode
Island statute.

Meyers v. Pope, 110 Mass. 314.

Marriage was not intended by the
parties.

1 Bishop, Marr. Div. & Sep. § 327;
McClurg v. Terry, 21 N. J. Eq. 225;
Clark v. Field, 13 Vt. 460; Cf. Dal-
rymple v. Dalrymple, 2 Hagg. Consist.
Rep. 54, 161 Eng. Reprint, 665, 17 Eng.
Rul. Cas. 11; Dickinson v. Dickinson L.
R. [1913] 205, 109 L. T. N. S. 408, 29
Times L. R. 765, 58 Sol. Jo. 32; D—e v.
A—g, 1 Hob. Eccl. Rep. 279; Anders v.

Anders, 224 Mass. 438, L.R.A.1916E,
1273, 113 N. E. 203.

Messrs. Warner, Stackpole, & Brad-
lee, Richard J. Cotter, and Gladwin M.
Nead for petitioner.

De Courcy, J., delivered the opin-
ion of the court:

This is an appeal from a decree
of the probate court for the county
of Suffolk appointing Walter K.
Martin administrator of the estate
of Emma Angeannette Martin. The
decree was made without notice to
the next of kin, on the allegation
that the petitioner was the husband
of the deceased. In this court the
case was referred to a master, to
hear the parties and their evidence,
and to find the facts. On the com-
ing in of his report the case was re-
served for our determination.

The exceptions filed by both par-
ties deal with the question whether
Martin was the husband of the
intestate. The master's report
states:

"That depends on:

"(a) Whether he already had a
wife at the time he went through the
ceremony of marriage with the de-
ceased at Middletown, Rhode Island,
on September 7, 1915; or

"(b) Whether, even if he were
then unmarried, the intended mar-
riage at Middletown was void by
reason of irregularities connected
with the ceremony, taken in connec-
tion with the possible nonconsum-
mation of the marriage."

The findings of the master answer
the first question in the negative.
Martin, under the name of Walter
Winston Kenilworth, was a fortune
teller; and in 1901, at Atlantic
City, he entered into illicit relations
with a married woman named

Sophia Boehm. For some years they lived together ostensibly as husband and wife, both before and after she had secured a divorce from her husband. But the master finds that, "contrary to the testimony of the Boehm woman, no ceremony of marriage ever took place between her and the appellee;" that, although "they were regarded and treated by their friends and relatives as man and wife," there was no intent on the part of Martin to create the marriage relation between himself and her; and that "the appellee was never the husband of the Boehm woman." In the

Reference—
findings of
master—con-
clusiveness.

absence of the evidence we must accept these findings, and the parties do not argue to the contrary.

The main controversey arises as to the alleged marriage of Martin and Emma Angeannette Clark. In 1912 Mrs. Clark, who was a widow, sixty-three years old, and possessed of a considerable fortune, went to the office of Martin (or Kenilworth) in Paris, to have her fortune told. He was thirty-seven years old. He paid her marked attentions, and she became infatuated with him. Before she sailed for the United States July 1, 1913, an engagement of marriage had been made and broken more than once. In May, 1914, Mrs. Clark returned to Paris; but after the war broke out both decided to come to America until the end of the war, and they sailed for New York on the same boat in January, 1915. He resumed his occupation of fortune telling at Atlantic City, and later at Newport, Rhode Island. Mrs. Clark was often in his company, and was importuned by Martin to marry him. On August 31, 1915, they went before the city clerk of Newport, and applied for a marriage license. Across the end of the paper when issued was printed, "This license may be used only in Newport, Rhode Island. F. N. Fullerton, City Clerk." Under this license a marriage ceremony took place on September 7, 1915, in Mid-

dletown, a town adjoining Newport; and it was performed by an Episcopal minister, who later filed the license with his return thereon at the office of the town clerk of Middletown. The bridal couple left Newport for New York on the evening boat, both occupying the same state-room. After short stays at hotels in Atlantic City and New York as "Mr. and Mrs. W. W. Kenilworth, Paris and Newport," they rented a small apartment in New York and lived together (occupying always separate though connecting rooms) until January, 1916. From that time matters went ill with them, by reason of his irregular habits and vices; Martin resumed his life in Atlantic City, and Mrs. Martin remained in New York, except for about one month, until her death on June 12, 1917.

According to the master's report the statutory law of Rhode Island, in effect in 1915, relating to marriage of nonresidents, is as follows:

"Persons intending to be joined together in marriage in this state must first obtain a license from the clerk of the town or city in which they reside, . . . or, if not residents of this state, from clerk of the town or city in which the marriage is to be solemnized. . . ." Pub. Laws 1909, chap. 430, § 10.

The license must bear upon it the words, "This license may be used only in . . .," and the town or city clerk is to insert the name of the town or city if the license is issued to persons nonresidents in that state. Gen. Laws of Rhode Island 1909, chap. 243, provides in § 22 (so far as here applicable): "No marriage solemnized before a person professing to have a license to join persons in marriage as required by this chapter, . . . shall be deemed or adjudged to be void, nor shall the validity thereof be in any way affected by want of jurisdiction or authority in such person or society nor by reason of noncompliance with any of the requirements of this chapter, if the marriage is in other respects lawful and has been per-

formed with a full belief on the part of the persons so married, or either of them, that they have been lawfully joined in marriage."

This § 22 has never been construed by the courts of Rhode Island. At the trial there was presented in addition to the statute itself the testimony of a member of the Rhode Island bar, who gave his opinion as to the correct construction of the statute. The master made certain findings on the assumption that he was bound by the testimony of this witness, because it was the only testimony submitted on the subject. Plainly that is not so. The evidence as to the law of Rhode Island consisted both of the statute and of the oral testimony of an expert. It was

Evidence—
foreign law—
expert testi-
mony.

for the tribunal determining the facts to decide what the foreign law was, as

in the case of any controverted fact depending upon like evidence. *Kline v. Baker*, 99 Mass. 253. The master had the right to disregard the testimony of the expert if that testimony did not commend itself to his judgment. *Lindenbaum v. New York N. H. & H. R. Co.* 197 Mass. 314, 323, 84 N. E. 129; *C. W. Hunt Co. v. Boston Elev. R. Co.* 199 Mass. 220, 235, 85 N. E. 446. He further reports:

"If I am not bound by such evidence, and it is within my province to weigh my own construction of the statute against the construction given it by the Rhode Island attorney, then I should make, instead of findings 43 and 44, the following findings:

"(43a) The marriage between the appellee and Mrs. Clark was irregular as a ceremonial marriage because the ceremony was not performed in the city in which the license was issued.

"(44a) Said irregular marriage, however, was saved as a valid marriage by the saving clause contained in § 22 of the Rhode Island Statute set forth in finding 40."

In making these latter findings, as we construe the report, the master

duly considered the expert's testimony, but was not convinced by it, and formed his own opinion as to the legal effect of the statute. We think the master's construction of the statute was correct. See *Parton v. Hervey*, 1 Gray, 119; *Com. v. Munson*, 127 Mass. 459, 34 Am. Rep. 411; *Bradley v. Borden*, 223 Mass. 575, 586, 112 N. E. 416.

The master adds: "By finding 44a I intend to decide only that, by the saving clause referred to, the ceremony had such effect as if solemnized in due form under a proper license, and I do not intend to decide whether, in view of the other facts found in this report, the parties were validly married."

Apparently by "the other facts" he refers to finding 36: "The marriage between Mr. and Mrs. Martin, if there was a valid ceremonial marriage, was never consummated by coition." And the further finding that, as a result of a fibroid tumor with which she was afflicted, it is doubtful whether coition was probable or physically possible. As to this it suffices to say

that the consummation of a marriage by coition is not necessary to its validity. *Franklin v. Franklin*, 154 Mass. 515, 13 L.R.A. 843, 26 Am. St. Rep. 266, 28 N. E. 681. See L.R.A. 1916E, 1274, note. And impotency does not render a marriage void, but only void-

able at the suit of the party conceiving himself or herself to be wronged. See *Rev. Laws*, chap. 152, § 1; L.R.A. 1916C, 694, note. It is not contended that the marriage in question was induced by fraud on the part of Mrs. Martin. She "had explained to the appellee on more than one occasion that by reason of her condition it would be impossible for her to fulfil the part of a wife so far as the physical aspect of marriage was concerned;" and "the appellee had accepted her explanation, assigned it as an additional reason why she needed someone to care for

Marriage—
absence of
license—effect.

—necessity of
consummation.

—effect of
impotency.

her, and renewed his proposal of marriage." See *Millar v. Millar*, 175 Cal. 797, 167 Pac. 394, L.R.A. 1918B, 415, Ann. Cas. 1918E, 184, and note. It may be added that the present contention of the appellants, that the clergyman who performed the ceremony was not "a person professing to have a license to join persons in marriage," manifestly was not advanced at the hearing before the master; and it is disposed of by the terms of the statute itself. The first exception of the appellants must be overruled. All other exceptions to the report are rendered immaterial, or disposed of by what has been said above.

One of the objections of the appellants to the decree of the probate court is, that even if Martin was the lawful husband of the deceased, he "was an unfit and improper person to be appointed administrator of said estate." In addition to his general findings, the master has found specifically that Martin uses liquor to excess; that he has been convicted in New Jersey from time to time of the misdemeanor of fortune telling; that he knowingly gave false testimony at the hearings; that

it would not be wise to give him possession of money and securities in which other persons have an interest; and that his feelings toward the appellants are hostile. Martin's place of residence at the time of the death of his wife has been found to be Paris, France; and apparently Paris was the domicil of Mrs. Martin, even before her marriage. The law of France as to who are entitled to share in the intestate's estate was not reported by the master. In addition to the possible interests of the next of kin, the claims of her creditors, and of the state and Federal governments for inheritance taxes, must be considered in determining the suitability of Martin to administer the estate. On the peculiar and abnormal facts disclosed by this record it seems to us manifest that he is not a suitable person, and that the decree of the probate court appointing him administrator of the estate of his wife should be reversed. *Stearns v. Fiske*, 18 Pick. 24; *Thayer v. Homer*, 11 Met. 104, 110. See *Riddell v. Fuhrman*, 233 Mass. 69, 123 N. E. 237.

So ordered.

Executor and administrator—
ineligibility of
husband.

ANNOTATION.

Weight of oral testimony as to law of another state or country.

- I. Oral testimony in conflict, 1344.
- II. Oral testimony not in conflict:
 - a. Oral testimony alone, 1345.
 - b. Oral testimony in connection with other evidence:
 - 1. Testimony not conclusive, 1347.
 - 2. Testimony conclusive, 1349.

I. Oral testimony in conflict.

Where the oral testimony of experts as to a foreign law is in conflict or is contradicted, it is generally held that the court may resort to the statute or decisions of the foreign jurisdictions, if they are in evidence, and impose on them its own construction. *Nelson v. Bridport* (1845) 8 Beav. 527, 50 Eng. Reprint, 207, 10 Jur. 871; *Bremer v. Freeman* (1857) 10 Moore, P. C. C.

306, 14 Eng. Reprint, 508; *Rice v. Gunn* (1881) 4 Ont. Rep. 579; *Hunt v. Trusts & G. Co.* (1905) 10 Ont. L. Rep. 147, affirmed in (1905) 18 Ont. L. Rep. 351; *Re Goodman* (1916) 26 Can. Crim. Cas. 84, 28 D. L. R. 197, 34 West. L. Rep. 531, affirmed in (1916) 26 Manitoba, L. R. 537, 29 D. L. R. 725, 26 Can. Crim. Cas. 254, 34 West. L. Rep. 1091.

Thus, in *Pittsburg, C. C. & St. L. R. Co. v. Austin* (1911) 141 Ky. 722, 133 S. W. 780, the court said: "Where the testimony is conflicting as to what the law of another state is, and the witnesses reaching conflicting conclusions give the opinions of the state court on which their conclusions are based, a court of this state may, in an action pending here, read the opinions

so designated for itself, and determine what is the proper construction to be placed upon them."

In *Nelson v. Bridport* (1845) 8 Beav. 527, 50 Eng. Reprint, 207, a case involving the testimony of experts regarding the law of Sicily, the court held it to be the general rule that foreign law must be proved by properly qualified witnesses who can construe the law in relation to the case in question, but that, nevertheless, a judge might in some cases "take upon himself to construe the words of a foreign law and determine their application to the case in question, especially if there should be a variance or want of clearness in the testimony."

In *Bremer v. Freeman* (1857) 10 Moore, P. C. C. 306, 14 Eng. Reprint, 508, wherein a question arose as to the validity of a will under the municipal law of France, it appeared that the witnesses testifying as experts differed in their opinion of the law as applicable to the facts of the case. Under the circumstances the court reviewed the cases on the point, although decisions were not of so much authority in France as in England. "But," the court said, "we must consider these decisions, pronounced by sworn judges, under their judicial responsibility, as of more weight than the opinion of advocate witnesses, or even than some text-writers."

In *Rice v. Gunn* (1881) 4 Ont. Rep. 579, wherein a question arose as to the validity of certain contracts for the sale of grain, made by the plaintiff for the defendant in Chicago, the testimony of the experts as to the Illinois law governing the case being contradictory, the court considered the cases on the subject, as decided by courts in the United States.

In *Hunt v. Trusts & G. Co.* (1905) 10 Ont. L. Rep. 147, affirmed in (1905) 18 Ont. L. Rep. 351, a question arose as to the legitimacy of one whose issue claimed him to be the half-brother of an intestate, and the fact of legitimacy depended on the law of the state of New York. Expert evidence was offered thereon, which, however, was contradictory, although based on the authority of decided cases. The court

6 A.L.R.—85.

said: "Upon this conflict of testimony I am driven to an examination of the authorities upon which the experts respectively rely. Reading these with the aid of the explanatory, critical, and argumentative testimony adduced, and discharging functions analogous to those of a special jury, I am obliged to determine to the best of my ability what is in fact, upon such controverted points, the law which obtains in the state of New York."

Re *Goodman* (1916) 28 D. L. R. 197, 26 Can. Crim. Cas. 84, 84 West. L. Rep. 531, affirmed in (1916) 26 Manitoba, L. R. 537, 26 Can. Crim. Cas. 254, 29 D. L. R. 725, 34 West. L. Rep. 1091, was an application for the extradition of one Goodman, who was charged with having violated the Bankruptcy Act of the United States. A Massachusetts lawyer gave testimony as to the law applicable to the case. The court said: "Where the evidence given by the expert Mr. Matthews has been challenged and disputed by counsel for the accused, I think the decision of the Privy Council in *Bremer v. Freeman* (Eng.) *supra*, warrants me in looking at American decisions and authorities bearing upon the point."

II. Oral testimony not in conflict.

a. Oral testimony alone.

When uncontradicted oral testimony is given as to the law of another state or country, it is generally considered conclusive in the absence of other evidence, such as the statutes or decisions of the jurisdictions involved. *Milwaukee & St. P. R. Co. v. Smith* (1874) 74 Ill. 197; *Spaeth v. Kouns* (1915) 95 Kan. 320; L.R.A.1915E, 271, 148 Pac. 651; *Pittsburg, C. C. & St. L. R. Co. v. Austin* (1911) 141 Ky. 722, 133 S. W. 780; *J. T. Morgan Lumber Co. v. Williams* (1911) 143 Ky. 115, 136 S. W. 131; *Baltimore & O. R. Co. v. Glenn* (1867) 28 Md. 287, 92 Am. Dec. 686; *Macdonald v. Macdonald* (1872) L. R. 14 Eq. (Eng.) 60, 41 L. J. Ch. N. S. 566, 26 L. T. N. S. 685, 20 Week. Rep. 789. But see *Clardy v. Wilson* (1900) 24 Tex. Civ. App. 196, 58 S. W. 52.

In *Milwaukee & St. P. R. Co. v. Smith* (1874) 74 Ill. 197, it appeared that the plaintiff had delivered to the

defendant certain goods destined for a point beyond the line of defendant's road, and a question arose whether the defendant was to be considered as having contracted to deliver the goods at such a point, the contract having been made in Wisconsin. The testimony of three Wisconsin lawyers was offered to prove that under the law of that state the undertaking on the part of the defendant was merely to carry the goods to the line of the next carrier, and not to the point of destination. There was no opposing testimony and the court said: "This would seem to be sufficient to settle the question as to what is the law in Wisconsin." The rule so laid down was held not to be varied by the fact that the witnesses stated that there was no statute and no direct decision in Wisconsin on the subject, or by a decision to the contrary of their opinion in Illinois.

In *Spaeth v. Kouns* (1915) 95 Kan. 320, L.R.A.1915E, 271, 148 Pac. 651, wherein the plaintiff offered the testimony of two Missouri experts, an attorney at law and an abstractor, to prove a marketable title to land in Missouri which he had contracted to sell to the defendant, the evidence mentioned was disregarded in the court below. The court above said: "We must hold that the evidence of the Missouri experts in this case was competent, and as it was uncontradicted and no reason shown for disregarding it, it should have been controlling."

In *Pittsburg, C. C. & St. L. R. Co. v. Anstin* (1911) 141 Ky. 722, 188 S. W. 780, an action to recover damages for injuries incurred by being struck by a train, it appeared that the accident occurred in Indiana, and a question arose as to the law in Indiana in such a case. The court said: "When a witness is introduced in a case pending here, and states that certain opinions of the supreme court of another state establish a certain proposition, . . . the court trying the case may read these decisions itself and determine their effect. But it cannot disregard the conclusion of the witness when it

has not before it the facts upon which the witness bases his conclusion."

In *J. T. Morgan Lumber Co. v. Williams* (1911) 148 Ky. 115, 136 S. W. 181, it appeared that the defendant company had cut timber on the land of the plaintiff in Tennessee, and that the defendant's attorney had agreed to abide by the decision of a third person as to the amount of damages involved. The defendant claimed that this submission of the matter to arbitration was unauthorized, and that the judgment rendered in consequence thereof was void. Two attorneys of Tennessee gave testimony that, under the statutes and laws of that state, an attorney had "the power to submit to arbitration any matters involved in pending litigation." The court said: "There being no evidence to the contrary, we must hold that the law of Tennessee was properly stated."

In *Baltimore & O. R. Co. v. Glenn* (1867) 28 Md. 287, 92 Am. Dec. 688, wherein was involved the question of the transfer of property as affected by the Statute of 13 Eliz. chap. 5, the appellant being a corporation of the state of Virginia, expert testimony was offered of the law of that state in relation thereto. It had been agreed by counsel that the law of Virginia would be ascertained, *inter alia*, from the decisions and reports of that state. The court held that, outside of this agreement, the testimony of the lawyers as to the legality of the deed under the Virginia law was conclusive, it being of uniform tenor.

In *Macdonald v. Macdonald* (1872) L. R. 14 Eq. (Eng.) 60, wherein it appeared that a testator had made a gift to charity, and a question arose as to the interpretation to be given thereto under the Scotch law, the court said: "There is evidence as to the Scotch law which I take to be conclusive, because the facts are stated in the case submitted to the Scotch advocate. He gives an express and distinct opinion that the £10,000 is a valid bequest according to the laws of Scotland. Nothing remains but to have it paid."

In *Clardy v. Wilson* (1900) 24 Tex. Civ. App. 196, 58 S. W. 52, wherein it appeared that certain persons had

married in Tennessee and had later moved to Texas, where they purchased land which was put in the name of the wife, a question arose as to whether the money used in the purchase of this land was to be considered the property of the husband because it was received by the wife while the couple were living in Tennessee, where the common-law rule governing the matter was said to prevail. The testimony of a Tennessee lawyer was offered to the effect that the common law obtained in that state except as modified by statute. The court held this proof insufficient to establish the fact that the common-law rule as to marital rights prevails in the state of Tennessee. The testimony was considered too indefinite and uncertain.

b. Oral testimony in connection with other evidence.

1. Testimony not conclusive.

In the majority of jurisdictions, when foreign statutes or decisions are before the court they may be consulted and the law derived therefrom, in spite of the fact that the uncontradicted testimony of experts places a contrary interpretation thereon.

Georgia.—*Chattanooga, R. & C. R. Co. v. Jackson* (1890) 86 Ga. 676, 13 S. E. 109.

Kansas.—*Eberhart v. Rath* (1913) 89 Kan. 329, 131 Pac. 604, Ann. Cas. 1915A, 268.

Massachusetts.—See the reported case (*MARTIN v. OTIS*, ante, 1340).

Michigan.—See General Conference Asso. v. Michigan Sanitarium & Benev. Asso. (1911) 166 Mich. 504, 132 N. W. 94.

New York.—*Bank of China v. Morse* (1901) 168 N. Y. 458, 56 L.R.A. 139, 85 Am. St. Rep. 676, 61 N. E. 774.

Texas.—*Western U. Teleg. Co. v. White* (1914) — Tex. Civ. App. —, 162 S. W. 905; *Banco Minero v. Ross* (1915) 106 Tex. 523, 172 S. W. 711; *American Surety Co. v. Huey & P. Hardware Co.* (1917) — Tex. Civ. App. —, 191 S. W. 617.

England. — *Dalrymple v. Dalrymple* (1811) 2 Hagg. Consist. Rep. 54, 161 Eng. Reprint, 665, 17 Eng. Rul. Cas.

11; *Concha v. Murrieta* (1860) L. R. 40 Ch. Div. 545, 60 L. T. N. S. 798.

In *Chattanooga, R. & C. R. Co. v. Jackson* (1890) 86 Ga. 676, 13 S. E. 109, an exception was taken to the admission of the testimony of two lawyers concerning the law and practice of the courts in Tennessee. It was held that the judge acted properly in the matter, and that "he was not bound by the opinions of these attorneys," and he might decide the law with the assistance of such other information as was accessible to him. "The statutes of Tennessee and the decisions of its supreme court" had been read to the judge in this instance.

In *Eberhart v. Rath* (1913) 89 Kan. 329, 131 Pac. 604, Ann. Cas. 1915A, 268, the children of a decedent, by her first marriage, sought to enforce an agreement made by her with her second husband, providing that if she died before him, he should receive none of her property. The defendant husband sought to have the agreement held invalid, and offered the opinions of lawyers from Nebraska, where the agreement was made, to the effect that it was void by the laws of that state. The court held the testimony was not convincing, in the absence of any controlling decision. Several Nebraska cases were before the court, and they did not support the expert's conclusion.

In *Bank of China v. Morse* (1901) 168 N. Y. 458, 56 L.R.A. 139, 85 Am. St. Rep. 676, 61 N. E. 774, it appeared that a corporation had transferred its property to another company in a plan for winding up its own business, and that, its debts having been paid, it now sought to enforce the payment of calls by the stockholders "to the full amount unpaid on their shares," and to the sole benefit of the new company. It was stated by the plaintiff's experts that such schemes were approved by the English courts, but the court held that this could not be considered as controlling, in view of a statute and decisions of the English courts.

In *Western U. Teleg. Co. v. White* (1914) — Tex. Civ. App. —, 162 S. W. 905, the question arose as to the law in New Mexico, as regards the rights

to recover for mental pain and anguish resulting from the failure to deliver a telegram promptly. The testimony of a New Mexico lawyer was introduced in relation thereto, and the court said: "The testimony of McElroy, with reference to the course the case would take under the laws of New Mexico, and what, in his opinion, was the court of final resort, was not binding upon the trial court, because there were matters depending upon the Federal statutes, of which the trial court must take judicial notice."

In *Banco Minero v. Ross* (1915) 106 Tex. 522, 172 S. W. 711, wherein it appeared that the defendant bank, on the order of a Mexican court, had paid out certain money deposited and claimed by the plaintiff, it became necessary to decide whether the order of the judge was valid according to Mexican law, and the testimony of an expert was offered to that effect, his opinion being based on the Mexican Civil Code. It was held that the trial judge had properly disregarded this testimony and construed the provisions of the Code for himself, the Code having been in evidence and before the judge. "He was not obliged to accept the construction placed upon them by the witness."

American Surety Co. v. Huey & P. Hardware Co. (1917) — Tex. Civ. App. —, 191 S. W. 617, was an action to recover on a bond, executed by the defendant as surety for contractors who had agreed to build a courthouse and jail in Arkansas, and to whom the plaintiffs had furnished material for which they had not received payment. It was contended that the bond should have been sued on and the venue laid in the county where the building was erected, according to the provisions of an act of the general assembly of Arkansas, as stipulated in the bond. Testimony of an Arkansas lawyer was offered to prove that in such a case suit should be brought in the county where the improvement was made, but the trial court found contrary to this testimony, as to venue, and it was held that it did so properly, especially if the lawyer was putting a construction on the act in question,

since it was not considered susceptible of such construction.

In *Dalrymple v. Dalrymple* (1811) 2 Hagg. Consist. Rep. 54, 161 Eng. Reprint, 665, 17 Eng. Rul. Cas. 11, it was necessary to decide whether, by the law of Scotland, a marriage was constituted by a present declaration, without copula, and the court held that the decisions of the tribunals of Scotland on this point of law were entitled to greater weight than the opinions of learned professors offered in the case, or of text-writers on the subject.

In *Concha v. Murrieta* (1860) L. R. 40 Ch. Div. (Eng.) 548, it was desired to determine what, under the law of Peru, was the liability of a father for the sale of his child's property, received by the child from a deceased mother. Testimony of experts was offered in relation thereto, the experts specifying certain sections of the Civil Code of Peru as applicable to the case. It was contended that the court could look only to "the affidavits of the experts," but the court said: "The proper evidence of the law of any foreign country is evidence by lawyers of that country; but if, in their evidence, they refer to passages in the Code of the country whose law we are endeavoring to ascertain, it would, as it appears to me, be most unreasonable to hold that we are not at liberty to look at those passages and consider what is their proper meaning."

In *General Conference Asso. v. Michigan Sanitarium & Benev. Asso.* (1911) 166 Mich. 504, 182 N. W. 94, an action of assumpsit on promissory notes, it appeared that three of the notes made by the defendant and payable to one Ruiter had been assigned to the plaintiff by the widow of Ruiter as administratrix with the will annexed. A copy of Ruiter's will was offered in evidence, and also the deposition of an advocate of the province of Quebec, where Ruiter had lived, to the effect that, under the laws of that province, a universal legatee under a will was entitled to act as executor, where none was named in the will, and that an executor has power to indorse and transfer notes belonging to the decedent. The Civil Code of Lower

Canada, referred to by the advocate, was also offered. The court held that "the testimony of the Canadian advocate and the articles of the Code were sufficient proof of the authority of Mrs. Ruiter to act as executrix of her husband's will, and of the fact that she became the absolute owner of the notes, under the will, and could dispose of them as she saw fit."

2. *Testimony conclusive.*

On the other hand, it has been held that uncontradicted expert testimony as to the law of another state or country is conclusive, although the statutes or decisions of such foreign jurisdiction are before the court for consideration. *The Asiatic Prince* (1901) 47 C. C. A. 325, 108 Fed. 287; *Badische Anilin & Soda Fabrik v. A. Klipstein & Co.* (1903) 125 Fed. 543; *Consolidated Real Estate & F. Ins. Co. v. Cashow* (1874) 41 Md. 59.

In *The Asiatic Prince* (1901) 47 C. C. A. 325, 108 Fed. 287, writ of certiorari denied in (1901) 183 U. S. 697, 46 L. ed. 395, 22 Sup. Ct. Rep. 938, a question arose as to the law of Brazil, concerning the delivery of dutiable goods. Excerpts from the statute law of Brazil were offered to contradict the statements of an expert in Brazilian law, but the court held that "much more than the text of a statutory enactment" was to be considered, and the law having been properly proved by the offer of an expert's statements, the conclusion based thereon was well founded.

In *Badische Anilin & Soda Fabrik v. A. Klipstein & Co.* (1903) 125 Fed. 543, evidence was offered to prove the incorporation of the complainant and its

consequent ability to sue. The testimony consisted of the statements of two German lawyers, who testified that procedure taken by the complainant was sufficient to constitute the associates a corporation with capacity to sue or be sued. The court said: "This is certainly prima facie evidence of incorporation, and, in the absence of any evidence to the contrary (no expert in German law was called by defendants), must be taken as conclusive." The German Code had been set forth and an analysis thereof submitted by the defendants.

In *Consolidated Real Estate & F. Ins. Co. v. Cashow* (1874) 41 Md. 59, a question arose as to the validity of an assignment of an insurance policy, made by the receiver of an insurance company in dissolution. The policy was one of reinsurance, and the company was incorporated and dissolved under the laws of the state of New York, the statutes of which state provided for the sale by receivers of property coming into their hands. It was agreed that these statutes should be read from the printed volumes, and the validity of the sales decided in accordance therewith. The court said: "The evidence of the witness Lee, on this point, who swears that the sale was made 'after due public notice and advertisement, as required by the laws of the state of New York,' settles the question, provided he is shown to be sufficiently an expert to give such testimony." And the court considered that his qualifications were acceptable, it being shown that he was a lawyer, thirty-four years of age, and a resident of New York city.

R. S.

RE ESTATE OF ANNIE M. WILSON, Deceased.

MARTHA R. WILSON et al., Appts.

Pennsylvania Supreme Court — February 25, 1918.

(260 Pa. 407, 103 Atl. 880.)

Will — demonstrative legacy — gifts to be deducted from specified fund.

1. A direction in a codicil that specified bequests of certain sums shall be deducted from the proceeds of certain property, and the remainder dis-

tributed to certain charities, does not make such bequests demonstrative within the rule that demonstrative legacies do not abate when the estate is insufficient to satisfy all the bequests provided for by the will.

[See note on this question beginning on page 1353.]

— demonstrative legacy — definition.

2. If a legacy is given with reference to a particular fund, only as pointing out a convenient mode of payment, it is demonstrative, and the legatee will not be disappointed though the fund totally fail.

— presumption of intention.

3. The presumption of intention is favorable to general legacies in the first instance, rather than demonstrative or specific ones, and it will require clear proofs of a restrictive intention to repel it.

APPEAL by certain legatees from a decree of the Orphans' Court for Philadelphia County dismissing exceptions to adjudication in the estate of Annie M. Wilson, deceased. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Thomas O. Peirce and Walter Penn Shipley, for appellant Home:

A demonstrative legacy is one payable primarily out of a particular fund or thing named in the will, and if that fails, then payable out of the general assets.

Smith's Appeal, 103 Pa. 559; Armstrong's Appeal, 63 Pa. 312.

Such a legacy should not be confused with a specific legacy, which is a gift of the thing or fund itself.

Drayer's Estate, 25 Pa. Dist. R. 1141; Black's Estate, 223 Pa. 382, 72 Atl. 631; Rankin's Estate, 41 Pa. Super. Ct. 410; Henry's Estate, 24 Pa. Dist. R. 168.

Messrs. Maurice Bower Saul, F. B. Bracken, and Charles B. Evans for other appellants.

Messrs. MacCoy, Evans, Hutchinson, & Lewis and Williams & Sinkler, for appellees:

The legacies are general, and not demonstrative.

Nolen's Estate, 19 Pa. Dist. R. 660; Welch's Appeal, 28 Pa. 363; Gallagher v. Gallagher, 6 Watts, 473; Re Barklay, 10 Pa. 387; Armstrong's Appeal, 63 Pa. 312; Black's Estate, 223 Pa. 382, 72 Atl. 631; Henry's Estate, 24 Pa. Dist. R. 168.

Stewart, J., delivered the opinion of the court:

The testatrix, Annie M. Wilson, died July 3, 1915, leaving a last will executed March 3, 1910, in and by which she bequeathed pecuniary legacies amounting in the aggregate to \$59,450. In June, 1911, she disposed of, by sale, a valuable piece of real estate in the city of Philadelphia, receiving therefor the sum

of \$85,000. Her personal estate being thus largely increased, in order to dispose of part or all of this increase otherwise than under the residuary clause of her original will, she executed a codicil under date of October 4, 1911, in and by which she made additional pecuniary bequests amounting in the aggregate to \$75,000. Her estate is now for distribution. The pecuniary legacies given in the will and codicil together—not including the bequests to several charitable societies mentioned in the codicil—amount to \$104,450, while the fund out of which they are payable amounts to \$89,011, to which is to be added, as derived from the income, \$4,135.27, less inheritance tax, which remains to be deducted. It is this marked discrepancy between the amount of the legacies and the fund available for payment that gives rise to the present contention. The learned auditing judge, holding the view that the pecuniary legacies bequeathed by the original will as well as those by the codicil—not including the bequests to the several charitable societies therein named—were alike general legacies, and because in the aggregate they exceeded in amount the fund for distribution they were entitled to the whole fund, made pro rata distribution among them, denying any participation to the charitable societies named in the codicil. Exceptions were filed on behalf of these societies and by

several of the individual legatees under the codicil, with the result that after hearing the exceptions were dismissed, and the adjudication was confirmed by a divided court. From this decree we have here five separate appeals. They require to be distinguished for present purpose no further than that, in the first three appeals of Martha R. Wilson, Elizabeth E. Wilson, and Alice Wilson, the subject of complaint is the same in each, namely, that the court erred in directing an abatement of the legacies given them in the codicil, while in the other two, appeal of the Home for Aged and Infirm Colored Persons, and appeal of the Jefferson Hospital, the complaint is the same in each, namely, that the court erred in declining to allow the charitable societies named in the sixth clause of the codicil participation in the distribution of the estate. It will be seen as we proceed that the answer to the contention urged in behalf of the charitable societies will depend largely, if not entirely, upon our conclusion with respect to the contention of the individual legatees. We shall therefore first address ourselves to the question raised by the latter.

The position taken by the appellants here first named is that the legacies given them under the codicil, \$3,000 to each, are demonstrative, and therefore not subject to abatement for insufficiency of assets. If the legal proposition here asserted, that these legacies are demonstrative, were to be conceded, it would follow necessarily that the conclusions derived therefrom would be correct, that these legacies have been improperly subjected to abatement; but this is only stating the real controversy, which is, Are these legacies demonstrative? The court below held they were not demonstrative, but general. It is important before proceeding further that we get a clear understanding of what is meant in law by a demonstrative bequest or legacy, so that we may not under estimate the burden as-

sumed by him who asserts such claim. Nowhere can we find it more intelligibly and satisfactorily defined than in *Walls v. Stewart*, 16 Pa. 275, where Mr. Justice Bell, after a discussion of the several kinds of legacies, specific and demonstrative, thus concludes: "The distinction [between them] seems to be this: If a legacy be given with reference to a particular fund, only as ^{will-demonstrative legacy-definition.} pointing out a convenient mode of payment, it is considered demonstrative, and the legatee will not be disappointed though the fund totally fail. But where the gift is of the fund itself, in whole or in part, or so charged upon the object made subject to it as to show an intent to burden that object alone with the payment, it is esteemed specific, and consequently liable to be adeemed by the alienation or destruction of the object. In this, as in other questions springing from the construction of wills, the intention of the testator is principally to be ascertained, and it is said to be necessary that the intention be either expressed in reference to the thing bequeathed, or otherwise clearly appear from the will, to constitute a legacy specific. If it be manifest there was a fixed and independent intent to give the legacy, separate and distinct from the property designated as the source of payment, the legacy will be deemed general or demonstrative, though accompanied by a direction to pay it out of a particular estate or fund specially named."

To this we may add what is said by Gibson, Ch. J., in *Blackstone v. Blackstone*, 3 Watts, 335, 27 Am. Dec. 359: "It is certainly true that the presumption of intention is favorable to general legacies in the first instance, and that it requires ^{presumption of intention.} clear proofs of a restrictive intention to repel it."

In all such contentions it is the intention of the testator as expressed in his will that prevails, and

when this can be satisfactorily ascertained from the language used the inquiry extends no further, but stops right there. The contention of these appellants controverts nothing we have so far said, but rests exclusively upon the sixth clause of the codicil, and from the language there used they seek to derive a clear intent on part of this testatrix to make the legacies given in the codicil demonstrative. Each clause in the codicil preceding the sixth contains a distinct bequest; in some the gift is absolute to a single individual, in others it is to a trustee and the beneficiaries there are several, but each clause is devoted exclusively to some particular bequest. Then the sixth clause is reached, which reads as follows: "Sixth. I direct that the principal sums of the bequests hereinabove made shall be deducted from eighty-five thousand dollars (\$85,000), which is the amount I received from the proceeds of sale of 1712 Walnut street, and such balance as there may remain after such deduction, I give and bequeath in equal shares unto the Day Nursery, now situate at No. 2218 Lombard street, Philadelphia, the Home for Aged and Infirm Colored Persons, now situate at Belmont and Girard avenues, Philadelphia, the Indigent Widows' and Single Women's Society of Philadelphia, now situate at 3615 Chestnut street, Philadelphia, and the Home for the Aged, now situate in 1809 Mt. Vernon street, Philadelphia."

Tested by the general rules governing such cases to which we have adverted, what is there in this clause that indicates an intention on the part of the testatrix to make a gift of the fund derived from the sale of the real estate, in whole or in part, to these appellants, or anybody else; or what is there to suggest a segregation of such fund from the balance of her estate and a gift of it as something distinct and separate, or a purpose to burden it with some charge for which the general estate would otherwise be liable? These

things are required to appear affirmatively before the legal presumption that the legacies are general, and not either demonstrative or specific, can be overcome. To our mind it is perfectly clear that reference to the \$85,000 received by testatrix from the sale of her real estate was introduced with no intention to affect this particular fund itself in any way, but simply and only to provide some certain standard by which the uncertain (in amount) bequests to the charitable societies could be made certain. The bequest was of whatever balance might remain after deducting the legacies "hereinabove made" from an ascertained and fixed sum, one not in any sense variable. It is a fact, admittedly well known to the testatrix, that she had expended much of that she had received for her real estate, and presumably she expected to expend still more if she lived. Knowing that her general estate would be applied to the payment of the legacies, whether given in the will or codicil, and knowing further what these would amount to in the aggregate, but not knowing what the general estate applicable would amount to, depending upon what she had already expended thereout and how much she might yet expend, she adopted a fixed quantity from which the subtraction of the legacies could be made,—namely, the total price paid her for the real estate sold,—and gave the balance, if any, to the charitable societies. Whether this be a correct interpretation of testatrix's purpose so far as relates to the reference to the sum received on the sale of the real estate in the will, or otherwise, it nevertheless remains true that there is nothing in the will that indicates any purpose on part of the testatrix to make demonstrative the legacies given to these appellants. We therefore conclude that they were general, and, as such, subject to abatement.

—demonstrative
legacy—gifts
to be deducted
from specified
fund.

What we have said applies with equal force in the appeals of the two charitable societies, and a like result there must follow. We may further add: If the legacies given by the codicil were demonstrative, then they had a right to participate in the general fund; if their participation so increased the liability of the estate to general legatees

as to exhaust the fund for distribution, leaving nothing in remainder, the bequests to the several charitable societies failed, and they were properly denied participation in the distribution. The appeals are severally dismissed, for the reasons we have stated, and the decree appealed from is confirmed.

ANNOTATION.

When legacy is regarded as demonstrative.

- I. Introductory, 1858.
- II. Definitions and distinctions:
 - a. In general, 1858.
 - b. Specific legacy distinguished, 1856.
 - c. General legacy distinguished, 1858.
- III. Rules of construction:
 - a. Intent of testator, 1358.
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- IV. Illustrations:
 - a. In general, 1862
 - b. Bequest referring to income of business or fund, 1866.
 - c. Bequest referring to deposit, 1868.

- d. Bequest referring to debt, 1870.
- e. Bequest referring to insurance, 1874.
- f. Bequest referring to note or mortgage, 1875.
- g. Bequest referring to stock or bond:
 - 1. Generally, 1877.
 - 2. Use of "my" or similar expression, 1886.
- h. Bequest referring to interest in partnership, 1888.
- i. Bequest referring to land or proceeds thereof, 1889.

I. Introductory.

A discussion of those cases only wherein a legacy was decided to be demonstrative would obviously present a one-sided and incomplete view of the authorities on this point. On the other hand, cases holding legacies to be general or specific, without discussing the alternative contention, are so numerous that it is impractical to include a treatment of them all. This note is, therefore, confined to those cases wherein demonstrative legacies have been discussed or distinguished from legacies of another class. Those cases wherein legacies were, in effect, decided to be demonstrative, have been excluded, if they were not so treated by the court *eo nomine*.

II. Definitions and distinctions.

a. In general.

A demonstrative legacy was defined in *Nusly v. Curtis* (1906) 36 Colo. 464, 7 L.R.A.(N.S.) 592, 118 Am. St. Rep. 113, 85 Pac. 846, 10 Ann. Cas. 1134, as follows: "A demonstrative legacy

partakes both of the nature of a general and specific legacy. It is a gift of money or other property charged on a particular fund in such a way as not to amount to a gift of the corpus of the fund, or to evince an intent to relieve the general estate from liability in case the fund fails."

That definition is sustained by the following cases:

United States.—*Georgia Infirmary v. Jones* (1889) 37 Fed. 750; *Ives v. Conby* (1891) 48 Fed. 718; *Kenaday v. Sinnott* (1900) 179 U. S. 606, 45 L. ed. 839, 21 Sup. Ct. Rep. 233; *Kramer v. Kramer* (1912) 119 C. C. A. 482, 201 Fed. 248.

Alabama.—*Myers v. Myers* (1858) 33 Ala. 85; *Gilmer v. Gilmer* (1868) 42 Ala. 9; *Harper v. Bibb* (1872) 47 Ala. 547; *Maybury v. Grady* (1880) 67 Ala. 147; *Kelly v. Richardson* (1892) 100 Ala. 584, 13 So. 785.

California.—*Apple's Estate* (1885) 66 Cal. 432, 6 Pac. 7.

Colorado.—*Nusly v. Curtis* (1906) 36 Colo. 464, 7 L.R.A.(N.S.) 592, 118

Am. St. Rep. 113, 85 Pac. 846, 10 Ann. Cas. 1184; *School Dist. v. International Trust Co.* (1915) 59 Colo. 486, 149 Pac. 620; *Collar v. Gaarn* (1918) — Colo. —, 171 Pac. 63.

Connecticut. — *Angus v. Noble* (1900) 73 Conn. 56, 46 Atl. 278.

District of Columbia. — *Douglass v. Douglass* (1898) 18 App. D. C. 21.

Georgia. — *Thompson v. Stephens* (1912) 138 Ga. 205, 75 S. E. 136.

Illinois. — *Meily v. Knox* (1915) 191 Ill. App. 126, affirmed in (1915) 269 Ill. 463, 110 N. E. 56.

Indiana. — *Roquet v. Eldridge* (1889) 118 Ind. 147, 20 N. E. 733.

Iowa. — *Re Newcomb* (1896) 98 Iowa, 175, 67 N. W. 587.

Kentucky. — *Smith v. Lampton* (1839) 8 Dana, 69.

Maine. — *Moore v. Alden* (1888) 80 Me. 301, 6 Am. St. Rep. 208, 14 Atl. 199; *Additon v. Smith* (1891) 83 Me. 551, 22 Atl. 470; *Stilphen's Appeal* (1905) 100 Me. 146, 60 Atl. 888, 4 Ann. Cas. 158; *Spinney v. Eaton* (1913) 111 Me. 1, 46 L.R.A.(N.S.) 535, 87 Atl. 378.

Maryland. — *Dugan v. Hollins* (1857) 11 Md. 41; *Dryden v. Owings* (1878) 49 Md. 356; *Kunkel v. MacGill* (1880) 56 Md. 120; *Gelbach v. Shively* (1837) 67 Md. 498, 10 Atl. 247; *Matthews v. Targarona* (1906) 104 Md. 442, 65 Atl. 60, 10 Ann. Cas. 153; *Harrison v. Denny* (1910) 113 Md. 509, 77 Atl. 837; *Gardner v. McNeal* (1911) 117 Md. 27, 40 L.R.A.(N.S.) 553, 82 Atl. 988, Ann. Cas. 1914A, 119.

Massachusetts. — *White v. Winchester* (1827) 6 Pick. 48; *Richardson v. Hall* (1878) 124 Mass. 228; *Smith v. Fellows* (1881) 131 Mass. 20; *Stevens v. Fisher* (1887) 144 Mass. 114, 10 N. E. 803; *Bradford v. Brinley* (1887) 145 Mass. 81, 13 N. E. 1.

Michigan. — *Byrne v. Hume* (1891) 86 Mich. 546, 49 N. W. 576; *Hibler v. Hibler* (1895) 104 Mich. 274, 62 N. W. 361.

Minnesota. — *Merriam v. Merriam* (1900) 80 Minn. 254, 83 N. W. 162.

Mississippi. — *Hailey v. McLaurin* (1916) 112 Miss. 705, 73 So. 727.

New Hampshire. — *Wallace v. Wallace* (1851) 23 N. H. 149.

New Jersey. — *Norris v. Thomson*

(1863) 16 N. J. Eq. 222; *Johnson v. Conover* (1896) 54 N. J. Eq. 333, 35 Atl. 291; *Pennsylvania Ins. Co. v. Riley* (1918) 89 N. J. Eq. 252, 104 Atl. 225.

New York. — *Walton v. Walton* (1823) 7 Johns. Ch. 258, 11 Am. Dec. 456; *Enders v. Enders* (1848) 2 Barb. 362; *Tift v. Porter* (1853) 8 N. Y. 516; *Giddings v. Seward* (1857) 16 N. Y. 365; *Pierrepoint v. Edwards* (1862) 25 N. Y. 128; *Newton v. Stanley* (1863) 28 N. Y. 61; *Watrous v. Smith* (1876) 7 Hun, 544; *Florence v. Sands* (1880) 4 Redf. 206; *Delaney v. Van Aulen* (1881) 84 N. Y. 16; *Re Newman* (1886) 4 Dem. 65; *Humphrey v. Robinson* (1889) 52 Hun, 200, 5 N. Y. Supp. 164; *Re Van Vliet* (1893) 5 Misc. 169, 25 N. Y. Supp. 722; *Crawford v. McCarthy* (1897) 21 App. Div. 484, 47 N. Y. Supp. 436, reversed in (1899) 159 N. Y. 514, 54 N. E. 277; *Methodist Episcopal Church v. Hebard* (1898) 28 App. Div. 548, 51 N. Y. Supp. 546; *Olcott v. Osowski* (1901) 34 Misc. 876, 69 N. Y. Supp. 917; *Re Warner* (1902) 39 Misc. 432, 79 N. Y. Supp. 363; *Re Fisher* (1904) 93 App. Div. 186, 87 N. Y. Supp. 567; *Re Bedford* (1910) 67 Misc. 38, 124 N. Y. Supp. 619; *Re Bouk* (1913) 80 Misc. 196, 141 N. Y. Supp. 922; *Re Marshall* (1913) 80 Misc. 1, 141 N. Y. Supp. 546; *Re Union Trust Co.* (1916) 97 Misc. 581, 161 N. Y. Supp. 954; *Re Brundage* (1917) 101 Misc. 528, 167 N. Y. Supp. 694; *Re Ingraham* (1918) 104 Misc. 644, 172 N. Y. Supp. 234.

North Carolina. — *Croom v. Whitfield* (1853) 45 N. C. (Busbee, Eq.) 143; *Alsop v. Bowers* (1877) 76 N. C. 168; *Baptist Female University v. Borden* (1903) 132 N. C. 476, 44 S. E. 47, 1007.

North Dakota. — *Adair v. Adair* (1902) 11 N. D. 175, 90 N. W. 804.

Ohio. — *Glass v. Dunn* (1867) 17 Ohio St. 413; *Rote v. Warner* (1899) 9 Ohio C. D. 536, 17 Ohio C. C. 342.

Pennsylvania. — *Re Barklay* (1849) 10 Pa. 387; *Ludlam's Estate* (1850) 13 Pa. 188, affirming (1845) 3 Clark, 332; *Balliet's Appeal* (1850) 14 Pa. 451; *Walls v. Stewart* (1851) 16 Pa. 275; *Welch's Appeal* (1857) 28 Pa. 363; *Hoppel's Estate* (1863) 5 Phila. 216; *Armstrong's Appeal* (1870) 63

Pa. 312; *Cascaden's Estate* (1871) 8 Phila. 582; *Knecht's Appeal* (1872) 71 Pa. 333; *Smith's Appeal* (1883) 103 Pa. 559; *Hammer's Estate* (1893) 158 Pa. 632, 22 Atl. 231; *Pruner's Estate* (1908) 222 Pa. 179, 45 L.R.A.(N.S.) 561, 70 Atl. 1000; *Stover's Estate* (1911) 45 Pa. Super. Ct. 451; *Re Wilson* (reported herewith) ante, 1349.

Rhode Island.—*Bowen v. Dorrance* (1879) 12 R. I. 269.

South Carolina.—*Cogdell v. Widow* (1811) 3 S. C. Eq. (3 Desauss.) 346; *Boykin v. Boykin* (1884) 21 S. C. 513; *Rogers v. Rogers* (1903) 67 S. C. 168, 100 Am. St. Rep. 721, 45 S. E. 176; *White v. White* (1906) 73 S. C. 261, 53 S. E. 871.

Tennessee.—*Tipton v. Tipton* (1860) 1 Coldw. 252; *Darden v. Hatcher* (1860) 1 Coldw. 513; *Darden v. Orgain* (1867) 5 Coldw. 211; *Martin v. Osborne* (1887) 85 Tenn. 420, 3 S. W. 647; *Ford v. Cottrell* (1919) — Tenn. —, 207 S. W. 734.

Texas.—*Lake v. Copeland* (1891) 82 Tex. 464, 17 S. W. 786.

Vermont.—*Boomhower v. Babbitt* (1895) 67 Vt. 327, 81 Atl. 838.

Virginia.—*Corbin v. Mill* (1869) 19 Gratt. 438; *Morriss v. Garland* (1883) 78 Va. 215; *Myers v. Myers* (1891) 88 Va. 131, 13 S. E. 346; *Dunford v. Jackson* (1895) — Va. —, 22 S. E. 853.

West Virginia.—*Dunn v. Renick* (1895) 40 W. Va. 349, 22 S. E. 66.

Wisconsin.—*Wheeler v. Hartshorn* (1876) 40 Wis. 83.

England.—*Gillaume v. Adderley* (1808) 15 Ves. Jr. 384, 33 Eng. Reprint, 799; *Fowler v. Willoughby* (1825) 2 Sim. & Stu. 354, 57 Eng. Reprint, 381, 4 L. J. Ch. 72, 25 Revised Rep. 219; *Gardner v. Hatton* (1833) 6 Sim. 97, 58 Eng. Reprint, 531; *Livesay v. Redfern* (1836) 2 Younge & C. Exch. 90, 160 Eng. Reprint, 824; *Rogers v. Clarke* (1888) C. P. Cooper, 376; *Davies v. Morgan* (1839) 1 Beav. 405, 48 Eng. Reprint, 997, 3 Jur. 284; *Colwile v. Middleton* (1840) 3 Beav. 570, 49 Eng. Reprint, 224; *Hosking v. Nicholls* (1842) 1 Younge & C. Ch. Cas. 478, 62 Eng. Reprint, 979; *Creed v. Creed* (1844) 11 Clark & F. 491, 8 Eng. Reprint, 1187; *Dickin v. Edwards* (1844) 4 Hare, 278, 67 Eng. Reprint,

651; *Townsend v. Martin* (1849) 7 Hare, 471, 68 Eng. Reprint, 194; *Sparrow v. Josselyn* (1852) 16 Beav. 135, 51 Eng. Reprint, 729; *Bessant v. Noble* (1855) 2 Jur. N. S. 461; *Coard v. Holderness* (1856) 22 Beav. 391, 52 Eng. Reprint, 1158; *Williams v. Hughes* (1858) 24 Beav. 474, 53 Eng. Reprint, 441, 27 L. J. Ch. N. S. 218, 4 Jur. N. S. 42, 6 Week. Rep. 94; *Vickers v. Pound* (1858) 6 H. L. Cas. 385, 10 Eng. Reprint, 543, 28 L. J. Ch. N. S. 16, 6 Week. Rep. 586, 4 Jur. N. S. 543; *Mullins v. Smith* (1860) 1 Drew. & S. 204, 62 Eng. Reprint, 356, 8 Week. Rep. 739; *Re Ward* (1860) 6 Jur. N. S. 1046, 8 Week. Rep. 631, affirmed in (1861) 8 De G. F. & J. 662, 45 Eng. Reprint, 1035, 7 Jur. N. S. 746, 9 Week. Rep. 643; *Jones v. Southall* (1862) 32 Beav. 31, 55 Eng. Reprint, 12, 1 New Reports, 152, 32 L. J. Ch. N. S. 180, 9 Jur. N. S. 98, 8 L. T. N. S. 108, 11 Week. Rep. 247; *Paget v. Hurst* (1863) 9 Jur. N. S. 906, 32 L. J. Ch. N. S. 463, 2 New Reports, 104, 8 L. T. N. S. 445, 11 Week. Rep. 636; *Bevan v. Atty. Gen.* (1863) 4 Giff. 861, 66 Eng. Reprint, 746, 9 Jur. N. S. 1099, 9 L. T. N. S. 221; *Disney v. Crosse* (1866) L. R. 2 Eq. 592; *Hodges v. Grant* (1867) L. R. 4 Eq. 140, 36 L. J. Ch. N. S. 935, 15 Week. Rep. 607; *Davies v. Fowler* (1873) L. R. 16 Eq. 308, 43 L. J. Ch. N. S. 90, 29 L. T. N. S. 285; *Mytton v. Mytton* (1874) L. R. 19 Eq. 80, 44 L. J. Ch. N. S. 18, 31 L. T. N. S. 828, 23 Week. Rep. 477; *Re Pratt* [1894] 1 Ch. 491, 63 L. J. Ch. N. S. 484, 8 Reports, 601, 70 L. T. N. S. 489; *Oliver v. Oliver* (1871) L. R. 11 Eq. 506, 40 L. J. Ch. N. S. 189, 24 L. T. N. S. 350, 19 Week. Rep. 432; *Ashburner v. Macguire* (1786) 2 Bro. Ch. 108, 29 Eng. Reprint, 62, 2 Eng. Rul. Cas. 18; *Re Sayer* (1884) 53 L. J. Ch. N. S. 882, 50 L. T. N. S. 616; *Ricketts v. Harling* (1871) 23 L. T. N. S. 760; *Walford v. Walford* [1912] A. C. 658, 81 L. J. Ch. N. S. 828, 107 L. T. N. S. 657, 56 Sol. Jo. 631.

Canada.—*Day v. Harris* (1882) 1 Ont. Rep. 147.

"The courts are disinclined to recognize specific legacies because of their liability to sink with the destruction of the thing bequeathed or the fund

charged. But as it was obviously impossible to esteem as purely pecuniary many of the testamentary gifts which judges inclined to withdraw from the class of specific legacies, they were driven to borrow from the civilians a term thought to be descriptive of a species of donation holding a middle place between specific and pecuniary, the only kinds distinctly recognized when Swinburne wrote. They are called demonstrative, and, like general legacies, are gifts of mere quantity, but differ from these by being referred to a particular fund for payment. They are so far general that if the particular fund be called in or fail the legatees will be permitted to receive their legacies out of the general assets; yet so far specific as not to be subject to abatement, with general legacies, on a deficiency of assets. They are thus specific in one sense, and pecuniary in another; specific, as given out of a particular fund, and not out of the estate at large; pecuniary, as consisting only of definite sums of money, and not amounting to a gift of the fund itself, or any aliquot part of it, the mention of the fund being considered rather by way of demonstration than of condition—rather as showing how or by what means the legacy may be paid than whether it shall be paid at all. . . . The distinction seems to be this: If a legacy be given with reference to a particular fund, only as pointing out a convenient mode of payment, it is considered demonstrative, and the legatee will not be disappointed though the fund totally fail. But where the gift is of the fund itself, in whole or in part, or so charged upon the object made subject to it as to show an intent to burden that object alone with the payment, it is deemed specific, and consequently liable to be adeemed by the alienation or destruction of the object." *Walls v. Stewart* (1851) 16 Pa. 275.

A demonstrative legacy was defined in *Spinney v. Eaton* (1913) 111 Me. 1, 46 L.R.A. (N.S.) 585, 87 Atl. 378, as follows: "A demonstrative legacy is a bequest of a certain sum of money, stock, or the like, payable out of a par-

ticular fund or security, and partakes of the nature of a general legacy by bequeathing a specified amount, and also of the nature of a specific legacy by pointing out the fund from which the payment is to be made; but differs from a specific legacy in this particular: that if the fund pointed out for the payment of the legacy fails, resort may be had to the general assets of the estate."

"A demonstrative legacy is a bequest of a thing or money not specified or distinguished from all others of the same kind, but payable out of a designated fund." *Kramer v. Kramer* (1912) 119 C. C. A. 482, 201 Fed. 248.

"Whenever it can be inferred from the language of the will that the testator's intention was to give the legatee a specified sum, not necessarily out of a particular fund, although incidentally and primarily so, but irrespective of it, the gift will be construed as a demonstrative, instead of a specific, legacy." *Georgia Infirmary v. Jones* (1889) 37 Fed. 750.

"A demonstrative legacy exists wherever the primary object is the gift of the legacy, and the fund out of which it is payable is merely a secondary consideration." *Cascaden's Estate* (1871) 8 Phila. (Pa.) 582.

It was said in *Watrous v. Smith* (1876) 7 Hun (N. Y.) 544: "The cases in which the courts have held a legacy to be demonstrative have been those where the testator has bequeathed a certain sum of money or annuity in such a manner as to show a clear, separate, and independent intention that the money shall be paid to the legatee at all events."

b. Specific legacy distinguished.

In *Myers v. Myers* (1858) 33 Ala. 85, specific legacies are distinguished from demonstrative as follows: "Where the bequest is a part of a particular thing or money, it is specified and distinguished from all others of the same kind—it is individualized, and susceptible of distinct identification, and is, therefore, a specific legacy. On the other hand, if the legacy is of a given quantity, and the intention was merely to point out the

particular fund or property, by way of demonstrating whence the payment is to be derived, it is demonstrative."

In *Crawford v. McCarthy* (1897) 21 App. Div. 484, 47 N. Y. Supp. 436, reversed in (1899) 159 N. Y. 514, 54 N. E. 277, the following illustrations were offered as explanatory of the three classes of legacies: "The bequest to an individual of the sum of \$1,500 is a general legacy. A bequest to an individual of the proceeds of a bond and mortgage, particularly describing it, is a specific legacy. A bequest of the sum of \$1,500, payable out of the proceeds of a specified bond and mortgage, is a demonstrative legacy. A demonstrative legacy partakes of the nature of a general legacy by bequeathing a specified amount, and also of the nature of a specific legacy by pointing out the fund from which the payment is to be made, but differs from a specific legacy in the particular that, if the fund pointed out for the payment of the legacy fails, resort may be had to the general assets of the estate."

The following distinction was made in *Wallace v. Wallace* (1851) 23 N. H. 149: "A legacy is specific when it is the intention of the testator that the legatee should have the very thing bequeathed, and not merely a corresponding amount in value. . . . But if a legacy be given generally, with a demonstration of a particular fund as the source or means of payment, it will be a demonstrative legacy."

The court in *Douglas v. Douglas* (1896) 13 App. D. C. 21, distinguished specific and demonstrative legacies as follows: "A specific legacy is the bequest of a particular thing, or a specified part of a testator's property, distinguished from all others of the same kind. 1 Roper, Legacies, 191; 13 Am. & Eng. Enc. Law, 10. If the language of the will indicates not the gift of the specified article, or part of the estate, to the extent of value stated, but its designation only, as a certain interest or fund from which the bequest of money, or amount of value, shall be primarily paid or satisfied, it becomes a demonstrative legacy."

"The points of difference between

specific and demonstrative legacies are these: A specific legacy is not liable to abatement for the payment of debts, but a demonstrative legacy is liable to abate when it becomes a general legacy by reason of the failure of the fund out of which it is payable. A specific legacy is liable to ademption, but a demonstrative legacy is not. A specific legacy, if of stock, carries with it the dividends which accrue from the death of the testator; while a demonstrative legacy does not carry interest from the testator's death." *Mullins v. Smith* (1860) 1 Drew. & S. 204, 62 Eng. Reprint, 356.

"A demonstrative legacy differs from a specific in that there is recourse for its payment from the general estate in the event of ademption." *Thompson v. Stephens* (1912) 138 Ga. 205, 75 S. E. 136.

A specific legacy is one which is to be paid only out of a particular source, or fund designated by the will, so that if the fund out of which it is payable is extinguished, or such a change in it is made as makes it another thing, the bequest fails for reasons paramount to considerations of intention.

"In determining whether the legacy is specific or demonstrative, the question always is whether it is a gift out of a specified fund or security, or a gift of a special sum, with a specified fund as security. If it falls within the former class, the legacy fails when the fund or security ceases to exist in the testator's lifetime." *Georgia Infirmary v. Young* (1889) 37 Fed. 750, appeal dismissed in (1893) 149 U. S. 774, 37 L. ed. 966, 13 Sup. Ct. Rep. 1047.

Demonstrative legacies were compared with specific legacies in *Dugan v. Hollins* (1857) 11 Md. 41, as follows: "They are what are called demonstrative legacies, not strictly specific, but in the nature of specific legacies; that is to say, to the extent of the value of the fund or property on which they are chargeable (when that does not exceed the amount of the legacy), they are to be treated, in some respects, as specific; liable to abate with specific legacies in the payment of debts, and entitled to con-

tribution from them, if the fund demonstrated has been so applied, to the exemption of specific legacies."

c. General legacy distinguished.

"A demonstrative legacy differs from a general legacy in that it does not, in the first instance, abate upon insufficiency of assets." *Thompson v. Stephens* (1912) 138 Ga. 205, 75 S. E. 186.

The courts often classify legacies as general merely, without designating them demonstrative, when the facts obviously warrant such a distinction, and this is usually the case when it is important only to determine whether a legacy be specific or pecuniary. And the same legacy is often referred to in both terms indiscriminately. The following from *Johnson v. Conover* (1896) 54 N. J. Eq. 333, 35 Atl. 291, is illustrative: "The first question propounded is whether the bequest to testator's wife of 'the sum of \$8,000, invested in stocks, the interest thereof to be paid to her during life,' is a specific or a demonstrative legacy. The second question is whether, if it be a general legacy, it is chargeable upon the real estate of the testator."

A demonstrative legacy was referred to as a kind of general legacy, by the Georgia court, in a case wherein it was said: "A pecuniary legacy, with the addition of a demonstrative statement or direction as to the fund from which it is to be paid, will ordinarily be construed to be a general, rather than a specific, legacy; the legacy being considered to be of the sum named, and the demonstrative clause as pointing out the primary source of payment, but not the exclusive means, if such fund should not be sufficient." *Hart v. Brown* (1916) 145 Ga. 140, 88 S. E. 670.

It was said in *Kramer v. Kramer* (1900) 119 C. C. A. 482, 201 Fed. 248: "In some of the cases, general and demonstrative legacies are referred to, without noticing a distinction between them. In such cases, as in the instant case, the important question being whether or not a legacy considered is a specific legacy, the usually recognized difference between general and

demonstrative legacies is of no great importance."

III. Rules of construction.

a. Intent of testator.

The general rules with reference to the interpretation of wills are fully applicable in determining whether a legacy, in any particular instance, is to be treated as demonstrative, general, or specific. Especially operative is the rule that effect will be given to the intent of the testator as evinced by the words of the will, and, in cases where such evidence is admissible, by surrounding circumstances. There are suggestions in some of the early cases that the intention of the testator is immaterial, and that the use of certain words alone, or sometimes coupled with a particular circumstance, ipso facto identifies a legacy as belonging to one or another class. Thus, in the case of *Oliver v. Oliver* (1871) L. R. 11 Eq. (Eng.) 506, Sir R. Malins, V. C., decided that a certain legacy was specific, although he conceded that this was manifestly at variance with the intent of the testator as gathered from the will. He said: "But, at the same time, I repeat that that is manifestly against the intention of the testator. I accede to the argument, that a subsequent codicil confirming a will will not set up adeemed legacies; yet the circumstance of the testator making a codicil three years afterwards, that is, three years after the death of his sister, in which, by not altering his will, he confirms every part of it, shows what his intention was. He was not aware of this doctrine of ademption. He clearly wished that his son should have the £2,000, and it is only the doctrine of this court that says he shall not. Therefore, although I am obliged to allow the demurrer, I do so with regret, because I feel I am deciding in direct contravention of what I believe to be the testator's intention."

This error is apparently based on a misconception of the rules of construction applicable to wills. As a matter of fact, a legacy is classified for convenience in treatment as general, specific, or demonstrative, be-

cause it appears to possess certain characteristics and incidents, and these incidents attach because they are construed to have been intended by the testator in the first instance. Thus it is said that a gift of a specified sum of money with reference to a certain fund is either specific or demonstrative. It is specific, if the fund is designated as the exclusive source out of which the legacy is to be paid; it is demonstrative, if the fund is merely the primary but not the exclusive source for the satisfaction of the legacy. Now it is clear that whether this fund should be considered as the exclusive source or not must, by the ordinary rules of construction, depend on the intent of the testator in designating the fund, and it is said that a legacy is classified according to the incidents it is designated to possess by the testator, and not that it possesses these incidents because of its classification. This process of reasoning is found in the general modern authorities, and is supported by the following cases, which hold that the intent of the testator is of primary importance in determining the nature of a legacy:

United States.—*Ives v. Canby* (1891) 48 Fed. 718; *Kenaday v. Sinnott* (1900) 179 U. S. 606, 45 L. ed. 339, 21 Sup. Ct. Rep. 233; *Kramer v. Kramer* (1912) 119 C. C. A. 482, 201 Fed. 248.

Alabama.—*Harper v. Bibb* (1872) 47 Ala. 547.

California.—*Re Zeile* (1887) 74 Cal. 130, 15 Pac. 455.

Colorado.—*Nusly v. Curtis* (1906) 36 Colo. 464, 7 L.R.A. (N.S.) 592, 118 Am. St. Rep. 113, 85 Pac. 846, 10 Ann. Cas. 1184; *School Dist. v. International Trust Co.* (1915) 59 Colo. 436, 149 Pac. 620; *Collar v. Gaarn* (1918) — Colo. —, 171 Pac. 63.

District of Columbia.—*Douglass v. Douglass* (1898) 13 App. D. C. 21.

Georgia.—*Hart v. Brown* (1916) 145 Ga. 140, 88 S. E. 670.

Iowa.—*Newcomb v. Fitch* (1896) 98 Iowa, 175, 67 N. W. 587.

Maine.—*Re Stilphen* (1905) 100 Me. 146, 60 Atl. 888, 4 Ann. Cas. 158, and

note; *Spinney v. Eaton* (1913) 111 Me. 1, 46 L.R.A. (N.S.) 535, 87 Atl. 378.

Maryland.—*Kunkel v. Macgill* (1880) 56 Md. 120; *Dryden v. Owings* (1878) 49 Md. 356; *Gelbach v. Shively* (1887) 67 Md. 498, 10 Atl. 247; *Gardner v. McNeal* (1917) 117 Md. 27, 40 L.R.A. (N.S.) 553, 82 Atl. 988, Ann. Cas. 1914A, 119.

Massachusetts.—*White v. Winchester* (1827) 6 Pick. 48.

Minnesota.—*Merriam v. Merriam* (1900) 80 Minn. 254, 83 N. W. 162.

New Jersey.—*Johnson v. Conover* (1896) 54 N. J. Eq. 333, 35 Atl. 291.

New York.—*Enders v. Enders* (1848) 2 Barb. 362; *Humphrey v. Robinson* (1889) 52 Hun, 200, 5 N. Y. Supp. 164; *Re Bouk* (1913) 80 Misc. 196, 141 N. Y. Supp. 922.

Ohio.—*Gilbreath v. Alban* (1840) 10 Ohio, 64.

Pennsylvania.—*Walls v. Stewart* (1851) 16 Pa. 275; *Pruner's Estate* (1908) 222 Pa. 179, 40 L.R.A. (N.S.) 561, 70 Atl. 1000; *Stoevers's Estate* (1911) 45 Pa. Super. Ct. 451; *RE WILSON* (reported herewith) ante, 1349.

South Carolina.—*Cogdell v. Widow* (1811) 3 S. C. Eq. (3 Desauss.) 346.

Texas.—*Lake v. Copeland* (1891) 82 Tex. 464, 17 S. W. 786.

Virginia.—*Corbin v. Mills* (1869) 19 Gratt. 438.

England.—*Ashburner v. Macguire* (1786) 2 Bro. Ch. 108, 29 Eng. Reprint, 62, 2 Eng. Rul. Cas. 18; *Sparrow v. Josselyn* (1852) 16 Beav. 135, 51 Eng. Reprint, 729; *Vickers v. Pound* (1858) 6 H. L. Cas. 885, 10 Eng. Reprint, 1543, 6 Week. Rep. 580, 4 Jur. N. S. 543, 28 L. J. Ch. N. S. 16; *Mytton v. Mytton* (1874) L. R. 19 Eq. 30, 44 L. J. Ch. N. S. 18, 23 Week. Rep. 447, 31 L. T. N. S. 328; *Re Pratt* [1894] 1 Ch. 491, 68 L. J. Ch. N. S. 434, 8 Reports, 601, 70 L. T. N. S. 489; *Compare Rogers v. Clarke* (1838) Cooper, Pr. Cas. 376, 47 Eng. Reprint, 1786.

Canada.—*Day v. Harris* (1882) 1 Ont. Rep. 147.

It was said by Chancellor Kent in *Walton v. Walton* (1823) 7 Johns. Ch. (N. Y.) 258, 11 Am. Dec. 456: "Lord Thurlow said, in *Stanley v. Potter* (1789) 2 Cox. Ch. Cas. 180, 30 Eng. Reprint, 83, 2 Revised Rep. 26, that

the question in these cases did not turn on the intention of the testator, and that the idea of proceeding on the animus adimendi had introduced confusion. Where the testator gives a specific chattel in specie, the ademption follows, of course, on a sale, or change, or destruction of the chattel, and the ademption becomes a rule of law, and not a question of intention. But I apprehend the words of Lord Thurlow are to be taken with considerable qualification; and that it is essentially a question of intention, when we are inquiring into the character of the legacy, upon the distinction taken in the civil law, between a demonstrative legacy, where the testator gives a general legacy, but points out the fund to satisfy it, and where he bequeaths a specific debt. In *Coleman v. Coleman* (1795) 2 Ves. Jr. 639, 30 Eng. Reprint, 818, Lord Loughborough puts the question of general or specific legacy entirely on intention."

"With substantial agreement in the matter of definitions, the multitude of decisions construing bequests to be specific, on the one hand, and general and demonstrative, on the other, show great difficulty, in their application to the facts of particular cases. In this, as in every question on the construction of wills, the intention of the testator is the object to be ascertained; and this is to be gathered, not from the words of the particular clause alone, but from all the others going to constitute the whole will and to disclose the complete purpose of the testator. For these reasons, necessarily, the decision of one case rarely furnishes a rule for the direct control of another." *Douglass v. Douglass* (1898) 18 App. D. C. 21.

b. Specific legacy disfavored.

"The courts have inclined against construing legacies as specific, in order to guard the legatee against the risk of ademption, and that the legacy may be liable to contribution and abatement, if the assets are insufficient to pay the debts and also to satisfy the general pecuniary lega-

cies." *Ives v. Canby* (1891) 48 Fed. 718.

"Because of the hardship of the doctrine that a specific legacy is lost if the subject of it is disposed of by the testator, or is extinguished in his lifetime, notwithstanding the will may denote unmistakably that the testator intended to treat the legatee as an object of his bounty, the courts incline to consider legacies as demonstrative, rather than specific, where the language of the will is reasonably capable of that construction. Accordingly, if the bequest, instead of being for a specified sum 'due upon' a security or obligation, is for the sum 'out of the proceeds,' or 'contained in' a security or obligation, it will be treated as a demonstrative legacy." *Georgia Infirmary v. Jones* (1889) 37 Fed. 750.

In each of the following cases the general attitude of disfavor toward specific legacies was recognized by the court:

United States.—*Ives v. Canby* (1891) 48 Fed. 718; *Kenaday v. Smith* (1900) 179 U. S. 606, 45 L. ed. 339, 21 Sup. Ct. Rep. 233.

Colorado.—*Nusly v. Curtis* (1906) 36 Colo. 464, 7 L.R.A.(N.S.) 592, 118 Am. St. Rep. 118, 85 Pac. 846, 10 Ann. Cas. 1134; *Collar v. Gaarn* (1918) — Colo. —, 171 Pac. 63.

District of Columbia.—*Douglass v. Douglass* (1898) 18 App. D. C. 21.

Georgia.—*Hart v. Brown* (1916) 145 Ga. 140, 88 S. E. 670.

Maine.—*Spinney v. Eaton* (1913) 111 Me. 1, 46 L.R.A.(N.S.) 535, 87 Atl. 378.

Maryland. — *Dryden v. Owings* (1878) 49 Md. 356; *Kunkel v. Macgill* (1880) 56 Md. 120; *Gardner v. McNeal* (1911) 117 Md. 27, 40 L.R.A.(N.S.) 558, 82 Atl. 988, Ann. Cas. 1914A, 119.

New Hampshire.—*Wallace v. Wallace* (1851) 23 N. H. 149.

New Jersey.—*Johnson v. Conover* (1896) 54 N. J. Eq. 833, 35 Atl. 291, affirmed without opinion in (1897) 55 N. J. Eq. 592, 39 Atl. 1114.

New York.—*Enders v. Enders* (1848) 2 Barb. 362; *Tift v. Porter* (1853) 8 N. Y. 516; *Giddings v. Seward* (1857) 16 N. Y. 365; *Re Bouk* (1913) 80 Misc.

196, 141 N. Y. Supp. 922; Ingraham's Petition (1918) 104 Misc. 644, 172 N. Y. Supp. 234.

Ohio.—*Gilbreath v. Alban* (1840) 10 Ohio, 64.

Pennsylvania.—*Balleit's Appeal* (1850) 14 Pa. 451; *Walls v. Stewart* (1851) 16 Pa. 275; *Eckfeldt's Estate* (1879) 7 W. N. C. 19; *Smith's Appeal* (1883) 103 Pa. 559; *Hammer's Estate* (1893) 153 Pa. 632, 28 Atl. 281; *Pruner's Estate* (1908) 222 Pa. 179, 40 L.R.A.(N.S.) 561, 70 Atl. 1000; *Stoevers Estate* (1911) 45 Pa. Super. Ct. 451.

South Carolina.—*Cogdell v. Widow* (1811) 3 S. C. Eq. (3 Desauss.) 346; *White v. White* (1900) 73 S. C. 261, 53 S. E. 371.

Virginia.—*Morriss v. Garland* (1883) 78 Va. 215.

England.—*Gillaume v. Adderley* (1808) 15 Ves. Jr. 384, 33 Eng. Reprint, 799; *Rogers v. Clarke* (1838) *Cooper, Pr. Cas.* 376, 47 Eng. Reprint, 1786.

"It may also be admitted that the leaning of the English decisions, followed generally in this country, has been towards a construction that would declare a legacy general, rather than specific. The earlier cases, especially, indicate the rule to be to hold every legacy to be general, unless an intent to the contrary be either expressly shown in the words of the particular bequest, or made clearly to appear from the whole of the will.

... To this leaning or tendency there need be no objection, so long as it is not allowed to contravene the reasonable implication of the intention of the testator to make the bequest specific. Where the intention fairly appears, it must be respected and given effect." *Douglass v. Douglass* (1898) 13 App. D. C. 21.

It was said by Barker, P. J., in *Humphrey v. Robinson* (1889) 52 Hun, 200, 5 N. Y. Supp. 164: "In all the cases bearing on the question whether the legacy is specific or general, as the rule is stated with uniformity that to make a legacy specific it is necessary that it should appear that it was the clear purpose of the testator to make it such, otherwise the legacy will

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be held to be pecuniary or demonstrative."

The following observation was made in *Smith v. Lampton* (1889) 8 Dana (Ky.) 69: "In doubtful cases, it is the policy of the law to incline against construing legacies as altogether specific. And therefore, nothing appearing to the contrary, a bequest of a certain sum of money 'out of,' or to be paid 'out of,' a designated fund or note or bond, or a bequest of stock 'out of' a greater amount of the like stock, has been generally considered as a demonstrative legacy, pledging a particular fund as a collateral security, and being as to that security merely directory, but not depending for its validity or value on the sufficiency or existence of the fund thus specially dedicated for securing it."

The inclination against construing a legacy as specific is especially noted in those cases where the legatee is a natural object of the testator's bounty.

"There is often great difficulty in determining, in regard to bequests of stocks or other securities having a definite and fixed pecuniary value, whether the testator intended to give the specific security mentioned in the will, or a sum equivalent to the nominal amount of such security. Inasmuch, however, as the legacy, if specific, is lost in case the subject of it is disposed of by the testator, or is extinguished by payment or otherwise in his lifetime, courts, proceeding upon the presumption that the testator intended a real benefit to the legatee, incline to consider legacies as general rather than specific, where the language of the bequest will admit of that construction. This reason has a peculiar force in a case like the present where the legatee named appears to be the primary object of the testatrix's bounty." *Giddings v. Seward* (1857) 16 N. Y. 365.

"Little assistance in arriving at testamentary intention in this respect is to be obtained from an examination of the cases in detail. Such an examination would show that in determining whether, by the use of this formula, the testator means to give the sum of money, or to give the specific stock or

share or bond in which it is invested, every expression in the will is scanned to arrive at the intention of the testator. When there cannot be found any particular language which can be pressed into use for this purpose, then the courts seem to go upon the ground that the testator is presumed to have intended to make a sensible and equitable disposition of his property; and if the bequest is to a person so related to the testator that the ademption of the gift could not have been anticipated by the testator, then the bequest will be held to be general, to save it from ademption." *Johnson v. Conover* (1896) 54 N. J. Eq. 333, 35 Atl. 291.

In each of the following cases the fact that the legatee was the natural object of the testator's bounty was considered by the court in determining the testator's intentions:

United States.—*Kenaday v. Sinnott* (1900) 179 U. S. 606, 45 L. ed. 339, 21 Sup. Ct. Rep. 233; *Kramer v. Kramer* (1912) 119 C. C. A. 482, 201 Fed. 248, modifying decree in (1912) 197 Fed. 618.

Colorado.—*School Dist. v. International Trust Co.* (1915) 59 Colo. 486, 149 Pac. 620.

Maine.—*Moore v. Alden* (1888) 80 Me. 301, 6 Am. St. Rep. 203, 14 Atl. 199.

Maryland.—*Dugan v. Hollins* (1857) 11 Md. 41.

Michigan.—*Byrne v. Hume* (1891) 86 Mich. 546, 49 N. W. 576; *Hibler v. Hibler* (1895) 104 Mich. 274, 62 N. W. 361.

Minnesota.—*Merriam v. Merriam* (1900) 80 Minn. 254, 83 N. W. 162.

New Jersey.—*Johnson v. Conover* (1896) 54 N. J. Eq. 333, 35 Atl. 291, affirmed without opinion in (1897) 55 N. J. Eq. 592, 39 Atl. 1114.

New York.—*Pierrepont v. Edwards* (1862) 25 N. Y. 128; *Newton v. Stanley* (1868) 28 N. Y. 61.

North Dakota.—*Adair v. Adair* (1902) 11 N. D. 175, 90 N. W. 804.

Ohio.—*Morris v. Harris* (1869) 19 Ohio St. 15.

Pennsylvania.—*Balliet's Appeal* (1850) 14 Pa. 451; *Welch's Appeal*

(1857) 23 Pa. 368; *Knecht's Appeal* (1872) 71 Pa. 333.

South Carolina.—*Cogdell v. Widow* (1811) 3 S. C. Eq. (3 Desauss.) 346.

South Dakota.—*Re Hawgood* (1916) 37 S. D. 565, 159 N. W. 117.

Texas.—*Lake v. Copeland* (1891) 82 Tex. 464, 17 S. W. 786.

Vermont.—*Boomhower v. Babbitt* (1895) 67 Vt. 327, 31 Atl. 838.

Virginia.—*Morris v. Garland* (1883) 78 Va. 215.

England.—*Gillaume v. Adderley* (1808) 15 Ves. Jr. 384, 33 Eng. Reprint, 799; *Sparrow v. Josselyn* (1852) 16 Beav. 135, 51 Eng. Reprint, 729; *Bessant v. Noble* (1855) 2 Jur. N. S. 461; *Disney v. Crosse* (1866) L. R. 2 Eq. 592.

Canada.—*Day v. Harris*, (1882) 1 Ont. Rep. 147.

IV. Illustrations.

a. In general.

In *Lake v. Copeland* (1891) 82 Tex. 464, 17 S. W. 786, it appeared that the testator clearly expressed the intention in his will that all of his property should be divided equally between his wife and daughter. He then designated certain items, real and personal, affixing a value to each, so that the property given to the one approximated in value that given to the other, and bequeathed such property to wife and daughter respectively. In construing the will the court decided that it was not the intention of the testator to give the specific property described, but its equivalent, in value, only indicating the items as a convenient mode of equal division, and hence that the bequests were demonstrative.

In *Cogdell v. Widow* (1811) 3 S. C. Eq. (3 Desauss.) 346, it appeared that a testator, after making certain specific bequests to his wife, bequeathed to her \$300 "to be paid her in proportion as received of the sale of his estate." This was followed by gifts of specified sums of money, "to be paid as above." The court held that these were demonstrative legacies.

In *Coard v. Halderness* (1856) 22 Beav. 391, 52 Eng. Reprint, 1158, it appeared that the testator's son was

indebted to H. in a certain sum. The testator bequeathed to H. so much as should be so owing at the testator's death. It was further provided that the amount required to pay this indebtedness should be taken out of the share to which the son would become entitled under the will. On the theory that it was the testator's intention that this share was indicated as the exclusive source for the payment of the legacy to H. it was held that the legacy was specific, and not demonstrative.

In *Cunliffe v. Cunliffe* (1875) 23 Week. Rep. (Eng.) 724, it appeared that a testatrix recited in her will that she was entitled to the sums of \$4,000 and \$6,000 under her father's will. She then bequeathed sums amounting to \$4,000, and directed them to be paid out of the \$4,000 and out of her other personal estate except the \$6,000. She then directed "the following legacies and bequests to be paid out of the said sum of \$6,000." Thereupon she bequeathed further sums amounting to \$5,800, and it was held that these legacies were demonstrative.

A bequest which directs certain sums to be paid to named legatees out of proceeds that may be realized out of a contingent claim is a specific legacy, as distinguished from a demonstrative, the latter being a bequest of a specified sum, with superadded direction to pay out of a particular fund. *Maybury v. Grady* (1880) 67 Ala. 147.

It was held in *Wallace v. Wallace* (1851) 23 N. H. 149, that a gift of "\$500 in personal property, such as she (the legatee) may select," is not a demonstrative but a specific legacy.

In *Bradford v. Brinley* (1887) 145 Mass. 81, 13 N. E. 1, it appeared that the testator had been given power under his father's will to dispose of \$125,000 in a certain manner, and also general power of disposal of an additional \$265,000. After reciting in his will the general purpose of the first fund, he directed that \$100,000 "of said property" be set aside for each of three legatees, and it was held that such a bequest was demonstrative, since the testator must have con-

templated that the deficit would have to be made up from the later named fund, knowing that the first was quite insufficient to satisfy the legacies.

A bequest "to my son Jacob, the sum of \$1,500, . . . to be paid to him first out of my personal property on hand after the death of my said wife, and before any division shall be made of said personal property," has been held to be a demonstrative legacy. *Hibler v. Hibler* (1895) 104 Mich. 274, 62 N. W. 361.

In *Hailey v. McLaurin* (1917) 112 Miss. 705, 78 So. 727, wherein it appeared that a testator, by his will, directed that his trustee create a fund of \$25,000 out of the proceeds of the testator's personal property and his real estate situated outside of the state of Mississippi, and that he deliver such fund to a charitable hospital, it was held that such a disposition constituted a demonstrative legacy.

In *Re Brundage* (1917) 101 Misc. 528, 167 N. Y. Supp. 694, affirmed on other grounds in (1919) 186 App. Div. 722, 175 N. Y. Supp. 37, it appeared that a testator gave to his niece the income of \$20,000 during her life, and directed that on her death \$5,000 of this sum should go to a certain charitable institution, and \$15,000 to the residuum of his estate. In a preceding clause of the will a direct gift of \$5,000 was made to the said institution "on the death of M. T. (the niece), as hereinafter mentioned." It was held that the \$5,000 gift was a demonstrative legacy, "being a bequest for a certain sum of money, stock, or the like, payable out of a particular fund or security."

The will under consideration in the case of *Re Union Trust Co.* (1916) 97 Misc. 581, 161 N. Y. Supp. 954, after making certain specific bequests, directed that "out of the residue . . . then remaining" a certain amount be set aside in trust for purposes later indicated. In a subsequent clause it was directed that a certain sum be set apart out of the above trust fund, for a certain named legatee, and it was held that the later clause created a demonstrative legacy.

The will construed in *Enders v. Enders* (1848) 2 Barb. (N. Y.) 362, provided as follows: "And my said wife having now in her possession the sum of \$850 in money, I direct and request my said executor to pay her the sum of \$150 more, so as to make her the sum of \$1,000; my meaning and intention is to give her the sum of \$1,000. The foregoing provision is given and made to my beloved wife in lieu of dower out of my estate." This bequest was held to create a demonstrative legacy.

In the case of *Re Warner* (1902) 39 Misc. 432, 79 N. Y. Supp. 363, it appeared that a testatrix by her will directed that a monument be erected to her husband, at an expense not exceeding \$500, this amount to be taken from the "\$4,000 advance," made by her from the sale of certain property. The balance of such money she directed to be divided equally among three named legatees. It did not appear from the evidence that the testatrix at any time ever separated and set apart this fund, nor that it existed at the time of her death in separate or well-defined form. It was said by the court, in holding such legacies to be demonstrative: "The gifts in the second, third, and fourth clauses are not specific legacies. They are each a gift of 'one third' of the balance of said '\$4,000.' Such \$4,000 is not mentioned as being on deposit in any bank or invested in any way. A fund may be referred to; but a particular fund actually existing in a particular place and in a defined form is not given. Hence the legacies are not specific. . . . Mrs. Warner did not give a certain bank deposit, or security, or securities; but, feeling that she had \$4,000 which in justice ought to go to her husband's relatives, measured her gifts to them by that amount, and, after providing for her husband's monument, divided the balance of said \$4,000 among them. Such gifts are given out of and measured by a particular fund, and are demonstrative legacies."

In *Adair v. Adair* (1902) 11 N. D. 175, 90 N. W. 804, it appeared that after making sundry dispositions by

his will, a testator provided that on the happening of a certain event \$500 of the \$1,000 already given to his wife by the will should go to his daughter. It appeared that he had not made a gift of the \$1,000 to his wife. The contingency provided for occurred, and an issue was raised as to the nature of the above bequest. The court, declaring it unnecessary to distinguish as between a general and demonstrative legacy in this case, decided that it was either general or demonstrative, and not specific.

In the reported case (*RE WILSON*, ante, 1849), it appeared that a testatrix, after making several bequests of certain sums, provided that the principal sums of bequests already made should be deducted from a fund of \$85,000 which she had received from the sale of certain real estate, and the balance remaining after such deduction was given to sundry charities. It was sought to charge the \$85,000 fund particularly with the payment of the bequests, the contention being made that they were demonstrative gifts with the fund pointed out as a primary source of payment. But it was held that the will indicated an intention on the part of the testator not to primarily burden this fund with the payment of the legacies, but that the legacies were general, merely, and not demonstrative or specific, the fund being mentioned merely as a fixed method of measuring the gifts to the charities.

The will construed in the case of *Re Hawgood* (1916) 87 S. D. 565, 159 N. W. 117, directed that the residue of testator's property, consisting of mines, mining property, and other personal property used in connection therewith, be sold, and that one third of the proceeds of such property be given to his wife, and \$1,000 to each of four nieces and nephews, and \$1,000 to his wife's sister and her daughter. It was provided that after the payment of the foregoing legacies the remaining amount should be divided between four sisters of the testator. It was held that under a statute (§ 1071, Civ. Code) the first three legacies above were demonstrative.

In *Walford v. Walford* [1912] A. C. (Eng.) 658, 81 L. J. Ch. N. S. 828, 107 L. T. N. S. 657, 56 Sol. Jo. 681, 50 Scot. L. R. 602, it was held that a bequest of £10,000, to be paid out of the estate inherited by the testator from his mother, is a demonstrative legacy.

In *Disney v. Crosse* (1866) L. R. 2 Eq. (Eng.) 592, it appeared that a testatrix had the power of appointment by will of a certain fund. She directed that the fund be paid to a person who was not an object of appointment, but charged the fund so given with the payment of legacies to her son and daughter, who were objects of the appointment. She then bequeathed the residue of her real and personal estate, subject to all the legacies given by her will. It was held that the legacies to the son and daughter were demonstrative.

In an English case, by the will under consideration, the testatrix made certain bequests of sums of money, and directed that they be paid from a reversionary estate upon the death of the tenant thereof for life. By a codicil subsequently executed, she directed that the above bequests should be paid, in common with other legacies given in her will, immediately after her death. Sir J. Romilly, M. R., said, in deciding that the legacy was demonstrative, "that if the case stood upon the will alone he should be of opinion that the legacies were specific, but the clause in the codicil altered the case materially. By codicil the testatrix put all the legacies upon the same footing, and removed one of the most important matters, namely, that the legacies were not to be paid until after the death of her sister-in-law. He thought, therefore, that upon the codicil there was an intention on the part of the testatrix that the legacies should be paid at all events, whether the fund pointed to was sufficient or not." The result was that, in his Honor's opinion, the legacies were demonstrative. *Williams v. Hughes* (1858) 24 Beav. 474, 58 Eng. Reprint, 603.

In *Sparrow v. Jesselyn* (1852) 16 Beav. 135, 51 Eng. Reprint, 729, it appeared that the testator was a partner in two banking establishments, his

capital in each being £5,000. By a codicil to his will he provided as follows: "I hereby revoke the several legacies or portions of £3,000 in and by my said will given to my sons Basil Sparrow and John B. Sparrow, and in lieu thereof I give and bequeath unto my son Basil Sparrow . . . £10,000 sterling, being my share of the capital now engaged in the banking business." And after reciting his right so to do, he nominated his son Basil Sparrow to succeed him in the business of banker at Chelmsford and Braintree, and proceeded thus: "I direct that the legacy of £10,000, my present capital therein, hereinbefore given to him, shall be paid to him, my said son Basil Sparrow, whether the same, at my decease, be engaged in one or two or more separate sums, it being my intention to give him such capital of £10,000, wherever the same may be." The court decided that it was the intention of the testator to give his son £10,000 out of the capital designated, and not the capital itself, and hence the legacy was demonstrative.

In *Jones v. Southall* (1862) 32 Beav. 31, 55 Eng. Reprint, 12, 1 New Reports, 152, 32 L. J. Ch. N. S. 130, 9 Jur. N. S. 93, 8 L. T. N. S. 103, 11 Week. Rep. 247, it appeared that the testatrix had undertaken to enter into a marriage, which, on account of the relationship between the parties, was void. The testatrix, believing that under the presumed marriage her supposed husband was entitled to certain of her personalty, made certain bequests, and, after reciting that the aforesaid personalty was in the possession of her husband, directed the bequests to be paid out of such personalty by the alleged husband, who, however, predeceased the testatrix. The court declared these legacies to be demonstrative.

In *Richardson v. Hall* (1878) 124 Mass. 228, it appeared that the testator gave an annuity to his son, being the proceeds of certain real estate. It was further provided that if such proceeds did not amount to \$4,500 yearly, such deficiency should be paid from a life annuity given to his wife. The deficiency occurred, and, the wife being dead, the question arose whether

such deficiency could be made up from the general estate, and it was held that the clause providing for the payment of the deficiency did not create a demonstrative legacy, and hence the gift failed with the extinction of the fund. The following language of the court discloses the only reason assigned for the decision: "It cannot be treated as a demonstrative legacy when it is impossible, without reference to the particular fund, to ascertain definitely the amount of the annuity or legacy given, the payment of which, upon the failure of the fund, it is contended must be charged on the general estate."

A peculiar state of facts was presented in the case of *Johnson v. Osborne* (1866) 62 N. C. (Phill. Eq.) 59, wherein it appeared that a testator directed that his estate be divided into three shares, two shares consisting of negro slaves, the third share of other property. The legatees were to select their shares by lot. At the death of the testator he owned many negroes out of which the two shares could have been made, but by the Act of Emancipation it had become impossible to make the two shares in the manner directed, and the question arose whether the loss should fall upon the legatees named to take these shares or on the estate in the hands of the executors. The court in one sentence declared the legacies to be demonstrative, and in the next sentence, specific. The language of the court was as follows: "This legacy is demonstrative, i. e., the species of property of which it is to consist is pointed out by the testator, to wit, a part of his negroes to be designated by the executors. The legacy, then, is specific, and as the subject has been destroyed by the political death of the slaves, the effect is the same as if they had all died a natural death, and in that case it is settled that the legatees must lose the legacy, and cannot look to the other parts of the estate for indemnity."

In a case where a bequest was of "twenty negroes of the average value of all the slaves I may possess," and this was followed by a bequest of "the

rest and residue of my negro slaves," the bequest was held to be specific, and not demonstrative. The court said: "One of the tests of a specific legacy is whether it would be adeemed by the failure of the thing given, or whether it would still be satisfied out of the general assets. Here, as the gift is of a part of the testator's slaves, it would clearly be a violation of the will to supply the want of the slaves by the purchase from the general assets of other slaves. It would give other and different property from that which is bequeathed by the will. Upon reason and authority we decide that the legacy was specific." *Myers v. Myers* (1858) 38 Ala. 85.

A bequest of a certain sum, with the source of payment pointed out, but coupled with expressions of desire that the legatee be provided for, has been held to indicate an intention on the part of the testator that the legacy be paid, although the fund designated fails, and hence the legacy was held to be demonstrative. *School Dist. v. International Trust Co.* (1915) 59 Colo. 486, 149 Pac. 620.

b. Bequest referring to income of business or fund.

In *Florence v. Sands* (1880) 4 Redf. (N. Y.) 206, it appeared that by her will a testatrix bequeathed to F., out of her rents or income, \$50 per month for life. This was held to be a demonstrative legacy.

In *Delaney v. Van Aulen* (1881) 84 N. Y. 16, it appeared that a testatrix by her will directed that her husband should have the rents, profits, etc., of her estate, but provided further that another beneficiary should be paid thereout certain annuities. At the date of the death of the testatrix the income was more than enough to satisfy the annuity, but after her death the income was reduced so that it was not sufficient. The annuitant then sought to subject the corpus of the estate to the payment of the annuity, and the question arose as to the nature of the legacy. It was held that this was not a demonstrative legacy, entitling the legatee to take at all events though the designated fund failed or proved insufficient to pay the

legacy, but that the annuity abated, pro tanto; that the gift to the husband was a specific gift of rents and profits, and the gift to the annuitant, being excepted from that fund, was entitled to no preference in payment. It was a gift of an exception from a specific fund, and hence was itself specific.

It has been held that where a testator directed by his will that certain annuities be paid to his wife and daughter and that, to secure their payment, a portion of the estate should remain undivided in the hands of the executors to be kept by them on good real estate security, such bequest constituted a demonstrative legacy. *Booth v. Babbitt* (1895) 67 Vt. 327, 81 Atl. 888. A distinction was made in that case between a fund set apart to produce an annuity, and a fund set apart to secure the payment of an annuity, the former being specific, the later demonstrative.

Where the testator directed his executors to select \$50,000 worth of stocks, paying at least 6 per cent, and pay the interest therefrom half yearly to his wife, the bequest was held to be a demonstrative legacy of 6 per cent yearly of \$50,000. *Morris v. Garland* (1883) 78 Va. 215.

By the will construed in *Merriam v. Merriam* (1900) 80 Minn. 254, 83 N. W. 162, a testator directed that his executors should pay to his wife \$8,000 annually, such sum to be raised from securities to be set apart by his executors, sufficient to yield such income. It was held that a selection of the securities in the first instance did not constitute the gift a specific legacy, but that the bequest was demonstrative, entitling the specified annual sum to be satisfied out of the corpus of the estate in case the securities first selected diminished in value and failed to produce an amount sufficient to satisfy the annual claim.

A gift of an annuity of \$1,000, "the same to be paid from the income of my property," has been held to be in the nature of a demonstrative legacy. *Smith v. Fellows* (1881) 131 Mass. 20.

In *Additon v. Smith* (1891) 83 Me. 551, 22 Atl. 470, a bequest of an annuity, to be paid out of the income of

the testator's estate, was held to be a demonstrative legacy, it appearing from the will that such was the intent of the testator. In reaching this conclusion, the court said: "The predominant idea of the cases seems to be that, where the testator bequeaths a sum of money, or, which is the same thing, a life annuity, in such a manner as to show a fixed and independent intention that the money shall be paid to the legatee at all events, that intention will not be permitted to be overruled merely by the direction in the will that the money is to be raised in a particular way or out of a particular fund, such direction being a secondary thought. . . . If it be manifest that there was such intent, separate and distinct from the property designated as the source of payment, the legacy will be deemed general or demonstrative, though accompanied by a direction to pay it out of a particular estate."

Where a testator directed in his will that an annuity of \$8,000 be paid his wife "out of the income of my estate," the bequest was held to be a demonstrative legacy, although it appeared that the testator believed, at the time of the making of his will, that the income from his estate would be at least \$11,000. The court said: "The leading principle of the cases is that when the testator bequeaths a sum of money, or, which is the same thing, a life annuity, in such a manner as to show a separate and independent intention that the money shall be paid to the legatee at all events, that intention will not be permitted to be overruled merely by a direction in the will that the money is to be raised in a particular way, or out of a particular fund." *Pierrepoint v. Edwards* (1862) 25 N. Y. 128.

In *Watrous v. Smith* (1876) 7 Hun (N. Y.) 544, it appeared that a testator, by his will, directed that his real and personal estate be sold, and \$8,000 of the proceeds be converted into bonds and mortgages, the interest of which he bequeathed to his wife in lieu of dower. After payment of costs and debts, his estate did not yield \$8,000, and the question arose whether

the wife was entitled to the annual interest on \$8,000, to be paid at all events, taking part of the principal of the estate to make up the deficiency, or whether she was to take only the interest on such part of \$8,000 as remained to be invested in bonds and mortgages; and it was held that the bequest was not demonstrative, entitling her to make up the deficiency from the general estate, but that it was a specific legacy, being a gift of the interest only on \$8,000, and that, upon the failure of the estate to produce so much cash to be converted into bonds, she was entitled only to the interest on such amount as was available for the purchase of the bonds.

Where a testator bequeathed to his trustees the right to take tolls on a certain turnpike road, in trust that they should pay out of the tolls \$25 per month to the testator's mother during her life, the bequest was held not to be demonstrative. *Morris v. Harris* (1869) 19 Ohio St. 15.

In *Paget v. Hurst* (1863) 9 Jur. N. S. (Eng.) 906, 32 L. J. Ch. N. S. 468, 2 New Reports, 104, 8 L. T. N. S. 445, 11 Week. Rep. 636, it appeared that after making several bequests of specific chattels, a will recited that several persons be paid annuities of various stated sums. This was followed by an instruction that the said annuities should be paid out of the rents of all the real estate devised by the will. There was a subsequent gift of all the residue of real and personal property of which the testator should die seised. The annuities were held to be demonstrative legacies.

c. Bequest referring to deposit.

"A testator may, if he sees fit, bequeath all of a particular fund in a purse or a bank, which is separate from other funds, and may employ such language as to show that he creates a specific legacy of that particular fund, rather than a legacy of a definite amount, to be paid from a specific fund." *Hart v. Brown* (1916) 145 Ga. 140, 88 S. E. 670.

In *Tennille v. Phelps* (1873) 49 Ga. 541, it was said that undoubtedly a testator may so charge a money leg-

acy on a particular fund as to make the legacy follow the fate of the fund.

It appeared in *Kenaday v. Sinnott* (1900) 179 U. S. 606, 45 L. ed. 339, 21 Sup. Ct. Rep. 233, that a testator, having expressed an intention in his will to leave all his property to his wife except what was otherwise expressly disposed of, in effectuation of that intention inserted, among other enumerations of gifts to his wife, the following clause: "Also deposits of currency entered on my bank book of the First National Metropolitan Bank, amounting to \$10,000 more or less." Before his death, the testator transferred part of the deposits to other banks, but it was held that the wife should nevertheless take other assets equal to the amount on deposit at the date of the will, since the bequest was shown by the will to be demonstrative, and not adeemed by the failure of the particular fund. It was said by the court: "If the latter item stood alone and were not read in connection with the will as a whole, it might well be that it should be held to be a specific legacy, adeemed pro tanto by the use of the money except \$810.60 in the purchase of additional bonds, or otherwise. But taken in connection with all the provisions of the will, with the manifest general intention of the testator, and with the rules against partial intestacy, and against treating legacies as specific, if that construction can be avoided, we think that it should be regarded as in its nature a demonstrative legacy, and not adeemed by the change from money into property. Assuming that the testator had at the date of the will about \$10,000 on deposit in the bank, his intention was clear that his wife should receive the amount, and we are of opinion that we ought not to defeat that intention by holding that the pecuniary legacy was specific, and that the subsequent change was an ademption, and so a rule of law rather than a question of intention. In *Towle v. Swasey* (1870) 106 Mass. 100, a legacy of 'whatever sum may be on deposit' in a certain savings bank was held to be specific, but there the provisions of the will evidenced no intention to the contrary,

and the language used essentially differed from that in this case."

Where a testator devised "to my brother J. M. my railroad stock and all moneys remaining in bank, excepting the sum of \$300, which I leave to M. F.," these words were held to create a demonstrative legacy of \$300 in favor of M. F., but the bequest to J. M. was held to be specific. *Gardner v. McNeal* (1911) 117 Md. 27, 40 L.R.A. (N.S.) 558, 82 Atl. 988, Ann. Cas. 1914A, 119.

Gifts of specified sums of money, with the proviso that the legacies should be paid only out of the moneys now deposited in certain named banks, have been held to be specific, as is a gift of "all my money" in a named bank. *Bullard v. Leach* (1912) 213 Mass. 117, 100 N. E. 57.

It appeared in the case of *Crawford v. McCarthy* (1897) 21 App. Div. 484, 47 N. Y. Supp. 436, reversed on other grounds in (1899) 159 N. Y. 514, 54 N. E. 277, that a testatrix, on the date of the execution of her will, had on deposit in a bank about \$1,800 in the name of her daughter. In her will she directed that the daughter pay her son \$1,500 out of this fund. In deciding that such a bequest was specific, and not demonstrative, the court said: "It will be observed that there is no general bequest of the sum of \$1,500, but that his right thereto rests solely in the direction to the daughter to pay him that sum, and that payment is to be made out of the particular fund designated as the fund belonging to the testatrix, but on deposit in the name of Isabella. It is contended that this direction to pay William is a demonstrative legacy. We do not so understand it. As we have seen, two elements are necessary in order to constitute such a legacy. There must be, first, a bequest in the nature of a general legacy, and, second, it must point to a fund out of which the payment is to be made, partaking of the character of a specific legacy. But one of these elements is present in this case, and that is the one directing the payment to be made out of a particular fund. We think, therefore, it is a specific legacy, and that the plain-

tiff is entitled to only that which the testatrix had on deposit in the name of her daughter."

Where a testatrix gave to her children a house and lot directing that mortgages against the house should be paid off with money in bank, the gift of money was held to constitute a demonstrative legacy to the extent required to discharge the mortgages. *Re Bedford* (1910) 67 Misc. 38, 124 N. Y. Supp. 619.

In the case of *Smith's Appeal* (1883) 103 Pa. 559, it appeared that a will provided, *inter alia*, as follows: "I give and bequeath to my son, Samuel Smith, . . . the sum of \$2,000 out of the sum of near \$4,000 now on deposit in the Farmers' Bank of Shippensburg, or in the hands of the assignees of said bank, providing the said amount and interest is collected from the assets or stockholders of said bank, . . . I give and bequeath unto my son, William Smith, . . . the sum of \$1,500 providing the said money in the Farmers & Mechanics' Bank of Shippensburg is collected from the assets or stockholders in said bank (of the sum of near \$4,000 now on deposit in said bank of my money). . . The remaining part of the money collected from the said Farmers & Mechanics' Bank of Shippensburg, out of the sum deposited in said bank and the interest on same, to be divided equally between my sons, William and Samuel Smith, or to their heirs." In deciding that the bequest constituted a specific legacy, the court said: "The giving to each a certain portion—to both the whole—is indicative of an intent to give that fund; not so much money out of the estate if the fund failed. The phrase, 'I give and bequeath to my son Samuel the sum of \$2,000 out of the sum of near \$4,000 now on deposit in the bank,' by itself, would vest a demonstrative legacy; but the testator added: 'Providing the said amount and interest is collected from the assets or stockholders of said bank.' Manifestly, the word 'providing' is used in the sense of 'provided,' and means upon condition, or with the understanding, that said \$2,000 shall be collected out of that debt.

Then, if it should not be collected out of the specified debt, it was not to be paid. Here, also, the intention seems to be to limit payment of the legacy to the fund itself."

The following bequest has been held to be demonstrative: "To S. T. I give \$1,000 in the Union Savings Bank." This bequest was preceded by certain pecuniary and specific bequests, and followed by a bequest in these words: "All I have invested in . . . or in bonds, not otherwise disposed of, I give," etc. *Bowen v. Dorrance* (1879) 12 R. I. 269.

But in *Hart v. Brown* (1916) 145 Ga. 140, 88 S. E. 670, it appeared that a testator gave "the following amounts of cash money now on deposit as follows . . . as shown by the deposit book issued to me by said bank." It was further directed that these amounts be paid in yearly instalments until the named funds should be exhausted. It was held that these bequests were specific, since it appeared from the will that the testator's intent was that the funds named should be the exclusive source for the payment of the legacies.

2. Bequest referring to debt.

The general rule regarding legacies given with reference to debts seems to be that where the debt itself, or a part of the debt, as such, is given, the legacy is specific; but if there is a gift with the debt designated merely as a primary source of payment, it is demonstrative. Some of the early cases failed to follow this principle in their decisions, but made a distinction between a gift of a debt, or out of a debt, owing to the testator, where the testator himself demands payment or calls in the debt in his lifetime, and those cases where the debt is paid voluntarily without demand or any act of participation in the transaction except a passive acceptance by the testator, holding in the first instance that the gift was adeemed, and in the latter, not. Thus, Lord Chancellor King in *Rider v. Wager* (1725) 2 P. Wms. 328, 24 Eng. Reprint, 751, said: "Where a certain sum is given out of any fund, if the testator himself in

his lifetime receives it, whereby his personal estate is increased, this must be made good to the legatee out of some other part of the personal estate; but where the thing given is specific, viz., such a debt, or the residue of the said debt, and the testator himself afterwards receives in this debt, as the devise is specific, and the thing in specie by the act of the testator does not continue to have any subsistence, this is properly and reasonably an ademption of the legacy; and that it is a material distinction where the testator himself calls in a debt which he has devised by his will, and where the debtor unprovoked, or uncalled upon, pays it in; for in the latter case it cannot be said to be the act of the testator, and therefore would be no ademption nor revocation of the will."

But this distinction has been quite discarded, and the later authorities lay down the rule that the question of the ademption of a legacy of a debt depends on whether the legacy is specific or demonstrative, and that this in turn is determined by whether the testator in the first instance has made a gift of the debt, or, on the other hand, has merely designated the debt as a primary security for the legacy, or a fund out of which it is to be first paid.

Thus, in *Ashburner v. Macguire* (1786) 2 Bro. Ch. 108, 29 Eng. Reprint, 62, the bequest in question was of the interest of a bond due to the testator, to his sister for life, and the principal of the said bond, on the decease of his sister, to her four daughters. The debtor became bankrupt, and testator received a small dividend in his lifetime. There were other dividends paid to the creditors after the testator's death. . . . Lord Thurlow said there were two questions: (1) "Whether the bond was given as a specific legacy, which depends upon this: whether the manner in which the sum is mentioned turns it to a pecuniary legacy, or, as the civilians call it, a demonstrative legacy, that is, a legacy in its nature a general legacy, but where a particular fund is pointed out to satisfy it, or whether it be what is called *legatum nominis*, or *legatum*

debiti." (2) "Whether the legacy, supposing it to be specific, is adeemed, so far as the testator has received dividends in respect of the debt (or as the bankrupt's estate may be insufficient to pay the residue)." On the first point, the Lord Chancellor was of opinion that the legacy was specific, for whenever a debt, or part of a debt, is the subject bequeathed, it is *legatum nominis*, or *legatum debiti*. If in this case the fortune of the testator had failed, so as not to satisfy all the pecuniary legacies, this legacy would not have been bound to contribute. When the testator made his will, £5,300 was due him on the bond. He meant to relinquish that bond for the benefit of those legatees, whether it turned out well or ill; the bequest must be considered, though the sum be mentioned, for, he said he could not agree to Lord Camden's distinction in *Atty. Gen. v. Parkin* (1769) 2 *Ambl.* 566, 27 *Eng. Reprint*, 365, who held that the bequest of a debt was not adeemed by the payment of part of the debt to the testator, on the ground that the sum or amount was named in the bequest. On the second point, whether the testator by receiving a dividend adeemed the whole legacy, the Lord Chancellor was clear that there was no redemption except as far as the money was received.

Lord Camden in the case of *Atty. Gen. v. Parkin* (*Eng.*) *supra*, held that there was no distinction between voluntary payment and payment on demand or suit, and that in both cases the legacy was extinguished, as far as paid in.

Lord Macclesfield in *Thomond v. Suffolk* (1718) 1 *P. Wms.* 461, 24 *Eng. Reprint*, 474, disapproved of the distinction between a debt recovered by suit, or paid in voluntarily. And Lord Thurlow adopted the opinions of Lord Camden and Lord Macclesfield.

See also *Cogdell v. Widow* (1811) 3 *S. C. Eq.* (3 *Desauss.*) 346 wherein the foregoing English cases are reviewed.

It has been held that a gift of a part of a debt owing the testatrix creates a specific legacy, where it appears that the intention of the tes-

tatrix was that the designated debt should be the only source of payment. *Re Stilphen* (1905) 100 *Me.* 146, 60 *Atl.* 888, 4 *Ann. Cas.* 158.

In *Angus v. Noble* (1900) 73 *Conn.* 56, 46 *Atl.* 278, it appeared that a testator by his will gave "to the First Presbyterian Society on Church street . . . the sum of \$500 to be kept as a separate fund. . . . This can be taken from the mortgage of Fredericks and Emma Glieman . . . and the other \$600 that is due on the mortgage to go to the children . . . or, if all parties wish, they can take the interest thereof, and keep the mortgage." This was held to create a demonstrative bequest, which could be made specific by agreement of the parties in interest.

Where a will recited that the testator's estate consisted of a claim against the United States, followed by bequests of specific sums, with the direction that the bequests be paid when the claim is collected, it was held that the bequests were demonstrative. *Matthews v. Targarona* (1906) 104 *Md.* 442, 65 *Atl.* 60, 10 *Ann. Cas.* 153.

In *Ingraham's Petition* (1918) 104 *Misc.* 644, 172 *N. Y. Supp.* 234, it appeared that a testatrix made a bequest to P.'s two daughters, "the sum of \$1,500—my husband's life insurance money which they already have." It was shown by parol evidence that the legatees did not have such money, but that \$1,969.59 was owed to testatrix from P.'s estate, which was insolvent, and the testatrix was cognizant of these circumstances. In holding that a demonstrative legacy was created, the court said: "The language of the instrument, 'which they already have,' must be disregarded, since it is clear misdescription, and is shown by parol evidence to have been known to the testatrix to be inaccurate. Of course, the claim that the legacy was payable out of specific property belonging to the testatrix inevitably confesses that the legacy was either specific or demonstrative. That it was to be paid from the chose in action against the son's estate must be conceded. It only remains to determine whether it was payable from that source alone. It

could not be a specific gift, since it was less than the whole sum indicated as the source of payment. A legacy of '\$1,500, the amount which my son owes me,' might well be specific, if \$1,500 only was due from the son; but a legacy of '\$1,500, payable out of \$1,900 which my son owes me,' is demonstrative. It does not contemplate a direct gift to the legatee, to be taken without the intervention of an executor. It intends rather a gift which must come only from the process of administration. Unless the executor finds it necessary to possess himself of the subject of a specific legacy in order to provide for debts or expenses of administration, he has nothing to do with it, and it passes directly to the legatee; but where the gift is carved out of a particular piece of property, apparently or possibly greater than the gift itself, it is ordinarily the duty of the executor to administer the property and to pay the legacies therefrom so far as it may be available. The exercise of this duty is inconsistent with a specific gift. . . . The parol evidence requires that the codicil be construed as if it were: 'I give to Janet and Ruth \$1,500, from the amount of \$1,969.50 which their father owes to me.' Under such reading, the legacy, so far as it is not paid from the demonstrated source, is payable from the general estate."

In *Newton v. Stanley* (1863) 28 N. Y. 61, it appeared that a testator bequeathed to one of his sons, A, the sum of \$250 and to another, B, \$400. A third son, C, was indebted to the testator over \$1,000, secured by mortgage. The will directed that C pay to A and B the amounts bequeathed to them, "from the moneys due and to become due" on the debt. It was held that the gifts to A and B were demonstrative legacies.

A bequest reading: "I also give . . . all the amount of moneys and interest that may be recovered of and from Dr. Kirker for the purchase of the Penrose estate . . ." is not demonstrative, but specific. *Gilbreath v. Alba* (1840) 10 Ohio, 64.

In an early Pennsylvania case the will construed read as follows: "My

stepson, John K. Hoppel of New York, is indebted to me in the sum of \$400. It is my will and I give and bequeath said sum of \$400 as follows: Fifty dollars thereof to the said John K. Hoppel, and \$50 thereof to Matilda, wife of William Hoppel, for her own use and behoof, and \$50 to John T. Hoppel, \$50 to Christiana Hoppel, \$50 to George C. Hoppel, \$50 to Jacob Hoppel, \$50 to William Hoppel, and \$50 to Albert J. Hoppel, children of William Hoppel." The debt was paid during the life of the testator, and the question arose whether the legacies above given were adeemed. It was held that the legacies were demonstrative, being payable out of a fund, and hence not adeemed by a payment of the debt. *Hoppel's Estate* (1863) 5 Phila. (Pa.) 216.

In *Rogers v. Rogers* (1903) 67 S. C. 168, 100 Am. St. Rep. 721, 45 S. E. 176, it appeared that a testator bequeathed to his three daughters the claims of every kind and description which he had against his father's estate. These claims amounted to about \$1,500. The father's estate being insolvent, it was impossible to collect the testator's claims in full, and the legatees sought to subject the general estate of the testator to the payment of the balance of the legacies, it being claimed that they were demonstrative. The court, however, declared the legacies to be specific, saying: "The legacy in question is specific, because the debts or claims given, whether considered with reference to the evidences thereof, or with reference to the money that may be received thereon, are particularly distinguished and separate from all other property of the testator. The claims are designated as those which the testator holds against the estate of his father, things easily identifiable, and, in fact, particularly described in the complaint. In the event such claims were in the hands of the executor of testator, the bequest could have been fully carried out by a transfer of the notes and accounts to the legatees, or, in the event these claims had been collected by the executor, by a delivery of the proceeds to the legatees. The legacy is not demonstra-

tive, because no definite sum of money is given with designation of a particular fund as primary source of payment. It is true a source of payment is designated,—the estate of testator's father,—but only in the sense of being the exclusive source of payment; whereas, to make a legacy demonstrative, the gift must be chargeable upon a particular fund in such a way as not to be a gift of the specific fund. Every legacy of a debt is in a sense a gift of whatever money may be realized therefrom, but in such case the gift is of the specific fund or proceeds, and is not a mere designation of the fund as primary source of payment, with right, in case of failure of such fund, to fall back upon the general assets of the testator."

In an English case, it appeared that a testatrix in her will recited, *inter alia*, as follows: "I also give . . . to my nephew . . . £2,000 (in which sum or thereabouts he now stands indebted to me), subject nevertheless to, and I hereby charge the same with, the payment of" certain annuities and sums of money mentioned in the will, and she directed the time when and manner in which these payments should be made. She further declared that this gift to the nephew should not exonerate him from his indebtedness, but that whatever he should owe at the date of her death should be taken in part or in whole as satisfaction of his legacy. She then directed that the several legacies given by her be paid within a year after her death, or as soon as her estate could be sold and converted into money. These legacies charged on the debt were held to be demonstrative. The Lord Chancellor, in so holding, said: "Upon the words of the present will I think it was the testatrix's intention that a sum of £2,000 should at all events be provided, out of which the annuities and legacies were to be paid. She does not appear to me to have intended to make these annuities and legacies contingent upon the ability of George Tennant to provide the fund, but to have expressed her will that this fund should be created as the means of satisfying

these annuities and legacies. . . . The means which he was to supply may be considered as alternative and substitutionary, in the whole or in part, of the primary fund derived from the testatrix's estate. The \$2,000 is given to George Tennant as a trustee for the annuitants and legatees. They were not to be dependent upon his means and ability if he should be unable to supply the fund out of which the trusts were to be satisfied. There does not appear to have been any intention that the general estate of the testatrix was to be relieved from the obligation of providing for the performance of these trusts." *Vickers v. Pound* (1858) 6 H. L. Cas. 885, 10 Eng. Reprint, 1543.

It has been held that a bequest which read, "I give . . . to . . . D. the sum of \$100, which said sum is owing to me by bond from her father," was a specific and not a demonstrative legacy. *Davies v. Morgan* (1839) 1 Beav. 405, 48 Eng. Reprint, 997, 3 Jur. 284.

In *Campbell v. Graham* (1831) 1 Russ. & M. 39 Eng. Reprint, 175, 453, 9 L. J. Ch. 234, it appeared that a testator made certain bequests in "Jamaica currency" and expressed his desire that these legacies should be paid out of the money due to him on bonds from one of the legatees. It did not appear whether the legatee was indebted to the testator at the date of the will in any amount, but prior to his death the legatee had executed bonds in certain amounts to secure a debt. These legacies were held to be demonstrative.

Where it appeared that a testator by his will directed that certain cotton claims against the United States be collected, and the proceeds divided between his children, it was held that the legacy was not demonstrative, but specific, and a collection of the claims by the testator during his life was held to defeat the bequest. This was not a gift to be paid at all events, but an indication of a particular fund as the exclusive source from which the legacy was to be satisfied, *Georgia Infirmary v. Jones* (1839) 37 Fed. 750, appeal dismissed upon stipulation in

(1893) 149 U. S. 774, 37 L. ed. 966, 13 Sup. Ct. Rep. 1047.

In the case of *Re Stilphen* (1905) 100 Me. 146, 60 Atl. 888, 4 Ann. Cas. 158, it appeared that a bequest was made of \$600, out of \$1,100 owed to the testatrix by her brother. Before her death this debt was paid, and it was held that the bequest was a specific legacy, and not a demonstrative legacy, which could be satisfied out of other assets of the estate.

c. Bequest referring to insurance.

In *Nusly v. Curtis* (1906) 36 Colo. 464, 7 L.R.A.(N.S.) 592, 118 Am. St. Rep. 113, 85 Pac. 846, 10 Ann. Cas. 1184, there was under consideration a bequest of "any and all sums of money which may at any time hereafter become due and payable to me or my estate by or under any insurance policy upon the life of my husband . . . which may heretofore have been insured." This gift was made to the five sisters of the deceased husband, but before the testatrix's death she collected the money on the policies indicated, and mingled it with her other assets. It was contended that this was a demonstrative legacy, and that, the fund pointed out for paying it being extinct, it should be satisfied out of other assets of the estate; but it was held that it was not demonstrative, but specific, because it is manifest that the testatrix clearly intended to give only such sums of money as her executors actually collected on the policies, the court saying that the language employed negatived any intention to give anything whatever if the moneys on the policy were received by her, or if the fund for any other reason ceased to exist, as such, at her death. This was not a gift "out of" or "from the proceeds of" any insurance policy, but was a gift of the entire fund itself, and could not, therefore, be called a demonstrative legacy. It was the same as if the policy itself had been bequeathed.

A bequest reading, "I give and bequeath to my said father and mother the sum of \$3,500, and I desire my executor to pay the same over to them out of my life insurance money, pay-

able to my executor as soon as collected," has been held to be in the nature of a demonstrative legacy, being a pecuniary legacy with the particular fund with which it is to be paid pointed out. *Byrne v. Hume* (1891) 86 Mich. 546, 49 N. W. 576.

In a Federal case, among several dispositions in a will, to testator's wife, the following was found: "Also the sum of \$10,000 to be realized out of the proceeds of such life insurance as may be of force on my life at the time of my death." It appeared from the record that at the time the will was made there were policies on the testator's life to the amount of \$15,000. One of these policies was for the sum of \$3,000, and after the making of the will the testator had the beneficiary named in the policy changed, making it payable to his wife; and after the death of the testator she collected on the policy \$2,630.49. It was claimed that the amount so collected should be credited to the \$10,000 legacy to his wife, since it was deemed to that extent; but it was held that the legacy was demonstrative, that the policy made to her after the execution of the will was an independent gift during the testator's life, and did not work as an ademption of the legacy. *Kramer v. Kramer* (1912) 119 C. C. A. 482, 201 Fed. 248, modifying (1912) 197 Fed. 618, writ of certiorari denied in (1913) 231 U. S. 753, 58 L. ed. 467, 34 Sup. Ct. Rep. 322. It was observed by the court in that case that a legacy is not designated as demonstrative, general, or specific as a matter of law, but the nature of the gift is determined by the intent of the testator as gathered from the will, and if it appears that it was intended that the legatee should take at all events, though a particular fund is indicated from which the legacy is to be paid, then such intention will be given effect, and the legacy, because of its character, classified as demonstrative, the court adding: "The authorities are innumerable which hold that a will is to be construed in accord with the intention of the testator, and that the construction of it depends not so much upon any rigid technical rules as it

does on what appears by the will itself to have been the testator's intention. This rule is recognized in Georgia by statute. Code of Georgia 1910, § 8900. This intention is ascertained by an examination, not alone of the clause in question, but of the whole will. The clause in question has been quoted, and it is a clear unqualified bequest of \$10,000, 'to be realized out of the proceeds of such life insurance as may be of force on my life at the time of my death.' The legacy is made a charge on a designated fund. The effect of this is not to imperil the legacy, if that fund should be exhausted or cease to exist. In that event, the legacy would have been paid out of the other assets of the estate; for a demonstrative legacy is not defeated by a failure of the fund out of which it is payable, but the deficiency is made up out of the personal estate not specifically bequeathed. Page, Wills, § 774; Lake v. Copeland (1891) 82 Tex. 464, 17 S. W. 786; Smith v. Fellows (1881) 131 Mass. 20. The effect, therefore, of the words used, was to give to his wife the legacy in such a way that she would receive it out of the insurance policies, if practicable, but if they failed or lapsed it would be paid her out of his general estate. The legacy not being specific, if he had disposed of all the policies, or if they had all been forfeited for failure to pay premiums, the legacy would have been payable out of the general estate. The only effect of the language creating this bequest, that took it out of the category of a general legacy, is that it is made, first, a charge on a designated fund. It is required by law that it be paid, even if the fund fails. Should we construe words intended to secure payment so as to make them imperil complete payment? The testator uses words that make a demonstrative legacy, adding security to what would otherwise be a general legacy. We cannot construe those words to be less effective than a general legacy, without defeating the testator's manifest intention."

Where a testator made bequests of specific sums to certain legatees, and added, "These legacies I desire my

executors to pay out of the proceeds of a policy of insurance which I have effected on my life," this was held to create a demonstrative legacy. Cascaden's Estate (1871) 8 Phila. (Pa.) 582.

In Pruner's Estate (1908) 222 Pa. 179, 40 L.R.A. (N.S.) 561, 70 Atl. 1000, it appeared that a testator bequeathed certain insurance policies held by him as security for a debt. The insurance matured, and the testator received the proceeds of the policies, which he invested in bonds. In holding that the bequest was specific, the court said: "The bequest of the 'life insurance policies which I hold on the life of A. C. Moyer' is clearly specific. The added words, 'she to pay the premiums on the same till they mature,' refers to payments that might become due after the policies passed by the will to the legatee. If they had been in force at the death of the testator, his niece would have received them free of any charge for premiums paid by him."

Where a will directed that the executors should collect the insurance policies on the life of the testator, and that from this amount certain sums of money should be paid to named legatees, it was held that, since there were no words in the will evincing an intention to relieve the general estate from liability in case the fund failed, the legacy was demonstrative. White v. White (1906) 73 S. C. 261, 53 S. E. 371.

In Stevens v. Fisher (1887) 144 Mass. 114, 10 N. E. 803, it appeared that a testatrix directed by her will that a fund of \$20,000 be created from the proceeds of certain insurance policies, with the addition of a sufficient amount to make that sum from her other estate. She then gave the amount of the fund, on certain conditions, to her brothers. This bequest, taken in connection with the other provisions of the will and its general context, was held to be specific, and chargeable only on the \$20,000 fund.

1. Request referring to note or mortgage.

In Collar v. Gaarn (1918) — Colo. —, 171 Pac. 63, the following clause

appeared in the will under review: "As soon as possible after my decease I wish my niece, Emily Collar, to have the note of one thousand dollars (\$1,000) loaned to the I. O. O. F., and held by Charles D. Cobb, turned over to her; or, if that cannot be done, I will that she shall receive the interest thereon until the principal is paid to her, and when the principal is paid, as her bequest is the largest I have made, I will and direct that she shall turn over one hundred dollars (\$100) toward my funeral expenses or to the expenses of administering my estate. I pray my niece, Emily Collar, to make and publish a last will and testament, wherein the remainder of the proceeds of said note, whether in money or other property, shall be bequeathed and devised to Drue, wife of my nephew, Horatio Ames Collar, in the event of my niece, Emily Collar, dying without issue living at the time of her death." The bequest so made was held to be demonstrative. The court said: "Had the language used devised the note to Miss Collar and stopped there, the bequest would have been specific, and become extinguished by the payment or other disposition of the note during the lifetime of the testatrix. *Nusly v. Curtis* (1906) 36 Colo. 464, 7 L.R.A. (N.S.) 592, 118 Am. St. Rep. 113, 85 Pac. 846, 10 Ann. Cas. 1134. But such is not the case here. In ascertaining the meaning of any portion of a will, the instrument should be considered as a whole, and effect given to all of it, if possible." *Collar v. Gaarn* (Colo.) supra.

Where a sum of money is given by will, the money to be paid "from the avails of notes and mortgages," the gift is demonstrative. *Newcomb v. Fitch* (1896) 98 Iowa, 175, 67 N. W. 587.

A bequest of \$500 "in bank notes of the Bank of the Commonwealth of Kentucky or notes of the State Bank of Kentucky, out of moneys of that description now on hand," etc., has been held to be demonstrative. *Smith v. Lampton* (1839) 8 Dana (Ky.) 69, wherein it was said: "We concur with the circuit judge in considering the bequest as not being a specific legacy

of that kind which will fail for want of the thing bequeathed, or may be adeemed by the testator's application of it to some other purpose; but as being a 'pecuniary' 'demonstrative' legacy, which, though it may have been so far specific as not to have been subject to abatement with general legacies, was, nevertheless, so far a general pecuniary legacy as not to fail, merely because the fund out of which it was to be taken had failed, or never existed."

It has been held that a gift by will of \$400 to a nephew of the testatrix, the money to be paid by assigning to him a mortgage held by the testatrix on his farm, was a gift of the mortgage itself, constituting a specific bequest. *Wheeler v. Wood* (1895) 104 Mich. 414, 62 N. W. 577.

A gift of "\$2,000, \$1,000 in cash and \$1,000 due me on a certain mortgage (describing mortgage)" is, to the extent of the part payable for the mortgage, demonstrative. *Re Marshall* (1913) 80 Misc. 1, 141 N. Y. Supp. 540, wherein the court said: "The mere devotion of a designated portion of the decedent's estate to the payment of the legacy, in part, only makes the legacy, pro tanto, demonstrative."

In the case of *Re Bouk* (1913) 80 Misc. 196, 141 N. Y. Supp. 922, it appeared that testator made a bequest of "the amount due on the bond and mortgage I hold on my mother's farm," and it was held that this was a specific and not a demonstrative legacy. The following distinction was made by the court: "A specific legacy is a bequest of a specified part of a testator's personal estate, as distinguished from all others of the same kind. A demonstrative legacy is a bequest of a certain sum of money, stock, or the like, payable out of a particular fund or security. A bequest of the proceeds of a certain bond and mortgage is specific; while the bequest of \$1,500, payable out of the proceeds of a specified bond and mortgage, is a demonstrative legacy."

In *Humphrey v. Robinson* (1889) 82 Hun, 200, 5 N. Y. Supp. 164, it appeared that the testator, among other gifts to his wife, made the following

bequests: "I give . . . to my beloved wife . . . the sum of fifty thousand dollars (\$50,000), the same to be paid to her . . . by the transfer to her of my stock in the New York Central [etc.] Company . . . as far as the same will go for that purpose, and the residue in cash . . . also a certain bond and mortgage [describing it] . . . to secure the payment of \$30,000." It was conceded that the gift of the \$50,000 was, by its terms, clearly a demonstrative legacy, and it was contended that the later gift of \$30,000 was also demonstrative, but it was held that this bequest was specific, although the following provisions appeared in the will: "And I do hereby direct my executors, in the event that there should be, for any reason, any delay in payment to her of the amount hereby bequeathed, to pay to her for her support and maintenance the sum of \$250 monthly until such legacies shall be paid to her as aforesaid."

In *Giddings v. Seward* (1857) 16 N. Y. 365, the bequest was "of the sum of \$1,200, and interest on the same, contained in bond and mortgage." There was a subsequent provision that the sum was given to the legatee for life, with a limitation over. This was held to be a demonstrative legacy. *Selden, J.*, said: "There is often great difficulty in determining, in regard to bequests of stocks or other securities having a definite and fixed value, whether the testator intended to give the specific security mentioned in the will, or a sum equivalent to the nominal amount of such security. Inasmuch, however, as the legacy, if specific, is lost in case the subject of it is disposed of by the testator, or is extinguished by payment or otherwise in his lifetime, courts, proceeding upon the presumption that the testator intended a real benefit to the legatee, incline to consider legacies as general rather than specific, where the language of the bequest will admit of that construction. This reason has a peculiar force in a case like the present, where the legatee named appears to be the primary object of the testatrix's bounty."

6 A.L.R.—87.

In *Tipton v. Tipton* (1860) 1 Coldw. (Tenn.) 252, a bequest of "the amount of the following notes, Ruth and Lillard's, \$385," etc., was held to be a specific bequest of the notes described.

In *Gardner v. Hatton* (1833) 6 Sim. 97, 58 Eng. Reprint, 530, a gift of the "interest of £7,000, secured on mortgage of an estate," etc., was held to be specific, and not a demonstrative legacy.

In *Wheeler v. Wood* (1895) 104 Mich. 414, 62 N. W. 577, it appeared that a testatrix made, *inter alia*, the following bequest: "I give and bequeath to my nephew H. W. the sum of \$400, the said \$400 to be paid by my executor assigning and transferring to the said H. W. a certain real estate mortgage," etc. It appeared that the mortgage referred to had been previously taken by the testatrix on the farm owned by H. W. In the administration of the estate, it was contended that the bequest was demonstrative, entitling the legatee to receive \$400 from the general estate, the mortgage having been discharged before the death of the testatrix. But it was held that the legacy was specific, being a gift not of money to be paid from the mortgage as a fund, but of the mortgage itself.

g. Bequest referring to stock or bond.

1. Generally.

"A bequest generally of certain bonds and stocks, without further explanation, and without more particularly referring to and marking the corpus of the identical bonds and stocks, does not amount to a specific legacy, even though, at the time of the execution of the will, the testator may in fact have been possessed of bonds and stocks of that description, to an equal amount or more. . . . At the same time, very slight changes in the form of the bequest—as, for example, the prefix of 'my'—have been regarded as sufficient to make the legacy specific." *Douglass v. Douglass* (1898) 13 App. D. C. 21.

In an early case (*Walton v. Walton* (1823) 7 Johns. Ch. (N. Y.) 258, 11 Am. Dec. 456) Chancellor Kent said: "The reasoning on this subject is that

if the legacy is meant to consist of the security it is specific, though the testator begins by giving the sum due upon it. A legacy of a debt, unless there is ground for considering it a legacy of money, and that the security is referred to as the best mode of paying it out of the assets, is as much specific as the legacy of a horse, or any moveable chattel whatever. If the specific thing is disposed of or extinguished, the legacy is gone."

It was said by the court in *Johnson v. Conover* (1896) 54 N. J. Eq. 333, 35 Atl. 291: "Of all the nice distinctions which have been drawn in arriving at testamentary intent, there are none finer than those which have been evolved by cases of gifts of money, or of a sum of money, coupled with the words, 'invested in securities,' or 'in stocks,' or 'in shares,' or 'in bonds.' Slight indications in other parts of the will are relied upon to discover whether, by the use of such language, the testator meant to give the stocks, or securities, or bonds, or shares in specie, or whether he merely meant to give a sum of money which happened to be invested in such stocks or bonds, or were to be so invested, and so meant to indicate that the sum of money given was to be paid out of such securities."

"There is a case, however (*Jeffreys v. Jeffreys* (1743) 3 Atk. 120, 26 Eng. Reprint, 873), in which the identity of the amount of stock bequeathed, with the amount owned by the testator, was deemed a sufficient ground for inferring an intention to make the legacy specific; and there is another case (*Avelyn v. Ward* (1750) 1 Ves. Sr. 424, 27 Eng. Reprint, 1117), in which the mere circumstance of the testator's possessing more of a certain species of annuity than he bequeathed was deemed sufficient to justify the inference of an intention to bequeath so much of the identical stock then possessed. But these cases seem to stand alone, and are not sustained by the current of English and American decisions. The fact that the testator has, at the making of his will, of that which is given in quantity equal to or greater than the bequest, is ground of an

argument, and, combined with other circumstances, may lead to the conclusion, that a specific legacy was intended, but, under the authorities and the established inclination of the courts to regard legacies as general rather than specific, it cannot of itself change the class of legacies from general to specific." *Gilmer v. Gilmer* (1868) 42 Ala. 9.

In *Dryden v. Owings* (1878) 49 Md. 356, the court construed a bequest reading as follows: "I give and bequeath to Virginia M. Owings \$8,000 in state of Missouri bonds." It appeared that the testator had just \$8,000 of such bonds at the date of his death. In deciding that the bequest was demonstrative, the court said: "The general rule to be deduced . . . is that in a bequest generally of stocks, or sums of money on stocks, without further explanation, and without more particularly referring to or marking the corpus of the identical stock, the fact that the testator possessed such stock at the time of the execution of the will is not sufficient to justify the court in declaring the legacy to be specific. . . . In order to constitute a specific legacy, it is necessary for the testator to distinguish or identify the stock or thing given, by saying, 'stock now in my possession,' or 'now standing in my name,' or some other equivalent expression, marking the corpus of the stock bequeathed, and showing the testator meant that identical stock, and no other, should pass to the legatee. Now in this case there is a general bequest of \$8,000 in Missouri state bonds, but there is no explanation or further expression or reference showing the testator meant to give to the legatee the identical bonds in his possession. So tested by the general rules of construction recognized and adopted by the adjudged cases, we are obliged to say the bequest to the appellee is not a specific legacy."

A provision in a will which reads, "I give . . . \$2,000 of the south ward loan of Chester, Pennsylvania," has been held to create a demonstrative legacy, in a case where it appeared that the bonds had been col-

lected before the death of the testatrix. *Ives v. Canby* (1891) 48 Fed. 718, wherein the court said: "Had the legacy of the plaintiff been restricted to \$2,000 'of my south ward loan of Chester,' or had the testatrix given \$2,000 of the debt belonging to her on one of the bonds in her possession at the date of her will, particularly describing the bond by number and date, showing that she intended to give to the plaintiff that amount of a specified debt, a different case would have been presented; but, in the absence of any such expressed or implied intention to make this a specific legacy, it must, under the rules established for the construction of similar bequests, be held to be a demonstrative legacy, and payable out of the assets of her estate."

Where a will directed that \$20,000 in United States bonds and other sums in like bonds should be given to named legatees, the gifts were held to be demonstrative. *Apple's Estate* (1885) 66 Cal. 432, 6 Pac. 7.

Where it appeared that a testator in his will recited a desire to provide liberally for a cousin during her life, directing his executors to buy a mortgage on her home, and to make improvements thereon, and authorizing them, in order to effect this purpose, to sell certain mining stocks, and further providing that, if the home should have been sold, she should receive the profits from certain shares of stock, it was held that, the contingency not having occurred, the bequest was not a specific gift of any particular shares, but a charge on the general estate of the testator. It is thus in effect declared to be a demonstrative legacy, being a gift of a certain sum, with the source of payment named, yet not a gift of the fund itself, nor solely dependent on the fund as a source of payment. *School Dist. v. International Trust Co.* (1915) 59 Colo. 486, 149 Pac. 620.

In *Canton's Succession* (1918) — La. —, 80 So. 218, there was involved the following bequests: "I leave to . . . \$11,000, represented by bonds of Louisiana fours and bonds of New Orleans City Railway & Light Com-

pany, and will be found in sealed envelop bearing inscription in her name in a box at Whitney Central National Bank." It was held that this was not a specific legacy, although it appeared from the whole will that the testatrix intended that the legatee should have \$11,000 in bonds.

In *White v. Winchester* (1827) 6 Pick. (Mass.) 48, it appeared that a will directed the executors to appropriate the income of twenty-seven shares of stock in one bank, ten and one half in another, and fifteen in an insurance company, towards the support of schools in a certain district. At the date of the will the testator had the exact number of shares named in each company, but before his death he had disposed of a part of the shares, and the question arose whether they were general, the fund for their payment being demonstrative merely as security, or primarily burdened with the gift. After a review of several cases decided on similar facts, the court declared the gift to be specific. The decision in this case was based entirely on the presumed intention of the testator as evinced by the will and surrounding circumstances, the court saying *arguendo*: "Whether these, and other cases, can be fully reconciled or not, they certainly all agree as to one point, namely, that when the question is whether a legacy is specific or pecuniary, it must be decided by the apparent intention of the testator. Now when one by his will gives a certain amount of stock, or the income of stock, in a particular bank or other corporation, and at the time of making the will he is owner of the exact amount of stock given, the presumption is strong that he intended to give the stock of which he was the owner. Such is the case under consideration. The testator was the owner of the exact amount of stock described in the will, and we must understand, nothing in the language of the will appearing to the contrary, that it was the income of this particular stock which he intended to appropriate for the use of schools. The provision made in case either of the companies should be dissolved confirms this con-

struction, and there is nothing in the language of any part of the will which renders it doubtful. This legacy, therefore, must be considered as specific and not pecuniary."

Where a testator directed in his will that his executors should sell such portion of his "bank and other stock" as shall produce the sum of \$27,500, and pay therefrom \$3,750 to each of his two sons, it was held that a demonstrative legacy was credited. *Dugan v. Hollins* (1857) 11 Md. 41.

In *Capron v. Capron* (1887) 6 Mackey (D. C.) 340, it was held in effect that a bequest by a testator, owning, at the date of his will, \$12,800 in government bonds, of \$21,000 of such bonds, was a demonstrative legacy, and the legatee was allowed to take the amount specified out of the general estate, the testator having disposed of all the bonds before his death. The court, in reaching this decision, said: "The law seems to be very clear that when a testator bequeaths 'my government bonds,' 'my consols,' etc., the legacy is specific; and if the testator disposes of them in his lifetime, the legacy becomes inoperative as to those. On the other hand, if the will bequeaths government bonds or consols, that is a pecuniary legacy. If it bequeaths \$10,000 of consols or bonds of any description, that means that that property is to be provided for out of the estate, by the application of so much money as may be necessary to do it. It is to be remarked that this interpretation of the legacy is not affected by the fact that, at the time, the testator owned the very kind of securities he speaks of. It is a direction that out of his estate, whether he owns the securities at the time or not, it shall be provided for by the moneys that he leaves. Of course, if he has securities, they can be applied; if not, money may be applied to the purchase of them. It does not make any difference whether he had the securities at the time of making the will, or acquired them between that time and the date of his death, or never had them at all. . . . Of course the case would be still stronger if the testator did not own the securities

described and which he undertakes to bequeath; and that consideration is applicable to the case, because the testator, at the time the will was executed, owned \$12,800 of government bonds, and undertook to dispose of \$21,000 and odd."

In *Douglass v. Douglass* (1898) 13 App. D. C. 21, the following item appeared in the will under consideration: "Third, I give and bequeath to the said Helen Douglass \$10,000 in registered United States bonds, and \$10,000 in lawful money, the latter to be derived from my other property not mentioned in the foregoing." The court, holding that the gift was specific and not demonstrative, said: "Looking, then, as we must, to the 'four corners' of this will for the intention of the testator in respect of the nature of this legacy, we entirely agree with the learned justice who rendered the decree appealed from that it must be declared to be specific. . . . Had he prefixed the significant word 'my' to this clause, there would be no reasonable doubt of his intention to make the legacy specific. Not having used that word, which is found naturally in the preceding devises and bequests, it is argued with plausibility that its omission evinces a change of the intention from specific to general or demonstrative. Conceding that the word 'registered,' as descriptive of the bonds, would not necessarily render the legacy specific, and giving due weight to the omission of the specially descriptive 'my,' still, in our opinion, an intention to make the legacy specific appears from the immediately succeeding additional bequest of another \$10,000 'in lawful money.' Then, as if to render this indication of intention clear, the testator adds the remaining words of the sentence: 'The latter to be derived from my other property not mentioned in the foregoing;' that is to say, from property not before specifically bequeathed. Rejecting these last words, even, the separation of the two bequests into the bonds which he then possessed, on the one hand, and into money, on the other, considered in connection with the general scheme of

the will, would, as intimated above, be sufficient of itself to indicate the intention to make the first one specific. In a well-considered decision of the supreme judicial court of Massachusetts, substantially similar words of separation in a bequest of stocks and money were regarded as having an important effect upon the construction of the will. After referring to the language of the testator in several of the items making bequests, the court said: 'But in the first and in the second items of the will, he makes to the same legatees bequests both of stocks and of money, a fact much relied on by Lord Chancellor Cairns in *Kermode v. MacDonald* (1868) L. R. 3 Ch. (Eng.) 584, 37 L. J. Ch. N. S. 879, 19 L. T. N. S. 179, 17 Week. Rep. 4, as showing that the legacy of a sum invested in stocks was specific.' *Metcalfe v. Framingham* (1880) 128 Mass. 372."

Where a will directed that the stock which the testator had in a bank be sold, and the proceeds divided between certain named legatees, it was held that the bequest was not merely demonstrative, but specific. *Re Zeile* (1887) 74 Cal. 125, 15 Pac. 455.

In *Johnson v. Conover* (1896) 54 N. J. Eq. 333, 35 Atl. 291, affirmed without opinion in (1897) 55 N. J. Eq. 592, 39 Atl. 1114, a bequest of "\$8,000 invested in stocks, the interest whereof to be paid to her (testator's wife) during life," was held to be demonstrative. The court said: "Looking at the form of words employed in making the present bequest, and at the whole face of the will, it is difficult to say whether the testator meant to give absolutely the sum of \$8,000, or to give the stocks and bonds of the nominal value of \$8,000. It is to be remarked, however, that if he had intended to make a specific gift of the stock and the bonds it would have been easy for him to have given them by name. But by employing the words 'the sum of \$8,000,' in the first clause, and by repeating it in the succeeding clause, he has left it doubtful whether his intention was not to give the sum of \$8,000, which happened at that time to be invested in what he termed

'stocks.' It is probable that he had no notion that, in case of the fluctuation in the value of stocks, or from any reason, it should become politic to change these securities, the gift would thereby become extinguished. I shall, therefore, lean towards that construction which prevents ademption, and hold this to be a demonstrative legacy."

In a New York case it appeared that a testator gave to one legatee, "the sum of \$3,000 in government bonds," to another the same amount, and to a third "\$1,500 in government bonds." It appeared that at the time of making the will the testator had an amount in government bonds equal to the total of the above bequests, but it was held that this fact and the words of the will did not make the gifts specific, but that they were general legacies. The court, however, in its opinion, seems to confuse the elements of a demonstrative legacy, considering it primarily as in the nature of a specific legacy, rather than general. It was in fact not necessary to distinguish demonstrative and general legacies in this case, but the court said: "The legacies in question are not specific, for the reason that they are primarily gifts of money, and also because the government bonds are not stated in the will to be a portion of the testator's estate. 'Unless the language describes, points out, and identifies the particular thing given as a part of the testator's estate, distinguishing it from all other things of the same kind, then it is not specific. Although the testator may, at the time of executing the will, have an article or articles of the same kind as that which he purports to give, still, unless his language is sufficient to refer to, designate, and identify the very article itself as forming a part of his estate, which he thereby gives, the legacy is not specific, but general. Under these circumstances the word "my" is often operative in identifying the article.' 3 Pom. Eq. Jur. § 1130, notes 1 and 3. . . . In the case before us we have gifts of money in government bonds. This language is not sufficient to make these legacies demonstrative, for the

reason that it is not pointed out in the will that the money is to be taken out of any particular fund belonging to the estate. This latter qualification is an essential element of a demonstrative legacy. 3 Pom. Eq. Jur. § 1133. The clear meaning of the will is that the money given is to be used in obtaining bonds, and then to be delivered in the manner provided in the will. Undoubtedly, the legatees, being of full age, could receive the money in place of the bonds." *Re Van Vliet* (1893) 5 Misc. 169, 25 N. Y. Supp. 722.

In *Walton v. Walton* (1823) 7 Johns. (N. Y.) 258, 11 Am. Dec. 456, it appeared that a testator bequeathed to his nephew as follows: "All my right, interest and property in thirty shares which I own in the Bank of the United States and in four shares which I own in the companies of the Northern & Western Inland Lock Navigation." It was held that the bequest was not demonstrative, but specific.

In the case of *Re Newman* (1886) 4 Dem. (N. Y.) 65, it appeared that a testator, when he died, was the owner of only \$4,000 in government bonds. By his will he gave to several legatees certain named sums "in government bonds," the sums so given amounting to \$5,000, and it was held that these gifts were not specific, nor demonstrative, but general legacies. The court distinguished these gifts from similar bequests appearing in other cases, as follows: "The testator left government bonds to the amount, at par, of only \$4,000, and there are not sufficient assets to pay all the legacies. Those to the daughter-in-law and the three nephews, of sums of money 'in government bonds,' possibly were so given by the testator under the erroneous supposition that the amount, at par, which he had, was \$5,000. However that may be, the legacies 'in government bonds' are not specific (*Tift v. Porter* (1853) 8 N. Y. 516); nor are they demonstrative, because not directed to be paid out of any particular fund, as was done in the cases of *Giddings v. Seward* (1857) 16 N. Y. 365 and *Newton v. Standley* (1863) 28 N. Y. 61; nor out of any specified portion of his assets. The case of *Pierrepont v. Ed-*

wards (1862) 25 N. Y. 128, cited by the executor, carries the definition of what is a demonstrative legacy, by a divided court, to its extreme verge; still, it was there held to be such. But here the legacies are not specific, nor are they demonstrative. The testator does not bequeath his government bonds, nor does he make the legacies payable out of them. He simply gives general legacies of money, payable in a certain manner. The effect would have been the same if he had directed them to be paid in gold coin, in greenbacks, in bonds and mortgage, in cattle, sheep, or horses. All are nothing more than general legacies."

In *Tift v. Porter* (N. Y.) *supra*, it was held that a gift of 360 shares of Cayuga County Bank Stock, 120 shares to one legatee and 240 to another, were demonstrative and not specific legacies, although it appeared that at the date of the will the testator was the owner of exactly 360 shares of such stock. The court said: "In those cases in which legacies of stocks or shares in public funds have been held to be specific, some expression has been found from which an intention to make the bequest of the particular shares of stock could be inferred. Where, for instance, the testator has used such language as 'my shares,' or any other equivalent designation, it has been held sufficient. But the mere possession by the testator, at the date of his will, of stock of equal or larger amount than the legacy, will not of itself make the bequest specific."

In *Re Phillips* (1919) 108 Misc. 413, 177 N. Y. Supp. 663, where corporate stock was bequeathed in trust with directions to the trustees to sell the stock at the end of the ten years and to pay certain sums out of the proceeds to specific persons, the latter were held not to be demonstrative legacies, and consequently, the fund out of which they were to be paid having failed because the trust was invalid, the legacies also failed. The court said that there are two elements in a demonstrative legacy: (1) A bequest in the nature of a general legacy; and (2) the pointing to a fund out of which the payment is to be made, par-

taking of the character of a specific legacy, and that only the second of the elements was present in the instant case.

Where a testator by will gave to legatees certain pecuniary sums out of bonds due the testator by sundry parties, and the funds on deposit in a certain savings bank, the gifts were held to be demonstrative legacies. *Alsop v. Bowers* (1877) 76 N. C. 168.

In *Baptist Female University v. Borden* (1903) 132 N. C. 476, 44 S. E. 47, it was held that a bequest to certain named legatees of specified sums of money, to be paid by "turning over any of my bonds, stocks . . ." etc., "at their market value, and if these are not sufficient then the balance . . . to be paid in money," was demonstrative.

A bequest of "\$1,000 of the United States 6 per cent stock of the year of 1812, standing in my name in the loan office, Penn'a, as per certificate No. 269," has been held to create a specific legacy, being a gift of the corpus of the stock, and not a gift of money out of the stock. *Ludlam's Estate* (1850) 13 Pa. 188, affirming (1845) 3 Clark, 332.

In the case of *Eckfeldt's Estate* (1879) 13 Phila. (Pa.) 202, 7 W. N. C. 19, it appeared that the bequest was of "ten shares of Germantown & Norristown Railroad stock," the testatrix at her death owning a large number of shares of such stock. This bequest was held to be general merely, and not demonstrative or specific, the court saying: "That the legacy is of a part only of a larger number of shares of stock belonging to the testator is not sufficient, ipso facto, to prevent it from being specific. . . . Such a legacy may be either specific or general, according to the circumstances. It is never demonstrative; a demonstrative legacy is always pecuniary, differing, however, from an ordinary legacy in being referred to a particular fund or source of payment."

In *Boykin v. Boykin* (1884) 21 S. C. 513, a provision in a will which read: "I give and bequeath \$2,000 in 6 per cent stocks of the state of South Carolina," was held to create a demonstra-

tive legacy. It did not appear in that case whether the testator owned any such stocks at the date of the will, but it was said in the opinion that if he had it would have made no difference in the interpretation of the bequest.

In *Wheeler v. Hartshorn* (1876) 40 Wis. 83, it appeared that a testator owned United States bonds, railroad bonds, and various other securities and cash assets, such personalty being of a nominal value of \$101,444, but appraised at only \$53,529. By his will he made a bequest of "\$8,000 in bonds or notes secured by mortgage," and similar bequests to other legatees. It was held that such bequests were demonstrative.

In *Rote v. Warner* (1899) 17 Ohio C. C. 342, 9 Ohio C. D. 536, there was construed a bequest of \$10,000 payable as follows: "Twenty shares of the capital stock of the First National Bank of Painesville, Ohio, at \$2,000. One thousand dollars in Lake Shore & Michigan Southern Railroad Company at par \$1,000. Seven thousand dollars in money or in good well-secured notes." The court decided that the bequest of the \$1,000 payable in the railroad securities was a demonstrative legacy, saying: "The bequest in this case is the sum of \$10,000. The main or ruling idea of the testator is the amount, and if the testator, at the time of his death, did not own \$1,000 in Lake Shore & Michigan Southern Railway Company (bonds or stocks)—something filling the description—the same will be fully satisfied by the payment of \$1,000 out of the residuum by the executors, and this we hold to be true construction of this item."

Where it appeared that a testator owned 1,830 shares of preferred stock in a corporation, and in his will made bequests of a specific number of such shares, and later revoked a bequest of a certain number to a sister, assigning as a reason that he had already transferred such shares to her, it was held that the bequests were demonstrative, since the will, taken as a whole, evinced an intention by the testator that the legacies should be paid, although the fund pointed out for their

payment should be changed or become extinct. *Spinney v. Eaton* (1913) 111 Me. 1, 46 L.R.A. (N.S.) 535, 87 Atl. 378.

In *Davies v. Fowler* (1873) L. R. 16 Eq. (Eng.) 308, 43 L. J. Ch. N. S. 90, 29 L. T. N. S. 285, it appeared that a testatrix had the power of appointment over a certain fund invested in government stock. By her will she gave specified sums of such trust funds to certain legatees. It was held that these gifts were specific.

In *Gillaume v. Adderley* (1808) 15 Ves. Jr. 384, 33 Eng. Reprint, 799, a legacy of £5,000 sterling or 50,000 current rupees," and later referred to in the will as "now vested in" the East India Company's bonds, and mentioned later as "the said sum of £5,000 sterling," was held to be demonstrative. This decision was based on the manifest intention of the testator, and the opinion was strengthened by the fact that the testator, being the father of the legatee and placing himself in loco parentis, intended that she should take at all events.

Where a testator bequeathed the dividends of his American bonds which should be due to him at the time of his decease, for the purpose of the payment of the arrears of allowances to his daughters, the bequest was held to be specific, and not demonstrative. *Ricketts v. Harling* (1871) 23 L. T. N. S. (Eng.) 760.

In *Harper v. Bibb* (1872) 47 Ala. 547, it appeared that the testator by his will made a gift of certain sums to be paid out of Confederate states bonds, or other notes which he held. Neither of these funds existed at the testator's death, and the issue arose on the right of the legatees to have their gifts satisfied out of the general assets of the estate. And it was held that they were general legacies, not defeated by a failure of the designated funds. The court observed the distinction between general, specific, and demonstrative legacies, but declared that for the purposes of this case it was immaterial whether the legacies were considered as general, merely, or demonstrative; that the right to have the legacy paid notwithstanding the failure of the designated fund was en-

tirely dependent on the will of the testator, and not on technical rules of construction. The doctrine was reiterated that it is not the classification of a legacy that gives it certain incidents, but it is classified because of those incidents, which are given by the testator as his desire in the will.

In *Re Sayer* (1884) 53 L. J. Ch. N. S. (Eng.) 832, 50 L. T. N. S. 616, it appeared that a testatrix bequeathed to her trustees the sum of £1,500 then invested in the B. B. & C. J. R. Co., in trust for her brother, and on certain conditions she bequeathed to the trustees of a certain charity £500, part of the above-described stock. At the date of her will the testatrix was possessed of £1,900 of the aforesaid stock, but none at the date of her death, and it was held that the gift to the charity was specific and not demonstrative.

In *Gilmer v. Gilmer* (1868) 42 Ala. 9, several bequests of certain sums of money "in Confederate states bonds" were held to be general, and not demonstrative or specific. They were declared to be merely gifts, with the manner and form of payment designated, and not the source of payment. And it was said to be immaterial in this instance whether the testator was the owner of more or less, or an equal amount, of such bonds at the date of his will or at the time of his death. In the same case it was held that a legacy of certain railroad bonds which the testator described was specific, while a "legacy of \$5,000 in railroad bonds" was general.

In *Olcott v. Ossowski* (1901) 34 Misc. 376, 69 N. Y. Supp. 917, it appeared that a bequest was made in the following words, "I give \$9,000 to Maria Uppenkamp . . . which are invested as follows," a list of securities being then set forth. This legacy was construed to be demonstrative.

In *Re Pratt* [1894] 1 Ch. (Eng.) 491, 63 L. J. Ch. N. S. 484, 8 Reports, 601, 70 L. T. N. S. 489, it appeared that the bequest was of £3,000 invested in 2½ per cent consols and other like bequests, the testatrix thus attempting to dispose of a total of £2,300 consols, when she was in fact possessed of only £3,000. The question in issue was

whether the gift was specific or demonstrative. Judge North, after a review of many cases, held that this was a specific bequest of the consols.

It has been held that a bequest of £5,000 consols, followed by a provision that, if the testatrix should not have enough stock standing in her name to satisfy the legacy, her executors should purchase enough out of her residuary estate to make up the deficiency, was a specific and not a demonstrative legacy. The court said: "Although a mere gift of a certain sum of stock, as in the first part of this bequest, did not alone make the legacy specific, yet a gift of a sum of stock, with a direction that, if the stock should not be in existence, the legatee should have an equivalent sum of money, or, as in this case, that the deficiency in the sum bequeathed should be made up, pointed to the consequence that, on a failure of the stock, in the absence of any provision for that event, the legatee would either wholly or in part have lost the benefit of the gift." *Townsend v. Martin* (1849) 7 Hare, 471, 68 Eng. Reprint, 194.

The basis on which a substitutionary gift is held to be specific is explained in *Fontaine v. Tyler* (1821) 9 Price, 94, 147 Eng. Reprint, 32, thus: "A gift of all the horses which I may have in my stable at the time of my death, would be specific. And so it would equally be, if it were provided that in case they died the legatee was to be paid a sum of money, or be given some other specific thing."

In *Hosking v. Nicholls* (1842) 1 Younge & C. Ch. Cas. 478, 62 Eng. Reprint, 979, it appeared that a testator bequeathed the sum of £4,000 capital stock in the 3 per cent Consolidated Bank annuities, or in whatever government funds the same should be invested. It was further directed by the will that the executors to whom the legacy was bequeathed in trust should transfer the said capital stock to the designated legatees. At the time of the testator's death there was standing in his name £4,100 stock of the above description. It was said by the Vice Chancellor, in declaring such a bequest to be specific and not merely

demonstrative: "The question is whether this legacy is merely demonstrative or specific. It has always been held that a legacy of stock out of stock is specific, being the gift of a part of a specific fund. Here the testator intimates an intention that the stock shall be taken, not out of his general personal estate, but out of whatever government fund he may possess; therefore, only government funds are to be resorted to. It is not a bequest of *money* out of stock, but *stock* out of stock. It is a specific bequest."

In *Oliver v. Oliver* (1871) L. R. 11 Eq. (Eng.) 506, there was construed a will which, after reciting that the testator was entitled on the death of his sister to receive £5,602 consols, gave to O. "the sum of £2,000 consols, part thereof or a sum equal thereto . . . and to be transferred or paid to my said son [O.] when and as soon as the same shall be received or got in by my said executors." The court declared that the legacy was specific, although it was manifest that the decision was contrary to the manifest intent of the testator.

In *Mullins v. Smith* (1860) 1 Drew. & S. 204, 62 Eng. Reprint, 356, it appeared that a testator bequeathed £500 3 per cent consols, or other stock into which the same might be converted, or, in case he was not possessed of so much stock at the date of his death, then he gave as much sterling as that amount of stock would be worth at that time. In a subsequent clause he gave to the same person another legacy of the same stock, "in addition to the legacy already given," to be raised out of the proceeds of his residuary estate. The court said as to the first legacy that it was specific if the testator was possessed of that amount of such stock at the time of his death; but if he was not, then the legacy was general. The later bequest, however, was determined to be demonstrative. The court said: "These legacies of stock are specific legacies, in contradistinction to general and to demonstrative legacies. They are not money legacies payable out of a particular property (which would be demonstra-

tive legacies); but they are legacies of specific portions of a particular property, which he contemplated his being in possession of at his death (which are specific legacies). A legacy of stock is equally specific, whether the testator says, 'I give £500 3 per cent consols out of the consols now standing in my name,' or, 'I give £500 3 per cent consols out of the consols which shall be standing in my name at the time of my decease.' A stock legacy payable out of stock of the same denomination is specific, but a money legacy payable out of stock is not specific, but demonstrative."

2. Use of "my" or similar expression.

"Bonds and shares of stock of corporations may be specifically bequeathed, and the word 'my,' 'in my possession,' or 'standing in my name,' and other like expressions, referring to the corpus of the fund, have generally been relied on as showing the intent of the testator that the bequest of such stock was specific." *Gardner v. McNeal* (1911) 117 Md. 27, 40 L.R.A.(N.S.) 553, 82 Atl. 988, Ann. Cas. 1914A, 119.

In *Kunkel v. Macgill* (1881) 56 Md. 120, a bequest of stock was held to be specific, the clause making the gift reading as follows: "I give . . . to . . . M. E. K. \$5,000 Northern Railroad bonds." It appeared, however, that the testator had made various dispositions in the will, and in referring to other stocks and bonds he had used the expression "my," and other similar language, indicating an intention that the beneficiaries take particularly designated property, and it was decided from a perusal of the whole will that a gift of the specific stock named was intended. It was, however, suggested in the opinion that the mere fact that five bonds of said company, each of the face value of \$1,000, were found in the possession of the testator at the time of his death, would not be in itself sufficient to show that he intended to give these identical bonds to the legatee. The court continued: "But in dealing with this question, regard must be had to the rest of the will, and if, taken as

a whole, such appears to have been his intention, the legacy must be regarded as specific, although the clause in question might receive a different interpretation considered separately.

. . . And when he gives to the appellant \$5,000 of the Wilmington, Columbia, & Augusta Railroad bonds, this bequest, when considered in connection with the rest of the will, and the proof that five bonds of said company, each of the face value of \$1,000, were found in his possession at the time of his death, and that his death occurred only thirteen days after the execution of the will, it is clear he intended to give to his daughter these identical bonds. We cannot think he intended to give \$5,000 in money, with these bonds pointed out as the fund to be applied to the payment thereof, and the balance to be paid by his executors, much less can we suppose he intended that his executors should purchase \$5,000 worth of such bonds, then dishonored in the market, and worth but 30 cents in the dollar."

In *Morriss v. Garland* (1883) 78 Va. 215, the will which was presented for construction read as follows: "I will and direct my executors to set apart \$50,000 worth, at par value, of my bank and other paying stocks and corporate bonds, paying at least 6 per cent per annum, the interest or dividends whereof must be paid to my wife half yearly during her natural life, to be used as her own, without accountability on her part. At her death the stocks, bonds, etc., to pass to Charles Y. Morriss, in trust for the use of his wife, our adopted daughter, P. B. Morriss, and her children, as separate estate. The following extract from the opinion indicates the reason for the decision that such a legacy was demonstrative: "The circumstance that the testator used the word 'my' in connection with his bank stocks in this clause of his will cannot affect the case; for whilst that word has been frequently fastened upon to fix the character of a legacy as specific, in cases where the particular stock out of which it was to come was also referred to, it can have no appreciable influence in a case like

this, where the testator has not only not designated any particular stock as the stock out of which the legacy is to come, but, on the contrary, has grouped all of these securities together, and given his executors the right to select any of them which paid as much as 6 per centum per annum, in making up the \$50,000 directed to be set aside under this clause of the will.

. . . If, however, I entertained a doubt as to the character of this legacy, I should feel constrained by the well-settled rule of construction, which has been fully recognized in this state, that a legacy will not be held to be specific unless there appears in the will a clear intention to make it so, to construe this legacy to be not specific, but demonstrative.

. . . For this rule applies with peculiar force to a case of this kind, where the testator is providing an annuity for the wife of his bosom, and making a provision for an adopted child, with whose maintenance we may well presume he had charged himself."

In *Mytton v. Mytton* (1874) L. R. 19 Eq. (Eng.) 30, an often cited case in English courts of chancery, it appeared that a testatrix, having £3,000 East India debenture bonds, gave a legacy to her executors in trust to pay to her nephew "the sum of £3,000 invested in Indian securities." The court, holding that this was a demonstrative legacy, said: "Now did she intend merely to give shares in Indian funds? If she had used the word 'my,' the gift must have been held specific, and have failed, because she had no property answering that description at the time of her death. If she intended to give a legacy at all events, the words descriptive of the fund make it simply a demonstrative legacy. In this case I am so clearly satisfied that it was the intention of the testatrix to give £3,000, irrespective of the kind of investment she might have at her death, that I would look carefully at everything in the will tending to show that it was not specific. If she had said, 'I give £3,000 which is now invested in Indian securities,' the gift would be simply

demonstrative. Now, looking at the whole will, I am clearly of opinion that it was her meaning to give the £3,000 which was then invested in Indian securities, and I think it ought not to fail because at her death there was no fund invested in Indian securities, and I am perfectly satisfied that this decision will be in accordance with her real intention."

In *Gordon v. Duff* (1860) 28 Beav. 519, 54 Eng. Reprint, 465, the following bequest, *inter alia*, appeared in the will under consideration: "I give

. . . the sum of £2,000 long annuities, standing in my name in the books of the governor and company of the Bank of England." By another clause the will gave another sum "of the said long annuities." It appeared that at the date of the will, and at the time of the death of the testator, the long annuities standing in his name amounted to only £300. The court, in deciding that this was not a demonstrative legacy, said: "If a person bequeaths a legacy, and charges that legacy upon a particular fund, then the general estate is liable, though the particular fund on which it was charged should fail; but if he gives the legacy to be paid solely out of the particular fund, then, if the particular fund fails, the legacy fails also. If not properly called a specific legacy, it is in the nature of a specific legacy, and cannot properly be distinguished from it; it is not a demonstrative legacy. . . . Where the testator, as

in this case, having a particular fund, gives a portion to one person, and the residue, which is part of the general estate, is either not disposed of or is completely exhausted by subsequent gifts, there I am of opinion that it is still a portion of the fund itself given.

. . . The difficulty is to get over these words constituting a gift of nothing except long annuities, or a portion of long annuities. Here a sum of £2,000 long annuities is given, and no case that I have heard cited to me would enable me to turn this into a legacy of £2,000 generally, and merely charged on long annuities."

In *Ashburner v. Macguire* (1786) 2 Bro. Ch. 108, 29 Eng. Reprint, 62, 2

Eng. Rul. Cas. 18, a bequest of "my capital stock of £1,000 in the Indian Company's stock" was held to be specific.

But in *Rogers v. Clarke* (1838) C. P. Cooper (Eng.) 376, it appeared that the testator bequeathed to certain legatees £10,000 3 per cent consolidated bank annuities, and to certain other legatees £2,850 3½, "reduced." It was further shown that at the date of the will and of his death the testator was possessed of the exact amount of stocks above described and bequeathed, but it was held that the legacies were nevertheless not specific, but demonstrative. This decision seems not to have been determined on the intention of the testator, but rather on the rule of construction which disfavors an interpretation which would render a legacy specific. The vice chancellor [Sir Lancelot Shadwell] said that his private opinion was that the testator meant to give the consols and the 3½ per cents as specific legacies, subject, however, as he would presently mention; but that there was an absence of any of those indications of intention, which the court, in its anxiety to adopt constructions in favor of general legacies, and to avoid the inconveniences to which specific legacies are exposed, had of late years been in the habit of requiring; that the testator nowhere described the stocks as being his at the date of the will; that if he had referred to the stocks as then standing in his name, the directions to purchase such stocks could not have prevented the bequests from being specific (see *Fontaine v. Tyler* (1821) 9 Price, 94, 147 Eng. Reprint, 32); that the testator, from the nature and amount of his property, and from some passages in the will which, although obscure, yet were intelligible, must have designed that the stocks should be a fund to secure the payment of the legacies . . . and that the same must be considered as by implication charged upon such stocks, and not to be liable to abate; that in that respect they resemble specific legacies; but that, on the other hand, if such stocks had been sold by the testator in his

lifetime, it was clear that the said last-named legatees would have been equally entitled to their legacies out of the other personal estate, so that such legacies also partook of the character of general legacies; that they were demonstrative legacies."

h. Bequest referring to interest in partnership.

In an English case it appeared that, at the date of his will, a testator was a member of a firm of two partners. After making various dispositions he directed that the "proportion of capital invested in the business" be converted into cash and given to certain charities, with the exception of certain bequests thereafter mentioned. He then directed that his executors would pay as soon as convenient after his decease, "out of the capital employed in the business," certain sums to twenty-two legatees (the legatees and the sums being then designated). Sir J. Stuart, V. C., said that there was here evinced an intention to give the sums named at all events, and that the partnership capital was merely designated as a primary fund out of which the legacies were to be paid, and hence these were demonstrative, the words, "out of the capital," etc., being merely an auxiliary direction, and not of the essence of the bequest. *Beavan v. Atty. Gen.* (1863) 4 Giff. 361, 66 Eng. Reprint, 746, 9 Jur. N. S. 1099, 9 L. T. N. S. 221.

In *Day v. Harris* (1882) 1 Ont. Rep. 147, it appeared that while the testator was engaged in a partnership business he made his will, wherein he bequeathed as follows: "I will and direct that \$5,000 of the money to which I may be entitled as my share of the partnership business . . . under the name of E. Harris & Company shall be invested by my executors at interest in some good and safe security; and that the income derived therefrom shall by them be paid over from time to time, as the same is received, to my daughter Maud Harris for her maintenance, until she attains the age of twenty-one years, at which age she shall be entitled to receive the whole of the said principal sum of \$5,000; and if the interest or profit

in any year derived from the investment of the said sum of money falls short of \$400, the difference to make up that sum shall be paid by my executors out of the interest or profits derived from the remainder of my estate hereinafter mentioned. Subject as aforesaid I give, devise, and bequeath all the rest and residue of my estate, real and personal, to my said executors in trust for my son Alfred Harris, etc." In 1878 that partnership was dissolved, and the testator from that time till his death carried on the business alone, but under the same style of E. Harris & Company. His interest in the partnership was realized by him and carried into his new business carried on by himself. It was held under the circumstances that this legacy was not specific, but demonstrative, the court probably being influenced by the consideration of the fact that, since the legacy was for support of his infant daughter, the testator would not have made its validity contingent on the continuance of the designated fund in the original enterprise. "Besides," argued the court, "the bequest to Maud is of a part of the share to which he might be entitled, which would carry on the period from the date of the will to the termination of the partnership. And there was much more than \$5,000 received by the testator from the partnership, and carried into his sole business. Carrying it into his sole business would not be an ademption of the legacy. The bequest is not of so much as should be due to him from the partnership, which might probably be adeemed by the receipt of the sum by the testator himself. His share would rather mean the amount he should receive from the partnership upon a dissolution. It would then form part of his general estate, and the bequest would simply be a legacy of \$5,000 out of that general estate, a conclusion that seems justified by the other provisions of the will."

Where a testator by his will gave his wife an annuity of \$1,000 for life, to be paid from the earnings of his individual and partnership properties, the bequest was held to be demon-

trative. *Moore v. Alden* (1888) 80 Me. 301, 6 Am. St. Rep. 203, 14 Atl. 199, wherein it was said: "There is a clause in the will which, if standing alone, might seem to look in a contrary direction, and that is the declaration of the testator that the annuity is to be paid from the earnings of his individual and partnership property. We think the idea of the testator in this clause was that he was enlarging rather than limiting the funds out of which the annuity might be paid. He devotes for the purpose the earnings of all his properties. He expresses no limitation or condition. The gift is unconditional and absolute, although, as is often the case, he overestimates the sources of supply which were to assure its payment. The sources indicated turning out to be insufficient, others must be taken to supply the deficiency. It is a demonstrative legacy, not lost because of the nonexistence of the property specially pointed out as a means of satisfying it."

1. Bequest referring to land or proceeds thereof.

The rules pertaining to gifts made with reference to the proceeds of real estate are not different from those where other funds or property are referred to. The rule, as disclosed in the cases hereinafter discussed, seems to be that wherever an independent gift is made and lands are designated merely as a security for its payment, the legacy is considered as demonstrative, but if the land itself or part of it is given, or land is designated as the exclusive source for the payment of the legacy, it is treated as specific.

It was said by the court in *Fream v. Dowling* (1855) 20 Beav. 624, 52 Eng. Reprint, 744: "There is a distinction of very considerable importance to be found in the books between a legacy given charged upon a particular estate, and where the proceeds of the sale of a particular estate are created a fund for the payment of a legacy."

In *Newcomb v. Fitch* (1896) 98 Iowa, 175, 67 N. W. 587, a bequest of a sum of money to be paid from the sale of real estate owned by the testator was held to come within the class of demonstrative legacies.

In *Meily v. Knox* (1915) 191 Ill. App. 126, affirmed in (1915) 269 Ill. 463, 110 N. E. 56, it appeared that a testatrix executed a will and codicil, devising certain real estate to a trustee to be sold and the proceeds divided in specified portions between certain named legatees. Before her death, the testatrix sold the real estate. It was held that the bequests failed and could not be paid out of the general estate of the testatrix; that the bequests were specific, and not demonstrative as being a bequest of legacies to be paid primarily, but not exclusively, out of a designated fund. The court said: "There was no gift to persons named, aside from the direction to the trustee as to the distribution of the proceeds of sale. . . . There is nowhere in the will any evidence of an intention to give the persons named any amount [though the amounts were named] except such as might be received from the sale of the real estate."

Where a testator made bequests of specific sums "out of the portion or share of my father's estate that may come to me," it was held that the bequests were not demonstrative, but specific in so far as they depended exclusively on the designated fund for payment, an intention to this effect being evinced by the words of the bequest. *Gelbach v. Shively* (1887) 67 Md. 498, 10 Atl. 247.

So it was held in *Roquet v. Eldridge* (1889) 118 Ind. 147, 20 N. E. 733, that a bequest of a sum of money to each of testator's children, to be taken and considered as in full of each of their respective interests in the homestead farm, was held to be general, since no particular fund was pointed out as a primary source from which the legacies were to be satisfied.

By the will construed in *Harrison v. Denny* (1910) 113 Md. 509, 77 Atl. 837, a testatrix gave each of her three nieces \$12,500. Each of these gifts was made in separate items, the first being followed by the clause, "being part of the proceeds of the property on Charles and German streets," etc.; the second by the clause, "being the proceeds or part thereof, of the prop-

erty No. 13 German street," etc.; the third by the clause, "being in place of No. 219 South street." Each of these gifts was held to be demonstrative.

In *Pennsylvania Co. v. Riley* (1918) 89 N. J. Eq. 252, 104 Atl. 225, it appeared that a clause in a will read: "I direct that out of the proceeds of the sale of my house or other property, \$1,000 shall be set apart and held in trust," etc. The bequest was held to be demonstrative.

In *Methodist Episcopal Church v. Hebard* (1898) 28 App. Div. 548, 51 N. Y. Supp. 546, it appeared that by the sixth clause of her will, testatrix devised a farm to be sold by her executors, and the proceeds thereof to be used in paying six legacies numbered consecutively. In a subsequent clause it was provided: "It is my will and express direction that if the proceeds of my said farm and my other estate should prove insufficient to pay all the legacies hereinbefore given in full, then and in that case the legacies given in and by the first five sections of this will, and in and by the 1st, 2d, 3d, and 4th clauses of the sixth section of this will, shall be paid or set aside and retained in full, and the remaining legacies shall be proportionally abated." The court held that the first four legacies of clause 6 were demonstrative, but that the other two were specific, being abated if the proceeds of the sale of the farm were insufficient to satisfy the preceding legacies.

In *Croom v. Whitfield* (1853) 45 N. C. (Busbee, Eq.) 143, a bequest of \$3,000, to be paid out of the proceeds of the land directed to be sold, was held to be a demonstrative legacy.

By the will under consideration in *Glass v. Dun* (1867) 17 Ohio St. 413, the testator made various bequests of specified sums of money, and directed that these bequests, also his debts, be paid out of his personal assets and the sale of certain real estate. It was held that the bequests were neither demonstrative, nor specific, but general pecuniary legacies. This decision was based on the apparent intent of the testator to make the fund indicated not a particular fund for the pay-

ment of the legacies simply, but a general fund for the payment of the general burdens on the estate. The court said: "The fund provided was not for the payment of legacies alone. It was for the payment of debts also. It consisted, in part, of the fund set apart by the law for the payment of debts and legacies, and the testator merely directed that an addition should be made to that fund by selling part of the real estate. It was a general fund, for general purposes, and not a specific fund for a specific purpose. The provision is no more than a direction to change part of the real estate into money, thereby augmenting the personal assets, which the law itself sets apart for the payment of debts and legacies. The fund was primarily for the payment of debts, and was made up in the same way the law itself would have made it up, by selling land and adding the proceeds to the personal assets. Had specified parts of the property been set apart for the payment of these legacies, and specified parts thereof to the payment of debts, the case would have been different."

In *Armstrong's Appeal* (1869) 63 Pa. 312, it appeared that a testator, by his will, directed that certain real property be sold, and that out of the proceeds of such sale a certain legatee should be paid \$1,200. It was further provided that, should the property not bring the amount of the legacy so bequeathed, the deficiency should be paid out of the general estate. The will was held to create a demonstrative legacy.

In the case of *Re Barklay* (1849) 10 Pa. 387, it appeared that a testator directed his executors to sell a particular part of his land, and, after deducting \$300 from the proceeds of the sale, to divide the residue equally among his daughters. He then gave \$100 to each of his three grandchildren. It was decided that it was the intention of the testator that the \$300 directed to be deducted from the sale of the land should be applied to the legacies given to his granddaughters, since he made no further mention of

that fund, and hence the legacies were demonstrative.

It appeared in *Cryder's Appeal* (1849) 11 Pa. 72, that a testator directed by his will that real estate, designated X, be sold, and that another plot, designated Y, should be sold, specifying the mode of payment in each case. He then made bequests of certain sums of money, and directed that these be paid out of the proceeds of Y. After paying the debts of the estate the proceeds of both plots were insufficient to satisfy the legacies, and it was held that they must abate pro tanto, being specific legacies, and not payable out of the general estate.

In the case of *Hammer's Estate* (1893) 158 Pa. 632, 28 Atl. 231, it appeared that the testator directed conversion of his real estate, and out of the proceeds directed \$3,000 to be paid to a son "to equalize him with my other sons who were advanced \$3,000 each in the purchase of real estate." This legacy was held to be demonstrative, but the case seems to have turned on the expressed purpose of the testator to equalize the sons for amounts given to them, either before or after his death, and the court strongly intimated that but for the presence of these words in the will, the legacy in question would have been construed to be specific.

After making certain general and specific bequests to his sister, a testator directed that she should have all the rents, etc., of a certain house and lot, and after her death the house and lot should be sold and the proceeds of the sale given to an orphans' home. The gift to the home was held to be specific, and not demonstrative. *Ford v. Cottrell* (1919) — Tenn. —, 207 S. W. 734.

It has been held that a bequest of "\$3,000 in money from the sale of my land," also a bequest of "\$800 from the sale of my land," and of "\$2,000 from the sale of my land," are demonstrative legacies, where such bequests are preceded by a direction that a certain piece of testator's land be sold. *Darden v. Hatcher* (1860) 1 Coldw. (Tenn.) 513; *Darden v. Orgain* (1867) 5 Coldw. (Tenn.) 211.

In *Corbin v. Mills* (1868) 19 Gratt. (Va.) 438, the following provision, *inter alia*, appeared in the will under construction: "I gave . . . unto my executors . . . in trust for the separate benefit of my daughter, . . . the sum of \$1,080 per annum, payable semiannually, being the interest on the purchase money of the real estate on Main street, . . . also, the further sum of \$450 per annum, payable quarterly, being the interest on the purchase money (\$7,500) of the real estate on Main street, sold by me to Lewis Hyman; also, the further sum of \$540 per annum, payable quarterly, being the interest on the purchase money (\$9,000) of the real estate fronting on Franklin street, sold by me to Thomas Bradford; also, the further sum of \$300 per annum, payable semiannually, being the interest on \$5,000 of state stock of Virginia." It was further directed that on the death of his daughter these several principal sums should be divided between the children of his daughter. It was held that the legacies of the first three sums, both to his daughter and her children, were demonstrative and not specific, but that the legacy of the stock and the interest on it is a general legacy of so much stock and whatever interest was paid by the state on that stock.

In the case of *Myers v. Myers* (1891) 88 Va. 131, 13 S. E. 346, it appeared that a testator directed that his executor should take "the home place" at \$40 an acre, or sell it to the highest bidder and divide the proceeds thereof equally between the testator's six children. This bequest was declared to be demonstrative. The decision seems clearly inconsistent with the definition of a demonstrative legacy as given in the opinion, which accords with that given by the authorities. This can only be accounted for by the fact that the only question before the court was whether this legacy should abate with the general legacies given by the same will, the court laying stress on that branch of the will as to demonstrative legacies which gives them priority over general legacies. The question then before the court

was whether the legacy was merely general, on the one hand, or demonstrative or specific on the other.

It has been held where a will directed the sale of certain real property belonging to the testator, and that out of proceeds of such sale certain sums of money should be paid to designated legatees, such a bequest constituted a demonstrative legacy. *Dunford v. Jackson* (1895) 2 Va. Dec. 196, 22 S. E. 853.

Where a testator owned over 3,700 acres of land and devised 500 acres of land in Pierce or St. Croix county," the gift was held to be demonstrative. *Wheeler v. Hartshorn* (1876) 40 Wis. 83.

It has been held that a will which provides that a certain piece of land be sold, and out of its proceeds designated persons be paid certain sums of money, creates a demonstrative legacy. *Dunn v. Renick* (1895) 40 W. Va. 349, 22 S. E. 66.

In *Hodges v. Grant* (1867) L. R. 4 Eq. (Eng.) 140, 36 L. J. Ch. N. S. 935, 15 Week. Rep. 607, it appeared that a testatrix who had the power of appointment over four estates directed the same to be sold, and the proceeds thereof and all her other estate to be held for the payment of the legacies thereafter given. She then directed that after her death the estates not already sold should be disposed of, and out of the proceeds P. should be paid £20,000. It was held that this was a demonstrative legacy.

In *Bessant v. Noble* (1855) 2 Jur. N. S. (Eng.) 461, it appeared that a testator directed his trustees to set aside £1,666, 13 s. 4 d. consols for the use of his daughter, and that, if at the time of his death he did not own so much of such security, his trustees should purchase the same, but he did not mention by what means. Subsequently, however, he executed a codicil, wherein he directed that his trustees purchase the amount of such securities bequeathed out of the rents and profits of his leasehold and freehold estates. It was held that this was a demonstrative legacy, with the leasehold and freehold estates desig-

nated as a primary source out of which the legacies should be satisfied.

In *Colville v. Middleton* (1840) 3 Beav. 570, 49 Eng. Reprint, 224, 4 Jur. 1197, it appeared that a testator devised certain real estate in trust to sell so much thereof as would, in the exoneration of his personal estate, pay certain claims, also several legacies given by his will. He further recited that he was entitled under a marriage settlement to the sum of £7,442, of which he had already received £2,442. He then bequeathed to four legatees the sum of £2,442 out of the money to arise from the sale of the estate aforesaid, also the £5,000 where and if the same should be received and got, but not otherwise. It was further provided by the will that if the £5,000 or any part thereof should be received by the testator in his lifetime, then the same or so much thereof as had been received should be raised out of the moneys to arise from the estate devised to be sold as aforesaid. This was held to be a demonstrative legacy of £7,442.

In *Dickin v. Edwards* (1844) 4 Hare, 273, 67 Eng. Reprint, 651, a gift of £1,000 to be raised by the sale of timber trees growing on certain lands was held to be demonstrative. It was said, further, that the character of this legacy was not changed by a subsequent direction in the will that the personal estate of the testator was given subject to the payment of his debts, legacies, funeral expenses, etc.

Where a testatrix made a bequest of an annuity of £100, charging it on a certain leasehold estate, and all and every of her residuary personal effects with some exceptions, it was held that the legacy was demonstrative. *Livesay v. Redfern* (1836) 2 Younge & C. Exch. 90, 160 Eng. Reprint, 324, 6 L. J. Exch. in Eq. N. S. 35.

In the case of *Creed v. Creed* (1844) 11 Clark & F. 491, 8 Eng. Reprint, 1187, it appeared that there were gifts by will of annuities and legacies. The gift of the annuities was as follows: "I leave and bequeath an annuity or yearly rent charge of so much for life, charged upon and payable out of all my real and freehold estates and

properties, except Ballinanty; and I do hereby charge and encumber the same therewith, and also empower the annuitant to take all and every remedy for recovery thereof, as in cases of rent service is usual." In the gift of the legacies, after giving several pecuniary legacies without reference to any fund for payment, the will proceeded as follows: "The said several legacies to be paid by my trustees and executors, as soon as conveniently may be after my decease, out of such part of my personal estate aforesaid as may remain after payment of my debts and funeral expenses; and such part of said legacies as shall or may remain unpaid by the said personal estate, to be raised and paid by my trustees and executors, in such manner as they shall think proper, out of my real and freehold properties, except Ballinanty aforesaid; and I do hereby charge and encumber the same herewith." It was held that the annuities were specific, but that the legacies were demonstrative. The court said: "General legacies do not become specific because they are payable out of the proceeds of real estate; but the gift of the proceeds of the sale of real estate may be specific, as in *Page v. Leapingwell* (1812) 18 Ves. Jr. 463, 34 Eng. Reprint, 392, 11 Revised Rep. 234. So the charge of the legacies upon the real estate does not make them specific, although the annuities payable and issuing out of them are so."

In *Bleeker v. White* (1876) 23 Grant, Ch. (U. C.) 163, it appeared that a testator directed certain real estate and all of his personal property, excepting his household furniture, to be sold by his executors. In the succeeding clause he gave certain named sums to his sons and the balance to be divided equally between his daughters. The proceeds of the sale of the above property being insufficient to satisfy the legacies bequeathed, the legatees sought to have the legacies paid out of the general estate, but it was held that the bequests were not merely demonstrative, but specific, being confined to the proceeds of the sale of the designated property.

In *Fowler v. Willoughby* (1825) 2

Sim. & Stu. 354, 57 Eng. Reprint, 381, 4 L. J. Ch. 72, 25 Revised Rep. 219, a legacy was held to be demonstrative where it consisted of a gift of a certain sum, to be raised by the sale of real estate which the testator had contracted to purchase.

An exhaustive and informative treatment of demonstrative legacies appears in the case of *Walls v. Stewart* (1851) 16 Pa. 275. It appeared in that case that a testator devised a certain farm to his son, subject to and charged with a legacy of \$600 to certain legatees. The farm was sold before the death of the testator, and the question arose whether such sale worked an ademption of the legacy charged on the land, and it was held that the legacy was specific and failed with the extinction of the fund upon which it was charged. It was said by the court: "Indeed, I think an examination of the authorities, English and American, will show that wherever an intent is exhibited to make distribution of the value of lands, either by means of a sale and division of proceeds, or by the charge of a sum in numero, payable by the devisee of the land as a quasi partial purchase of the estate devised, the bequests are always treated as specific, and consequently liable to be adeemed by an alienation of the land in the lifetime of the testator. I may add, this is also true where the only gift of a legacy is found in the direction to pay it out of the land devised; . . . or, as it is elsewhere expressed, where a testator charges his real estate with a sum of money, and then bequeaths the sum so charged; . . . though it is commonly otherwise where there is a distinct bequest, afterwards generally charged on the lands of the donor."

In *Knecht's Appeal* (1872) 71 Pa. 333, it appeared that a testator devised certain real estate to his son under and subject to the payment of \$7,000. The residue of his estate he directed to be divided between his other children. It was provided that the devise was to have no share in the residue. The charge of \$7,000, though the direction for its division appeared in the residuary clause, was held to

constitute a demonstrative legacy, payable out of the devised land as a primary fund.

In *Balliet's Appeal* (1850) 14 Pa. 451, it appeared that a testator made certain bequests of sums of money, and directed that these legacies be paid as subsequently provided. In another clause he devised certain real estate, charged with the payment of the above legacies, with a pecuniary legacy as a residuary bequest to the devisee. It was held that a sale of the land on which the legacies were charged worked an ademption of the legacies, the court saying that these were perhaps specific rather than demonstrative or general legacies. However, the decision was based on the apparent intention of the testator as gathered from the whole will and from a consideration of the relation between the testator and the beneficiaries under the will.

It was held in *Welch's Appeal* (1857) 28 Pa. 363, that where a testator devised a plot of land to his son, "subject to the payment of legacies hereinafter bequeathed," and then gave his daughter \$300 to be paid "by my son William out of the profit of the real estate bequeathed to him as aforesaid," the legacy was demonstrative. It was said in that case: "General legacies do not become specific merely because they are charged upon or payable out of the proceeds of real estate. . . . These general rules may, of course, be controlled in their application by the intention of the testator as expressed in the will. . . . This is not strictly a specific legacy. It is what the civilians call a demonstrative legacy. The real estate charged is merely an auxiliary fund provided to secure its payment."

In the case of *Stoever's Estate* (1911) 45 Pa. Super. Ct. 451, it appeared that a testator devised to his nephew certain land "at and for the sum of one hundred and seventy-five dollars (\$175) per acre, which said purchase money I order and direct him to pay to the following named legatees in manner following." Then followed bequests of different speci-

fied sums, concluding with a gift of "the balance thereof" to another legatee. The devisee refused to take the land at the purchase price named, and it was sold by his executors as directed in that event. The proceeds of the sale were not sufficient to satisfy the legacies given, and it was contended that they were demonstrative and should be satisfied out of the general estate. But it was held that the language of the will evinced an intent to give the proceeds of the land as such, not merely indicating the proceeds as

a fund for payment, and hence the legacies were specific. The court said: "We are not dealing with the case of giving a legacy and then directing a fund out of which it shall be paid, but it is a direct and specific giving of the purchase money. The legacy and the fund are one and the same thing. Under the cases cited we think these legacies are clearly specific, and that the testator intended that they should be confined for payment to the farm devised to his nephew." R. M. F.

FLOY P. CASON, Plff. in Err.,

v.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

Colorado Supreme Court — May 5, 1919.

(Clason v. Mutual L. Ins. Co. — Colo. —, 184 Pac. 296.)

Insurance — effect of dividend on lapse of policy.

1. The existence of an earned, but undeclared, dividend upon a policy of term insurance, renewable yearly at the time a yearly premium becomes due, does not continue the policy in force, although, upon subsequently receiving notice of it, the beneficiary attempts to apply it under the terms of the policy towards the payment of premiums, and tenders the balance due in cash.

[See note on this question beginning on page 1400.]

— waiver of terms of policy — correspondence.

2. Correspondence between an insurer and the holder of a life insurance policy by which an attempt is made to change the terms of the policy with respect to time of payment of premiums is not a waiver of any of the rights of the insurer under the policy so as to prevent the company from insisting on termination of a renewable term policy for nonpayment of a premium when it accrues under the terms of the policy.

On Petition for Rehearing.

— interpretation — "except as herein after provided."

3. The words, "except as hereinafter provided," in a provision in an insurance policy that if any premium is not paid, the policy shall cease, and all premiums previously paid shall be forfeited to the company, "except as hereinafter provided," refers exclusively to forfeiture of premiums, not to cessation of policy.

ERROR to the District Court for the City and County of Denver (Perry, J.) to review a judgment granting a nonsuit in an action brought to recover the amount alleged to be due on a life insurance policy. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. Archibald A. Lee, for plaintiff in error:

The provisions of the policy with regard to payment of premium were fully complied with, and the premium must

be treated as paid by the dividend beyond the date of the death of the insured, and the beneficiary is entitled to the insurance.

Phoenix Mut. L. Ins. Co. v. Doster,

106 U. S. 30, 37, 27 L. ed. 65, 68, 1 Sup. Ct. Rep. 18; Chicago L. Ins. Co. v. Warner, 80 Ill. 410; Girard L. Ins. Annuity & T. Co. v. Mutual L. Ins. Co. 97 Pa. 15; Union Cent. L. Ins. Co. v. Caldwell, 68 Ark. 505, 58 S. W. 355; Mutual L. Ins. Co. v. Henley, 125 Ark. 372, 188 S. W. 829; Knights Templars & M. Life Indemnity Co. v. Vail, 206 Ill. 404, 68 N. E. 1103, 105 Ill. App. 331; Albrecht v. People's Life & Annuity Asso. 129 Mich. 444, 89 N. W. 44; Smith v. St. Louis Mut. L. Ins. Co. 2 Tenn. Ch. 727; McNaughton v. Des Moines L. Ins. Co. 140 Wis. 214, 122 N. W. 764; Matlack v. Mutual L. Ins. Co. 180 Pa. 360, 36 Atl. 1082; North American Acci. Ins. Co. v. Bowen, — Tex. Civ. App. —, 102 S. W. 163; American Nat. Ins. Co. v. Mooney, 111 Ark. 514, 164 S. W. 276; Hull v. Northwestern Mut. L. Ins. Co. 39 Wis. 397; Kephart v. Buddecke, 20 Colo. App. 546, 80 Pac. 501; 1 Cooley, Briefs on Ins. p. 628; 9 Cyc. 579; 17 Am. & Eng. Enc. Law, 7; Mississippi Home Ins. Co. v. Adams, 84 Ark. 431, 106 S. W. 209; Chrisman v. State Ins. Co. 16 Or. 283, 18 Pac. 466; Connecticut F. Ins. Co. v. Colorado Leasing Min. & Mill. Co. 50 Colo. 424, 116 Pac. 154, Ann. Cas. 1912C, 597; National Mut. F. Ins. Co. v. Duncan, 44 Colo. 472, 20 L.R.A. (N.S.) 340, 98 Pac. 634; Jennings v. Brotherhood Acci. Co. 44 Colo. 68, 18 L.R.A. (N.S.) 109, 130 Am. St. Rep. 109, 96 Pac. 982; Preferred Acci. Ins. Co. v. Fielding, 35 Colo. 19, 83 Pac. 1013, 9 Ann. Cas. 916; Head Camp, W. W. v. Irish, 23 Colo. App. 85, 127 Pac. 918; Rickerson v. Hartford F. Ins. Co. 149 N. Y. 307, 43 N. E. 856; Bartholomew v. Security Mut. L. Ins. Co. 204 N. Y. 649, 97 N. E. 869; Veal v. Security Mut. L. Ins. Co. 6 Ga. App. 721, 65 S. E. 714; Goodwin v. Provident Sav. Life Assur. Asso. 97 Iowa, 226, 32 L.R.A. 473, 59 Am. St. Rep. 411, 66 N. W. 157; Hill v. Travelers Ins. Co. 146 Iowa, 133, 28 L.R.A. (N.S.) 742, 124 N. W. 898; Ferrer v. Home Ins. Co. 47 Cal. 416; Kern v. Western Life Indemnity Co. 192 Ill. App. 96.

It was error to rule that there was no waiver of the default in payment of premium.

Noem v. Equitable L. Ins. Co. 37 S. D. 176, 157 N. W. 308; Mee v. Bankers' Life Asso. 69 Minn. 210, 72 N. W. 74; Chicago L. Ins. Co. v. Warner, 80 Ill. 410; New York L. Ins. Co. v. Eggleston, 96 U. S. 572, 577, 24 L. ed. 841, 843; Hartford Life Annuity Ins. Co. v. Unsell, 144 U. S. 439, 449, 36

L. ed. 496, 500, 12 Sup. Ct. Rep. 671; Loftis v. Pacific Mut. L. Ins. Co. 38 Utah, 532, 114 Pac. 134.

Mr. John Campbell also for plaintiff in error.

Messrs. Charles Waterman and William A. Jackson for defendant in error.

Bailey, J., delivered the opinion of the court:

Floy P. Cason, plaintiff, brought suit as beneficiary in an insurance policy issued by the Mutual Life Insurance Company of New York, defendant, upon the life of her husband. At the close of her testimony the company interposed a motion for a nonsuit, which was allowed. She brings the cause here for review.

The policy in question was issued in April, 1912. In it the defendant covenants, in consideration of the premium paid on the date of issue, and in the further consideration of the payment of an annually increasing premium upon the first day of April of each succeeding year, during the continuance of the policy, to pay to the beneficiary a sum fixed by the policy upon the death of the insured. It also provides for payment of premiums in advance, with thirty days or one month of grace, whichever is the longer, after the expiration of the year for which the payment of the last premium kept the policy alive.

It then provides as follows:

"All premiums are payable in advance at said home office or to any agent of the company upon delivery, on or before date due, of a receipt signed by an executive officer of the company. . . .

"A grace of thirty days (or one month if greater), subject to an interest charge at the rate of 5 per centum per annum, shall be granted for the payment of every premium after first, during which time the insurance shall continue in force. If death occur within the period of grace, the overdue premium and the unpaid portion of the premium for the then current year, if any, shall be deducted from the amount payable hereunder.

"Except as herein provided the payment of a premium or instalment thereof shall not maintain this policy in force beyond the date when the next premium or instalment thereof is payable. If any premium or instalment thereof be not paid before the end of the period of grace, then this policy shall immediately cease and become void, and all premiums previously paid shall be forfeited to the company, except as hereinafter provided."

Dividends and the disposal thereof are stipulated for in the following language:

"This policy shall participate in the surplus of the company, and the proportion of the surplus accruing hereon shall be ascertained and distributed annually on the anniversary of its date of issue. At the option of the insured or the owner of this policy such dividends shall be either—

"(1) Paid in cash, or (2) applied toward the payment of any premium or premiums; or (3) left to accumulate to the credit of the policy with interest at the rate of 3 per centum per annum, and payable at the maturity of the policy, but withdrawable on any anniversary of the policy.

"Unless the insured or the owner of this policy shall elect otherwise within three months after the mailing of a written notice requiring the election of one of the three above options, the dividends shall be paid in cash."

Under the scale of premiums agreed upon the deceased was assessed the sum of \$91.20, as premium for the year in which he died.

Terms upon which lapsed policies may be reinstated are as follows: "Unless the original term for which this policy was issued has expired, it may be reinstated at any time within three years from date of default in payment of any premium, upon evidence of insurability satisfactory to the company, and upon payment of the arrears of premium with interest thereon at the rate of 5 per centum per annum."

The policy is designated as a "yearly renewable term" policy, and under the caption "Notice to policyholder" is found the following: "As this policy is on the yearly renewable term plan, the premiums will increase yearly, as shown by the table herein, and they will increase more rapidly as time goes on. Owing to the low rate of premium charged, the dividends on this policy will be small, and must not be confused with those on ordinary forms of policy."

The insured failed to pay the premium which fell due on April 1, 1916, and some correspondence ensued in reference thereto between him and the defendant. On May 18, 1916, the insured died, not having paid or attempting to pay that premium. Some time after his death the beneficiary received from the defendant company blank forms upon which to designate the manner in which a dividend then due, under the terms of the policy, should be applied. Mrs. Cason filled out one of them in which she elected to have the dividend applied to the payment of the current premium, and on the 23d of June, 1916, tendered the same, together with the balance of the yearly premium, to the agent of the company. The tender was refused, and defendant, declining to recognize the right of the beneficiary to so elect, denied any liability upon the ground that the policy had lapsed.

The sole question is whether the policy was in force at the death of the insured. It is plain that it is a renewal term contract, and that under its provisions there is a new contract of insurance each year, provided the one condition precedent is fulfilled; to wit, the payment of the premium within the time limit. Failure to perform that condition terminates the contract.

Plaintiff contends that the policy gives an option to apply dividends to the payment of premiums. But the policy also provides that the insurance shall cease if the premium is not paid within the period of

grace, and that the contract is for a term of one year, renewable only upon the payment of the annual premium in advance. Manifestly

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the option must be exercised while the contract is yet in force, and a full annual premium must be paid.

At the time of the death of the insured a dividend had accrued upon the policy in the sum of \$22.70. It is argued that the insurance company is bound by the terms of the policy to apply this dividend to any overdue premium and so keep the policy in force, and that there is no evidence that the company ever gave notice of this accrued dividend or that it ever required the insured to elect how it should be applied. It is also contended that the notice to elect, sent the beneficiary after the death of the insured, and her response thereto and tender of the balance of the premium, were sufficient to reinstate the policy. Also, that in any event, the correspondence above mentioned between the company and the insured, following the nonpayment of the premium in question, was a waiver of whatever right to declare the policy forfeited the company might have had. It is argued that this is true regardless of whether the policy is a whole life policy, or one, as stated in the contract, for a renewable term.

As noted above, the policy is designated as a "yearly renewable term" policy, which is a distinct form of insurance differing from a life policy, and other forms. It is for a specific period of time. In this case it was for a yearly period, with one month of grace, and to be kept in force, according to its terms, must have been renewed each year before it had lapsed. The payment of the yearly premiums was a condition precedent to a renewal. In *New York L. Ins. Co. v. Statham*, 93 U. S. 24, 23 L. ed. 789, 19 Am. Rep. 512, the forms of term insurance and whole life policies are contrasted and discussed on page 30 of 93 U. S. as follows: "We agree

with the court below, that the contract is not an assurance for a single year, with a privilege of renewal from year to year by paying the annual premium, but that it is an entire contract of assurance for life, subject to discontinuance and forfeiture for nonpayment of any of the stipulated premiums."

In *Rosenplanter v. Provident Sav. Life Assur. Soc.* 46 L.R.A. 473, 37 C. C. A. 566, 96 Fed. 721, a renewable term policy was under discussion, and at page 476 of 46 L.R.A. the court said: "The contract which the parties themselves made was one for an insurance for a single year, with the privilege of renewal for succeeding years upon condition of the payment of an additional premium upon the day named in the policy. Failure to renew it according to . . . contract put an end to the policy, without more ado."

Also in *McDougall v. Provident Sav. Life Assur. Soc.* 135 N. Y. 551, 32 N. E. 251, where the court described and construed the policy there involved in the following language: "Defendant further promised 'to renew and extend this insurance during each successive year from the date thereof, upon condition that the assured shall pay, on or before the twenty-third day of June in each successive year during the continuance of the contract. . . .' It is plain that this policy was a contract for an insurance for the term of one year only, providing, however, by its terms, for its renewal for successive years upon compliance by the assured with the conditions named."

See also *Haas v. Mutual L. Ins. Co.* 84 Neb. 682, 26 L.R.A. (N.S.) 747, 121 N. W. 996, 19 Ann. Cas. 58; *Hartford F. Ins. Co. v. Walsh*, 54 Ill. 164, 5 Am. Rep. 115; *Baldwin v. Provident Sav. Life Assur. Soc.* 23 App. Div. 5, 48 N. Y. Supp. 463; *Roberts v. Aetna L. Ins. Co.* 101 Ill. App. 313; *Brady v. Northwestern Ins. Co.* 11 Mich. 443; *Jenkins v. Covenant Mut. L. Ins. Co.* 171 Mo. 375, 71 S. W. 688.

It is plain from the terms of the

policy that the insurance was distinctively from year to year, subject to renewal only upon compliance with its provisions. The insured had allowed the policy to lapse, and the correspondence between him and the defendant shows an effort upon the part of both to renew the contract upon different terms as to the payment of the premiums. This, however, was not a waiver of any of the rights of defendant.

—waiver of
 terms of policy—
 correspondence.

There was nothing in the policy which required the company to apply the dividend due to the partial payment of the annual premium. The Supreme Court of the United States, in *Slocum v. New York L. Ins. Co.* 228 U. S. 364, at page 374, 57 L. ed. 879, 884, 33 Sup. Ct. Rep. 527, Ann. Cas. 1914D, 1029, in discussing the question whether an insurance company is bound to accept partial payments of premiums, said: "The policy plainly provided for the payment of the stipulated premium annually within the month of grace following the due day, and as plainly excluded any idea that payment could be made in instalments distributed through the year. Concededly, there was no payment of the whole of the premium in question, and as a partial payment was not within the contemplation of the policy, nothing was gained by handing to the agent the check . . . unless what he did in that connection operated as a waiver of full and timely payment."

In the case at bar it was not within the contemplation of the policy that partial payments would be allowed. Indeed, the correspondence mentioned above was, among other things, a tentative effort to change the terms of payment under the policy to semiannual or quarterly payments of the premium, and to reinstate the policy under those proposed new terms.

There is no provision in the policy authorizing the application of dividends to the purchase of extended insurance, or providing for the pur-

chase of any insurance less than for a whole year, or for the payment of anything less than a full annual premium. There was nothing under this policy to be forfeited and therefore nothing which could be waived, because the failure to pay the premium had put an end to the contract. If the condition precedent is not performed the policy dies, and if it is to be revived it must be by a new agreement between the parties.

In any event, regardless of whether the policy is a term policy or an entire life policy, there is nothing in the correspondence which warrants a holding that the lapse of the policy was waived. The letter chiefly relied upon by plaintiff is the one dated May 10, 1913, which appears upon its face to be a stereotype form probably sent to all policyholders who permit their contracts to lapse by failure to pay premiums.

Upon a full and careful examination of the policy it must be concluded that it is one for a fixed term of one year, with a period of grace added, and may be renewed at the end of each year by paying the full premium due under its terms; that the payment of such yearly premium within the time specified is a condition precedent to renewal; that the failure to make such payment terminates the policy; that it has no provision either authorizing or requiring the company of its own motion to apply dividends to the payment, either partially or wholly, of any premium or premiums due; and that it contains absolutely no provisions for extended insurance by a partial payment of a premium.

It conclusively appearing that the insured had not paid the current premium, and had therefore permitted the policy to lapse, it is unnecessary to discuss any of the other points raised by the plaintiff.

The terms of the policy are direct, clear, and without ambiguity. They leave no room for construction. It is the function of courts to enforce contracts according to their precise

terms, and not to attempt to modify or change them or to make a different contract between the parties from that into which they themselves have voluntarily entered.

The judgment of the trial court in dismissing the action was right and should be affirmed.

Judgment affirmed.

A petition for rehearing having been filed, the following additional opinion was handed down on October 6, 1919:

The main contention on rehearing is that the court in its opinion fails to give effect to the words in the policy, "except as hereinafter provided," and that this provision has not had consideration by the court in reaching a conclusion.

These words appear in this clause of the policy: "If any premium or instalment thereof be not paid before the end of the period of grace, then this policy shall immediately cease and become void, and all premiums previously paid shall be forfeited to the company, except as hereinafter provided."

The expression, "except as hereinafter provided," has not the slight-

est application to the question of the termination of the policy. It plainly refers to the forfeiture of premiums previously paid, and to that alone. This is clearly apparent, not only from grammatical construction, but in view of the other provisions of the policy which make it manifest beyond the possibility of doubt that the only way to continue the policy in force is by the payment of the agreed premium when due, or within the period of grace allowed.

The clause under discussion simply provides that as a result of the fact that the policy has lapsed, it is expressly agreed that all premiums previously paid are forfeited, except only those which are returnable under the dividend clause. Such clearly is the sole and only purpose and effect of the limitation in question. There appears to be no room for a difference of opinion on this proposition.

The clause under discussion simply provides that as a result of the fact that the policy has lapsed, it is expressly agreed that all premiums previously paid are forfeited, except only those which are returnable under the dividend clause. Such clearly is the sole and only purpose and effect of the limitation in question. There appears to be no room for a difference of opinion on this proposition.

Rehearing denied.

Garrigues, Ch. J., and Allen, J., concur.

ANNOTATION.

Dividends as preventing lapse of policy for nonpayment of premiums.

General rule.

Except as hereafter noted it is a general rule that where an insurer has accrued dividends in its hands sufficient to cover premiums due, it is its duty to apply them to the payment of the premiums and prevent a forfeiture, especially if this has been the custom of the parties. *Manhattan L. Ins. Co. v. Hoelzle* (1879) Fed. Cas. No. 9,025; *Mutual L. Ins. Co. v. Henley* (1916) 125 Ark. 372, 188 S. W. 829; *Mutual L. Ins. Co. v. Breland* (1918) 117 Miss. 479, L.R.A.1918D, 1009, 78 So. 362; *Girard L. Ins. Annuity & T. Co. v. Mutual L. Ins. Co.* (1881) 97 Pa. 15; *Matlack v. Mutual L. Ins. Co.* (1897) 180 Pa. 360, 36 Atl. 1082.

In *Girard L. Ins. Annuity & T. Co. v. Mutual L. Ins. Co.* (1881) 97 Pa. 15,

it was held that the insurer could not declare a policy forfeited for nonpayment of premiums where it had dividends belonging to the insured in its hands, and it had been his custom to apply dividends due him to the payment of premiums.

To the same effect is *Matlack v. Mutual L. Ins. Co.* (Pa.) supra.

And in *Manhattan L. Ins. Co. v. Hoelzle* (Fed.) supra, where it was the custom of the insurer to apply dividends to the payment of the next premium when the insured so requested, it was held that a recovery was not barred because of a nonpayment of a premium, where the insured had requested the insurer to apply the dividends to the payment of the premium.

And in *Mutual L. Ins. Co. v. Breland*

—interpretation
"except as hereinafter provided."

(1918) 117 Miss. 479, L.R.A.1918D, 1009, 78 So. 362, it was held that the insurer should, in the absence of notice to the insured to exercise his option as to the application of accrued dividends, apply them in payment of the premium so as to prevent a forfeiture, notwithstanding a provision of the policy that upon failure of the insured to exercise his option the dividends should be applied to furnish paid-up additions to the policy.

In *Citizens' Nat. L. Ins. Co. v. Morris* (1912) 104 Ark. 288, 148 S. W. 1019, however, because of a provision in the policy for forfeiture if premiums were not paid when due, and for the termination of the contract if the insured failed to carry out an agreement whereby he was to act as the insurer's agent, it was held that the rule requiring dividends to be applied to pay premiums, and avoid a forfeiture, had no application.

And in *Straube v. Pacific Mut. L. Ins. Co.* (1899) 123 Cal. 677, 56 Pac. 546, which was an action by a wife after her husband's death, based on fraud by the insurer in procuring the surrender of the policy for a cash consideration, the court stated that there was no merit in the wife's contention that the accumulated dividends should have been applied to the payment of premiums. This conclusion apparently was based on provisions of the policy for paid-up insurance and for forfeiture on default in the payment of premiums.

Application of undeclared dividends.

It has been held that profits in the insurer's hands which have been earned, but not declared as, dividends, cannot be treated as funds in its hands applicable to the payment of premiums, and that it is not therefore required to apply them to the payment of premiums and prevent a forfeiture. *Empire L. Ins. Co. v. Wier* (1910) 135 Ga. 130, 68 S. E. 1035; *Mutual F. Ins. Co. v. Miller Lodge* (1882) 58 Md. 463; *Jones v. Northwestern Mut. L. Ins. Co.* (1889) 10 Ohio Dec. Reprint, 631; *Mutual L. Ins. Co. v. Girard L. Ins. Annuity & T. Co.* (1882) 100 Pa. 172.

The court in *Mutual L. Ins. Co. v.*

Girard L. Ins. Annuity & T. Co. (Pa.) supra, said: "We think it would be carrying the rule beyond any recognized principle to hold that profits earned, but not declared as dividend or otherwise, could be treated as funds in the hands of the company applicable to the payment of a premium. Non constat that such provision ever will be made. That it was subsequently done in this case is not to the point."

In an abstract of the opinion in *Empire L. Ins. Co. v. Wier* (1910) 135 Ga. 130, 68 S. E. 1035, actual payment of the yearly premium was held a condition precedent to the earning of a dividend provided for in certain coupons attached to the policy, and there having been no actual payment of an overdue premium, and no duty on the part of the insurer to declare a dividend, the policy was held forfeited.

And it has been held that an insured was not entitled to have dividends applied to prevent a forfeiture for nonpayment of premiums where, after the premium became due, the directors of the insurer declared a dividend to participating policies, conditioned upon the payment of the annual premiums, and providing that no dividend should be payable to policies upon which premiums were unpaid. *Bryant v. Mutual Ben. L. Ins. Co.* (1901) 109 Fed. 748; *Petrie v. Mutual Ben. L. Ins. Co.* (1904) 92 Minn. 489, 100 N. W. 236.

Attention may be called at this point, however, to the fact that in some cases it has been held that the insurer has no right to declare dividends conditioned upon the payment of the next premium due. *Aetna L. Ins. Co. v. Hartley* (1902) 24 Ky. L. Rep. 57, 67 S. W. 19; *Mutual Ben. L. Ins. Co. v. Davis* (1903) 115 Ky. 404, 73 S. W. 1020.

Insufficient dividends.

It has been held that where dividends due are insufficient to pay a full premium, the insurer is not bound, in the absence of an offer by the insured to pay the balance, to apply them to the payment of premiums. *Bulger v. Washington L. Ins. Co.* (1879) 63 Ga. 328; *Hollister v. Quincy Mut. F. Ins. Co.* (1875) 118 Mass. 478; *Wheeler v.*

Connecticut Mut. L. Ins. Co. (1880) 82 N. Y. 543, 37 Am. Rep. 594.

In *Hollister v. Quincy Mut. F. Ins. Co.* (1875) 118 Mass. 478, where the by-laws of a fire insurance company provided that any risk should be suspended unless an assessment was paid within a specified time, it was held not a valid excuse by a member for neglecting to pay an assessment that the company owed him a dividend on an old policy, less in amount than the amount of the assessment if he had not offered to pay the balance.

And in *Terry v. State Mut. L. Ins. Co.* (1911) 90 S. C. 1, 72 S. E. 498, where the policy gave the right to pay premiums semiannually or quarterly, and provided that dividends might be applied to the payment of premiums, or drawn in cash, it was held that the insurer was not bound to apply a dividend to the payment of the premium where it was insufficient to pay a quarterly premium, the shortest period provided for, although it was sufficient to continue the policy in force beyond the date on which the insured died.

And it will be observed that in the reported case (*CASON v. MUTUAL L. INS. CO.* ante, 1395) where the yearly renewable term policy provided for the payment of premiums in advance with a grace of thirty days, and provided that "except as herein provided" the payment of a premium shall not maintain the policy beyond the date when the next premium is payable, and that, at the option of the insured, dividends should be paid in cash or applied toward the payment of premiums, it was held that on default in the payment of the premium, continuing for more than a month, the policy was avoided, notwithstanding the fact that dividends were due which, although not sufficient to pay the premiums for a year, were sufficient to extend the risk beyond the time of the insured's death.

In *Mutual L. Ins. Co. v. Henley* (1916) 125 Ark. 372, 188 S. W. 829, however, where the insurer had dividends to the insured's credit sufficient to pay a quarterly premium, it was held that the policy was not forfeited for nonpayment of the premium, although the premiums were payable

annually, it appearing that the policy contained a provision that the premium might be paid semiannually or quarterly, the court stating that although the insured had not elected to pay quarterly, his consent to the appropriation of the dividend to prevent a forfeiture might be presumed.

And it has been held that although an insurer cannot be compelled to accept less than a full premium, and cannot be compelled to apply a dividend less than the premium due in part payment thereof, yet where it has actually so applied the dividend, it cannot, during the time covered by the part payment, declare the policy forfeited for nonpayment of the premium. *Ætna L. Ins. Co. v. Hartley* (1902) 24 Ky. L. Rep. 57, 67 S. W. 19.

Application to payment of interest on premium notes.

It has been held the duty of the insurer to apply dividends in its hands to the payment of interest on premium notes, where a default in the payment of the interest would work a forfeiture of the policy. *Union Cent. L. Ins. Co. v. Caldwell* (1900) 68 Ark. 505, 58 S. W. 355; *Franklin L. Ins. Co. v. Wallace* (1884) 93 Ind. 7; *Smith v. St. Louis Mut. L. Ins. Co.* (1877) 2 Tenn. Ch. 727.

And this result has been reached notwithstanding a provision for payment in cash of interest on the notes. *Northwestern Mut. L. Ins. Co. v. Fort* (1884) 82 Ky. 269; *Russum v. St. Louis Mut. L. Ins. Co.* (1876) 1 Mo. App. 228.

And a like conclusion was reached in *Hull v. Northwestern Mut. L. Ins. Co.* (1876) 39 Wis. 397, notwithstanding a provision for the payment of interest on notes in cash, there being a further provision that dividends should first be applied to pay unpaid interest, the court holding that in case of repugnant provisions they should be so construed as to avoid a forfeiture.

In *Mutual F. Ins. Co. v. Miller Lodge* (1882) 58 Md. 463, it was held that unless declared dividends are expressly made applicable to the payment of interest on premium notes, the insurer

is not bound or justified, unless with the insured's assent, to apply dividends to pay the interest on such notes, even for the purpose of preventing a forfeiture.

And in *Ewald v. Northwestern Mut. L. Ins. Co.* (1884) 60 Wis. 431, 19 N. W. 513, where the policy provided for a forfeiture for nonpayment of interest, and contained a provision that interest on premium notes should be paid in cash, and that dividends should be applied to the payment of premium notes, it was held that the insured could not complain of a forfeiture where he had failed to pay the inter-

est according to the provisions of the policy.

And in *Anderson v. St. Louis Mut. L. Ins. Co.* (1876) 1 Flipp. 559, Fed. Cas. No. 362, the insurer was held not required to apply dividends first to the payment of interest, and then to the principal, in order to prevent a forfeiture of a policy which made no special provision for dividend credits, and required payment annually in advance of the interest on notes, the insured's customs having been to pay the interest in cash and allow the dividends to be applied to the payment of the principal. J. T. W.

MARY E. HAMBLIN

v.

EDNA MARCHANT, Impleaded, etc., Appt.

Kansas Supreme Court — October 12, 1918.

(103 Kan. 508, 175 Pac. 678.)

Constitutional law — changing descent to murderer.

1. Section 3856 of the General Statutes of 1915 does not violate § 10 or § 12 of the Bill of Rights, or § 6 of article 6 of the state Constitution, or the 14th Amendment to the Constitution of the United States.

[See note on this question beginning on page 1408.]

Descent — murder of ancestor — statute.

2. Section 3856 of the General Statutes of 1915 applies to a woman who kills her husband by shooting him, for which she is afterwards convicted of manslaughter in the third degree.

[See 9 R. C. L. 50.]

— right of widow.

3. A widow takes property from her deceased husband under the Statute of Descents and Distributions, and not otherwise.

[See 9 R. C. L. 51.]

(On Rehearing.)

Dower — inchoate interest — right of legislature to change.

4. The interest of a wife, under a statute declaring that one half of her husband's property shall be set apart to her upon his death, is inchoate until his death, and may be changed or destroyed by statute.

[See 6 R. C. L. 312; 9 R. C. L. 566.]

Headnotes 1-3 by MARSHALL, J.

APPEAL by defendant Marchant from a judgment of the District Court for Montgomery County (Shukers, J., pro tem.) in favor of plaintiff in an action brought to quiet title to certain real property. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. Thomas E. Wagstaff, for appellant:

Defendant Edna Marchant could not be prevented from succeeding to the estate of her husband.

McAllister v. Fair, 72 Kan. 533, 3 L.R.A.(N.S.) 726, 115 Am. St. Rep. 233, 84 Pac. 112, 7 Ann. Cas. 973; 4 Bl. Com. pp. 193; *Re Kuhn*, 125 Iowa, 449, 101 N. W. 152, 2 Ann. Cas. 657;

Re Kirby, 162 Cal. 91, 39 L.R.A. (N.S.) 1088, 121 Pac. 370, Ann. Cas. 1913C, 928.

Appellant had a vested interest in the lands of her husband.

Helm v. Helm, 11 Kan. 19; Busenbark v. Busenbark, 38 Kan. 572, 7 Pac. 245; Munger v. Baldrige, 41 Kan. 286, 18 Am. St. Rep. 273, 21 Pac. 159; Flanigan v. Waters, 57 Kan. 18, 45 Pac. 56; McKelvey v. McKelvey, 75 Kan. 325, 121 Am. St. Rep. 435, 89 Pac. 663; Murray v. Murray, 102 Kan. 184, 170 Pac. 393; Nagle v. Tieperman, 74 Kan. 32, 9 L.R.A. (N.S.) 674, 85 Pac. 941, 88 Pac. 969, 10 Ann. Cas. 977; Jenkins v. Dewey, 49 Kan. 49, 30 Pac. 114.

Applied to third degree manslaughter, chap. 193, Laws 1907, violates § 10 of the Kansas Bill of Rights.

McKelvey v. McKelvey, 75 Kan. 325, 121 Am. St. Rep. 435, 89 Pac. 663.

The Statute of 1907 also violates § 6, art. 6, of the Constitution of Kansas and § 1 of the 5th Amendment to the Constitution of the United States.

Atchison, T. & S. F. R. Co. v. State, 22 Kan. 1; Manker v. Tough, 79 Kan. 46, 19 L.R.A. (N.S.) 675, 98 Pac. 792, 17 Ann. Cas. 208; Carpenter's Estate, 170 Pa. 203, 29 L.R.A. 145, 50 Am. St. Rep. 765, 32 Atl. 637; Owens v. Owens, 100 N. C. 240, 6 S. E. 794.

Mr. Alfred M. Jackson, *amicus curiæ*:

The wife has an interest in the real estate of her husband prior to his death.

Helm v. Helm, 11 Kan. 19; Jenness v. Cutler, 12 Kan. 500; Busenbark v. Busenbark, 38 Kan. 577, 7 Pac. 245; Flanigan v. Waters, 57 Kan. 23, 45 Pac. 56; McKelvey v. McKelvey, 75 Kan. 325, 121 Am. St. Rep. 435, 89 Pac. 663; Murray v. Murray, 102 Kan. 184, 170 Pac. 393; Re Kuhn, 125 Iowa, 449, 101 N. W. 151, 2 Ann. Cas. 657; 9 R. C. L. p. 51, § 43.

Mr. Sullivan Lomax, for appellee:

A wife, after having been convicted of manslaughter for the killing of her husband, cannot inherit his estate.

Hannon v. Taylor, 57 Kan. 1, 45 Pac. 51; State ex rel. Ise v. Cline, 91 Kan. 419, 50 L.R.A. (N.S.) 991, 137 Pac. 932; Re Mertes, 181 Ind. 478, 104 N. E. 753; Beddingfield v. Estill, 118 Tenn. 39, 9 L.R.A. (N.S.) 640, 100 S. W. 108, 11 Ann. Cas. 904; Re Kirby, 162 Cal. 91, 39 L.R.A. (N.S.) 1088, 121 Pac. 370, Ann. Cas. 1913C, 928.

The interest of a wife in the lands and property of her husband while he

yet lives is the same sort of inchoate or contingent interest as dower. So far as being a vested interest is concerned, it is no more so than dower.

Hatch v. Small, 61 Kan. 242, 59 Pac. 262; Crane v. Fipps, 29 Kan. 585; Chapman v. Chapman, 48 Kan. 636, 29 Pac. 1071; Kessinger v. Schrader, 79 Kan. 23, 98 Pac. 236.

Marshall, J., delivered the opinion of the court:

The plaintiff commenced this action to quiet title to certain real property in Montgomery county. Judgment was rendered in her favor against defendant Edna Marchant, who appeals. All other defendants filed disclaimers.

On July 10, 1915, John A. Marchant owned an undivided one-half interest in the land in controversy. On that day he was shot and killed by defendant Edna Marchant, who was then his wife. They had no children. Edna Marchant was afterwards convicted of manslaughter in the third degree for killing her husband.

Edna Marchant claims that she is the only heir of John A. Marchant, deceased, and that she is therefore the owner of an undivided one-half interest in the real property. She claims that § 3856 of the General Statutes of 1915 does not apply to persons convicted of manslaughter in the third degree. That section reads: "Any person who shall hereafter be convicted of killing or of conspiring with another to kill, or of procuring to be killed, any other person from whom such person so killing or conspiring to kill or procuring said killing would inherit the property, real, personal, or mixed, or any part thereof, belonging to such deceased person at the time of death, or who would take said property by deed, will or otherwise at the death of the deceased, shall be denied all right, interest and estate in or to said property or any part thereof, and the same shall descend and be distributed to such other person or persons as may be entitled thereto by laws of descent and distribution, as

if the person so convicted were dead."

In *McAllister v. Fair*, 72 Kan. 533, 3 L.R.A. (N.S.) 726, 115 Am. St. Rep. 233, 84 Pac. 112, 7 Ann. Cas. 973, decided in 1906, this court declared that a husband inherits his intestate wife's property, although he killed her for the purpose of acquiring that property. The 1907 session of the legislature passed the statute quoted, apparently for the purpose of changing the rule of law declared by the court. The language of the statute is broad, and includes every person who may take property from a deceased person in either of the ways named in the statute. The statute says any person who shall hereafter be convicted of killing any other person,

Descent—murder
of ancestor—
statute.

etc. A conviction for manslaughter is a conviction for killing. John A.

Marchant was killed by his wife, who shot him. That act was within the statute.

It is contended that Edna Marchant did not inherit nor otherwise take from her husband. Then how does she claim any right to the property? If she has any right, that right comes from our Statute of Descents and Distributions. She acquires no right to her husband's property, except by virtue of that statute. It does not

—right of
widow.

matter whether that right is acquired by inheritance or by contract growing out of the marriage relation. Edna Marchant either inherited the property or otherwise took it from her husband, unless § 3856 prevents her from acquiring it. That section controls, and prevents her from taking the property under any circumstances.

The constitutionality of the statute is questioned. It is argued that it violates §§ 10 and 12 of the Bill of Rights, and § 6 of article 6 of the state Constitution, and that it also violates the 14th Amendment of the Constitution of the United States. It is argued that the statute

is penal and works a forfeiture. So far as the present action is concerned, the statute changed the law of the devolution of property, on the death of the owner. The legislature has entire control of that matter. The Law of Descents and Distributions prescribes the way in which property shall go on the death of the owner, and the statute in question is merely an exception to the general rules prescribed by the Statute of Descents and Distributions. The statute in question is a part of the Law of Descents and Distributions, and it provides that the property of a deceased owner shall not go to the person who took the owner's life. Whether the person to whom the property would ordinarily go took the owner's life is a question that must be judicially determined by a court of competent jurisdiction. The legislature has seen fit to say that that fact must be ascertained in a criminal prosecution in which the person who would take the property is charged with killing the owner. When that fact is ascertained the property is not then taken from the person who would inherit, but it is then determined that the person never did inherit, and never did acquire any interest in the property. The statute is not penal; it does not add anything to the punishment of the person convicted; neither does it provide for a forfeiture; and nothing is taken from the person convicted. Edna Marchant never acquired nor received anything that could be taken from her. It follows that neither of the constitutional provisions mentioned has been violated by the statute. The conclusion reached

Constitutional
law—changing
descent to
murderer.

is supported by *Perry v. Strawbridge*, 209 Mo. 621, 16 L.R.A. (N.S.) 244, 123 Am. St. Rep. 510, 108 S. W. 641, 14 Ann. Cas. 92.

The judgment is affirmed.

All the Justices concur.

First petition for rehearing denied, November 14, 1918.

A second petition for rehearing having been granted, *Marshall, J.*, on May 10, 1919, handed down the following additional opinion (104 Kan. 689, 180 Pac. 811):

An opinion was rendered in this action on October 12, 1918. *Hamblin v. Marchant*, 103 Kan. 508, ante, 1403, 175 Pac. 678. A rehearing was granted.

The defendant insistently argues that § 3856 of the General Statutes of 1915 is unconstitutional, in that it works a forfeiture of a wife's rights in her husband's property, when she survives him, and is convicted of killing him. Homestead rights do not appear to be involved; at least, they are not argued. The defendant's argument is largely based on the declarations of this court concerning the interest of a wife in the property of her husband while both are living. These declarations will be examined in connection with the statute that gives to the wife that interest. That statute in part reads: "One half in value of all the real estate in which the husband, at any time during the marriage, had a legal or equitable interest, which has not been sold on execution or other judicial sale, and not necessary for the payment of debts, and of which the wife has made no conveyance, shall, under the direction of the probate court, be set apart by the executors as her property, in fee simple, upon the death of the husband, if she survives him." Gen. Stat. 1915, § 3831.

Pertinent declarations of the court follow:

"A wife residing in this state is entitled, upon the death of her husband, to the half of all the real estate owned by him during the marriage which has not been sold on judicial sale, and is not necessary for the payment of debts, and of which the wife has made no conveyance; so that there is an inchoate interest to the extent of one half given to the wife in the real estate of the husband. It is true that this interest in the real estate of the

husband is inchoate and uncertain; yet, according to the authorities, it possesses the element of property. It is an interest and right of which she can be divested only by her consent, or crime, or her dying before her husband. It is an interest which may be, in connection with the husband, the subject of contract and bargain, and is by many of the authorities denominated a contingent, but valuable, interest. It has been decided by this court that the wife has an estate in the homestead occupied by herself and husband, although the title to the same be in the husband, and that it is such a present and existing state that it will be protected by the courts. *Helm v. Helm*, 11 Kan. 19; *Jenness v. Cutler*, 12 Kan. 500." *Busenbark v. Busenbark*, 33 Kan. 576, 7 Pac. 245.

"The interest of the wife in the real estate of her husband during marriage is a contingent one, it is true; but it is unquestionably property. . . . That it is an existing interest, and one which may be the subject of conveyance by the wife during marriage, is expressly recognized by the statute defining the same." *Munger v. Baldrige*, 41 Kan. 243, 13 Am. St. Rep. 273, 21 Pac. 161.

"Under our statute, the property of the husband belongs exclusively to him, as the wife's property is exclusively her own. Neither has any vested interest or control over the property of the other by virtue of the marriage relation. The wife has no estate in the land of the husband. It is a mere possibility, depending upon the death of the husband, or whether he has divested himself of the title prior to his death. If he survives her, no interest is taken by nor transmitted to her heirs. If she survives him, but before his death he conveys the land, or it has been sold on execution or other judicial sale, nothing remains for her to take, and she has been deprived of no right. If there was an attempt to convey by the husband alone, when his wife was a resident,

the title would remain in her, because the manner of conveying land prescribed by statute had not been pursued; and if there was no judicial sale of the land, and it was not necessary for the payment of debts, a one-half interest would descend to her." *Buffington v. Grosvenor*, 46 Kan. 734, 13 L.R.A. 282, 27 Pac. 139.

"The interest which the statute gives to the wife in the real estate of her husband during his life is not easily classified or defined. Because of this difficulty it has been thought by some to be in its nature an inheritance, and such a suggestion may be found in some of the opinions of this court. But practically the entire trend of the decisions of this court is to treat it as a present existing interest—one which the wife may protect by an appropriate action during the life of the husband and against his wrongful acts." *McKelvey v. McKelvey*, 75 Kan. 329, 121 Am. St. Rep. 435, 89 Pac. 664.

"Where the wife of a mortgagor of unoccupied Kansas lands comes into court on a publication service, and admits that she joined with her husband in the execution of a note and mortgage, and no personal judgment is sought against her, she has no appealable interest in the lands of her husband subjected to foreclosure under a judgment based on such note and mortgage." *Stinson v. Bell*, 96 Kan. 191, 150 Pac. 603.

"It has been difficult to find a name for the interest the wife has in her husband's real estate apart from the homestead." *Murray v. Murray*, 102 Kan. 185, 170 Pac. 394.

"Money paid a married man as the consideration for a conveyance of his real estate, in which his wife joins, belongs to him, unless it be definitely agreed that a specific portion shall belong to her individually." *Osborn v. Osborn*, 102 Kan. 890, 172 Pac. 23.

"But a wife has certain rights and interests in property acquired by the husband during the existence

of the marriage relation, which, with the aid of the statute, the courts upon proper occasion will recognize and protect. Without such statute these rights of the wife would be imperfect and unenforceable, but they would morally exist nevertheless, and they only need such statute to give them legal vitality. It is not easy, and perhaps unnecessary, to delimit all these rights. Where the marriage relationship is harmonious, it is scarcely necessary to consider them. Ordinarily it requires either death or discord to mature them. . . .

From the adoption of the Constitution until now, the whole tendency of our legislation has been to recognize that the wife has a clearly existent legal and equitable right in the property of her husband, which is based upon the marriage relation and the spirit of mutual co-operation which is presumed to arise therefrom, and to find its fruition in the joint accumulation of property to serve their mutual needs and to avert or minimize the adverse contingencies of life. . . . If they lived together happily, both would enjoy the property, and upon the death of one of them the other's half interest would completely mature, and the Statutes of Wills and of Descents and Distributions would protect it." *Putnam v. Putnam*, 104 Kan. 52, 177 Pac. 840.

Under these declarations, the interest of a wife in her husband's property must be declared inchoate, and not vested. Can the legislature change or destroy that interest before it has become vested by the death of the husband? That question must be answered in the affirmative, for the reasons that follow:

There are some points of analogy between the present right of a wife in the property of her husband, and dower as it existed in this state before § 3831 was enacted. Dower was then provided for by § 1 of chapter 83 of the Compiled Laws of 1862, which read: "Every widow shall be endowed of the third part of all the lands whereof her hus-

band, or any other person to his use, was seised of an estate of inheritance, at any time during the marriage, to which she shall not have relinquished her right of dower in the manner prescribed by law, to hold and enjoy during her natural life. Dower in leasehold estates, for a term of twenty years or more, shall be granted and assigned as in real estate; for a (less) term than twenty years, shall be granted and assigned as in personal property."

Concerning that statute this court said:

"We cannot consent to the view, vigorously claimed, that dower is such a vested right as to forbid the legislature from changing or repealing such contingent interest." *Chapman v. Chapman*, 48 Kan. 638, 29 Pac. 1072.

"Before the death of the husband, and while the right of dower is in the inchoate stage, it is subject to legislative control, and may be enlarged, diminished, altered, or abolished." *Hatch v. Small*, 61 Kan. 242, 59 Pac. 262.

There are ample authorities supporting these declarations of this court. 12 C. J. 961; 6 R. C. L. 312; note in 12 Ann. Cas. 191. The same rule applies to curtesy before it is vested by becoming curtesy initiate. 12 C. J. 962; 6 R. C. L. 313.

It has been held that this rule applies to community property. 12 C. J. 962; *Arnett v. Reade*, 220 U. S. 311, 55 L. ed. 477, 36 L.R.A. (N.S.) 1040, 31 Sup. Ct. Rep. 425; *Warburton v. White*, 18 Wash. 511, 52 Pac. 233, 532, affirmed in 176 U. S. 484, 44 L. ed. 555, 20 Sup. Ct. Rep. 404. But there are contrary

authorities. *Spreckels v. Spreckels*, 116 Cal. 339, 36 L.R.A. 497, 58 Am. St. Rep. 170, 48 Pac. 228. The rule has not been confined to dower, curtesy, and community property, but has been applied to the statutory interest of a wife in the property of her husband where she survives him and thereafter holds in fee a portion of his land.

"The right which a wife has by virtue of chapter 40, Laws 1875, and chapter 37, Laws 1876, in the lands of her husband during coverture, is inchoate and contingent, and may, at any time before it becomes consummate by the death of the husband, be diminished or entirely taken away by the legislature." *Griswold v. McGee*, 102 Minn. 114, 112 N. W. 1020, 12 Ann. Cas. 186.

There can be no serious question about the power of the legislature to change, enlarge, diminish, or abolish the right of a wife in the property of her husband, other than the homestead, at any time before that right becomes vested by his death. If this is true, it necessarily follows that the legislature had the right to say that a wife who kills her husband shall not receive any part of his property; therefore § 3856 of the General Statutes of 1915 does not violate §§ 10 or 12 of the Bill of Rights, or § 6 of article 6 of the state Constitution.

Dower—inchoate interest—right of legislature to change.

Other questions are discussed, but they were sufficiently answered in the former opinion.

The judgment of affirmance is adhered to.

All the Justices concur.

ANNOTATION.

Constitutionality of statute precluding inheritance by one who killed decedent.

It is very generally, although not universally, held that, in the absence of a statutory provision to the contrary, a murderer is not precluded from participating in the estate of his decedent (see 9 R. C. L. pp. 47-49);

and that neither the statutory right of a widow in her husband's estate, (see *Eversole v. Eversole* (1916) 169 Ky. 793, L.R.A.1916E, 593, 185 S. W. 487) nor her dower right (see *Owens v. Owens* (1888) 100 N. C. 240, 6 S. E.

794) are barred because she has taken or was a party to the taking of her husband's life.

This situation has led to the adoption in various states of statutes of the type involved in the reported case (*HAMBLIN v. MARGHANT*, ante, 1408), providing that anyone convicted of killing a person from whom he would have inherited shall forfeit such inheritable interest. To these statutes two objections have been made on constitutional grounds: First, that they constitute an impairment of a vested right, and, second, that they contravene constitutional provisions that no conviction shall work a forfeiture of estate. Since there cannot be a forfeiture of estate unless some vested right is interfered with (see cases set forth, *infra*), both objections involve substantially the same inquiry into the nature of the right which the statute operates to limit.

Notwithstanding the suggestion thrown out *arguendo* in several cases (see *Hagan v. Cone* (1917) 21 Ga. App. 416, 94 S. E. 602; *Wall v. Pfanschmidt* (1914) 265 Ill. 180, L.R.A.1915C, 328, 106 N. E. 785, Ann. Cas. 1916A, 674; *McAllister v. Fair* (1906) 72 Kan. 533, 3 L.R.A.(N.S.) 726, 115 Am. St. Rep. 233, 84 Pac. 112, 7 Ann. Cas. 973; *Deem v. Millikin* (1892) 6 Ohio C. C. 357, 3 Ohio C. D. 491, affirmed on reasoning below in (1895) 53 Ohio St. 668, 44 N. E. 1134; *Carpenter's Appeal* (1895) 170 Pa. 203, 29 L.R.A. 145, 50 Am. St. Rep. 765, 32 Atl. 637) in support of the view that no exception can be made in the case of murderers, to the ordinary operation of the Statutes of Descent and Distribution, that a contrary conclusion would be at variance with the constitutional provision that no conviction shall work a forfeiture of estate, the courts which have had occasion directly to consider the question have held otherwise.

Thus, in *Perry v. Strawbridge* (1908) 209 Mo. 621, 16 L.R.A.(N.S.) 244, 123 Am. St. Rep. 510, 108 S. W. 641, 14 Ann. Cas. 92, it was held that the construction of a statute giving a widower one half the property of his childless wife, as not applying to one who murders his wife, is not prevented

by such a constitutional provision. The court said: "This construction of the existing statute, or even an express statute, as they have in Iowa, prohibiting a murderer from inheriting from his victim, does not violate our constitutional provision. There is no forfeiture of an estate which he has, but it is simply preventing him from acquiring property in an unauthorized and unlawful way, i. e., by murder. It takes nothing from him, but simply says: 'You cannot acquire property in this way.' Nor does such a statute prevent his heirs from inheriting through him property rightfully his, at the time of his demise. The state cannot by law take a criminal's property, but it can say to every individual citizen: 'You cannot acquire property by designated unlawful means.' Such statutes violate no constitutional provisions, either state or Federal."

And in *Box v. Lanier* (1904) 112 Tenn. 409, 64 L.R.A. 458, 79 S. W. 1045, the court, in ruling adversely to a contention that its holding that the common-law right of succession to property did not operate in favor of one who had wilfully taken the life of his ancestor violated a constitutional provision that conviction of crime shall not work a forfeiture of estate, said: "This provision has no connection whatever with the devolution of property, but it is intended in its last clause to prevent a forfeiture of an estate of a criminal on account of his offense; but we held that, under the facts found in this record, the surviving husband never acquired an estate in this property, and therefore there was nothing upon which this constitutional provision could operate. The same answer may be made to that part of the petition which calls the attention of the court to §§ 9 and 10, art. 1, of the Federal Constitution."

Inasmuch as the right to take by inheritance is, so long as the decedent is living, merely an expectant and not a vested right, the only real difficulty as to the constitutionality of statutes of the kind in question arises in the case of their application where a husband or wife has taken the life of the other,

and this only in those jurisdictions in which it is held that a wife's inchoate right of dower (see, for example, *Russell v. Rumsey* (1864) 35 Ill. 362; *Re Alexander* (1894) 53 N. J. Eq. 96, 30 Atl. 817), or a husband's estate as tenant by the curtesy initiate (see, for example, *McNeer v. McNeer* (1892) 142 Ill. 388, 19 L.R.A. 256, 32 N. E. 681; *Jackson v. Jackson* (1893) 144 Ill. 274, 36 Am. St. Rep. 427, 33 N. E. 51), or other property right growing out of the marital relation, is a vested right, and only as to property acquired prior to the enactment of the statute. As to the character, as vested rights, of dower, curtesy, and community rights, and of other rights growing out of the marital relation, see 6 R. C. L. pp. 812, 813, 13 R. C. L. pp. 1008-1011.

Two decisions of collateral interest in connection with the reported case

are *Re Kuhn* (1904) 125 Iowa, 449, 101 N. W. 151, 2 Ann. Cas. 657, holding that a statute, providing that "no person who feloniously takes or causes or procures another so to take the life of another shall inherit from such person or take by devise or legacy from him any portion of his estate," does not operate to exclude a wife who has taken the life of her husband, from the distributive share which the widow takes under Iowa Code, § 3366, and which goes to her as a matter of contract and of right, and not by inheritance; and *Beddingfield v. Estill* (1907) 118 Tenn. 39, 9 L.R.A. (N.S.) 640, 100 S. W. 108, 11 Ann. Cas. 904, which decides that a man holding an estate by entirety with his wife does not, upon her death, inherit it from her within the meaning of a similar statute.

E. S. O.

CITY OF PORTLAND, Respt.,

v.

P. J. TRAYNOR, Appt.

SAME, Respt.,

v.

CATHERINE KITCHEN, Appt.

Oregon Supreme Court — September 16, 1919.

(— Or. —, 183 Pac. 933.)

Municipal corporation — power to require license to conduct soft-drink business.

1. A municipal corporation may prohibit the business of furnishing food and soft drinks within its limits without a license, to be granted on proof of suitability of place and physical fitness of applicant and payment of a fee, under charter authority to make regulations to prevent introduction of contagious disease into the city, and to provide for the health of the city, and exercise police powers and make and enforce sanitary laws and grant licenses.

[See note on this question beginning on page 1417.]

Constitutional law — health ordinance — unlawful interference with business.

2. An ordinance purporting to protect the public health, which has no real or substantial relation to the subject-matter and is an unreasonable and unwarranted interference with the con-

duct of a lawful business, is unconstitutional.

[See 6 R. C. L. 239.]

License — arbitrary power to grant — validity.

3. An ordinance which invests in an officer or board arbitrary power to issue or withhold a license for a trade or

profession, without regard to the qualification of the applicant, is void.

[See 6 R. C. L. 209, 228.]

Municipal corporation — ordinance prohibiting occupation — validity.

4. An ordinance by or under which a lawful occupation which, when lawfully conducted, is not injurious to person, property, or the public, may be absolutely prohibited at the dictation of a public official, without any just cause or reason, is void.

[See 19 R. C. L. 813.]

— requirement of health certificate — effect of negligence of medical examiner.

5. That the medical examiners are careless and negligent in the discharge

of their duties is no defense to a prosecution for conducting a business without a health certificate as required by ordinance.

— failure to furnish guide.

6. That an ordinance requiring a license to conduct the business of selling food, which shall be issued only in case the place is suitable and the applicant physically fit, is not invalid because furnishing no guide for determining the question of suitability and fitness, if the issuance of the license is required when the premises are suitable according to the city ordinances and the regulations of the United States.

[See 6 R. C. L. 217 et seq. 12 R. C. L. 1283.]

APPEAL by defendants from judgments of the Circuit Court for Multnomah County (Tucker and Stapleton, JJ.) convicting them of violating an ordinance of the city providing for the licensing of persons conducting or working in food and soft-drink establishments. *Affirmed.*

Statement by Johns, J.:

Inasmuch as the legal questions involved in both cases are very similar, for the purposes of the opinion this and the companion case of City of Portland v. Catherine Kitchen will be considered as one. On January 31, 1919, the city of Portland passed Ordinance No. 35,013 entitled "An Ordinance Amending Article XV $\frac{1}{2}$ of Ordinance Number 34,046 as Amended, and Repealing Ordinance Number 34,800, and Declaring an Emergency." The first four sections of the ordinance are as follows:

"Article XV $\frac{1}{2}$.

"Section 1. Definitions. The term 'food establishment,' whenever used in this ordinance, shall mean and include every place in the city of Portland where food products are sold or offered for sale or served to the public, or manufactured, produced, concocted, prepared, or cooked for the public.

"The term 'soft-drink establishment,' whenever used in this ordinance, shall be deemed to mean every place in the city of Portland where drinks are sold, manufactured, or served or offered for sale to the public.

"The word 'person,' whenever used in this article, shall mean any person, firm, or corporation, and the masculine pronoun shall include the feminine, and the singular number shall include the plural, unless otherwise indicated by the text.

"Sec. 2. Licenses. It shall be unlawful for any person to open for business, conduct, or maintain, or cause to be opened, conducted, or maintained, any food establishment or soft-drink establishment in the city of Portland without first securing a license therefor as provided by ordinance.

"Sec. 3. Sanitary Conditions—Permit. Any person desiring to secure a food establishment or soft-drink establishment license shall make application to the bureau of health for inspection of the location where such establishment is intended to be located, which application shall state the exact location of such establishment, and the name and address of all persons interested therein, either as owner, proprietor, or manager. If, upon investigation, such proposed location is found to be suitable for a food establishment or soft-drink establishment, as the case may be, and in proper sanitary condition, according to the ordinances

of the city of Portland and the rules and regulations of the United States with reference to plumbing, water supply, ventilation, and cleanliness, the bureau of health shall issue to such applicant a permit for such establishment. Such permit shall be presented with the application for a license to conduct such food establishment or soft-drink establishment and no such license shall be issued unless accompanied by such permit.

"Sec. 4. Revocation of License. Any license issued hereunder may be revoked for failure to comply with any of the provisions of the ordinances of the city of Portland and/or the regulations of the United States government relating to food and soft-drink establishments, and no such license shall be transferable."

Section 5 provides that it shall be unlawful for any individual to be employed or to work in any food establishment without first having obtained a health certificate, or for any employer to hire any individual without such certificate. It is specified that the certificate is to be renewed quarterly, and that no certificate more than three months old shall be recognized by any employer. Section 6 of the ordinance is as follows: "Section 6. Examination. Any person desiring to secure a certificate of health as herein required shall present himself to the bureau of health for examination at least once every three months, and, if found by said bureau to be physically fit and free from diseases which are dangerous to the public, the bureau of health shall issue to such person a certificate of health entitling such person to work in a food establishment or soft-drink establishment. Each such applicant for a health certificate shall pay to the bureau of health a fee of 25 cents for such examination and permit."

The enactment further provides: "If the bureau of licenses refuses approval of any application, it shall at once so notify the applicant in

writing, and the applicant may appeal to the council within ten days thereafter, and the council shall proceed to hear and determine said appeal, and its decision shall be final."

To carry out the provisions of the ordinance the city of Portland was divided into seven districts, and inspectors were appointed for each. It was their duty to examine all of the food and soft-drink establishments in the city of Portland, to ascertain whether the owners thereof were complying with the municipal health ordinances in the construction of their buildings and sale of their merchandise, and in particular to note whether employees coming in contact with soft drinks, groceries, fruit, and vegetables with their hands were healthy and free from contagious or infectious diseases. A card index system was established, and after inspection the employees were required to report to the bureau of health, and submit to physical examination, for which, under the terms of the ordinance, a nominal charge was made. If it was found by the inspectors that the premises where the business was to be conducted were sanitary and complied with the ordinances of the city, a license was then granted to conduct the business upon the payment of an annual fee. If, upon examination, an employee was found to be free from contagious or infectious diseases, a certificate was then issued to him by the bureau of health, authorizing him to handle and sell such merchandise in bulk, as distinguished from canned or carton goods.

The defendant was engaged in conducting a grocery store in the city of Portland, and refused to obtain a license for his business. A complaint was filed against him in the police court of the city, upon which he was convicted, and appealed to the circuit court. In the latter court a jury was waived. The defendant objected to the introduction of any evidence, upon the ground that the complaint did not

state facts sufficient to charge a crime; that the ordinance is void for the reason that it is an unnecessary and unwarranted interference with lawful business, and violates the provisions of the 5th and 14th Amendments of the Constitution of the United States, and § 20 of article 1 of the Constitution of the state of Oregon, in that it grants special immunities and privileges to some which are not given to all, and confers an arbitrary power upon the city government. The objections were overruled, and the defendant was tried, convicted, and sentenced. He appeals to this court.

Messrs. J. Le Roy Smith and Wilson T. Hume for appellants.

Messrs. W. P. La Roche, E. Y. Lansing, and L. E. Latourette, for respondent:

The provision of the ordinance in regard to the health examination of persons handling food is not unreasonable, unnecessarily oppressive, or an unlawful delegation of authority.

New York ex rel. Lieberman v. Van De Carr, 199 U. S. 552, 50 L. ed. 305, 26 Sup. Ct. Rep. 144; Gundling v. Chicago, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633; Jacobson v. Massachusetts, 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. Rep. 358, 3 Ann. Cas. 765; Hall v. Geiger-Jones Co. 242 U. S. 539, 61 L. ed. 480, L.R.A.1917F, 514, 37 Sup. Ct. Rep. 217, Ann. Cas. 1917C, 643; White v. Mears, 44 Or. 215, 74 Pac. 981; State v. Briggs, 45 Or. 366, 77 Pac. 760, 78 Pac. 361, 2 Ann. Cas. 424; State v. Brown, 64 Or. 473, 130 Pac. 985; Thielke v. Albee, 79 Or. 48, 153 Pac. 793; Hurst v. Warner, 26 L.R.A. 484, and note, 102 Mich. 238, 47 Am. St. Rep. 525, 60 N. W. 440; State v. Zeno, 79 Minn. 80, 48 L.R.A. 88, 79 Am. St. Rep. 422, 81 N. W. 743; Crayton v. Larabee, 220 N. Y. 493, L.R.A. 1918E, 432, 116 N. E. 355; Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531, 542, 58 L. ed. 713, 718, 34 Sup. Ct. Rep. 359; Richardson v. Simpson, 88 Kan. 684, 43 L.R.A.(N.S.) 911, 129 Pac. 1128; State Medical Bd. v. McCrary, 95 Ark. 511, 30 L.R.A.(N.S.) 783, 130 S. W. 544, Ann. Cas. 1912A, 631; Morse v. Medical Examiners, 57 Tex. Civ. App. 93, 122 S. W. 446; Lassen v. Dental Examiners, 24 Cal. App. 767, 142 Pac. 505; State Medical Examiners v. Macy, 92 Wash. 614, 159

Pac. 801; State Medical Examiners v. Harrison, 92 Wash. 577, 159 Pac. 769; State Medical Examiners v. Jordan, 92 Wash. 234, 158 Pac. 982; Hewitt v. State Medical Examiners, 148 Cal. 590, 8 L.R.A.(N.S.) 896, 113 Am. St. Rep. 315, 84 Pac. 39, 7 Ann. Cas. 750; Coffman v. Ousterhous, — N. D. —, A.L.R. —, 168 N. W. 826; Creaghan v. Baltimore, 132 Md. 442, 104 Atl. 180; People ex rel. Lodes v. Health Dept. 189 N. Y. 187, 13 L.R.A.(N.S.) 894, 82 N. E. 187, 17 R. C. L. 556; Ex parte Bogle, 78 Tex. Crim. Rep. 1, 179 S. W. 1193; Quincy v. Kennard, 151 Mass. 563, 24 N. E. 860; St. Louis v. Fischer, 167 Mo. 654, 64 L.R.A. 679, 99 Am. St. Rep. 614, 67 S. W. 872, affirmed in 194 U. S. 362, 48 L. ed. 1018, 24 Sup. Ct. Rep. 673; People ex rel. Schwab v. Grant, 126 N. Y. 473, 27 N. E. 964.

The provision of the ordinance which requires a license would not be void, even if the provisions against which defendant complains were void.

Com. v. McCarthy, 225 Mass. 192, 114 N. E. 287.

The courts will not declare an ordinance or statute void as unreasonably depriving persons of the freedom of contract or employment, except in cases where the legislation clearly and palpably has no reference to the public health or safety and is a mere pretext for depriving the citizens of their property or rights.

4 Enc. U. S. Sup. Ct. Rep. 365; 5 Enc. U. S. Sup. Ct. Rep. 557; McLean v. Arkansas, 211 U. S. 539, 547, 53 L. ed. 315, 319, 29 Sup. Ct. Rep. 206; St. Louis Poster Advertising Co. v. St. Louis, 249 U. S. 269, 63 L. ed. 599, 39 Sup. Ct. Rep. 274; Middleton v. Texas Power & Light Co. 249 U. S. 152, 63 L. ed. 527, 39 Sup. Ct. Rep. 227; Merchants Exch. v. Missouri, 248 U. S. 365, 63 L. ed. 300, 39 Sup. Ct. Rep. 114; Hebe Co. v. Shaw, 248 U. S. 297, 63 L. ed. 255, 39 Sup. Ct. Rep. 125; Payne v. Kansas, 248 U. S. 112, 63 L. ed. 153, 39 Sup. Ct. Rep. 82.

Johns, J., delivered the opinion of the court:

We agree with defendant's counsel that an ordinance which is enacted to protect the public health, that has no real or substantial relation to the subject-matter, and is an unreasonable and unwarranted interference with the conduct

Constitutional law—health ordinance—unlawful interference with business.

of a lawful business, is unconstitutional; that any ordinance which invests in an officer or board arbitrary power to issue or withhold a license for any trade or profession, without

**License—
arbitrary power
to grant—
validity.**

regard to the qualification of the applicant, is void; and that an ordinance

by or under which a lawful occupation which, when lawfully conducted, is not injurious to the per-

Municipal corporation—ordinance prohibiting occupation—validity.

son, property, or the public, may be absolutely prohibited at the dictation

of any public official, without any just cause or reason, is void.

We have carefully read the record, and there is no proof of any discrimination by the inspector, or public health officials, of the city of Portland. Indeed, it appears, as a result of inspections, that about 2,500 individuals coming under the provisions of the ordinance have complied with its terms, and paid their licenses, and that the defendant is the only one who has not. It appears from his own testimony that his chief objection to paying it lies in the fact that he was required to go to the city hall for examination, and that he did not have any particular objection if it could be held in his own place of business.

Defendant's contention that the medical examiners are careless and negligent in the discharge of their

**—requirement of
health certificate—effect of
negligence of
medical
examiner.**

duties is not supported by the evidence; but, assuming that to be true, it would go only to the

administration, and not to the validity, of the ordinance, and would not be a defense to the charge against him. In the leading case of *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064, upon which appellant relies, it appeared that the petitioner had complied with every requisite of the ordinance and of the officers charged with its administration; that, notwithstanding such compliance, the supervisors withheld the required

license from him and 200 others similarly situated, and that 80 other and different persons were permitted to carry on the same business under similar conditions.

In construing those ordinances that court says: "They seem intended to confer, and actually do confer, not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent not only as to places, but as to persons. So that, if an applicant for such consent, being in every way a competent and qualified person and having complied with every reasonable condition demanded by any public interest, should, failing to obtain the requisite consent of the supervisors to the prosecution of his business, apply for redress by the judicial process of mandamus, to require the supervisors to consider and act upon his case, it would be a sufficient answer for them to say that the law had conferred upon them authority to withhold their assent, without reason and without responsibility." And the rule is there laid down that "class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment." And that "though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

That is good law, but there are no such facts in this record.

In the *Yick Wo* Case the petitioner complied with the ordinance, and, with 200 others, was arbitrarily refused a license by the supervisor.

In the instant case 2,500 other business men have complied with the ordinance, paid the fee, and obtained their license, and the inspectors have examined defendant's premises, and the board of health is ready and willing to grant him a license upon payment of the required fee, which the defendant refuses to pay, but wants to do business without a license.

He contends that the "ordinance makes no provision or regulation by which the bureau of health is to be guided in determining in what particular the applicant for license shall be 'physically fit,' nor what requirements must

—failure to furnish guide.

be met to constitute a grocery store 'a suitable place;'" and cites *Hewitt v. State Medical Examiners*, 148 Cal. 590, 3 L.R.A. (N.S.) 896, 113 Am. St. Rep. 315, 84 Pac. 39, 7 Ann. Cas. 750. That is a case where the board revoked a license which had been granted, and the court held that, in legislation providing for the revocation of a certificate of a person for professional or moral unfitness, the acts or conduct authorizing such forfeiting must be declared with certainty and definiteness, and that the acts upon which the board based its decision were not definite and certain. That is not this case. Here no license had been revoked, and it is only refused because the defendant will not pay the fee, and, as we construe it, the ordinance in question is certain and definite in its terms. It provides if, upon investigation, the location "is found to be suitable for a food establishment, and in proper sanitary condition according to the ordinances of the city of Portland and the regulations of the United States with reference to plumbing, water supply, ventilation, and cleanliness, the bureau of health shall issue to such applicant a food establishment permit."

If the premises comply with the ordinance of the city and the rules and regulations of the government with reference to plumbing, water supply, ventilation, and cleanliness,

the permit must be granted, and the health officer has no right to refuse it. The ordinance of the city of Portland, and the rules and regulations of the government in such matters, are both definite and certain, and the only question which the board of public health has any authority to consider is whether or not the premises or place of business come within such terms and provisions.

The intent is to provide for an inspection of the premises before any business is done, and, if the inspector makes an unfavorable report, the applicant may have the matter further investigated by the city health officer, and, if that officer will not grant the permit, he still has his remedy by direct appeal to the city commissioners.

It is not within the authority, or even the discretion, of the bureau of health to grant arbitrarily a permit to one person who has complied with the ordinance, rules, and regulations, and deny it to another who has complied with them. In the instant case, as to his place of business, there is no claim or pretense on the part of the city that the defendant has not complied with the city ordinance, rules, and regulations. The offense consists in his failure and neglect to pay the required license fee, which he admits he has not paid. In *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 58 L. ed. 713, 34 Sup. Ct. Rep. 359, the syllabus recites: "In determining whether the constitutional rights of a party have been affected by a state statute, the courts will presume, until the contrary is shown, that any administrative body to which power is delegated will act with reasonable regard to property rights."

The purpose and intent of both the city of Portland and the government was to control and to prevent the spread of contagious and infectious disease.

Under its charter the city of Portland has the power "to make regulations to prevent the introduction of contagious diseases into the city,"

and "to secure the protection of persons and property therein, to provide for the health, cleanliness, ornament, peace, and good order of the city," and "to exercise within the limits of the city of Portland all the powers commonly known as police powers, to the same extent as the state of Oregon has or could exercise said power within said limits," and "to make and enforce within the limits of the city all necessary water, local, police, and sanitary laws," and the execution of such laws is vested in its board of health, and power is also given "to grant licenses with the object of raising revenue, or for regulation or both, for any and all legal acts, things, or purposes, and to fix by ordinance the amount to be paid therefor, and to provide for the regulation of the same." To do this, plenary power is vested under the city charter, and the execution of that power is vested in the board of health. In *New York ex rel. Lieberman v. Van De Carr*, 199 U. S. 552, 50 L. ed. 305, 26 Sup. Ct. Rep. 144, the rule is laid down: "A state has the right, in the exercise of the police power, and with a view to protect the public health and welfare, to make reasonable regulations in regard to such occupations as may, if unrestrained, become unsafe or dangerous, and the conferring of discretionary power upon administrative boards to grant or withhold permission to carry on such a trade or business is not violative of the 14th Amendment. There is no presumption that a power granted to an administrative board will be arbitrarily or improperly exercised, and this court will not interfere with the exercise of such a power where the record does not disclose any ground on which the board acted."

In *State v. Briggs*, 45 Or. 366, 77 Pac. 750, 2 Ann. Cas. 424, the rule is stated that, in the regulation and licensing of trades, occupations, callings, and professions "which affect the public welfare, the legislature must enact the law necessary

to accomplish the object in view; but it may be carried into execution by some officer or board appointed for that purpose, and such officer or board may be authorized to prescribe the qualifications of those desiring to follow such callings or professions." In *White v. Holman*, 44 Or. 180, 185, 74 Pac. 933, 1 Ann. Cas. 843, it is said: "Under a Constitution like ours, any lawful business, the management of which might be injurious to the public, may be regulated so as to limit the place or to prescribe the manner in which it shall be conducted, provided that in doing so no privileges or immunities are granted to any individual or class of persons that shall not equally belong to all citizens upon the same terms."

In *State ex rel. McBride v. Superior Ct.* 103 Wash. 409, 174 Pac. 973, it is held that "laws and ordinances creating boards of health, and granting wide powers for the effective and effectual carrying out of the legislative plan for protecting health, must be liberally construed;" and "it is within the power of the legislature, in dealing with the problems of public health, to make the determination of a fact by properly constituted health officers final and binding upon the public as well as upon the courts."

Under its charter the city of Portland had a legal right to adopt the ordinance here involved. It is not for this court to say whether or not the measure should have been enacted; that is a legislative and not a judicial question. The charter also makes it the duty of the bureau of health to enforce such an ordinance, and vests it with power to make the necessary rules and regulations for its enforcement.

There is no evidence that the requirements of the bureau of health are arbitrary or unreasonable, or that there was any discrimination in their enforcement. The judgment in each case is affirmed.

Municipal corporation—power to require license to conduct soft-drink business.

ANNOTATION.

Power to require license for sale of soft drinks.**Generally.**

This note considers only the power of a state or municipality to require that a license be obtained therefrom by all venders of soft drinks. The power to prohibit or to regulate, other than by license, the sale of nonintoxicating drinks, is not discussed.

It is generally held that a municipality possesses the power to require that a license shall be obtained by all venders of soft drinks. *Campbell v. Thomasville* (1909) 6 Ga. App. 212, 64 S. E. 815; *Cassidy v. Macon* (1909) 133 Ga. 689, 66 S. E. 941; *Rome Coca Cola Bottling Co. v. Calhoun* (1910) 134 Ga. 360, 67 S. E. 1031; *Bradford v. Jones* (1911) 142 Ky. 820, 135 S. W. 290; *State v. Danenberg* (1909) 151 N. C. 718, 26 L.R.A. (N.S.) 890, 66 S. E. 301. And see the reported case (*PORTLAND v. TRAYNOR*, ante, 1410). Compare *Barling v. West* (1871) 29 Wis. 307, 9 Am. Rep. 576.

This power may be exercised by a municipality as a result of provisions in its charter whereby the right to regulate or tax such business is either generally or specifically delegated. A general delegation of this power has been construed from a grant of the police power under a "general welfare clause." *Campbell v. Thomasville* (Ga.) supra. And it was pointed out in that case that the exercise of this police power was justified on two grounds: "First, that the peace and good order of the community might otherwise be threatened by those who, under the guise of selling an alcoholic nonintoxicating drink, might violate the state Prohibition Laws; and second, that the public health must be guarded against the sale of impure or unhealthy compounds."

The courts seem to have distinguished between the sale of alcoholic and nonalcoholic "soft" drinks, the need for the regulation of the former having arisen particularly in those states which have passed "prohibition" laws, which resulted in the invention and introduction of nonintoxi-

cating liquors containing only a small percentage of alcohol, and it has been held that a license for the sale of these drinks, which appeared under a wide variety of names, such as "near-beer," "next-to-beer," etc., might be required by the municipalities in which they were sold, lest they prove a subterfuge for the evasion of the Prohibition Laws. *Campbell v. Thomasville* (Ga.) supra; *Cassidy v. Macon* (1909) 133 Ga. 689, 66 S. E. 941.

In *State v. Danenberg* (1909) 151 N. C. 718, 26 L.R.A. (N.S.) 890, 66 S. E. 301, the court distinguished the sale of alcoholic soft drinks from the vending of lemonade, soda water, etc., and, considering the former a distinct business, based its justification of the municipal tax thereon on several sections of the city charter which conferred a power to raise revenue by means of license taxes on trades and business.

The court in *Bradford v. Jones* (1911) 142 Ky. 820, 135 S. W. 290, drew a similar distinction, and pointed out that the sale of "soft drinks" containing alcohol might be subjected to the payment of one license fee because of their menace "to the morals and health of the community," while a different tax was imposed on non-alcoholic drinks, apparently by virtue of the municipality's "right of classification for revenue" purposes, for it was stated that the sale of such drinks did not call for an exercise of the police power.

In the reported case (*PORTLAND v. TRAYNOR*, ante, 1410), no discrimination between alcoholic and nonalcoholic drinks was made. The ordinance in question required a license for the maintenance of soft-drink establishments, and the power of the city of Portland to demand such a license was upheld as based on the provisions of a city charter, giving general police and revenue powers. The ordinance was apparently devised as a measure protective of the public health, and was so considered by the court.

In *Rome Coca Cola Bottling Co. v.*

Calhoun (1910) 134 Ga. 360, 67 S. E. 1031, the court upheld the right of a municipality to impose a license tax on the plaintiff, a dealer in soft drinks, who sold only to merchants in the town. The decision was based on an amendment to the charter of the town, which authorized the collection of a license fee from "all itinerant venders of soft drinks or merchandise of any character."

In *Tolliver v. Blizzard* (1911) 143 Ky. 773, 34 L.R.A. (N.S.) 890, 137 S. W. 509, a case involving the validity of an ordinance forbidding the sale of any soft drinks, except those specified, the court asserted, by way of dictum, the power of a municipality to require a license for the sale of soft drinks, saying: "Where it is possible to conduct the business without harm to the public, all sorts of police regulation may be instituted which will tend to suppress the evil. A rigid system of inspection may be provided; and it may be made a condition of the license that it shall be revoked in case the licensee violates the Local Option Law."

In *Parker v. Griffith* (1909) 151 N. C. 600, 66 S. E. 565, the court, in requiring a sheriff to accept a license tax for the sale of nonintoxicating drinks, as provided by statute, remarked that the right of towns and cities "to adopt reasonable regulations for the sale of near-beer" was not denied thereby.

A case, not within the scope of this note, but frequently cited on the question of the right of a municipality to regulate the sale of nonintoxicating drinks, is *Monroe v. Lawrence* (1890) 44 Kan. 607, 10 L.R.A. 520, 24 Pac. 1113. The power to require a license for such a sale was not involved, but the point discussed was closely analogous. An ordinance specifying the manner for the sale of cider was upheld by the court, which pointed out that the subject was one calling for regulation because of the natural fermentative quality of cider, the tendency it might have to develop a taste for intoxicating liquor, and the probability of its use as a subterfuge for the sale of stronger drinks.

The case of *Barling v. West* (1871)

29 Wis. 307, 9 Am. Rep. 576, is opposed to the decisions heretofore noted. The court held therein that a municipality was without power to demand a license fee for the sale of lemonade from a temporary stand. No proof was given at the trial that the ordinance in question was demanded by consideration of the health and good order of the community, and the court consequently refused to consider that point. Nor would the court uphold the ordinance as a revenue measure, other provisions having been made to that end. The ordinance had been set up as a defense by officials of the village who had arrested the plaintiff for violation thereof, and who were held liable for the arrest made without a warrant. The court said: "Now the sale of lemonade, ice cream, cakes, fruit, etc., is a perfectly lawful trade, and its restraint or regulation is not demanded by the public welfare; nor for the 'good order of the village;' nor 'for the benefit of trade or commerce;' nor for the public health of the citizens. Why, then, should the business be prohibited, or a person engaged in it be required to procure a license to carry it on, as if it were immoral, or prejudicial to the public health or to the good order of society? It seems to us that the ordinance is an invasion of private rights and an unwarranted interference with an entirely innocent and lawful business." Nor, it was held, could such action be taken in the exercise of the police power for the preservation of health, where it was clear that the reason for the regulation was based on other grounds; that if the necessity for this ordinance existed from the point of view of the health of the community, the defendants should have shown it; and that the regulation was an unauthorized and unreasonable infringement on the rights of the citizens of the village, which could not be justified under the taxing power of the trustees, since this power had been provided otherwise in the charter.

Illustrations.

In *Campbell v. Thomasville* (1909) 6 Ga. App. 212, 64 S. E. 815, the defendant was charged with violating an

ordinance, regulating the sale of "near-beer" in the city of Thomasville, by virtue of which a license was required to be obtained by all those engaged in this business, and the validity of this ordinance was questioned. The court, in determining that the cities of Thomasville and Waycross possessed the power to require such licenses, pointed out that municipalities might regulate the sale of non-intoxicating liquors on the ground that it was an exercise of the police power, which was granted to them by way of a general welfare clause. The court continued: "In general terms it may be said that municipal corporations, in dealing with the sale of 'near-beer' and like beverages, may, under the general welfare clause, adopt all fair and appropriate regulations which would tend to prevent the business from becoming a nuisance, by attracting together idle or disorderly persons, or by otherwise tending to disturb the public peace and tranquillity; or from becoming a menace to health by reason of the sale of impure or unwholesome liquors; or from becoming a means of violating the law as to the sale or keeping of intoxicating liquors."

In *Cassidy v. Macon* (1909) 133 Ga. 689, 66 S. E. 941, the court in an official syllabus said that the officials of the city of Macon, by virtue of the general welfare clause of the city charter and the clause granting authority to levy a license tax on persons in business in the city, were empowered to demand a license for the selling of "soft drinks," and this regardless of whether these drinks were made in imitation of alcoholic drinks or not. The decision was placed on the ground that the city needed the power in order to maintain peace and good order against those who, under the guise of selling soft drinks, might be tempted to violate the law prohibiting the sale of intoxicating liquors.

In *Rome Coca Cola Bottling Co. v. Calhoun* (1910) 134 Ga. 360, 67 S. E. 1031, the plaintiff sought to enjoin the officials of the town from levying on an execution, issued against the plaintiff in order to obtain the sum due the

town on license fee, according to the provisions of an ordinance for selling soft drinks. It was contended by the plaintiff that the town officials were not empowered by the charter to collect the tax, since sales were made only to the merchants of the town and not in competition with them. It was held, however, that by an amendment to the charter express authorization had been given to tax itinerant vendors of soft drinks, into which class the plaintiff fell. No question of the constitutionality of the ordinance was raised.

In *Bradford v. Jones* (1911) 142 Ky. 20, 135 S. W. 290, the defendant was charged with violation of an ordinance of a town, which required the payment of a license tax by dealers in "soft drinks." The court held that a municipality had the right to tax the sale of all "soft" drinks, alcoholic and nonalcoholic, by virtue of its police and revenue powers. It was pointed out that the sale of alcoholic "soft" drinks might necessitate the exercise of police regulation, which would not be needed to control the sale of nonalcoholic beverages, and it was said that "a municipality, under its right of classification for revenue or police purposes, might well impose one license fee for the sale of drinks that contain any per cent of alcohol, and a different license fee for the sale of those that contain no alcohol whatever."

In *State v. Danenberg* (1909) 151 N. C. 718, 26 L.R.A. (N.S.) 890, 66 S. E. 301, the defendant was charged with selling "near-beer" without paying the license tax imposed thereon by a city, and it was contended by him that the tax was ultra vires. The court held, however, that the city possessed authority to pass the ordinance in question, by virtue of certain sections of the city charter. It was provided thereby that the city might raise revenue, inter alia, by means of license taxes levied upon any business or trade carried on in the city. The court said: "It is a distinct business which, from its very nature, admits of strict regulation under the general police power of the state, by its municipali-

ties upon which that power may have been conferred." It was accordingly held that as a recognized business it

was legitimately subjected to the payment of a license by the city under its charter. R. S.

LADD & TILTON BANK, Resp.,

v.

HATTIE MITCHELL et al., Impleaded, etc., Appts.

Oregon Supreme Court (In Banc) — October 14, 1919.

(— Or. —, 184 Pac. 282.)

Mortgage — to secure release from blanket mortgage — character.

1. A mortgage by a purchaser of a subdivision of a tract of land to one who lent money to his vendor to purchase the land, to secure notes by which the purchaser undertakes to pay a portion of the purchase price of his subdivision to his vendor's creditor, which note is guaranteed by his vendor, is not a purchase-money mortgage within the statute forbidding a deficiency judgment upon foreclosure of a mortgage executed to secure payment of the balance of the purchase price of real property, although the mortgage was executed to secure a release of such subdivision from the blanket mortgage executed by his vendor to secure the original loan.

[See note on this question beginning on page 1425.]

Definition — purchase-money mortgage.

2. A purchase-money mortgage is a mortgage on land executed by the purchaser of the land contemporaneously

with the acquisition of the legal title thereof, or afterwards, but as part of the same transaction.

[See 19 R. C. L. 416.]

APPEAL by defendants Mitchell from a decree of the Circuit Court for Multnomah County (Stapleton, J.) in favor of plaintiff in a suit to foreclose a mortgage on certain real property. *Affirmed.*

Statement by Bean, J.:

This is a suit by Ladd & Tilton Bank against defendants McKinley Mitchell and wife and Lewis-Wiley Hydraulic Company to foreclose a first mortgage on certain real property. The complaint is in the usual form, and asks that, in the event the amount received upon the sale of the real property be insufficient to satisfy the demand of plaintiff, it have judgment against defendants Hattie Mitchell and McKinley Mitchell, and each of them, for the deficiency. The defendants Hattie Mitchell and McKinley Mitchell filed an answer, admitting the allegations of the complaint, and setting up certain facts which they claim exempt them from the operation of any judgment for any balance that may remain after the proceeds of

the sale of the real property described in the mortgage.

The trial court rendered a decree in favor of plaintiff, and the Mitchells appeal from that portion of the judgment and decree which is as follows: "That if, after the application of the proceeds of sale of said real property in the manner aforesaid, any deficiency remains upon the judgment herein rendered and obtained by plaintiff, that plaintiff have execution against the defendants Hattie Mitchell and McKinley Mitchell or either of them, and against the property of them or either of them, to satisfy in whole or in part any such deficiency."

The cause was submitted upon the following stipulation of facts:

"It is hereby stipulated by and between the parties hereto, by and

through their respective attorneys of record, that the following facts are to be considered as true on the trial of the above-entitled case:

"(1) That on and prior to the 3d day of October, 1912, Lewis-Wiley Hydraulic Company, an Oregon corporation, owned and held absolute title to lots 2 and 3 in block 10, Westover Terraces, an addition to the city of Portland, Multnomah county, Oregon, according to the duly recorded maps and plats thereof, and that on or prior to said date, to wit, the 3d day of October, 1912, Lewis-Wiley Hydraulic Company had borrowed certain moneys from Ladd & Tilton Bank, and as security therefor had executed a blanket mortgage unto Ladd & Tilton Bank on all of the property owned by Lewis-Wiley Hydraulic Company, including in said blanket mortgage the property above described, to wit, lots 2 and 3 in block 10, Westover Terraces aforesaid. That said blanket mortgage was to secure Ladd & Tilton Bank for the repayment of moneys actually advanced by the said Ladd & Tilton Bank to said Lewis-Wiley Hydraulic Company and used by said Lewis-Wiley Hydraulic Company for its corporate purposes; the said blanket mortgage so executed by the Lewis-Wiley Hydraulic Company was not in fact a purchase-money mortgage and said property was never owned by Ladd & Tilton Bank.

"(2) That on or about the 3d day of October, 1912, Lewis-Wiley Hydraulic Company sold to Hattie Mitchell and McKinley Mitchell, the defendants above named, said lots 2 and 3 in block 10, Westover Terraces, for the total purchase price of \$6,750, paying \$750 in cash unto the Lewis-Wiley Hydraulic Company, and, at the request of Lewis-Wiley Hydraulic Company, Hattie Mitchell and McKinley Mitchell executed a first mortgage on said lots in favor of the plaintiff Ladd & Tilton Bank, for \$3,375, the said mortgage being the mortgage which is described in the complaint filed herein; and as a further portion of the consideration

Hattie Mitchell and McKinley Mitchell executed a mortgage for \$—— in favor of Lewis-Wiley Hydraulic Company to secure the payment of the balance of the consideration due Lewis-Wiley Hydraulic Company.

"(8) For the purpose of permitting the Lewis-Wiley Hydraulic Company and Hattie Mitchell and McKinley Mitchell to consummate the purchase of the real property as in paragraph 2 of this stipulation set forth, Lewis-Wiley Hydraulic Company requested Ladd & Tilton Bank to apportion to lots 2 and 3 in block 10, Westover Terraces aforesaid, such amount of the general indebtedness due unto Ladd & Tilton Bank from the Lewis-Wiley Hydraulic Company as should be proper and suitable in the premises, and, pursuant to said request, Ladd & Tilton Bank did apportion to said lots 2 and 3 in block 10, Westover Terraces aforesaid, from the general indebtedness due from Lewis-Wiley Hydraulic Company to Ladd & Tilton Bank, the sum of \$3,375. The Lewis-Wiley Hydraulic Company, as a consideration for the segregation of said indebtedness by Ladd & Tilton Bank as aforesaid, did represent to Ladd & Tilton Bank that Hattie Mitchell and McKinley Mitchell would assume and pay such proportion of said segregated indebtedness and as evidence of said obligation of Hattie Mitchell and McKinley Mitchell to pay such proportion of such segregated indebtedness due unto Ladd & Tilton Bank from the Lewis-Wiley Hydraulic Company, as a consideration mortgage in the sum of \$3,375, the same being the mortgage more particularly described and set forth in the complaint filed in this cause.

"(4) Hattie Mitchell and McKinley Mitchell were informed by the Lewis-Wiley Hydraulic Company of the fact that Ladd & Tilton Bank had a general blanket mortgage on the property known and described as Westover Terraces, and particularly lots 2 and 3 in block 10 thereof, which mortgage was to se-

cure the repayment of moneys theretofore loaned by Ladd & Tilton Bank to Lewis-Wiley Hydraulic Company.

"(5) That the mortgage in favor of Ladd & Tilton Bank was executed by Hattie Mitchell and McKinley Mitchell in consideration of the release by Ladd & Tilton Bank of lots 2 and 3 in block 10, Westover Terraces aforesaid, from the security of the Lewis-Wiley Hydraulic Company as hereinbefore set forth, and from the blanket mortgage executed to Ladd & Tilton Bank as hereinbefore set forth, and the repayment of the security afforded Ladd & Tilton Bank by said blanket mortgage.

"(6) At the time that Hattie Mitchell and McKinley Mitchell executed the note for \$3,375 and gave a first mortgage on lots 2 and 3 in block 10, Westover Terraces aforesaid, as security for the same, the Lewis-Wiley Hydraulic Company was not released from the liability for the repayment of the moneys theretofore loaned by it unto the Lewis-Wiley Hydraulic Company, but at the time of the execution of said note and mortgage by Hattie Mitchell and McKinley Mitchell and contemporaneously therewith, and at the time of the lodging of the same with Ladd & Tilton Bank, the Lewis-Wiley Hydraulic Company did execute the following guaranty on the back of the note, in words and figures as follows, to wit:

"For value received Lewis-Wiley Hydraulic Company hereby guarantees the payment of the within note and waives protest, demand, and notice of nonpayment thereof.

"Lewis-Wiley Hydraulic Company,

"By W. C. Morse,

"Vice President."

"Upon the foreclosure of a mortgage executed, to secure the payment of the balance of the purchase price of real property . . . the mortgagee shall not be entitled to a deficiency judgment."

Messrs. Manning & Slater, for appellants:

A mortgage on land executed by the purchaser thereof contemporaneously with the acquirement of the legal title thereto is a purchase-money mortgage; and this is true without reference to whether the mortgage was executed to the vendor or to a third person.

Wright v. Wimberly, 79 Or. 626, 156 Pac. 257.

When, by an agreement between the vendor and vendee in a contract to convey land that the vendee is to give to a third person a first mortgage to secure a part of the purchase price, such mortgage is given simultaneously with the conveyance of the land, such mortgage is a purchase-money mortgage.

Marin v. Knox, 117 Minn. 428, 40 L.R.A.(N.S.) 272, 136 N. W. 15; Albright v. Lafayette Bldg. & Sav. Asso. 102 Pa. 411.

The test whether a mortgage is a purchase-money mortgage is not whether it is executed to the vendor, but whether the proceeds are to be used to apply on the purchase price.

Commonwealth Title Ins. & T. Co. v. Ellis, 8 Pa. Dist. R. 5.

Where one purchased certain property subject to a mortgage, which he assumed and agreed to pay as a part of the purchase price, the mortgage, as to him, becomes a purchase-money mortgage.

Re Hays, 104 C. C. A. 656, 181 Fed. 674.

The promise of the defendants to the defendant company to make the mortgage in question to plaintiff in part payment of the purchase price of the property, in consideration of which plaintiff was to release its mortgage, was not in form, substance, or effect a promise to assume and pay the debt of the company to plaintiff, but was a promise to pay their own debt in a particular way.

Feldman v. McGuire, 34 Or. 309, 55 Pac. 872; Putney v. Farnham, 27 Wis. 187, 9 Am. Rep. 459.

Messrs. Wood, Montague, & Hunt, for respondent:

A purchaser who assumes and agrees to pay a mortgage is personally liable to the mortgagee for a deficiency judgment.

Farmers' Nat. Bank v. Gates, 33 Or. 388, 72 Am. St. Rep. 724, 54 Pac. 205; Windle v. Hughes, 40 Or. 1, 65 Pac. 1058.

The situation here is even stronger

in favor of the mortgagee, because it has been made a party to the transaction and has given up rights in consideration of the purchaser's promise.

Farmers & M. Bank v. Copsey, 134 Cal. 287, 66 Pac. 324.

A mortgage given to secure money used to purchase the land mortgaged is not a purchase-price mortgage.

Heusler v. Nickum, 38 Md. 270; *Eyster v. Hatheway*, 50 Ill. 521, 99 Am. Dec. 537.

Where one mortgage is intended by the parties to replace another, the latter partakes of the qualities of the former. As the first mortgage here was not a purchase-money mortgage, the one in question is not.

Pearce v. Buell, 22 Or. 29, 29 Pac. 78; *Kern v. A. P. Hotelling Co.* 27 Or. 205, 50 Am. St. Rep. 710, 40 Pac. 168; *Capital Lumbering Co. v. Ryan*, 34 Or. 73, 54 Pac. 1093; *Title Guarantee & T. Co. v. Wrenn*, 35 Or. 62, 76 Am. St. Rep. 454, 56 Pac. 271.

Bean, J., delivered the opinion of the court:

The only issue in this case is whether the plaintiff is entitled to a judgment for any balance that may remain due after the application of the proceeds of the sale of the real property described in the mortgage. It is contended on behalf of defendants *Hattie Mitchell* and *McKinley Mitchell*, whom we will hereafter designate as defendants, as *Lewis-Wiley Hydraulic Company*, the other defendant, did not answer or appeal, that under the provisions of § 426, L. O. L., the plaintiff is not entitled to a judgment for such balance, or, as it is termed, "a deficiency judgment." The provisions of this section of our Code are as follows: "When judgment or decree is given for the foreclosure of any mortgage, hereafter executed, to secure payment of the balance of the purchase price of real property, such judgment or decree shall provide for the sale of the real property, covered by such mortgage, for the satisfaction of the judgment or decree given therein, and the mortgagee shall not be entitled to a deficiency judgment on account of such mortgage or note or obligation secured by the same."

The transaction delineated by the stipulation was of the same force and effect as though *Ladd & Tilton Bank* had loaned to the *Mitchells* \$3,375, *Lewis-Wiley Hydraulic Company* guaranteeing payment thereof, and then the *Mitchells* had paid the same to the *Lewis-Wiley Hydraulic Company*, and that company in turn had paid the same to *Ladd & Tilton Bank*. Instead of taking such a circuitous route, a three-cornered transaction was made. It might be stated that in effect the *Mitchells* assumed and agreed to pay to *Ladd & Tilton Bank* a portion of the money the *Lewis-Wiley Hydraulic Company* had borrowed from *Ladd & Tilton Bank*. The *Mitchells* were not purchasers of the lots from *Ladd & Tilton Bank*; *Ladd & Tilton Bank* were not the sellers of the lots. The mortgage was not executed by the *Mitchells* "to secure the payment of the balance of the purchase price of real property" within the meaning of the statute. The original debt of the *Lewis-Wiley Hydraulic Company* to *Ladd & Tilton Bank* was for money loaned by the bank to that company. The mortgage given by the *Mitchells* to *Ladd & Tilton Bank* was in effect given for a loan.

Mortgage—to secure release from blanket mortgage—character.

The position of the defendants is that the mortgage was a purchase-money mortgage. We think that it may be conceded that it is a general rule, to which there is little dissent, that a mortgage on land executed by the purchaser of the land contemporaneously with the acquirement of the legal title thereto, or afterwards, but as a part of the same transaction, is a "purchase-money mortgage," and entitled to preference as such over all other claims or liens arising through the mortgagor, though they are prior in point of time; and this is true without reference to whether the mortgage was executed to the vendor or to a third person. 19 R. C. L. § 196,

Definition—purchase-money mortgage.

p. 416; *Marin v. Knox*, 40 L.R.A. (N.S.) 272, and note (117 Minn. 428, 136 N. W. 15).

But this rule is of little assistance in determining the question in the case at bar involving a construction of § 426, L. O. L., which was adopted for a different purpose.

The decisions holding that, if a loan is secured by a mortgage given on property purchased with the money lent, then such mortgage is a purchase-price mortgage, were for the benefit of the mortgagee and not to his detriment. In other words, the courts have construed such mortgages as purchase-price mortgages in order to secure to the mortgagee the full amount of the money advanced. In several jurisdictions, however, it is held that such mortgages are not purchase-price mortgages. *Heuisler v. Nickum*, 38 Md. 270; *Eyster v. Hatheway*, 50 Ill. 521, 99 Am. Dec. 537. In *Heuisler v. Nickum*, *supra*, it was said: "The term 'purchase money' does not include any money that may be borrowed to complete a purchase, but that which is stipulated to be paid by the purchaser to the vendor; as between them only, it is purchase money; as between the purchaser and lender, it is borrowed money."

A "purchase-money mortgage" is defined in 32 Cyc. at page 1267, as follows: "A mortgage given, concurrently with a conveyance of land, by the vendee to the vendor, on the same land, to secure the unpaid balance of the purchase price,"—citing *Black, Law Dict.*

While this definition is not the universal one, it seems to us that in enacting § 426, L. O. L., the legislature acted with the kind of purchase-money mortgage in view as defined above; that is, that the purpose of the law was to encourage and protect the purchaser of real estate, which perchance is made for the purpose of obtaining a home; that it was not the intent of the law-makers to render it more difficult for such a purchaser to obtain a

loan and pay the cash for a home, and receive the benefit of any lower price of the realty that might be made on account of such cash payment; that if the law should be so construed that anyone obtaining a loan and giving a real estate mortgage to a third party, not the vendor of the land, to secure the payment thereof, when it was contemplated that the money so borrowed should be used in payment for the real property purchased at the time, would be executing a mortgage "to secure payment of the balance of the purchase price of real property," within the purview of the statute, and that the lender could only look to the property upon a foreclosure proceeding, then the person wishing to purchase a home or other real property would be hampered and his credit impaired, and it might well be said that "the last state of that man is worse than the first." In such event, the beneficent purpose of the law would be thwarted. It must be considered that the bank was not speculating in real estate in the transaction; it was doing a banking business. It was not the purpose or the intent of the law to regulate banking business or the loaning of money. The ordinary transactions of a bank do not come within the provisions of the act.

Whatever may be the construction of the section referred to when applied to a mortgage executed by a vendee to a vendor to secure the payment of the balance of the purchase price of real property, we believe that it was not the intention of the legislature that mortgages like the one in question in the present case should come within the provisions of § 426, L. O. L.

The decree of the lower court is therefore affirmed.

Johns, J., not sitting.

Burnett, Benson, and Harris, JJ., concur in the result.

ANNOTATION.

Validity and construction of statutory provision against deficiency judgment in case of purchase-money mortgage.

There have been but few cases in which the courts have discussed the effect of statutes abolishing deficiency judgments on the foreclosure of a mortgage given for a purchase-money debt. Indeed, the statutes which seek to change the rights and remedies of mortgagor and mortgagee have more frequently been of the opposite tendency. See 19 R. C. L. § 484. These few cases pass on isolated aspects of the situation presented by such a statute, and do not permit of the formulation of any general rule.

It has been held that a statute prohibiting a deficiency judgment on a purchase-money mortgage does not preclude a recovery on a note independent of the mortgage.

Page v. Ford (1913) 65 Or. 450, 45 L.R.A.(N.S.) 247, 131 Pac. 1013, Ann. Cas. 1915A, 1048. In that case, an action to recover the amount due on a promissory note, it appeared that the note was given as part of the purchase price of certain real estate which was mortgaged to secure its payment. The defendants contended that since the note was for the balance of the purchase price of real estate, and secured by a mortgage thereon, no personal judgment could be recovered by reason of the provisions of a statute (L. O. L. § 426) which provided as follows: "When judgment or decree is given for the foreclosure of any mortgage, hereafter executed, to secure payment of the balance of the purchase price of real property, such judgment or decree shall provide for the sale of the real property covered by such mortgage for the satisfaction of the judgment or decree given therein, and the mortgagee shall not be entitled to a deficiency judgment on account of such mortgage or note or obligation secured by the same." The court held that the section quoted was applicable only to suits for the foreclosure of mortgages, and since the plaintiff brought his action at law on the note, he was not precluded from

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obtaining a usual judgment, saying: "This view is strengthened by an examination of the title of the act abolishing deficiency judgments, which is as follows: 'An Act to Abolish Deficiency Judgments upon the Foreclosure of Mortgages to Secure the Unpaid Balance of Purchase Price of Real Property.' Session Laws 1903, p. 252. By its title as well as by its text the effect of the act is confined to foreclosure suits. It will be noted that the act abolishing deficiency judgments upon foreclosure makes no mention of, nor does it purport to repeal, § 429, L. O. L., which is as follows: 'During the pendency of an action at law for the recovery of a debt secured by any lien mentioned in § 422, a suit cannot be maintained for the foreclosure of such lien, nor thereafter, unless judgment be given in such action that plaintiff recover such debt or some part thereof, and an execution thereon against the property of the defendant in the judgment is returned unsatisfied in whole or in part.'"

In the reported case (LADD & T. BANK v. MITCHELL, ante, 1420), the court holds that the provisions of the statute construed in the case last cited did not apply, where it appeared that the mortgagor was not the purchaser of the premises, nor the mortgagees the sellers of the same; but that the mortgage was given to secure a loan made by the mortgagees to a third person.

In Wright v. Wimberly (1916) 79 Or. 626, 156 Pac. 257, an action to foreclose a mortgage, it appeared that the defendants executed to the plaintiff's assignor their promissory note, to secure the payment of which they executed to the payee named therein a mortgage of a tract of real property. Subsequently the note and mortgage were transferred to the plaintiff, who, in addition to the usual prayer for foreclosure, asked that he might have judgment against the defendants for any deficiency that might arise upon a sale of the property. The defendants

claimed that the note and mortgage securing the same were given to secure the payment of a balance of the purchase price of the mortgaged property, and therefore the plaintiff was not entitled to a deficiency judgment. The court, having found that the note was given as a part of the purchase price of the property, held that the plaintiff could not obtain a deficiency judgment by reason of the provisions of the statute (L. O. L. § 426). The court held that the facts that the plaintiff was a transferee of the note and mortgage, and had no knowledge that they were given to secure the purchase price, did not operate to except him from the provisions of the statute.

The courts have held that the provisions of a statute abolishing deficiency judgments in case of a purchase-money mortgage do not apply to mortgages on which the right of action had accrued, or which were executed before the act took effect.

Thus in *Thompson v. West* (1900) 59 Neb. 677, 49 L.R.A. 337, 82 N. W. 13, wherein the plaintiff asked for a judgment for a deficiency existing

after the foreclosure of a purchase-money mortgage, and the sale of the mortgaged property, the court held that the act of the legislature of 1897 (Neb. Laws 1897, chap. 95), which repealed §§ 847 and 849 of the Code of Civil Procedure, thereby abrogating the power to enter deficiency judgments, did not affect pending actions founded on the repealed sections, saying: "Whether or not a statute which denies the right to a deficiency judgment as to existing debts is unconstitutional as impairing the obligations of contracts, the court is not at this time called upon to decide, and we refrain from now entering upon a discussion of the question. Section 2, chapter 88, Compiled Statutes, declares that 'whenever a statute shall be repealed, such repeal shall in no manner affect pending actions founded thereon, nor causes of actions not in suit.'"

To the same effect see *Burrows v. Vanderbergh* (1903) 69 Neb. 43, 95 N. W. 57, although the mortgage involved in that case was not given to secure the payment of the purchase price of the mortgaged property. *W. J. K.*

MRS. L. A. CAGLE et al., Plffs. in Err.,
v.

SABINE VALLEY TIMBER & LUMBER COMPANY et al.

Texas Supreme Court — May 1, 1913.

(— Tex. —, 202 S. W. 942.)

Public lands — right of transferee of locator.

1. A patent for public lands inures to the benefit of one to whom the patentee has transferred his right thereto, although there is no express warranty or language manifesting an intent that the transferee is to have the land, and therefore if the patent issues to the heirs of the transferor the right of the transferee is not merely equitable so as to become barred for want of prosecution as a stale claim, nor is the right of the patentee's heirs color of title to support title by limitation under the three-years' statute.

[See note on this question beginning on page 1430.]

Appeal — findings of fact — conclusiveness.

2. The supreme court will not, on

writ of error, disturb findings of fact supported by evidence.

[See 2 R. C. L. 203.]

(— *Tex.* —, 202 S. W. 942.)

ERROR to the Court of Civil Appeals for the Sixth Supreme Judicial District to review a judgment reversing a judgment of the District Court for Shelby County (Buford, J.) in plaintiffs' favor in an action brought to recover possession of certain land. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Sanders & Sanders and Oliver J. Todd, for plaintiffs in error:

A title sufficient to maintain the statutory legal action of trespass to try title is a legal right, requiring no affirmative equitable aid, and cannot be barred by stale demand.

Loomis v. Cobb, — *Tex. Civ. App.* —, 159 S. W. 309; *New York & T. Land Co. v. Hyland*, 8 *Tex. Civ. App.* 601, 28 S. W. 206; *Schleicher v. Gutbrod*, — *Tex. Civ. App.* —, 34 S. W. 657; *Creswell Ranch & Cattle Co. v. Waldstein*, — *Tex. Civ. App.* —, 28 S. W. 260; *Tinsley v. Magnolia Park Co.* — *Tex. Civ. App.* —, 59 S. W. 629; *Owen v. New York & T. Land Co.* 11 *Tex. Civ. App.* 284, 32 S. W. 189, 1057; *Trinity County Lumber Co. v. Pinckard*, 4 *Tex. Civ. App.* 671, 23 S. W. 720, 1015; *Lochridge v. Corbett*, 81 *Tex. Civ. App.* 676, 73 S. W. 96; *Hardy Oil Co. v. Burnham*, 58 *Tex. Civ. App.* 285, 124 S. W. 221; *Lowry v. McDaniel*, 58 *Tex. Civ. App.* 424, 124 S. W. 710; *Betzer v. Goff*, 35 *Tex. Civ. App.* 406, 80 S. W. 671; *Lyster v. Leighton*, 36 *Tex. Civ. App.* 62, 81 S. W. 1033; *Storer v. Lane*, 1 *Tex. Civ. App.* 250, 20 S. W. 852; *Morris v. Unknown Heirs*, — *Tex. Civ. App.* —, 95 S. W. 66; *Punchard v. Masterson*, — *Tex. Civ. App.* —, 103 S. W. 826; *Broussard v. Cruse*, — *Tex. Civ. App.* —, 154 S. W. 347; *Montgomery v. Trueheart*, — *Tex. Civ. App.* —, 146 S. W. 284; *Early v. Compton*, — *Tex. Civ. App.* —, 149 S. W. 694; *Mason v. Bender*, — *Tex. Civ. App.* —, 97 S. W. 715.

The legal title evidenced by the patent passed by estoppel to the true owner of the certificate, to whom the original grantee had transferred all his rights in the land.

Dupree v. Frank, — *Tex. Civ. App.* —, 39 S. W. 988, 91 *Tex.* 66, 40 S. W. 962.

No issue of the three years' Statute of Limitation was raised by the pleadings.

Mason v. McLaughlin, 16 *Tex.* 24.

Messrs. T. C. Davis, John T. Garison, Greers & Nall, Baker, Botta, Parker, & Garwood, and Davis, Davis, & Davis for defendants in error.

Greenwood, J., delivered the opinion of the court:

The plaintiffs in error recovered a judgment in the district court against defendants in error for 23,-935,000 square varas of land in Shelby county, except three small tracts adjudged to the W. R. Pickering Lumber Company. The court of civil appeals of the sixth supreme judicial district of Texas reversed this judgment on the ground that defendants in error had established title to some interest in the land, under the Statute of Limitations of three years, and remanded the cause for the reason that the court was unable to say what interest should have been recovered by one of the plaintiffs in error, who was held not shown to be barred. — *Tex. Civ. App.* —, 149 S. W. 697. The writ of error was granted because it was made to appear, on application by plaintiffs in error, that the judgment of the court of civil appeals practically settled the case.

The defendants in error claim the land under conveyances from certain heirs of Archibald Smith, who was an immigrant of the year 1826, and who had become entitled, before the Revolution, to a survey of a league and labor of land. The tract in controversy was patented by the state to the heirs of Archibald Smith on May 5, 1849. Prior to February 4, 1838, Mark Hailey had become the transferee of Archibald Smith's right to the land, and on that day a certificate was issued to Mark Hailey, as assignee of Archibald Smith, for a league and labor, under which the tract in controversy was located and surveyed. Our decision of the controlling questions in this case depends on the determination of the legal effect of the patent to the heirs of Archibald Smith, after Smith, in his lifetime, had transferred his right to the land to Mark Hailey, and after Hailey had pro-

cured the certificate and had caused the land to be located and surveyed thereunder, as assignee of Smith.

It is contended in behalf of defendants in error: (1) That, since there is no proof of any warranty in connection with the transfer or assignment from Smith to Hailey, the right in the land acquired by Hailey and his heirs was purely equitable, and is now barred as a stale demand; (2) that, the patent having invested the heirs of Archibald Smith with the legal title, those claiming under them had title or color of title to support three years' limitations.

There are expressions in the opinions of this court which seem to lend some support to the proposition that it is only where a transfer of a right to a land grant, or where an assignment of a land certificate, expressly shows an intention to convey the land to be acquired thereunder, or contains a covenant of warranty, that the legal title under the patent will inure to the transferee or assignee. *Barroum v. Culmell*, 90 Tex. 94, 37 S. W. 313; *Satterwhite v. Rosser*, 61 Tex. 166. The cases cited actually decided nothing more than that covenants of warranty or express language manifesting an intent that the transferee was to have the land, when located, had the effect to make the patent inure to the benefit of the transferee. These decisions are unquestionably sound, but it by no means follows that a contrary effect must be given a patent to one who has transferred his right to land, or his land certificate, because of the absence from the transfer of a covenant of warranty or of express language such as is above mentioned.

In our opinion, the very nature of a transfer of the right to a grant, or of a transfer of a land certificate, plainly implies the purpose of the transferor that the land itself and the final title shall belong to the transferee, and to fail to give a subsequent patent to the transferor, or his heirs, the effect of inuring to the benefit of the transferee, would

be to defeat the essential object of the transfer.

Section 10 of the general provisions of the Constitution of the Republic of Texas guaranteed the title to a league and labor of land to any citizen who held a transfer of the right to same from a colonist. The right of the colonist was but an inchoate right to the land, and it cannot now be questioned that such right was the subject of transfer, and that a transfer was fully protected by § 10. *Johnson v. Newman*, 43 Tex. 628. It appears to be held generally that, where a grantor quitclaims an inchoate or incomplete right to land, the subsequent confirmation or completion of that right, in the name of the grantor, as by patent, inures to the benefit of the grantee. 10 R. C. L. 680; 16 Cyc. 695; note in 35 L.R.A. (N.S.) 1188. This conclusion is founded on the law of estoppel as well as on the doctrine of relation. *Landes v. Brant*, 10 How. 348, 13 L. ed. 449; *Massey v. Papin*, 24 How. 364, 16 L. ed. 735; *Wholey v. Cavanaugh*, 88 Cal. 136, 25 Pac. 1112. The Texas cases sustain the same conclusion.

In *Merriweather v. Kennard*, 41 Tex. 281, one Fordtran proved merely that an unconditional certificate had been issued to him as assignee of one Merriweather. The court held: "The patent was issued in 1848, long after the death of Merriweather; and though it issued to him, it inured to the benefit of Fordtran, as his assignee."

The supreme court declared in *Humphreys v. Edwards*, 89 Tex. 516, 519, 36 S. W. 333, 434, that the opinion of Chief Justice Lightfoot stated the grounds on which their conclusions were based. In that opinion, it was held that if an administrator's sale passed the title of an estate to a land certificate, "and then such certificate was located by the purchaser upon the land in controversy, even though the patent should subsequently be issued in the name of George P. Humphreys, the original grantee, or his heirs, the superior title would inure to the

(— *Tex.* —, 303 S. W. 343.)

benefit of the purchasers of such certificate, and their vendees." The decision is followed in *Morgan v. Baker*, — *Tex. Civ. App.* —, 40 S. W. 27, and in *Broussard v. Cruse*, — *Tex. Civ. App.* —, 154 S. W. 350. To the same effect is *Davis v. Bargas*, 12 *Tex. Civ. App.* 59, 33 S. W. 548.

We cannot affirm the holding that the individuals who were the heirs of Archibald Smith at the date of the patent acquired any personal right thereunder.

In *Fishback v. Young*, 19 *Tex.* 515, where the land certificate in controversy was issued to the heirs of one Cornelius, it is said: "They [the children] have no personal or individual right to the grant. They can claim only as representatives of the deceased. . . . Let the grant be issued as it will, if the issue be to persons representing, in form or in fact, the deceased, it must inure to the benefit of all interested in the estate."

The patent made complete the title which had its origin in the certificate issued to Mark Hailey, by virtue of a right previously transferred to him. "The title relates to its origin, and must take the impress of its character from it." The patent therefore inured to the benefit of Mark Hailey as the assignee of Archibald Smith. *Welder v. Lambert*, 91 *Tex.* 521 to 526, 44 S. W. 281; *Fields v. Burnett*, 49 *Tex. Civ. App.* 446, 108 S. W. 1050. It follows that neither the heirs of Archibald Smith nor any claimant under them had "title or color of title" to support limitation of three years.

It is clearly stated in *Grigsby v. May*, 84 *Tex.* 254, 19 S. W. 343, and in *Burnham v. Hardy Oil Co.* 108 *Tex.* 555, 195 S. W. 1143, that there can be one regular chain of transfers from the sovereignty of the soil to a grant, and that "a conveyance made by the original owner, after he had already conveyed whatever right he had, is collateral, and can never connect a person claiming under it with the sovereignty of the

soil." This results from the want of power in the original grantee or his heirs to convey the title granted by the state, after having executed a transfer designed to invest the purchaser with that very title, and after the title under the grant has inured to the purchaser.

The opinion in *Grigsby v. May* expressly affirms the decision in *Gould v. West*, 32 *Tex.* 339, of the question under consideration, which decision is expressed in the following language: "The ancestor having disposed of his right in his lifetime, and the title, when the patent issued, having inured to the benefit of his vendee, the heir had neither title nor color of title by a regular, or an irregular, consecutive chain of transfer from the sovereignty of the soil. Without such title, or color of title, the plea [i. e., of three years' limitation] is unavailing."

Bearing in mind that we have already determined that at least after the issuance of the patent Mark Hailey and his heirs had both the legal and equitable title to the land, we but reaffirm *Baldwin v. Root*, 90 *Tex.* 546, 40 S. W. 3, followed in *Illies v. Frerichs*, 11 *Tex. Civ. App.* 575, 32 S. W. 917, and other cases, when we decide that those holding under the heirs of the patentee had neither title nor color of title to support limitation of three years.

Public lands—
right of
transferee
of locator.

The plea of stale demand, of course, could not be interposed to defeat the legal title of plaintiffs in error. *Duren v. Houston & T. C. R. Co.* 86 *Tex.* 291, 24 S. W. 258.

As to the defenses of bona fide purchasers and presumption of a reconveyance from Mark Hailey to Archibald Smith, the case at most presents only questions of fact which have been determined against defendants in error, and which, on this record, we would

Appeal—
findings of fact—
conclusiveness.

not be authorized to disturb. *Hernndon v. Vick*, 89 *Tex.* 475, 35 S. W. 141; *Baldwin v. Goldfrank*, 88 *Tex.*

258, 31 S. W. 1064; Poland v. Porter, 44 Tex. Civ. App. 334, 98 S. W. 217.

Civil Appeals is reversed, and the judgment of the District Court is affirmed.

The judgment of the Court of

Petition for rehearing denied.

ANNOTATION.

Rule that title subsequently acquired by grantor or assignor inures to the benefit of the grantee or assignee as affecting question of color of title.

The reported case (*CAGLE v. SABINE VALLEY TIMBER & LUMBER CO.* ante, 1426), in holding that a patent for public land, issued to the heirs of one who had transferred his right thereto, inured to the benefit of the transferee, and was not color of title for the patentees within the three-year Statute of Limitations, seems in accord with other cases in the same state interpreting the statutory definition of "color of title." Little authority on the question has been found in other jurisdictions. The following cases, in addition to the *CAGLE CASE*, present states of fact within the scope of the title of the present annotation, and the title subsequently acquired by the grantor or assignor, or his heirs, was held to inure immediately to the grantee or assignee, and not to support a claim of color of title under the Statute of Limitations on the part of an heir or a subsequent grantee. *Gould v. West* (1869) 32 Tex. 338; *Baldwin v. Root* (1897) 90 Tex. 546, 40 S. W. 3; *Illies v. Frerichs* (1895) 11 Tex. Civ. App. 575, 32 S. W. 915.

These decisions, and others in Texas cited in the note, appear to be based largely on the particular provision of the Texas statute, which defines title as "a regular chain of transfer from or under the sovereignty of the soil; and color of title is constituted by a consecutive chain of such transfer down to him or her or them in possession, without being regular, as if one or more of the memorials or instruments be not registered, or not duly registered, or be only in writing, or such like defect," etc. The intention of this statute, it has been said, was to protect settlers under junior grants from the state of Texas against older titles under the former Mexican sov-

ereignty, as well as against fraudulent issues of land certificates under the Republic. *League v. Atchison* (1868) 6 Wall. (U.S.) 112, 18 L. ed. 764.

This statutory definition of color of title is very different from that which has been given by courts to this term, namely, "that which in appearance is title, but which in reality is no title," and, the statute having defined the term "color of title," the court must, of course, look to it for its meaning. *Marsh v. Weir* (1858) 21 Tex. 97.

In *Gould v. West* (1869) 32 Tex. 338, supra, the holder of a land certificate conveyed the land with covenant of warranty, and, subsequent to the grantor's death, a patent to the land, which the court held was valid under a statute, was issued to the grantor and his heirs. An heir set up, as against the grantee, the three-year Statute of Limitations. On this point the court said: "Now, if this heir was simply attempting to hold by heirship, she was equally estopped by the deed of the ancestor, and was not in a condition to plead the statute. The ancestor having disposed of his right in his lifetime, and the title, when the patent issued, having inured to the benefit of his vendee, the heir had neither title nor color of title, by a regular or an irregular consecutive chain of transfer from the sovereignty of the soil. Without such title, or color of title, the plea is unavailing. If this were a case in which the doctrine of estoppel did not apply, there would be much force in the very able and plausible argument of the learned counsel for the appellants, upon the construction of the three-year Statute of Limitations. But the court is constrained to believe that this is not the character of case in

which repose was sought to be attained by the statute."

The rule in Texas that deeds made by persons who, before executing them, had conveyed the property to others, do not connect the vendee with the sovereignty of the soil so as to support the three-year Statute of Limitations, was applied in *Illies v. Freichs* (1895) 11 Tex. Civ. App. 575, 32 S. W. 915, *supra*, although the first deed was made before the issuance of a patent, and, after the patent was issued to him, the grantor made the subsequent conveyance. It was contended that, as the deed was made before the issuance of a patent, it did not pass title to the land, but was a conveyance only of the certificate. But this objection, the court said, was answered by the decision in *Duren v. Houston & T. C. R. Co.* (1893) 86 Tex. 287, 24 S. W. 258, in which, the court said, it was held that one claiming under a valid location and survey has the legal title, as distinguished from an equitable right. In the latter case the view is taken that, although the legal title remains in the state, the owner of the certificate need not resort to a court of equity to enforce it, since he is given legal rights by statute.

Where heirs in whose name a certificate had been issued for an unlocated balance of land conveyed their interest in the certificate with warranty of title, it was held that a patent, issued after location and survey of the land, in the name of the heirs, vested the legal title immediately, in the transferee of the certificate, and that a subsequent grantee from the heirs did not have color of title within the three-year Statute of Limitations. *Baldwin v. Root* (1897) 90 Tex. 546, 40 S. W. 3. The court said: "The rule most consistent with our system of laws upon this subject is that when one conveys land by warranty of title, or in such manner as to be estopped to dispute the title of his grantee, a title subsequently acquired to that land by the grantor will pass *eo instanti* to his warrantee, binding both the warrantor and his heirs and subsequent purchasers from either." The court said, further, that

it could not be doubted that if the transferrers of the certificate had not conveyed the land nor transferred the certificate before the patent was issued, but had done so after the patent was issued to them, and before the subsequent grant, there would have been such a break in the chain of title that it would not sustain the second grantee's plea of the three-year Statute of Limitations; and that the fact that the title conveyed by the state in the name of the heirs passed immediately to the transferee had the same effect upon the chain of title as if it had first vested in the heirs, and had been immediately by them conveyed to the transferee.

It was held, however, in *Baldwin v. Root* (Tex.) *supra*, that as to a part of the land to which the patent vested the legal title in the heirs, subject to an equitable title in the transferee of the certificate, the subsequent conveyance would constitute color of title within the three-year Limitation Statute.

Where land was conveyed with warranty of title when the grantor had no title, and the grantor subsequently acquired title and then executed a conveyance to a third party, it was held that the latter did not acquire color of title until the deed to him, and could not rely for color of title on the deed to his grantor, since the title the grantor acquired inured *eo instanti* to the benefit of the first grantee. *Guerin v. Mombleau* (1893) 144 Ill. 32, 33 N. E. 49. It will be observed that this case supports, by implication at least, the doctrine that the second grantee could rely on his deed for color of title, notwithstanding the fact that the title which the grantor acquired inured immediately to the benefit of the first grantee.

In *Grigsby v. May* (1892) 84 Tex. 240, 19 S. W. 343, the court cited *Gould v. West* (1869) 32 Tex. 339, *supra*, with other cases, as holding that conveyances made by persons who previously had conveyed the property to others would not connect the vendee with the sovereignty of the soil, so as to permit such vendee to set up successfully the three-year Statute of Limitations, for the reason that there

"can be but one regular chain of transfer from the sovereignty of the soil . . . and that chain of transfer which will reach back and connect itself with the sovereignty of the soil must consist of a grant in some form by the sovereignty, and that succession of transfers that pass whatever right the original grantee acquired. This is the regular chain of transfer; and a conveyance made by the original grantee or any successive owner, after he had already conveyed whatever right he had, is collateral, and can never connect a person claiming under it with the sovereignty of the soil."

A case throwing light on the point under consideration, so far as concerns the Texas statute, is *Burnham v. Hardy Oil Co.* (1917) 108 Tex. 555, 195 S. W. 1139, although the facts in that case do not bring it within the scope of the present annotation. The court said that the term "title" was employed in the statute in a strictly technical sense, and that its definition therein as "a regular chain of transfer from or under the sovereignty of the soil" meant that the claimant, by regular chain of transfer effectual for that purpose, must possess the purported title originally conveyed by the sovereign's grant; that the title must flow unbrokenly from its source; and the chain of transfer must be such as, in itself, invests the claimant with the right originally acquired in virtue of the grant; that the statute did not recognize as "title" any mere apparent right to the land granted; that, while it referred only to the title originally evidenced by the grant, and disregarded all other title, it did not "deal with any apparent right under that title, or with any right less than the actual 'interest' or 'estate' created by the grant. The claimant's title must connect with the grant. . . . It does not connect with the grant unless he holds the right vested by the grant. He does not hold such right, unless he has acquired, to the extent that the grant

conferred it, the real and beneficial interest in the land."

The holding in the reported case (*CAGLE v. SABINE VALLEY TIMBER & LUMBER Co.* ante, 1426) on the point under annotation seems consistent with the doctrine of a number of cases in the same state, to the effect that the legal, and not merely the equitable, title is vested in the grantee upon the subsequent acquisition of title by the grantor, where there is a conveyance with warranty of title. See, among other cases to this effect, in addition to the *CAGLE CASE*: *Satterwhite v. Rosser* (1884) 61 Tex. 166; *Barroum v. Culmell* (1896) 90 Tex. 93, 37 S. W. 313; *Baldwin v. Root* (1897) 90 Tex. 546, 40 S. W. 8; *Illies v. Frerichs* (1895) 11 Tex. Civ. App. 575, 32 S. W. 915; and *Batcheller v. Besancon* (1898) 19 Tex. Civ. App. 137, 47 S. W. 296.

Thus, it was held in *Batcheller v. Besancon* (Tex.) supra, that the assignee of a land certificate, where the assignment was unqualified and made with "full guaranty against all claims," became the legal owner of the land, and was not the holder of a mere equitable title, after a patent thereto was issued in the name of his assignor.

In view of the conclusion reached in the reported case (*CAGLE v. SABINE VALLEY TIMBER & LUMBER Co.*), that the legal title vested in the transferee after the patent was issued to the heirs of the transferrer, although there was no express warranty of title, it seems necessarily to follow, under the other Texas decisions interpreting the statutory definition of color of title in that state, that the heirs could not have color of title within the meaning of the three-year Statute of Limitations. It does not follow, however, that the same result would be reached in other jurisdictions where there is no similar statute, and especially where it is held that the title which inures to the grantee is by way of estoppel only, and is not the legal title.

R. E. H.

ANGELO GARBARINO, Respt.,

v.

PHILIP NOCE et al., Appts.

California Supreme Court (In Banco)—August 25, 1919.

(— Cal. —, 183 Pac. 532.)

Evidence — ancient deed — effect.

1. Recitals in a deed more than fifty years old relating to the property conveyed are competent evidence of the facts recited, even against strangers to the title.

[See note on this question beginning on page 1437.]

Waters — right to use.

2. Each owner of land riparian to a stream has the right to use therefrom a reasonable proportion of its water.

[See 15 R. C. L. 448.]

Pleading — ownership — title by prescription.

3. An allegation in an answer to a bill to establish a water right, of ownership in general terms of a portion of the right, may be supported by proof of ownership acquired by prescription.

Evidence — adverse title — sufficiency.

4. Evidence of long-continued use without interference, of water from a ditch claimed by another, will justify the inference that the use was rightful and adverse.

[See 15 R. C. L. 455.]

Appeal — credibility of evidence.

5. The appellate court cannot consider incredible testimony of the owner of a water ditch that he permitted others to use water from it to his own

detriment, for a period of years, without compensation, where it has been accepted by the trial court.

[See 2 R. C. L. 203.]

Evidence — declaration of title.

6. A recital in an ancient deed of ownership of a water ditch is competent evidence as a declaration of the owner in possession that he then claimed full ownership of the ditch and water rights.

— recitals in chain of title.

7. Upon the question of title to a water right, the fact that it is claimed in plaintiff's chain of title, while defendant's chain of title does not refer to it, is evidence that it belongs to plaintiff.

Abandonment — loss of easement.

8. An easement acquired by enjoyment is lost by disuse thereof for the statutory period.

[See 9 R. C. L. 812; see also Annotation, 1 A.L.R. 886.]

APPEAL by defendants from a judgment of the Superior Court for Mariposa County (Trabucco, J.) in favor of plaintiff in an action brought to determine the respective rights of the parties in the waters of a certain stream, and in a ditch by which water is diverted therefrom. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. J. B. Curtin for appellants.

Messrs. John A. Wall and R. B. Stolder for respondent.

Shaw, J., delivered the opinion of the court:

The defendants appeal from a judgment in favor of the plaintiff. The case involves the respective rights of the three parties in the waters of a stream known as Maxwell creek, and in a certain ditch by which water is diverted therefrom.

Each party owns a small parcel of land abutting upon the creek in the outlying limits of Coulterville. Noce's land is the upper parcel, Cammissiona's is the next, and that of Garbarino is the lowest upon the stream. The part of Noce's land for which the water is claimed lies on the northerly side of the creek. The lands of Cammissiona and Garbarino are on the southerly side. The ditch in question is a foot wide

at the bottom, 18 inches wide at the top, and a foot deep. It diverts water from the stream at a dam situated about $\frac{1}{2}$ of a mile above the land of Garbarino and about a quarter of a mile above the parcel of Noce. It is wholly on the southerly side of the stream and passes through the parcel of Cammissiona to that of Garbarino. In order to take water therefrom to the Noce land, a cut is made in the ditch, so as to let the water run into the bed of the creek, from whence it is taken into another ditch, on the northerly side of the creek, to the Noce land. Concerning these facts there is no dispute.

The plaintiff alleged that he is the owner of the entire interest in the ditch and in all the water it carries, that in July, 1916, defendant Noce wrongfully diverted water from the ditch and appropriated the same to his own use, and that he threatens to continue to do so. He prays that he be declared to be the owner of the entire interest in the water right and in the ditch, and that Noce be restrained from interfering therewith. Mrs. Cammissiona was brought in as a party defendant after the action was begun. The complaint contains no allegation as to her. The question as to her rights is raised by her answer. The claim of Noce and Mrs. Cammissiona is that the three parties to the suit are equal owners of the ditch and of the right to the water carried therein, as tenants in common, for a certain period of each year. More particularly, their claim is that the right to the common use of the ditch and to the water carried therein begins as soon each year as the water naturally running in the creek ceases to flow down its bed as far as their lands. In explanation it should be said that, as the land of each party is riparian to the stream, each

Waters—right to use.

has the right to use thereon a reasonable proportion of its water, and that in the early part of the season of each year there is enough water

in the creek to enable Noce and Cammissiona to divert it directly from the stream to their respective tracts without making use of Garbarino's ditch, and that they have been accustomed to do so. This usually continues until June or the early part of July. It is only thereafter, when the water gets too low to allow this, that they resort to the ditch or claim the right to use it. After this occurs, so they each claim and allege, each party, including Garbarino, has the right to use the ditch and all the water it carries, exclusive of the others, one day in three in successive turns, for the remainder of the season, to carry water to their respective parcels of land. At that time the ditch takes all the water of the creek flowing at its head. The court found that Garbarino was the sole owner of the entire interest in the ditch and in the water it takes from the creek, and gave judgment as prayed for in the complaint, but without damages. It is the contention of the defendants that this finding is contrary to the evidence. This is practically the only question in the case.

Upon a review of the evidence we are of the opinion that it is sufficient to sustain the finding. The plaintiff discusses at some length his claim that the defendants cannot prove title by adverse possession under the issues made by the pleadings. The complaint alleges that Garbarino is the owner of the ditch and of the water taken from the creek and flowing therein. The answer of each defendant alleges in general terms the ownership by such defendant of a one-third interest in said ditch and water right, consisting of the right to use the same one day in each three days during the irrigating season, as above stated. The rule is that such a general allegation may be supported by proof of ownership acquired by deed, by prescription, or in any other lawful manner. *Rogers v. Miller*, 13 Wash. 82, 42 Pac. 525, 52 Am. St. Rep. 20; *Raymond v.*

Pleading—ownership—title by prescription.

Morrison, 9 Wash. 156, 37 Pac. 318; Cooper v. Blair, 50 Or. 394, 92 Pac. 1074; Gray v. Walker, 157 Cal. 381, 108 Pac. 278.

There was testimony that the ditch was in existence as early as the year 1860, and that from that time until Garbarino acquired his land in the year 1871 the ditch and the water therein was used each year on the land of each of the parties to this action one day in each three during the period of the year above mentioned, and that this was done without asking permission of the owner of the Garbarino lot and without interference by him. There was no testimony with respect to this period that the owner of the Garbarino lot had made any statement regarding the title or right of the other parties to the ditch or water, or whether or not it was done by his permission. It appears that during the years 1872 to 1875, inclusive, the Oak Flat Company turned water from Boneyard creek into Maxwell creek, increasing its flow in the dry season, so that the persons occupying the lands in question were able to take water from the enlarged stream directly to their lands, and that during that period they did not use the Garbarino ditch. They paid for this water directly to the Oak Flat Company. After the year 1875, and until July, 1916, the water was used on the land owned by Noce every year during the time above mentioned, and was carried thereto through the said ditch one day in three, and so on in succession, during each season. Garbarino himself testified to this continuous use of the water in the manner stated. His testimony also shows a similar use by Mrs. Cammissiona on her lot, at one time for a period exceeding five years continuously.

From this evidence of long-continued use without interference, if unexplained, the court could have inferred that the use of each party was rightful and adverse, and therefrom might have concluded that each had thereby ac-

quired title by prescription to a one-third interest in the water and ditch, as claimed by defendants. But there was other evidence to the contrary. Garbarino also testified that each year during this time the other parties, before beginning to use water from the ditch, asked his permission to do so, and that when so asked he gave such permission to each of them to use the ditch and water one day out of each period of three days; that he did this out of friendship, and for no other consideration; and that he refused permission in the year 1916, because at that time he needed all the water on his own land. The appellant contends that this testimony is incredible; that the statement that one would continuously, for so many years, give away a valuable right, especially in view of his own testimony that it was necessary for his own land, and that the loss of the use of part of the water during that period of the season was injurious to him, surpasses belief. We cannot take this view of the testimony. The court below saw and heard the witness, and is the better judge as to whether he was sincere in his statement. In the words of Mr. Justice Burnett, in deciding the case in the district court of appeal: "We cannot say that, even in this period of thrift and fierce competition, the claim of such generosity is so extraordinary as to cause us to reject it as inherently improbable."

*Appeal—
credibility of
evidence.*

There was also other evidence of admissions by the other owners, tending to prove that they acknowledged the title and ownership of Garbarino in the ditch and the water, and that they had the use of it only by his permission. If this were true, it would disprove the theory of a tenancy in common acquired by continuous adverse use, and would be sufficient to support the finding in question.

Other evidence tends to confirm this view. Neither of the defend-

*Evidence—
adverse title—
sufficiency.*

ants introduced any evidence tending to show the acquisition of the right they claim in any other manner than by continuous adverse use under claim of right. There was no direct evidence of the original construction of the ditch, but there was evidence justifying an inference regarding the same. A deed executed on October 6, 1862, for the Garbarino lot by one Comisione to the predecessors in interest of Garbarino, under whom he claims title, purports to convey the lot in question and the "garden thereon," and it describes the appurtenances thereto as follows: "Two water ditches connected with the garden taken out of Maxwell's creek, one opposite of Chinatown and the other below the same, both on the same side of the creek of the garden, made and purchased to supply the garden with water."

It is admitted that the ditch coming out opposite Chinatown is the one now in controversy, although some changes in the place of diversion at the head thereof have been made since that time. A later deed in the chain of title of Garbarino also specifically describes the said ditch as an appurtenance to the lot. None of the deeds in the chain of title of the other lots to the defendants mentions this ditch in any manner. The deed to Noce from Cassacia not only fails to mention the Garbarino ditch as an appurtenance, but it does mention another ditch, known as the Cassacia ditch, leading from the creek on the opposite side from the Garbarino ditch to the Noce land. The deed of October 6, 1862, aforesaid, purported to convey the full title to the property described, including the ditch. Having been executed more than fifty years before the present controversy arose, it comes within the rules of evidence applicable to ancient deeds, and hence the recitals therein relating to the property conveyed are competent evidence of the

facts recited, even against strangers to the title. *Randall v. Chase*, 133 Mass. 210; *Drury v. Midland R. Co.* 127 Mass. 581; *Casey v. Inloes*, 1 Gill, 430, 39 Am. Dec. 658; *Fuller v. Den*, 20 N. J. L. 65; *Morris v. Callanan*, 105 Mass. 182; *Ryle v. Davidson*, — Tex. Civ. App. —, 116 S. W. 828. It is also competent as a declaration of the grantor while in possession, as evidence that he then ^{—declaration of title.} claimed full ownership of the ditch and water right. *Cannon v. Stockmon*, 36 Cal. 541, 95 Am. Dec. 205; *Stockton Sav. Bank v. Staples*, 98 Cal. 193, 32 Pac. 936. The recitals quoted tend to show that the ditch was originally constructed by the owner of the Garbarino lot for the purpose of conveying water from the creek to that lot. The fact that the title deeds of the Garbarino lot ^{—recitals in chain of title.} show this particular ditch as an appurtenance, while the title deeds of the other lots make no mention thereof, is some evidence, at least, that the right thereto was not claimed by the owner of the other lots at the time of making the conveyances thereof. All this evidence, we think, sufficiently supports the finding of the court that the defendants had not acquired title to any interest in the ditch or the water it carried.

With respect to the Cammissiona lot, it further appears from the evidence that water from the ditch was not used on that lot for the period of ten years preceding the beginning of the action. If we assume that, by her previous use of the ditch and water under claim of right for a period of more than five years prior to that time, she had acquired the right she claims thereto, the evidence just referred to would show that she subsequently had lost it by disuse. An easement acquired by ^{Abandonment—loss of easement.} enjoyment is lost by a disuse thereof for the period of five years. Civ. Code, § 811, subd.

Evidence—
ancient deed—
effect.

4; *Drake v. Russian River Land Co.* 10 Cal. App. 666, 103 Pac. 167.

There are no other points made in support of the appeal. It may be added that the evidence was very conflicting in many matters of detail. The conflict, however, was

substantial, and the court cannot interfere on appeal.

The judgment is affirmed.

We concur: Angellotti, Ch. J.; Lennon, J.; Wilbur, J.; Olney, J.; Melvin, J.; Lawlor, J.

ANNOTATION.

Recital in ancient deed as evidence of facts recited against stranger to title.

- I. General rule, 1487.
- II. Reason of rule, 1438.
- III. Application of rule:
 - a. Recital of pedigree, 1488.
 - b. Recital of consideration, 1444.
 - c. Recital of source of title, 1445.
 - d. Recital as to extent of title, 1448.

I. General rule.

The cases are in accord in holding that recitals in ancient deeds are evidence of facts recited therein as against strangers to the title, when accompanied by possession under the deed or other corroborating circumstances.

United States.—*Deery v. Cray* (1867) 5 Wall. 795, 18 L. ed. 653; *Davis v. Gaines* (1881) 104 U. S. 386, 26 L. ed. 757; *Fulkerson v. Holmes* (1886) 117 U. S. 389, 29 L. ed. 915, 6 Sup. Ct. Rep. 780; *Stokes v. Dawes* (1826) 4 Mason, 268, Fed. Cas. No. 13,477; *Baeder v. Jennings* (1889) 40 Fed. 199.

Connecticut.—*McMahon v. Stratford* (1910) 83 Conn. 386, 76 Atl. 983.

Georgia.—*Lanier v. Hebard* (1905) 123 Ga. 626, 51 S. E. 632.

Hawaii.—*Mist v. Kapiolani Estate* (1901) 13 Haw. 523.

Illinois.—*Whitman v. Heneberry* (1874) 73 Ill. 109.

Kentucky.—*Mann v. Cavanaugh* (1901) 110 Ky. 776, 62 S. W. 854.

Maine.—*Little v. Palister* (1826) 4 Me. 209; *Chandler v. Wilson* (1885) 77 Me. 76.

Maryland.—*Casey v. Inloes* (1844) 1 Gill, 430, 39 Am. Dec. 658.

Massachusetts.—*Drury v. Midland R. Co.* (1879) 127 Mass. 571; *Randall v. Chase* (1882) 133 Mass. 210.

Michigan.—*Norris v. Hall* (1900) 124 Mich. 170, 82 N. W. 832.

III.—continued.

- e. Recital of another instrument, 1449.
- f. Recital of compliance with statute, 1450.
- g. Recital of power of attorney, 1451.

Missouri.—*Strong v. Whybark* (1907) 204 Mo. 341, 12 L.R.A.(N.S.) 240, 120 Am. St. Rep. 710, 102 S. W. 968; *Anderson v. Cole* (1911) 234 Mo. 1, 136 S. W. 395.

New Jersey.—*Fuller v. Den* (1848) 20 N. J. L. 61; *Havens v. Sea Shore Land Co.* (1890) 47 N. J. Eq. 365, 20 Atl. 497; *Rollins v. Atlantic City R. Co.* (1905) 78 N. J. L. 64, 62 Atl. 929; *McGrath v. Norcross* (1911) 78 N. J. Eq. 120, 79 Atl. 85, affirmed on opinion below in (1918) 82 N. J. Eq. 367, 91 Atl. 1069.

New York.—*Doe ex dem. Clinton v. Phelps* (1812) 9 Johns. 169; *Jackson ex dem. Livingston v. Neely* (1813) 10 Johns. 874; *Jackson ex dem. Schuyler v. Russell* (1830) 4 Wend. 543; *Schermerhorn v. Negus* (1842) 2 Hill, 335; *Greenleaf v. Brooklyn, F. & C. I. R. Co.* (1892) 132 N. Y. 408, 30 N. E. 762; *Young v. Shulenberg* (1901) 165 N. Y. 385, 80 Am. St. Rep. 730, 59 N. E. 135; *Oxford v. Wiloughby* (1903) 181 N. Y. 155, 73 N. E. 677; *Ensign v. McKinney* (1883) 30 Hun, 249.

Pennsylvania.—*Garwood v. Dennis* (1811) 4 Binn. 314; *Murphy v. Loyd* (1838) 3 Whart. 539; *James v. Letzler* (1844) 8 Watts & S. 192; *Bowser v. Cravener* (1867) 56 Pa. 132; *Scharff v. Keener* (1870) 64 Pa. 376; *Carter v. Tinicum Fishing Co.* (1875) 77 Pa. 310; *Sitler v. Gehr* (1884) 105 Pa. 577, 51 Am. Rep. 207; *Dorff v. Schmunk* (1900) 197 Pa. 298, 47 Atl. 113; *Jack-*

son v. Gunton (1904) 26 Pa. Super. Ct. 203.

Rhode Island.—Horgan v. Jamestown (1911) 32 R. I. 523, 80 Atl. 271.

Texas.—Chamblee v. Tarbox (1863) 27 Tex. 139, 84 Am. Dec. 614; White v. Jones (1887) 67 Tex. 638, 4 S. W. 161; McCoy v. Pease (1897) 17 Tex. Civ. App. 303, 42 S. W. 659; Maxson v. Jennings (1898) 19 Tex. Civ. App. 700, 48 S. W. 781; Wren v. Howland (1903) 33 Tex. Civ. App. 87, 75 S. W. 894; Sydnor v. Texas Sav. & Real Estate Invest. Asso. (1906) 42 Tex. Civ. App. 138, 94 S. W. 451; Williams v. Cessna (1906) 43 Tex. Civ. App. 315, 95 S. W. 1106; Brewer v. Cochran (1907) 45 Tex. Civ. App. 179, 99 S. W. 1033; Hirsch v. Patton (1908) 49 Tex. Civ. App. 499, 108 S. W. 1015; Ryle v. Davidson (1909) — Tex. Civ. App. —, 116 S. W. 823; Ardoin v. Cobb (1911) — Tex. Civ. App. —, 136 S. W. 271; Stevens v. Crosby (1914) — Tex. Civ. App. —, 166 S. W. 62; Condit v. Galveston City Co. (1916) — Tex. Civ. App. —, 186 S. W. 395; Smith v. Hirsch (1917) — Tex. Civ. App. —, 197 S. W. 754; Sandmeyer v. Dolysi (1918) — Tex. Civ. App. —, 203 S. W. 113.

Vermont.—Bell v. Barron (1842) 14 Vt. 307; Cross v. Martin (1873) 46 Vt. 14.

Virginia.—Keppler v. Richmond (1919) — Va. —, 98 S. E. 747.

West Virginia.—Wilson v. Braden (1904) 56 W. Va. 372, 107 Am. St. Rep. 927, 49 S. E. 409; Webb v. Ritter (1906) 60 W. Va. 193, 54 S. E. 484.

England.—Fort v. Clarke (1826) 1 Russ. Ch. 601, 38 Eng. Reprint, 231.

II. Reason of rule.

The rule appears to exist on the principle of necessity, because of the impossibility of giving better evidence. The use of recitals in a deed is by way of exception to the hearsay rule, and the reason was stated in *Fulkerson v. Holmes* (1886) 117 U. S. 389, 397, 29 L. ed. 915, 918, 6 Sup. Ct. Rep. 780, where the court, in discussing recitals of pedigree in an ancient deed, said: "The proof to show pedigree forms a well-settled exception to the rule which excludes hearsay evidence. This exception has been recognized on the ground of neces-

sity; for, as in inquiries respecting relationship or descent, facts must often be proved which occurred many years before the trial, and were known to but few persons, it is obvious that the strict enforcement in such cases of the rules against hearsay evidence would frequently occasion a failure of justice."

In *Foulk v. Brown* (1834) 2 Watts (Pa.) 214, the court said: "The rule of presumption, when traced to its foundation, is a rule of convenience and policy, the result of a necessary regard to the peace and security of society. No person ought to be permitted to lie by whilst transactions can be fairly investigated and justly determined, until time has involved them in uncertainty and obscurity, and then ask for an inquiry. Justice cannot be satisfactorily done when parties and witnesses are dead, vouchers lost or thrown away, and a new generation has appeared on the stage of life, unacquainted with the affairs of a past age, and often regardless of them. Papers which our predecessors have carefully preserved are often thrown aside or scattered as useless by their successors."

The courts have, therefore, formulated the rule that at the end of thirty years it will be presumed that the witnesses who could prove the contents of a deed are dead. "There must be some period when the presumption of the continuance of life ceases, and the presumption of death supervenes." *Montgomery v. Bevans* (1871) 1 Sawy. 657, Fed. Cas. No. 9,735.

III. Application of rule.

a. Recital of pedigree.

Recitals of pedigree in ancient deeds are admissible in evidence when accompanied by evidence of possession thereunder, or other corroborating evidence. Such recitals are admissible on the theory that, if untrue, they would long since have been disproved, and that time and possession have raised the presumption of this truth, admissible even against strangers.

United States.—*Stokes v. Dawes* (1826) 4 Mason, 263, Fed. Cas. No.

13,477; *Fulkerson v. Holmes* (1886) 117 U. S. 389, 29 L. ed. 915, 6 Sup. Ct. Rep. 780; *Deery v. Cray* (1867) 5 Wall. 795, 18 L. ed. 653.

Georgia.—*Lanier v. Hebard* (1905) 123 Ga. 626, 51 S. E. 632.

Hawaii.—*Mist v. Kapiolani Estate* (1901) 13 Haw. 523.

Kentucky. — *Mann v. Cavanaugh* (1901) 110 Ky. 776, 62 S. W. 854.

Maine.—*Little v. Palister* (1826) 4 Me. 209.

Maryland.—*Casey v. Inloes* (1844) 1 Gill, 430, 39 Am. Dec. 658.

New Jersey.—*Rollins v. Atlantic City R. Co.* (1905) 73 N. J. L. 64, 62 Atl. 929.

New York.—*Young v. Shulenberg* (1901) 165 N. Y. 385, 80 Am. St. Rep. 780, 59 N. E. 135.

Pennsylvania. — *Murphy v. Loyd* (1838) 3 Whart. 539; *Bowser v. Cravener* (1867) 56 Pa. 132; *Scharff v. Keener* (1870) 64 Pa. 376; *Carter v. Tinicum Fishing Co.* (1875) 77 Pa. 310; *Sitler v. Gehr* (1884) 105 Pa. 577, 51 Am. Rep. 207; *Jackson v. Gunton* (1904) 26 Pa. Super. Ct. 203.

Texas.—*McCoy v. Pease* (1897) 17 Tex. Civ. App. 303, 42 S. W. 659; *Maxson v. Jennings* (1898) 19 Tex. Civ. App. 700, 48 S. W. 785; *Wren v. Howland* (1903) 33 Tex. Civ. App. 87, 75 S. W. 894; *Ardoin v. Cobb* (1911) — Tex. Civ. App. —, 136 S. W. 271.

Vermont.—*Bell v. Barron* (1842) 14 Vt. 307.

West Virginia.—*Wilson v. Braden* (1904) 56 W. Va. 372, 107 Am. St. Rep. 927, 49 S. E. 409; *Webb v. Ritter* (1906) 60 W. Va. 193, 54 S. E. 484.

England.—*Fort v. Clarke* (1826) 1 Russ. Ch. 601; 38 Eng. Reprint, 231.

In *Stokes v. Dawes* (Fed.) *supra*, it appeared that the title to certain lands had passed to the plaintiff by a grant of the legislature. The defendant claimed the land through an office copy of a deed whereby the land was devised to defendant's grandfather. Some years prior to the institution of the action the property had escheated to the state by reason of one Rebecca Stokes having died without lawful heirs. It was by reason of this escheat that the property was granted by the state to the plaintiff. The deed pro-

duced by the defendant was executed by the alleged son of Rebecca Stokes, and contained a recital that the real estate was that of "his grandfather Benjamin Stokes, or his mother Rebecca Stokes." It was held that the copy of the deed was admissible, and the fact of heirship, stated in the deed, was presumptive proof of the fact, since possession in conformity with the deed had continued for a period of thirty years.

In *Fulkerson v. Holmes* (1886) 117 U. S. 389, 29 L. ed. 915, 6 Sup. Ct. Rep. 780, an action of ejectment, the plaintiff to prove his title offered in evidence a deed for the premises in question, from one Young to Holmes. This deed recited the grant of the premises from the commonwealth, the death intestate of the former owner of the lands, and that the present grantor was his only son and heir. The defendant requested the court to instruct the jury that the recital was not evidence against him. The request was refused on the ground that it was a question for the jury as to whether or not they believed the fact that the grantor was the only son or heir. It was held that the recitals in the deed were admissible in evidence after the lapse of sixty years to prove the facts recited.

In *Deery v. Cray* (1867) 5 Wall. (U. S.) 795, 18 L. ed. 653, an action was brought to recover a certain tract of land, and the plaintiff claimed title through one Chew, her grandfather. On the trial a deed was offered purporting to be made to Chew by the executors of the estate of one Brent, and the instrument recited that the deceased, by his last will and testament, authorized the grantees to sell and dispose of the real property named, and that one of them was also the heir at law of the testator, and also conveyed in that capacity. The deed was rejected, since no evidence was offered as to the existence of the will nor of the heirship of Brent, the grantor. It was held that the deed should have been admitted, since no other proof was needed than the recital in the deed, which had been in existence nearly sixty years.

In *Lanier v. Hebard* (1905) 123 Ga. 626, 51 S. E. 632, it was sought to prove title in certain lands by a recital in a deed, which was made by the alleged heirs of the deceased owner through a power of attorney. The recitals in the deed were as follows: "Said premises having formerly belonged to the estate of Benjamin G. Barker, deceased, and are herewith conveyed and intended to be conveyed by the said William B. Van Benschoten in his own right and by several powers of attorney dated November 6th, 1871, and 8th of December, 1871, so far as the rights of other heirs and representatives of said Benjamin G. Barker are or may be concerned." It was held that these recitals were insufficient, because there was no direct and explicit statement that the makers of the deed were heirs at law of Benjamin G. Barker, and the other heirs, if any, are not stated.

In *Mist v. Kapiolani Estate* (1901) 13 Haw. 523, it appeared that the plaintiff was the grantee of Mikasobe, who was grantee of one Nakapuahi, who, it was alleged, was the brother and only heir of the patentee of the land in dispute, Nuuanu. The deed from Nakapuahi to Mikasobe was put in evidence to prove the relationship between Nakapuahi and Nuuanu. It recited that the deed was "issued in the name of Nuuanu, my younger brother, and I am the only remaining relative living." The court held that the deed was properly admitted.

In *Mann v. Cavanaugh* (1901) 110 Ky. 776, 62 S. W. 854, the plaintiffs claimed title to the property in question under a patent from the commonwealth to one John Crittenden. The plaintiffs are the sole heirs of one Mann who took the property as devisee in his father's will. The father acquired his title under a deed executed by one Raily, who acted as attorney in fact for the heirs at law of John Crittenden the patentee. The deed given by Raily contained a recital of the death of the patentee, and of the fact that the persons executing the power of attorney were the heirs and representatives of the deceased. It was held that, almost eighty years

having elapsed since the making of the deed in question, the recitals as to the death of the patentee and other facts would be admitted with additional proof.

In *Little v. Palister* (1826) 4 Me. 209, an action was brought for trespass, the plaintiff claiming his title from the heirs of one Fairweather. No conveyance was shown from Fairweather, but deeds made in 1779 and 1780 contained recitals that the grantees were the daughters of Fairweather. The deeds referred to were executed forty-five years before the commencement of this action. It was held that the recitals were evidence of pedigree, and admissible as such.

In *Casey v. Inloes* (1844) 1 Gill (Md.) 430, 39 Am. Dec. 658, an action of ejectment was brought, and the plaintiff, as part of his chain of title, introduced in evidence a deed made in 1756 and which contained the following recital: "And whereas I am eldest son and heir at law of the said Thomas Sheridine, deceased, for which reason the said Thomas Sligh is desirous of having conveyed to him my right or claim which I may have to the said 300 acres of land, so as aforesaid conveyed, now know ye that I, Thomas Sheridine, son and heir of the aforesaid Thomas Sheridine, deceased, for and in consideration of the sum of £50 sterling money, by the said Thomas Sligh to me in hand paid, have remised, released, and forever quitclaim unto him the said Thomas Sligh, his heirs and assigns forever, all that the aforesaid 300 acres of land." It was held that this deed, being over eighty years old, was properly admitted in evidence to prove the recitals contained therein.

In *Rollins v. Atlantic City R. Co.* (1905) 73 N. J. L. 64, 62 Atl. 929, the property in question was granted to one Rollins, whose heirs were sued by the tenants in common, Joseph Ball and Samuel Richards. Ball claimed title through a deed from one Condit, and the deed to him contained a recital that the grantor "was the issue and heir at law" of the deceased owner. The interest which Ball owned in common with Richards was claimed to

have passed to Richards by a deed executed by one Sarah Hastings, and her kinship to Ball was evidenced by a recital in that deed to the effect that she was formerly Sarah Richards, and the sister of Mary Ball, who was the mother of Joseph Ball, deceased. The defendant claimed that the recitals in these ancient deeds were not evidence as to the plaintiff's title. The court, after observing that there had not been actual possession by the grantees of the property, because the property was timberland and did not call for the exercise of possessory acts, said: "The deeds, however, in which the recitals occur, have been on record for eighty years. For eighty years, as far as appears, no other persons claiming the interests of Ashbridge and Joseph Ball have set up any rights in this property. There seem to have been conveyances made repeatedly by the grantees purporting to convey these interests. Under these conditions, I think the recitals are evidence of the facts recited. I also think that, in the absence of anything to contradict these facts, directly or inferentially, any number of verdicts against the probative force of these recitals would be set aside, and therefore the trial justice was warranted in saying to the jury that the plaintiff had proved title."

In *Young v. Shulenberg* (1901) 165 N. Y. 385, 80 Am. St. Rep. 730, 59 N. E. 135, an action was brought for trespass, and the defendant in his answer did not claim the right to enter upon the land, but questioned plaintiff's title. Defendant asserted that there was no evidence that one Anne Ellice and six others, who conveyed in 1817 a tract containing the portion in controversy, were the widow and heirs at law of Alexander Ellice who held the title. The deed of 1817 was introduced in evidence and contained a recital that Alexander Ellice died intestate and seised of the premises, leaving the grantors as his widow and heirs at law. The court, after stating the rule that the recitals in the deed were admissible if it appeared that the person making them was a member of the family, and that he was dead, incom-

petent, or beyond the jurisdiction of the court, said: "We think that the facts stated, together with the further fact that at the time of the trial eighty years had elapsed since the acknowledgment of the deed, were sufficient to establish, in the absence of rebutting evidence, that Anne Ellice and her co-grantors were members of the family, and hence in a position to speak on the subject of pedigree."

In *Murphy v. Loyd* (1838) 3 Whart. (Pa.) 539, it appeared that among the original purchasers of land in Philadelphia from William Penn was one George Green, under whom the plaintiff claimed title. The plaintiff offered in evidence an exemplification of a deed from one Thomas Green, which contained the following recital: "The said Thomas Green, being the only son of Edmund Green, being the eldest son of Benjamin Green, he, the said Benjamin Green, being the only son and heir of ——— Green." It was held that the deed was properly excluded from evidence, since the only proof that Thomas Green was the descendant of ——— Green was his own recital, and there was no pretense of possession or claim by Thomas Green as to those under whom he claimed prior to that deed.

In *Scharff v. Keener* (1870) 64 Pa. 376, the plaintiff claimed title to premises through one Scholl, and offered in evidence a deed dated April 30th, 1827, from one Hopp, and containing the following recital as to how Hopp gained possession: "Left to him by his grandfather Johannes Hopp, laying in Schuylkill county, Pennsylvania, now occupied by widow Schneider." The evidence was rejected. The court held that the rejection was error.

In *Bowser v. Cravener* (1867) 56 Pa. 132, the title to property was in controversy, and the plaintiff claimed under Richard Freeman, the patentee of the tract. The plaintiff offered in evidence a deed dated February, 1831, from Simon Freeman and others, by their attorney in fact to Anthony Cravener (plaintiff's grantor). This deed recited that the grantors were "heirs at law of Richard Freeman, late of

Washington City." The court held that the deed was properly admitted.

In *Carter v. Tinicum Fishing Co.* (1875) 77 Pa. 310, it appeared that certain fishing lands were in dispute, the plaintiff claiming the right through the will of Joseph Carter. The latter obtained title by virtue of three deeds dated August, 1796, March, 1797, and February, 1805. Each of these deeds contained recitals that the grantors derived title under David Sanderlin. Thus the deed of 1805 recites that the grantors "stand seised in our demesne as of fee and in the right to a fishing place on Tinicum island, we being heirs of James Claxton, deceased, who was one of the heirs of the estate of David Sanderlin, deceased, who died intestate, seised of the same in fee." The court held that these recitals were admissible in evidence to prove the plaintiff's chain of title.

In *Sitler v. Gehr* (1884) 105 Pa. 577, 51 Am. Rep. 207, it appeared that one Kitty Gehr had died seised of the property in question, and it had passed to the defendants in this action as her nearest relatives. The plaintiff brought this action of ejectment to recover one third of the property, claiming to be a distant relative of the deceased Kitty Gehr. The defendant offered in evidence several deeds containing recitals tending to disprove plaintiff's relation to the deceased owner. The trial court refused to admit this evidence, and it was held that this ruling was correct, the court saying: "The object of the offers, as I understand them, was to show the pedigree of the plaintiff's family, and that he was not connected with the Gehr family of Berks county. They show recitals in wills, deeds, mortgages, etc. There are also copies of assessments and other papers. They are, perhaps, the equivalent of the declarations of deceased persons, but there is nothing to connect them, or either of them, with the Baltzer Gehr who is the plaintiff in this suit, or with the Berks county family of Gehr. Hence the objections made by the defendants to the admission of the declarations of Anna Maria Gehr and

John Gehr, and which have already been considered, apply with far greater force to these papers. Regarding them as declarations, the declarants are not shown aliunde to belong to either branch of the family. We are of opinion that these records were properly excluded."

In *Jackson v. Gunton* (1904) 26 Pa. Super. Ct. 203, an action of trespass, it appeared that the patentee of the land had executed a declaration of a trust to the effect that he held the title for three persons named. The deed was offered in evidence to show a recital contained therein that Joseph Fox, the grantor, was "the eldest son and heir at law of him and said Samuel M. Fox, deceased," the patentee of the tract. The court held that the deed was properly admitted in evidence.

In *McCoy v. Pease* (1897) 17 Tex. Civ. App. 303, 42 S. W. 659, it appeared that the plaintiff claimed his title under one Bridges, and introduced in evidence an instrument dated in May, 1844, and executed by R. O. Beene and thirteen other parties, in which they designate themselves as heirs of James Bridges, deceased, which conveys to William Johnston all "their right, title, and interest in one league and labor of land, it being the headright of James Bridges, deceased." The court held that the instrument was improperly admitted, and said: "A recital by a grantor in a deed which is over thirty years old that he is an heir of a prior owner of the property conveyed has no relation to his power to make it, but is an assertion of his title by virtue of heirship to the estate of the deceased owner, and can be no more evidence of the truth of the assertion thirty years after the statement was made than it was on the day the instrument was executed. The fact of heirship is ordinarily susceptible of proof, and the bare statement of him in whose interest it is made should not be taken as evidence of its truth against anyone, without he is a party or privy to the instrument in which it is contained."

In *Maxson v. Jennings* (1898) 19 Tex. Civ. App. 700, 48 S. W. 785, an

action was brought for trespass to try the title to certain property. The plaintiff in proving his chain of title offered in evidence a deed which recited that the grantor was conveying as administrator of the estate of the owner of the property, and "further stipulating that as one of the heirs of said Robert he assents to said decree, and that he is fully authorized by the other heirs of the said Robert to express their assent to the same, which consent he hereby for said other heirs expresses." The court, holding that the deed had been properly admitted in evidence, said: "The deed from Henry Levenhagen recites him to be one of the heirs and to possess power from the others to convey their title. There is no evidence outside these papers showing who were the heirs of the decedent, and ordinarily a recitation of the fact in such a deed would not be evidence of heirship against anyone except parties thereto; but the lapse of time, coupled with acts of ownership on one side and the nonassertion of any opposing claim on the other, authorizes the court to presume and find as a fact not only the fact of heirship recited, but competent power in the grantor from the other heirs."

In *Wren v. Howland* (1903) 38 Tex. Civ. App. 87, 75 S. W. 894, it appeared that one of the deeds in the plaintiff's chain of title contained the following recital: "I declare that I am the son of David Wilson, deceased, and except my mother, Ophelia P. Wilson, or Talbot, I am the only heir." This was a disputed question on the trial, the defendant asserting that the grantor making the recital as set forth was not the son of David Wilson. The deed was held to be admissible to prove the recital as to pedigree.

In *Ardoin v. Cobb* (1911) — Tex. Civ. App. —, 136 S. W. 271, the plaintiff proved that the land had been patented to one Stanley, and that he had sold to Thomas Huling. No conveyance was shown in plaintiff's chain of title from Huling, but a deed was offered in evidence made by Elizabeth Huling, and reciting that she was the "surviving widow of Thomas B. Huling, deceased, late of Lampasas." The

deed also contained a recital that an inventory and appraisement had been filed, and a release by the other heirs of Thomas B. Huling. It was held that the deed was properly admitted in evidence.

In *Bell v. Barron* (1842) 14 Vt. 307, the plaintiff, to prove his title, introduced the original charter of the town and meane conveyances to one William Smith. No conveyance is shown from Smith, but a deed was introduced which recited that the grantors were the widow and heirs of Smith and conveyed the property to plaintiff's intestate. The court held that this deed was properly admitted in evidence.

In *Wilson v. Braden* (1904) 56 W. Va. 372, 107 Am. St. Rep. 927, 49 S. E. 409, it was held that recitals in a deed that the grantors were the widow and the sole heiress of the deceased were properly admitted in evidence. It appeared that plaintiff's chain of title was complete from the commonwealth of Virginia, except that the property had been conveyed to one Kemble, and no conveyance was recorded from him, but the next in the chain of title was by his widow and daughter. The court said: "Such is not the law as to ancient deeds, upwards of thirty years old, where possession has been continuously held thereunder. . . . This is on the theory that, if the recitals were untrue, they would have long since been disproved, and time and possession have raised the presumption of their truth, admissible even against strangers. Ann Kemble's deed under the circumstances could only be admitted as conveyance of her dower interest in the land, but it was good for the purpose, although it recited therein another deed not produced, which might have conveyed to her some other interest. *Deery v. Cray* (1867) 5 Wall. (U. S.) 795, 18 L. ed. 653. Mary D. Summers's deed conveyed her interest in the land as the sole heir of her father Robert J. Kemble, deceased, and thereby the Kemble link in the title is made complete. These being the only objections to plaintiff's chain of title, and they being without foundation, we must hold it good."

In *Webb v. Ritter* (1906) 60 W. Va. 193, 54 S. E. 484, the plaintiff objected to the admission of a deed which recited that the grantors were the widow and only child of the record owner of the property. The objection was that this was the only evidence given of the heirship of the two grantors. Another deed admitted in evidence and objected to was one executed by one George Brown in 1848, to Elizabeth, Anne, and Henry Cramond. The deed contained the following recital: "And the said William Cramond having departed this life since making said payment, leaving three children surviving him, namely, Elizabeth Cramond, Anne Cramond, and Henry Cramond, who are his heirs at law." The court held that these deeds were properly admitted to prove pedigree.

In *Fort v. Clarke* (1826) 1 Russ. Ch. 601, 38 Eng. Reprint, 231, it appeared that the title to the property was in one John Cormick in 1793, and on his death the land was conveyed by two persons claiming to be his daughters, and they embodied such a recital in the deed or conveyance to one Buckwood. The court held that these recitals were not evidence of pedigree as against strangers to the title, and said: "If evidence had been given that possession had followed and accompanied the pedigree; if, between 1747 and 1793, a possession had been shown passing from parent to child under the entail created in 1732, that enjoyment would have been a strong circumstance to prove that the persons named in the pedigree did, in fact, fill the characters which it was in 1793 alleged that they did fill."

b. Recital of consideration.

Where the question arises as to the payment of consideration, the courts have uniformly held that an ancient deed may be introduced in evidence as proof of facts therein recited which tend to prove that a valuable consideration was or was not given. *Strong v. Whybark* (1907) 204 Mo. 341, 12 L.R.A. (N.S.) 240; 120 Am. St. Rep. 710; 102 S. W. 968; *Anderson v. Cole* (1911) 234 Mo. 1, 136 S. W. 395; *Chamblee v. Tarbox* (1863) 27 Tex.

139, 84 Am. Dec. 614; *Smith v. Hirsch* (1917) — Tex. Civ. App. —, 197 S. W. 764.

In *Strong v. Whybark* (Mo.) *supra*, an action to quiet title was brought, and the plaintiff claimed title through mesne conveyances from one Josephine Hayden, who had received a quitclaim deed to the property from one S. Hayden in August, 1863, "in consideration of natural love and affection and \$5 to him in hand paid by the party of the second part, the receipt of which is hereby acknowledged." The title of defendant was claimed through conveyances from one William A. Moore, who had derived title from the same grantor as Josephine Hayden by a warranty deed for a recited consideration of \$640, given in March, 1861. The deed of the plaintiff's predecessor in title was recorded in 1863, and the one of the defendant's predecessor in 1874. It was held that the recital of consideration in the deed of Josephine Hayden was admissible in evidence.

In *Anderson v. Cole* (1911) 234 Mo. 1, 136 S. W. 395, an action for ejectment was brought, the plaintiff claiming through a deed executed in January, 1878, which recited a consideration of \$8,900 in hand paid. The deed was recorded March, 1878. The defendant deduced title through mesne conveyances from one Alexander, and his deed was given in September, 1878, and recorded in May, 1879. The common source of title was one Luca. The plaintiff offered in evidence the deed of January, 1878, reciting a consideration. It was held that the conveyance of 1878, being an ancient deed, was admissible in evidence to prove the recitals as to considerations.

In *Chamblee v. Tarbox* (1863) 27 Tex. 139, 84 Am. Dec. 614, it appeared that plaintiff derived his title through one of the defendants by virtue of a sheriff's sale under execution to one Lyle, and through mesne conveyances to the plaintiff. Lyle conveyed to one Lyman Tarbox in 1844, and the latter, in 1848, conveyed the premises to Jane Carroll, reciting as a consideration their approaching marriage. The remaining link in the plaintiff's chain of

title was a deed from Lyman Tarbox and wife, Jane Tarbox, to plaintiff. Plaintiff offered in evidence the deed of 1848, reciting Tarbox's approaching marriage to Jane Carroll, to prove that Jane Carroll and Jane Tarbox were the same person, thus completing plaintiff's chain of title. It was held that the deed was admissible in evidence, the court saying: "Recitals in deeds are ordinarily said to be evidence only against parties and privies; but when the recital is of a matter of pedigree, which includes the facts of birth, marriage, and death, it may be used as original evidence, even against strangers."

In *Smith v. Hirsch* (1917) — Tex. Civ. App. —, 197 S. W. 754, a suit was brought to cancel a deed made by the plaintiff's intestate. The deed in question recited a consideration of \$5, and quitclaimed the property. To show a valuable consideration, thus overcoming the presumption of fraud, the defendants offered in evidence a deed which recited a consideration of \$500, and the receipt of the same. The court held that this deed was properly admitted.

c. Recital of source of title.

The recitals in an ancient deed relating to the person or persons from whom title was derived are admissible in evidence, but only in connection with other proof of a long-continued and undisputed possession, in accordance with the right or title claimed.

Connecticut.—*McMahon v. Stratford* (1910) 83 Conn. 386, 76 Atl. 983.

Maine.—*Chandler v. Wilson* (1885) 77 Me. 76.

Michigan.—*Norris v. Hall* (1900) 124 Mich. 170, 82 N. W. 832.

New Jersey.—*Havens v. Sea Shore Land Co.* (1890) 47 N. J. Eq. 365, 20 Atl. 497.

New York.—*Jackson ex dem. Schuyler v. Russell* (1830) 4 Wend. 543; *Schermerhorn v. Negus* (1842) 2 Hill, 835.

Pennsylvania.—*Garwood v. Dennis* (1811) 4 Binn. 814; *James v. Letzler* (1844) 8 Watts & S. 192.

Texas.—*Sydnor v. Texas Sav. & Real Estate Invest. Asso.* (1906) 42 Tex. Civ. App. 138, 94 S. W. 451; *Brewer v.*

Gochran (1907) 45 Tex. Civ. App. 179, 99 S. W. 1083; *Hirsch v. Patton* (1908) 49 Tex. Civ. App. 499, 108 S. W. 1015; *Ryle v. Davidson* (1909) — Tex. Civ. App. —, 116 S. W. 823.

Vermont.—*Cross v. Martin* (1873) 46 Vt. 14.

In *McMahon v. Stratford* (Conn.) *supra*, an action was brought to quiet the title to certain lands situate in the defendant town. The plaintiff claimed through a series of conveyances beginning in 1741. Conveyances appeared in the proper form from that date to 1800, when the land was conveyed to one Eli Tongue. No conveyance from Tongue appeared on record, but in 1835 the land was granted by one Afford to one Timothy Risley, and that deed contained a recital that the conveyance was "property that I purchased of Eli Tongue, who purchased the same from James McKinzie." The court held that the deed from Afford to Risley was properly admitted in evidence to prove the recital.

In *Chandler v. Wilson* (Me.) *supra*, it appeared that the legislature had passed a statute providing for the grant of lands to veterans of the Revolution, or their representatives. The plaintiffs claimed under a grant made by the land commissioner to an assignee of a soldier's claim. The only evidence of this assignment was a recital in the deed made by the land commissioner. It was held that this evidence was admissible, as nearly fifty years had elapsed since the deed was made, and the evidence was offered against a stranger, who claimed under neither the soldier nor the commonwealth.

In *Norris v. Hall* (1900) 124 Mich. 170, 82 N. W. 832, it appeared that the plaintiff claimed title from the government, and brought ejectment against the defendant, who claimed title by certain tax deeds and adverse possession thereunder. The plaintiff, in proving his title, showed conveyances through several parties to five joint tenants. Four of these joint tenants conveyed to plaintiff's grantor, and in the deed recited the death of Sterne, the fifth trustee. It was held that the deed was properly offered in evidence

to prove the death of Sterne, since it was an ancient document.

In *Havens v. Sea Shore Land Co.* (1890) 47 N. J. Eq. 365, 20 Atl. 497, a suit for partition was brought, the complainants asserting title to the undivided half of the property, and the defendants asserting title to the entire tract. Both parties claimed under one David Curtis, and the defendant traced his title through a devise in the will of Curtis to his grandson, John Curtis. The defendant alleged that the devisee, John Curtis, conveyed to one Lawrence, and to prove this allegation introduced in evidence a deed made in 1790 by Lawrence, conveying the property to James Price. This deed contained the following recital after describing the land as that part of Squan beach "which I bought of John Curtis, which was left to him by his father David Curtis, deceased, which he bought of Elisha Lawrence, deed bearing date July 9th, 1770." It was held that this recital in a deed 100 years old was admissible in evidence to prove the existence of the prior deed.

In *Jackson ex dem. Schuyler v. Russell* (1830) 4 Wend. (N. Y.) 543, it appeared that two tracts of land had, in 1784, been granted to one William Cosby, sheriff of Amboy. In 1735, this land was devised by will by one William Cosby, governor of New York. The defendant in an action of ejectment claimed that these two William Cosbys were different persons, and no conveyance from the former to the latter was shown. The plaintiff introduced in evidence a deed made in 1762, which contained a recital of the grant to William Cosby, sheriff of Amboy, and a devise from him to William Cosby, governor of New York. It was held that the recitals in the ancient deeds were admissible to prove the facts in question.

In *Schermerhorn v. Negus* (1848) 2 Hill (N. Y.) 335, the plaintiff in an action of ejectment claimed title as one of the devisees of Schermerhorn. The plaintiff offered in evidence a deed from one Lefferts to Schermerhorn, which recited that, pursuant to an act of the colonial legislature, certain

commissioners had made partition of a certain tract of land, and that they had set aside two parcels to defray the expenses of the partition and sold these parcels of land to Lefferts and another. The evidence showed that no part of these lots had ever been possessed by any of the owners, their grantees, or those claiming under them. It was held that the recitals in the deeds were not admissible, where there had been no occupation of the land.

In *Garwood v. Dennis* (1811) 4 Binn (Pa.) 814, it appeared that defendant claimed title to the property in question under the will of Richard Dennis his father. Richard Dennis's wife, Hannah, derived title under the will of her father, but defendant alleged that in January, 1761, Hannah Dennis had conveyed all of her interest in the property to one Carpenter, who the next day had reconveyed to Richard Dennis, her husband. To prove this allegation the defendant offered in evidence a deed dated in June, 1764, and made by Richard Dennis and his second wife, Mary, which recited that Richard Dennis and Hannah his wife had conveyed all her share under the will of her father, John Coates, to Thomas Carpenter, who had reconveyed to Richard Dennis. This deed was rejected. It was held that the refusal to admit the deed in evidence was error.

In *Sydnor v. Texas Sav. & Real Estate Invest. Asso.* (1906) 42 Tex. Civ. App. 138, 94 S. W. 451, the parties claimed title under a common grantor. The property was conveyed to one John S. Sydnor, father of plaintiffs, on August 23, 1862. No conveyance appears from John S. Sydnor, the next conveyance being from J. T. Cyrus in 1863 to F. Levy. The defendants claimed that John S. Sydnor never held the beneficial title and real interest, but that the same rested in Cyrus. To prove this contention the defendants offered in evidence a deed made by the executor of John S. Sydnor in 1870, conveying the property to F. Levy and containing the following recitals: "Whereas, heretofore, to wit, on the 23d day of August, 1862,

Chauncey B. Sabin executed a conveyance to John S. Sydnor, of and for the tract of land hereinafter described; said deed is recorded in Harris county record of deeds, book Z, p. 287; and whereas said Sydnor held said land not for himself, but in trust for one J. T. Cyrus; and whereas thereafter, to wit, on the 24th day of April, 1863, said Cyrus conveyed the said land to Francis and Ella Levy, as will be seen by reference to the deed made by Cyrus, which deed is recorded in Harris county, aforesaid, in record of deeds, vol. 1, pp. 67, 68; said deed is witnessed by John S. Sydnor (by the name of S. S. Sydnor) and by Robert Black." It was held that the deed was admissible in evidence.

In *Brewer v. Cochran* (1907) 45 Tex. Civ. App. 179, 99 S. W. 1083, the defendant claimed that the land in controversy had been sold and conveyed in 1865 by William and Caroline Brewer, plaintiffs' ancestors, to one Roberts, whose title defendant claimed. The plaintiffs claimed title as heirs at law of William and Caroline Brewer. To establish the chain of title from Brewer and wife to Roberts, the deed having been lost or destroyed, the defendant offered in evidence recitals in the deed of Roberts to his grantee, which conveyed a one-half interest in the lands, the recitals being made in connection with the description of the land as follows: One undivided half of that one fourth of a league of land granted by the state of Texas to David Scott . . . and conveyed by David Burrell and H. E. Simpson, administrators representing the estate of David Scott, deceased, as per deed dated June 1, A. D. 1863, and November 30, 1865, to William and Caroline Brewer, and by them to me as per deed dated November 30, 1865, which patent and deeds are here referred to as part of this conveyance." The court held that such recitals were admissible.

In *Hirsch v. Patton* (1908) 49 Tex. Civ. App. 499, 108 S. W. 1015, an action of trespass to try title was brought, and the defendants, to sustain their claim of title, offered in evidence a deed made by one Joseph Dunman, in 1872, to W. Humble. The deed recited that the grantor conveyed not only his own interest, but also his

right, title and interest derived by virtue of a purchase made by him from one Jane Maule. This much was admitted, but the court refused to admit recitals with reference to the purchase by him of the interest of Jane Maule. It was held that the recitals should have been admitted.

In *Ryle v. Davidson* (1909) — Tex. Civ. App. —, 116 S. W. 823, the plaintiff claimed title under one Chireno who had received a grant of land from the state. In the plaintiff's chain of title was a deed executed in September, 1854, by J. Berlin to William Perrine. To prove the existence of a deed from Daniel to Jacob Berlin the plaintiffs offered in evidence a certified copy of the deed containing the following recital: "All that certain tract, piece, or parcel of land consisting of 2,000 acres, measured off in the form of a square from a certain larger tract of land described in a deed of conveyance thereof, bearing date of the 1st day of September in the year one thousand eight hundred and fifty-two, made and executed by Daniel Berlin to Jacob Berlin, September 1, 1852, before James M. Baldwin, commissioner of deeds for Texas at New York, as follows." The court, after observing that this deed conveyed to Perrine whatever title the grantor had, said: "The recitals in this ancient deed to Perrine were of themselves admissible as a circumstance to establish the execution of the deed from Daniel Berlin to Jacob Berlin of the larger tract, under which Perrine *dérails* his title, and, taken with the evidence furnished by the mutilated record, entirely sufficient to establish its execution. . . . The conclusion is irresistible therefrom that the mutilated record is the record of a deed from Daniel to Jacob Berlin of all of the Chireno league except the 1,628 acres which had previously been sold and conveyed by Daniel Berlin to John Ryle."

In *Cross v. Martin* (1873) 46 Vt. 14, the plaintiff claimed title through a grant from the state to one Gore in 1801, and offered in evidence a charter to prove a recital contained therein that the grant of the territory was made by the legislature on February 25, 1872, to Elijah Gore and associates.

The court held that the charter was properly admitted in evidence, as it was over seventy years old, and was prima facie evidence of the recital that the grant had been made.

d. Recital as to extent of title.

Where the extent of the property conveyed or the location of boundary lines are in dispute, ancient deeds are properly admitted in evidence to prove these matters. It is presumed by the courts that after the lapse of thirty years such evidence is reliable, as the grantor would have no reason to describe the premises falsely. See the reported case (*GARBARINO v. NOCE*, ante, 1433); *Drury v. Midland R. Co.* (1879) 127 Mass. 571; *Randall v. Chase* (1882) 133 Mass. 210; *Fuller v. Den* (1843) 20 N. J. L. 61; *McGrath v. Norcross* (1911) 78 N. J. Eq. 120, 79 Atl. 85, affirmed on opinion below in (1913) 82 N. J. Eq. 367, 91 Atl. 1069; *Greenleaf v. Brooklyn, F. & C. I. R. Co.* (1892) 132 N. Y. 408, 30 N. E. 762; *Oxford v. Willoughby* (1905) 181 N. Y. 155, 78 N. E. 677; *Horgan v. Jamestown* (1911) 32 R. I. 528, 80 Atl. 271; *Stevens v. Crosby* (1914) — Tex. Civ. App. —, 166 S. W. 62; *Keppler v. Richmond* (1919) — Va. —, 98 S. E. 747.

In the reported case (*GARBARINO v. NOCE*) the rights of the parties in a creek and a certain ditch of water were in controversy. The plaintiff introduced in evidence a deed executed on October 6, 1862, to the predecessors in interest of the plaintiff. This deed described the premises, and contained a recital as to the ditches in controversy. It is held that the ancient deed was admissible in evidence, even as against strangers to the title.

In *Drury v. Midland R. Co.* (1879) 127 Mass. 571, the question arose as to the position of the boundary line between two counties, and it was held that ancient deeds defining this boundary were properly admitted in evidence.

In *Randall v. Chase* (1882) 133 Mass. 210, an action was brought against the defendant for obstructing the plaintiff's alleged right of way. It appeared that the predecessors in title to the parties owned property adjoining, and the owner of the defendant's

premises granted a right of way to the owner of the plaintiff's premises. The defendant claimed that this was an easement. The plaintiff was permitted to give the deed in evidence to establish by its recitals the location of the driveway. It was held that the deed was admissible and its recitals competent evidence, the court saying: "Even if neither claimed under it or the parties to it, this deed was also admissible upon the ground that, having been made more than thirty years, its recitals were competent evidence of the place where the way was located, upon the same principle upon which it has been held that recitals in ancient deeds are evidence upon a question of boundary to prove the position of a line from which the disputed bound can be determined. . . . Nor was the use made of it in the charge of the presiding judge improper, the jury being instructed that, if the way was never practically located otherwise than in the manner and by the continued acts which he described, its situation might be presumed and taken to be, according to the terms of this deed and that of *Randall* to *Brigham* in 1837, that of a driveway not less than 12 feet, adjoining the block."

In *Fuller v. Den* (1843) 20 N. J. L. 61, it appeared that, among the predecessors through whom the plaintiff claimed title, the land in 1745 was held by three persons as joint tenants. A conveyance was offered in evidence by which one of the joint tenants, in 1758, devised to his daughter "his lot of 884 acres; an equivalent tract marked in division deed A." The court held that it was proper to admit this ancient document as evidence.

In *McGrath v. Norcross* (1911) 78 N. J. Eq. 120, 79 Atl. 85, the defendant, to prove his chain of title, offered in evidence two deeds made by his predecessors. In the first of these deeds, made in 1743, there was a recital describing the tract as follows: "First tract is 700 acres, survey to the said Edmund Iliff and others." The next deed in the defendant's chain of title was made in 1786, and contained the following recital as to title: "Containing 700 acres more or less, which survey formerly belonged to Edmund

Iliff and is one of the eight tracts accepted out of the society's resurvey for him, and was conveyed by said Iliff to the aforesaid Thomas Denny, the present grantor by deed of the — day of ———." The court held that it was proper to permit these recitals to be considered by the jury.

In *Greenleaf v. Brooklyn, F. & C. I. R. Co.* (1892) 132 N. Y. 408, 30 N. E. 762, the plaintiff's title was traced from a partition made in 1848 and various mesne conveyances, the tract in controversy being set off to John Emmons, through whom the plaintiff claimed title. John Emmons assumed to convey the land to one Greenleaf by deed in 1848. The plaintiff, to prove his chain of title, introduced in evidence this deed. The court held that it was admissible, but that the plaintiff could not recover because of his failure to show possession at any time or in any manner.

In *Oxford v. Willoughby* (1905) 181 N. Y. 155, 73 N. E. 677, the action was in equity to prevent the defendant from encroaching upon the public highway by the erection of an addition to a building. The plaintiff offered in evidence a deed made by Josiah Stevens in 1806, conveying certain lands, to show the boundaries of the street. This evidence was admitted over defendant's objection. The court held that the deed was properly admitted.

In *Horgan v. Jamestown* (1911) 32 R. I. 528, 80 Atl. 271, it appeared that the defendant town, through its council, entered a decree defining a certain highway in the township. The plaintiff contended that the decree was erroneous and appealed, claiming that the council lacked jurisdiction. Among various exceptions taken by the plaintiff was one for the refusal of the trial court to exclude several deeds which contained recitals showing that the highway had existed, and bounding the lots upon the highway. It was held that the deeds were properly admitted, the court saying: "The issue before the jury was whether a highway existed between the wharf lots to the east of the east line of Walcott avenue. The recitals in these ancient deeds, executed and recorded from the middle of the eighteenth century till

about thirty years ago, are competent evidence, having strong probative force, as to the existence of a highway running to the sea, and not terminating at some point short of the sea, as the appellant contends."

In *Stevens v. Crosby* (1914) — Tex. Civ. App. —, 166 S. W. 62, the action was for trespass to try title, and the issue involved the location of the old bed of a river. The plaintiff introduced in evidence a deed from them to one Tays which described a 600-acre tract of land, and recited in the deed the location of the beds of the old and new rivers. It was held that the deed was properly admitted in evidence to prove the recitals contained therein.

In *Keppler v. Richmond* (1919) — Va. —, 98 S. E. 747, a suit to restrain the defendant city from claiming a certain strip of land on the plaintiff's property as an alley, the defendants, to prove that the alley had been dedicated, offered in evidence a deed of the adjoining lot made by one Hirsch and containing a recital of the existence of the alley and making a reservation from the granted premises in case it should be closed. It was held that the deed, being more than thirty years old, was admissible against persons not in privity therewith.

c. *Recital of another instrument.*

When a party attempts to establish his chain of title through mesne conveyances from a remote grantor, it frequently happens that a deed in the chain has been either lost or destroyed. Where such a fact is established the courts have held that a subsequent deed containing a recital of the missing deed may be introduced in evidence to complete the chain of title. *Baeder v. Jennings* (1889) 40 Fed. 199; *Whitman v. Heneberry* (1874) 73 Ill. 109; *Dorff v. Schmunk* (1900) 197 Pa. 298, 47 Atl. 113.

In *Baeder v. Jennings* (Fed.) supra, an action to recover certain lands, the plaintiff claimed title through a grant from the proprietors in 1691. The plaintiff in proving his chain of title failed to produce a deed dated in 1772, but a subsequent deed made in 1823 recited the existence of the deed of 1772. It was held that the deed of

1772 was sufficiently proved by the recital in the later deed, accompanied by acts of ownership thereunder.

In *Whitman v. Heneberry* (1874) 73 Ill. 109, it appeared that the plaintiff claimed title to the lands in question through mesne conveyances from the patentee of military bounty lands. The defendant claimed that the deed by which the patentee conveyed title was a forgery, and was dated after the issue of the patent. The court held that the deed was admissible in evidence, since it contained a recital of the issue of the patent.

In *Dorff v. Schmunk* (1900) 197 Pa. 298, 47 Atl. 118, an action was brought for the specific performance of a contract. The defendant alleged that the title was unmarketable. It appeared that in 1851 the title was in the trustees of a land association, and the plaintiff claimed title under these trustees, but no deed was produced showing a transfer of title from the trustees. To supply this deficiency, the plaintiff offered in evidence a deed dated in June, 1810, from one Black to John Orr, which contained a recital that a deed dated April 4, 1851, had been executed by the trustees of the land association to John Black. It was held that the recital as set forth was properly admitted as evidence.

1. Recital of compliance with statute.

Where the question arises whether an executor or administrator, or other officer, complied with a statute before holding a sale or doing some other official act, an ancient deed reciting the performance of these duties is admissible in evidence against strangers to the title. *Davis v. Gaines* (1881) 104 U. S. 386, 26 L. ed. 757; *White v. Jones* (1887) 67 Tex. 638, 4 S. W. 161; *Williams v. Cessna* (1906) 43 Tex. Civ. App. 315, 95 S. W. 1106; *Condit v. Galveston City Co.* (1916) — Tex. Civ. App. —, 186 S. W. 395; *Sandmeyer v. Dolijsi* (1918) — Tex. Civ. App. —, 208 S. W. 113.

In *Davis v. Gaines* (U. S.) *supra*, it appeared that the plaintiff claimed title under a will executed by one Clark in 1813, while the defendants claimed as purchasers at a sale of the property made in pursuance of the provisions of a will executed in 1811.

The plaintiff claimed that the sale was not preceded by advertisements as required by law. The deed by which the executor conveyed the property was introduced in evidence, and it contained a recital that the sale was made after "the publications and delays prescribed by law." It was held that, the possession under the deed having been held for sixty years, it was admissible in evidence to prove the recitals contained therein.

In *White v. Jones* (1887) 67 Tex. 638, 4 S. W. 161, it appeared that both parties claimed title under one James Day, the plaintiffs as his heirs, and the defendants under a sale made by James Warnell as the administrator of the estate of James Day. The defendants introduced in evidence a deed which recited the appointment of the administrator, the order of the court to make the sale, and the giving of proper notice and sale by the administrator. The deed further recited an order of the court, confirming the sale. It was held that the copy of the deed was properly admitted in evidence, the recorded one having been destroyed. The court said: "At the time of the trial of this case in the court below, twenty-five years had elapsed since the sale of the lots was made. The administrator who made it was proved to be dead. Under such circumstances it may be that it should be presumed that the orders were made as the administrator's deeds set them forth, without other evidence tending to support that conclusion, save the failure of the heirs to set up their claim for so long a time. But it was also shown that the administrator *de bonis non* returned the purchase-money note upon his inventory, and the court finds upon sufficient evidence that the note was paid. . . .

It may be that the recital in the deed of the date of the grant of letters is a clerical mistake—1858 being intended instead of 1859; but, however that may be, after the lapse of twenty-five years, which has occurred in this case, the presumption *omnia recte acta* must apply, and, the records having been destroyed by fire, every intendment must be presumed in favor of the validity of the proceedings. If the heirs made application for the partition, ac-

quiesced in the sale, and recovered the purchase money for the lots, they and those claiming under them are certainly estopped from setting up title to the lots in controversy."

In *Williams v. Cessna* (1906) 43 Tex. Civ. App. 315, 95 S. W. 1106, the plaintiff introduced in evidence a copy of a deed made by the administrator of the deceased owner's estate. The deed recited the order of the court to sell the property, the appointment of appraisers, their appraisal of the property, and the sale by the administrator. The deed as recorded had been destroyed by fire. It was held that the deed, being over sixty years old, was properly admitted as an ancient document to prove recitals contained therein.

In *Condit v. Galveston City Co.* (1916) — Tex. Civ. App. —, 186 S. W. 395, the title to shares of stock in the defendant corporation was in issue. The plaintiffs claimed that they were the rightful owners, and had lost the certificate of stock, and sought to have another issued. The defendant claimed that L. N. Condit, through whom the plaintiffs claimed title, had transferred the share in question during his lifetime. To prove this the defendant offered in evidence a deed of transfer purporting to transfer the share of stock in question to one Chaleron. This deed recited that the certificate was sold at public auction pursuant to an order of the probate court. The plaintiffs contended that such evidence was inadmissible, in the absence of any evidence showing that the transferee or any person claiming under him had enjoyed possession or shown acts of ownership. It was held that the deed was properly admitted to prove the recitals.

In *Sandmeyer v. Dolijai* (1918) — Tex. Civ. App. —, 208 S. W. 113, it appeared that defendant claimed title through one Collins. The latter conveyed to a firm known as Opdyke, Carrico, & Company, and subsequently one Davis, administrator for Collins, obtained in 1830 an order from the probate court, reciting that a deed be executed to Davis and that he hold the title for the use and benefit of the firm of Opdyke, Carrico, & Company. In May, 1842, the executor of Davis

was ordered by the probate court to convey to Opdyke the premises in question. Plaintiff contended that the probate court did not have jurisdiction to grant this order, and therefore the recitals in the deed that Davis held as trustee were inadmissible. It was held that the recitals were admissible, although the probate court lacked jurisdiction.

g. Recital of power of attorney.

The rule admitting ancient deeds in evidence to prove recitals has been uniformly followed where conveyances have been made under a power of attorney and such power has not been recorded. A subsequent deed reciting the former conveyance as made under a power of attorney is competent evidence of the fact. *Doe ex dem. Clinton v. Phelps* (1812) 9 Johns. (N. Y.) 169; *Jackson ex dem. Livingston v. Neely* (1818) 10 Johns. (N. Y.) 374; *Ensign v. McKinney* (1833) 30 Hun (N. Y.) 249.

In *Doe ex dem. Clinton v. Phelps* (N. Y.) supra, the plaintiffs, to prove their title, gave in evidence a deed dated May 15, 1767, made by four of the owners, and recited a power of attorney from the other six owners to one of the grantors signing the deed. The court held that this evidence was properly admitted, saying: "The deed to Van Dam was from other patentees, besides those for whom Young assumed to act as attorney, and it purported to be a conveyance of the whole patent. After a lapse of forty-four years, and when the possessions have gone along with the deed to Van Dam, and when no pretense of claim in opposition to that deed has been heard of, the execution of the power of attorney recited in the deed of 1767 may reasonably be presumed. An ancient deed, with possession corresponding with it, proves itself; and a power of attorney contained in such deed, and necessary to give it validity, or full effect, will equally be embraced by the presumption."

In *Jackson ex dem. Livingston v. Neely* (1818) 10 Johns. (N. Y.) 374, it appeared that the lessors of plaintiffs claimed the property in question as heirs of one Livingston, who had been deeded the property by one Bleck-

er, acting as attorney in fact for the owner, Guth. The power of attorney was never recorded, but the plaintiff offered in evidence the deed from Bleeker to Livingston which recited the power of attorney. It was held that the deed was properly admitted.

In *Ensign v. McKinney* (N. Y.) *supra*, an action for ejectment was brought, and it appeared that the plaintiff claimed title from one Rowley. The deed to Rowley was executed

by one Hall on behalf of himself, and as attorney in fact for the other grantors, but the power of attorney had never been recorded, nor was it produced on the trial. The plaintiff offered in evidence the deed to Rowley, containing a recital of the power of attorney to Hall, but the court excluded the evidence. It was held that such refusal was error, and the deed was admissible to prove the recital.

E. C. B.

RE SUCCESSION OF CLARENCE C. BEIRD.

MRS. C. A. MAINS, Appt.

Louisiana Supreme Court — June 30, 1919.

(145 La. —, 82 So. 881.)

Will — dating — sufficiency of figures.

1. Under a requirement that a holographic will must be wholly written, dated, and signed by the hand of the testator, a will is invalid which represents the year in the date simply by two figures, since, the century not being designated, the will cannot be said to be wholly dated.

[See note on this question beginning on page 1455.]

—sufficiency of date — how determined.

2. The sufficiency of the date of a will must be determined from the face of the instrument.

Date — figures — interpretation.

3. When a date is written all in figures, and those intended to represent

day and month are less than thirteen, it is impossible to determine which refers to day and which to month.

—last will as revocation.

4. The last will executed by a testator revokes all prior ones in so far as it may conflict with them.

(O'Niell, J., dissents in part.)

APPEAL by legatee from a decree of the Civil District Court for the Parish of Orleans, Division E (Théard, J.), declaring a document ineffectual as a will in a proceeding for the annulment of the will of Clarence C. Beird, deceased. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. Joseph Lautenschlaeger for appellant.

Messrs. Robert H. Marr and A. P. Pujo, amici curiæ:

A holographic will, the date of which is expressed in figures, in all things is legal and valid, and must be probated and executed in conformity with its provisions.

Re Chevallier, 159 Cal. 161, 113 Pac. 130; Re Lakemeyer, 135 Cal. 28, 87 Am. St. Rep. 96, 66 Pac. 961; Stead v. Curtis, 112 C. C. A. 463, 191 Fed. 529;

Heffner v. Heffner, 48 La. Ann. 1088, 20 So. 281; Robertson's Succession, 49 La. Ann. 868, 62 Am. St. Rep. 672, 21 So. 586; Swanson's Succession, 132 La. 606, 61 So. 685.

Parol proof should be received and considered to explain any obscurity in the use of the figures and to translate their meaning and import, and the sense in which they were used and intended to be used by the testator when written.

DeBlois v. Reiss. 32 La. Ann. 586;

Greenl. Ev. 15th ed. §§ 240, et seq.; 1 Rice, Ev. § 175, ¶ b; 10 R. C. L. §§ 269, 270.

Mr. Charles G. Gill, for absent heirs, appellees:

The date on the will was uncertain and ambiguous, and under the law uncertainty or ambiguity of the date is equivalent to no date or absence of a date, and such uncertainty makes the will invalid.

Heffner v. Heffner, 48 La. Ann. 1088, 20 So. 281; Robertson's Succession, 49 La. Ann. 868, 62 Am. St. Rep. 672, 21 So. 586; Swanson's Succession, 132 La. 608, 61 So. 685; Vidal's Succession, 44 La. Ann. 41, 10 So. 414; Gaude v. Baudoin, 6 La. 722; Armant's Succession, 43 La. Ann. 315, 26 Am. St. Rep. 183, 9 So. 50; State v. Martin, 2 La. Ann. 667; Eichorn v. New Orleans & C. R. Light & P. Co. 114 La. 712, 38 So. 526, 3 Ann. Cas. 98; Conery v. His Creditors, 115 La. 807, 40 So. 173; Origet v. United States, 125 U. S. 240, 31 L. ed. 743, 8 Sup. Ct. Rep. 846; Meyer v. Osoline Chemical Co. 11 Orleans App. 203; Lee v. Rice, 12 La. 254; Ex parte Nicholls, 4 Rob. (La.) 53; Hedges v. Boyle, 7 N. J. L. 68.

Dawkins, J., delivered the opinion of the court:

Clarence C. Beird died leaving the following instrument as his last will and testament, to wit:

9/8/18.

Should anything happen to me I want Mrs. C. A. Mains to have all my goods and money.

C. C. Beird.

It was presented to the court below by the legatee, Mrs. Mains, for probate, who at the same time asked to be appointed dative testamentary executrix. An attorney for absent heirs was appointed, and he thereupon attacked the will on several grounds. In the meantime, the public administrator for the parish of Orleans appeared and opposed the application of Mrs. Mains, and later was appointed dative testamentary executor without prejudice to the attack upon the will.

After hearing, the lower court declared the document ineffectual as a will on the ground of the absence of a lawful date.

The legatee, Mrs. Mains, has appealed.

It is conceded in the briefs on both sides that all other issues have been eliminated, save and except the question of date.

The lower court rendered an able and well-considered opinion, in which both the French authorities and jurisprudence of this court are cited in support of the conclusion reached, and in which the common-law decisions are clearly differentiated from those of the civil law, under which the question of validity of a will must be determined in this state.

Article 1588 of the Revised Civil Code, which is the law governing the form of holographic wills, provides:

"The holographic testament is that which is written by the testator himself.

"In order to be valid, it must be entirely written, dated and signed by the hand of the testator. It is subject to no other form, and may be made anywhere, even out of the state."

Counsel for appellant concedes that, under this and other articles of the Code, a will, to be valid, must be dated, but contends that by well-recognized custom and usage, the figures, "9/8/18," are generally understood to mean, in their respective order, first, the month, second, the day of the month, and third, the year of the century in which the document is written and that the courts may take judicial cognizance thereof.

Certain extrinsic evidence was offered on behalf of the proponent of the will, over the objection of the attorney for absent heirs, and the lower court at first overruled the objection and admitted the evidence, but later reversed itself and excluded all further proof on that score, holding, as we think, correctly, that the sufficiency of the date must be determined from the face of the will.

Will—
sufficiency of
date—how
determined.

Heffner v. Heffner, 48 La. Ann. 1088, 20 So. 281.

While it is true the custom prevails and is in daily use of dating letters by the use of figures alone to represent the day, month, and year, at the same time there is almost as much variance in the order in which the month and day is written as there is in the use of words and figures. Some write the month first and the day of the month next, while others write the day first and the month second, and in a case like the present, where both the figures intended to represent the day and the month are less than thirteen, under this well-recognized variance, it is impossible to

**Date-figures-
interpretation.**

tell whether the deceased intended to write September 8th, or the 9th of August. If we are to take cognizance of the custom of using figures or abbreviations in writing dates, we are equally bound to take cognizance of the well-recognized variance in the methods of using that custom.

Again, we have held that, where the whole will was written in the hand of the deceased, save the figures representing the century, as in 1902, the 1 and 9 and 0 being printed, the same was void, because not being wholly written and dated in the hand of the testator. If the contention now made—that is, that the court may take cognizance of the century in which the will is written—is correct, the court might well have done so in that case (*Robertson's Succession*, 49 La. Ann. 868, 62 Am. St. Rep. 672, 21 So. 586), for article 1589 of the Code provides: "Erasures not approved by the testator are considered as not made; and words added by the hand of another as not written. . . ."

However, the fundamental weakness in such contention is that the court is called upon to supply from sources outside of the will some-

thing which does not appear on its face. There is no word or symbol to denote that part of the year which would tell the century in which the document was written. If this were not so, in the *Robertson Case*, it could easily have been said that the printed figures in the year of the date of the will, under the article of the Code just quoted from, should be treated as not written, and that a sufficient date would have still remained. However, we have uniformly applied the rule of strict interpretation to wills, and, to be valid, in the lan-

**Will-dating-
sufficiency of
figures.**

guage of the Code, they "must be entirely written, dated, and signed in the hand of the testator." It is hardly necessary to mention the reasons for this strictness, especially as to date, considering, as we must, that a person has the right to make as many wills as he chooses, and that the last, under

the law, at least in —last will as
revocation.

so far as it may conflict with prior ones, has the effect of revoking their dispositions. The date, therefore, must be certain and beyond speculation. Tested by this rule, the document assailed here fails to meet the requirements of the law.

For the reasons assigned, the judgment appealed from is affirmed, at the cost of the appellant.

O'Niell, J., concurs in the opinion that the date of a holographic will must speak for itself, and in the ruling that there is sufficient uncertainty of the day and month in this case to make the will null, but he dissents from the opinion that there can be any uncertainty as to the century in which the will was dated, when the year and decade are given.

Petition for rehearing denied October 14, 1919.

ANNOTATION.

Effect of use of figures to express date of will.

Ordinarily the statutes do not require will to be dated, and the use of figures ought generally to lead to no difficulty. Thus, where two wills were presented, one dated 14th of March, 1884, the other "the — day of —, 188," on evidence that the latter was the later instrument it was admitted to probate. *Re Haviland* (1896) 17 Misc. 193, 40 N. Y. Supp. 973, where the court said: "The Revised Statutes do not require that a will shall be dated. The date may be established or corrected by parol evidence showing the real date of its execution. *Schouler, Wills*, 2d ed. 279."

Where the statute did not require the date in a holographic will, the court, without referring to this, reversed a judgment admitting to probate an earlier will, the holograph being in the form of two letters, one dated, "Hebronville, 4—12, 1902," the other, "Monterey, Mexico, 5—6—1902." *Dougherty v. Holscheider* (1905) 40 Tex. Civ. App. 81, 88 S. W. 1118.

Most of the cases as to dates of holographic wills have arisen under the California or Louisiana statutes, which are nearly the same in form; both require the date. The Louisiana statute is given in the reported case (*RE BEIRD*, ante, 1452). The California statute is as follows: "A holographic will is one that is entirely written, dated, and signed by the hand of the testator himself. It is subject to no other form, and may be made in or out of this state, and need not be witnessed."

Under these statutes the date must be complete. Thus a holographic will is not sufficient if it omits the last two figures of the date of the year (*Swanson's Succession* (1913) 132 La. 606, 61 So. 685), nor if it omits the month, as "San Francisco, 27, 1911" (*Re Anthony* (1913) 21 Cal. App. 157, 131 Pac. 96), nor if it cannot be determined whether the month or the day is omitted, as "10 1912" (*Re Carpenter* [1916] 172 Cal. 268, L.R.A.1916E, 498, 156 Pac. 464).

It will be seen that it is held in the reported case (*RE BEIRD*) that a holographic will is not sufficiently dated when the date is "9/8/18."

The California courts take an opposing view. Thus it was held that a holographic will was sufficiently dated, "New York, Nov. 22,/97" (*Re Lake-meyer* (1901) 135 Cal. 28, 87 Am. St. Rep. 96, 66 Pac. 961); or "4—14—07" (*Re Chevallier* (1911) 159 Cal. 161, 113 Pac. 130); or "4/12/17th" (*Re Olssen* (1919) — Cal. App. —, 184 Pac. 22).

As under these statutes the date must be entirely in the handwriting of the testator, a holograph is insufficient if written upon a letterhead or other head with a portion of the date printed, as 1880 or 189 or 190. *Billings's Estate* (1884) 64 Cal. 427, 1 Pac. 701; *Robertson's Succession* (1897) 49 La. Ann. 868, 62 Am. St. Rep. 672, 21 So. 536; *Noyes v. Gerard* (1909) 40 Mont. 190, 26 L.R.A.(N.S.) 1145, 105 Pac. 1017, 20 Ann. Cas. 366 (where the statute is the same as that of California).
B. B. B.

J. K. HAYNES et al., Appts.,
v.

A. T. PETERSON.

Virginia Supreme Court of Appeals — September 17, 1919.

(— Va. —, 100 S. E. 471.)

Convict — provision for committee — effect.

1. A statutory provision for the appointment of a committee for the estate of one convicted of felony does not affect the power of the convict to dedicate his property to payment of his debts and support of his family before proceedings for appointment of the committee are instituted.

[See note on this question beginning on page 1459.]

Evidence — burden of proof — fraud.

2. To cancel a deed for fraud, plaintiff must prove the allegations upon which he seeks relief by satisfactory proof.

[See 4 R. C. L. 495.]

Convict — power to dispose of real property.

3. One convicted and incarcerated for felony may execute a valid power of attorney to dispose of his real estate where forfeiture of estate for felony is abolished.

[See 21 R. C. L. 1180.]

APPEAL by defendants from a decree of the Circuit Court for Wise County (Skeen, J.) in favor of complainant in a suit for the cancelation of certain deeds and for the restoration of the land to him. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Coleman & Carter, W. S. Cox, and S. H. Bond, for appellants:

A convict can convey his real estate in the absence of a statute inhibiting him from so doing.

2 Minor, Inst. pp. 655, 659; 2 Minor, Real Prop. p. 1096; Avery v. Everett, 110 N. Y. 317, 1 L.R.A. 264, 6 Am. St. Rep. 368, 18 N. E. 148; 40 Cyc. 99; Clark, Contr. 2d ed. § 89; Elliott, Contr. § 266; Harmon v. Bowers, 78 Kan. 185, 17 L.R.A. (N.S.) 502, 98 Pac. 51, 16 Ann. Cas. 121; Willingham v. King, 23 Fla. 478, 2 So. 851; Platner v. Sherwood, 6 Johns. Ch. 118; Frazer & Fulcher, 17 Ohio, 260; Davis v. Laning, 85 Tex. 89, 18 L.R.A. 82, 34 Am. St. Rep. 784, 19 S. W. 846; Re Nerao, 35 Cal. 392, 95 Am. Dec. 111; Presbury v. Hull, 34 Mo. 29; Cannon v. Windsor, 1 Houst. (Del.) 143; Rankin v. Rankin, 6 T. B. Mon. 531, 17 Am. Dec. 161; Omaha Sav. Bank v. Rosewater, 1 Neb. (Unof.) 723, 96 N. W. 68; Richardson v. Ainsa, 11 Ariz. 359, 95 Pac. 103; Wynehamer v. People, 13 N. Y. 378; Nance v. Southern R. Co. 149 N. C. 366, 63 S. E. 116; Com. v. Beck, 187 Mass. 15, 72 N. E. 357; People v. Marx, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29; Gray v. Stew-

art, 70 Kan. 429, 109 Am. St. Rep. 461, 78 Pac. 852; State, Percy, Prosecutor, v. Powers, 51 N. J. L. 432, 14 Am. St. Rep. 693, 17 Atl. 969; Re Donnelly, 125 Cal. 417, 73 Am. St. Rep. 62, 58 Pac. 61; Stephani v. Lent, 30 Misc. 346, 63 N. Y. Supp. 471; Tiffany, Real Prop. § 505.

Plaintiff is estopped from denying the validity of the power of attorney and the deed made in pursuance of same.

Hunt v. Rousmanier, 8 Wheat. 174, 5 L. ed. 589; 2 Kent, Com. p. 1057, § 644.

Neither in courts of law or equity will any relief be afforded from fraud unless the allegations be clearly and distinctly proved.

Terry v. Fountaine, 83 Va. 451, 2 S. E. 743; New York L. Ins. Co. v. Davis, 96 Va. 737, 44 L.R.A. 305, 32 S. E. 475; Engleby v. Harvey, 93 Va. 440, 25 S. E. 225.

Messrs. Bond & Bruce for appellee.

Whittle, P., delivered the opinion of the court:

The material facts of this case are these: Appellee, A. T. Peterson, was convicted on two indict-

ments for forgery at the June term, 1910, of the circuit court of Scott county, and on July 9th following was sentenced to confinement in the penitentiary for six years. At the time of his conviction Peterson was heavily indebted, and at the suit of some of his creditors his lands had been rented to pay liens, and other creditors were threatening to bring suit to subject his entire real estate to sale to satisfy their liens by judgments and deeds of trust. In that emergency, on July 8, 1910 (after verdict but before sentence), Peterson executed a power of attorney, appointing his brother, W. P. Peterson, his attorney in fact to sell such of his lands as might be necessary to discharge his debts, and to execute and deliver deeds of conveyance to purchasers. He furthermore authorized and directed his attorney in fact to apply the purchase money as follows: (1) To the payment of all his just debts; (2) to meet the necessary expenses of his family; and (3) the remainder, if any, to be placed in some safe bank to his credit. Then followed a general grant of power to the attorney in fact to do and transact any and all such business for and in behalf of his principal as the latter could do, if present and acting for himself. The instrument was signed, sealed, and acknowledged, and admitted to record.

The attorney in fact subsequently sold the 179 acres of land in controversy to appellants, J. K. Haynes and his wife, B. V. Haynes, for \$2,000, and on January 21, 1911, conveyed the property to them by deed in which the wife of A. T. Peterson united. Several years later Haynes and wife sold and conveyed the land, together with certain live stock, to their coappellant, J. A. Jessee, Jr., for \$3,000. In May, 1914, A. T. Peterson was pardoned and discharged from the penitentiary, and shortly thereafter filed the bill in this case, alleging that at the time of the execution of the power of attorney he had been convicted of felony and was civilly dead and in-

competent to contract or transact business of any character, and therefore the power of attorney executed by him was void and of no effect and conferred no authority upon W. P. Peterson to sell or convey his real estate. The bill also charged that before W. P. Peterson sold the land to Haynes and wife complainant had revoked the power of attorney, and that W. P. Peterson and his grantees and J. A. Jessee, Jr., had notice of the revocation at the dates of their respective purchases; that the sale to Haynes and wife was for a grossly inadequate price; that the parties knew there was no necessity to sell the land for the purposes set forth in the power of attorney, and that only \$1,250 of the purchase money was applied to the purchase mentioned therein; and that Haynes and wife conspired with W. P. Peterson wrongfully and fraudulently to deprive complainant of his property.

After the execution of the power of attorney, and the sale and conveyance of the land to the purchasers, and application of the purchase money as directed by the power, W. P. Peterson qualified as committee for A. T. Peterson.

So far as the case involved in this appeal is concerned, the bill prays that the deeds from the attorney in fact to the Hayneses and from the latter to Jessee be canceled and the land restored to complainant. The defendants demurred to the bill, and, their demurrer having been overruled, answered, denying all the material allegations of the bill affecting their good faith, or the validity of their title to the land, and insisting that they were purchasers for valuable and adequate consideration, without notice of any rights or equities in any way impairing their title. The circuit court, by the decree appealed from, set aside both deeds, but made provision for the return of the purchase money in each instance, with interest and the actual cost of permanent improvements put upon the land, subject to a re-

bate for its use and occupation and any damage that might have been done to the same while in the possession of the purchasers, and that each of the parties pay his own costs, and that no attorney's fee be taxed.

The law is settled that in suits for the cancelation of a deed on the ground of fraud the burden of proof rests upon the plaintiff to prove the allegations upon which he seeks relief by satisfactory proof; the cases generally even holding that fraud must be proved beyond a reasonable doubt.

In this instance, the evidence upon all material allegations is conflicting and, to say the most for it, falls far short of proving bad faith on the part of appellants. It utterly fails to prove a conspiracy between the attorney in fact and appellant J. K. Haynes wrongfully and fraudulently to deprive A. T. Peterson of the land in controversy. To the contrary the evidence preponderates in favor of the view that Haynes and wife were bona fide purchasers of the land at a fair price and without notice of any circumstance affecting the validity of their title. The same may be affirmed of appellant J. A. Jessee, Jr., who, as stated, subsequently purchased the land from the Hayneses. It is true the decree of the circuit court is silent as to the grounds on which cancelation was granted; yet it bears internal evidence of the fact that it was not decreed on the theory that the defendants had been proved to be guilty of bad faith or fraud, since it restores as far as practicable the status quo of the litigants, and directs that no attorney's fee be taxed, and that each party pay his own costs.

We shall notice briefly the remaining contentions of appellee in support of the decree. The point is stressed that the conviction of A. T. Peterson of a felony and his sentence to the penitentiary rendered him civiliter mortuus and incapable of executing a valid power of at-

torney. There is no statute in Virginia that deprives a convict of the power to make contracts or conveyances of his real estate, and corruption of blood and forfeiture of estate on conviction

Convict—power to dispose of real property.

of felony as at common law has been expressly abolished by statute. Code, § 3883. So, in Virginia, the right of a person to take, hold, and dispose of his property, real and personal, is not affected by his attainder of felony. 2 Minor, Inst. 4th ed. pp. 655, 659; 2 Minor, Real Prop. § 1096. The above is the prevailing doctrine on the subject in this country in the absence of statutory inhibition. Clark, Contr. 2d ed. § 89; Elliott, Contr. § 266; note to Harmon v. Bower, 17 L.R.A. (N.S.) 502.

It is also contended that while A. T. Peterson was confined in the penitentiary he expressly revoked the power of attorney to W. P. Peterson by a letter written to his wife, of which letter his attorney in fact and the purchasers of the land from him had notice before the sale was made. It is denied that the power of attorney in question was a mere naked power, revocable at the will of the principal, because it not only empowered the attorney in fact to sell and convey the land, but moreover dedicated the proceeds of sale to the payment of debts and support of the family, and imposed upon the attorney a trust relation to effectuate those objects, and to deposit the remainder in bank to the credit of the principal. 2 Kent, Com. p. 1057, § 644; Hunt v. Rousmanier, 8 Wheat. 174, 5 L. ed. 589; Sulphur Mines Co. v. Thompson, 93 Va. 293, 25 S. E. 232.

It is not necessary, however, to decide that question, since we do not think the evidence sustains the contention that A. T. Peterson wrote such a letter to his wife. He did not testify on the subject, and the evidence of his wife with respect to the letter is weakened by the fact that after the alleged receipt of it she voluntarily united

with the attorney in fact in conveying the land to the purchasers and acknowledged the deed for record.

The remaining contention is that the provisions found in chapter 202 of the Code, authorizing the appointment of a committee for the estate of a convict sentenced to confinement in the penitentiary for more than one year, to administer his estate, and to sue and be sued in respect to it, afforded the only remedy by which his estate could be subjected to the payment of debts.

There is no statute or decision in this state that denies to a convict

the right to contract, acquire, hold, and dispose of property, and obviously the procedure provided by chapter 202 does not apply where the convict has exercised the right to dedicate his property to the payment of debts and support of his family before the appointment of a committee.

Upon the whole case, we are of opinion that the decree of the Circuit Court is erroneous and must be reversed, and this court will enter such decree as the trial court ought to have entered, and dismiss the bill, with costs.

ANNOTATION.

Scope and effect of provisions for appointment of representative for estate of convict.

In some jurisdictions in which a convict loses his civil rights as a result of his conviction, statutory provision has been made for the appointment of a representative for the convict's estate. The powers of such representatives, while dependent on the provisions of the particular statute, are generally broad enough to place the convict in the same relative position as regards property rights which he occupied previous to imprisonment, and the courts, in construing these provisions, seem to strive for this result. See the following cases: *Rice County v. Lawrence* (1883) 29 Kan. 158; *Gray v. Stewart* (1904) 70 Kan. 429, 109 Am. St. Rep. 461, 78 Pac. 852; *New v. Smith* (1906) 78 Kan. 174, 84 Pac. 1030; *Harmon v. Bowers* (1908) 78 Kan. 185, 17 L.R.A.(N.S.) 502, 96 Pac. 51, 16 Ann. Cas. 121; *Williams v. Shackelford* (1888) 97 Mo. 322, 11 S. W. 222; *McLaughlin v. McLaughlin* (1910) 228 Mo. 635, 187 Am. St. Rep. 680, 129 S. W. 21; *Stephani v. Stephani* (1894) 75 Hun, 188, 26 N. Y. Supp. 1039; *Trust Co. v. State Safe Deposit Co.* (1905) 109 App. Div. 665, 96 N. Y. Supp. 585, affirmed in (1907) 187 N. Y. 178, 79 N. E. 996; *Davis v. Duffie* (1861) 8 Bosw. (N. Y.) 617; *Merchant v. Shry* (1914) 116 Va. 437, 82 S. E. 106, Ann. Cas. 1916D, 1203; *Guarantee Co.*

of N. A. v. First Nat. Bank (1898) 95 Va. 430, 28 S. E. 909; *Ex parte Graves* (1881) L. R. 19 Ch. Div. (Eng.) 1, 51 L. J. Ch. N. S. 1, 45 L. T. N. S. 397, 30 Week. Rep. 51, 46 J. P. 70, 14 Cox, C. C. 629, 15 Cox, C. C. 118; *Carr v. Anderson* [1903] 1 Ch. (Eng.) 90, 72 L. J. Ch. N. S. 50, 51 Week. Rep. 165, 87 L. T. N. S. 840, 20 Cox. C. C. 416; *Re Gaskell* [1906] 1 Ch. (Eng.) 440, 75 L. J. Ch. N. S. 203, 54 Week. Rep. 327, 94 L. T. N. S. 250, 22 Times L. R. 258. And see the reported case (*HAYNES v. PETERSON*, ante, 1456).

It has been held that where there is a statutory provision for the appointment of trustees for the estate of a convict, a judgment obtained against him without such an appointment is void. *Rice County v. Lawrence* (Kan.) supra, wherein it appeared that a judgment had been obtained against a convict after his conviction and imprisonment for embezzlement, in a suit commenced prior to the accusation against him, and without the appointment of a trustee to manage his estate or defend the action. It was held that the judgment was a nullity. The court, construing the statute (Laws 1879, §§ 333, 343, chap. 82) providing for the appointment of a trustee for the estate of a convict imprisoned for a term less than life, to

manage such estate and prosecute and defend all actions commenced by or against the convict, said: "The conviction, sentence, and imprisonment of the defendant suspended his civil rights, and also suspended his creditors' rights to bring actions against him. After his imprisonment, a trustee might have been appointed, upon the application of plaintiff or any other creditor, to take charge of and manage his estate; but no valid judgment could be rendered after his imprisonment, without the appointment of a trustee."

And under a statute (Gen. Stat. 1901, § 5781) providing that a trustee appointed for the estate of a convict imprisoned for a term less than his natural life may "sue for and recover in his own name any of the estate, property, or effects belonging to, and all debts and sums of money due or to become due to, such imprisoned convict, and may prosecute and defend all actions commenced by or against such convict," it has been held that the convict is the same as civilly dead, and that the trustee is the only person who can maintain an action for the recovery of property belonging to the convict. The court held that the action could be maintained by the trustee in his own name, there being no possible way in which the convict could be made a party, or could set up a cause of action in her own name or jointly with the trustee. *New v. Smith* (1906) 78 Kan. 174, 84 Pac. 1030.

In *Gray v. Stewart* (1904) 70 Kan. 429, 109 Am. St. Rep. 461, 78 Pac. 852, the court, construing the statute (Gen. Stat. 1901, § 5776) providing that "whenever any person shall be imprisoned in the penitentiary for a term less than his natural life, a trustee to take charge of and manage his estate may be appointed by the probate court of the county in which said convict last resided," held that it did not apply where a convict was sentenced to suffer death at a time to be set by the governor after the expiration of one year from the date of conviction, since such imprisonment was not for a term less than his natural life. And the court added that the provision, being in derogation of the natural right of

persons to hold and manage their own property, must be strictly construed and extended no further than the clear import of its terms required.

And see *Harmon v. Bowers* (1908) 78 Kan. 185, 17 L.R.A.(N.S.) 502, 96 Pac. 51, 16 Ann. Cas. 121, wherein the court said by way of dictum that the statute (Gen. Stat. 1901, §§ 5776, 5777) providing for the appointment of a trustee to manage the estate of a person imprisoned in the penitentiary for a term less than life could not be invoked until satisfactory evidence was given that the convict was actually imprisoned, and the fact of conviction and sentence was not equivalent to imprisonment.

It has been held that the provisions of the Missouri statute (Rev. Stat. § 6544) relative to the appointment of a trustee for the estate of a convict imprisoned in the penitentiary for a term less than life, which trustee may in the disposal of the convict's estate mortgage or lease the same when necessary (Rev. Stat. § 6550), provide the only means by which such a convict may alienate or encumber his property, and a mortgage executed by him while so imprisoned and without proceeding under the statute is void. *Williams v. Shackelford*. (1888) 97 Mo. 322, 11 S. W. 222.

A statute (Rev. Stat. 1899, art. 2, chap. 141) providing for the appointment of a trustee for the estate of a convict imprisoned in the penitentiary for a term less than life has been held to be exclusive of every other method of procedure, when it is desired to attack the estate of such a convict, the court saying: "The legislature had some purpose when it passed these laws as to the preservation of his estate. To our mind that purpose was to compel the appointment of a trustee whenever it was desired to attack his estate, either for the payment of debts or for the support and maintenance of his wife and children." And so a judgment in a divorce proceeding, decreeing the lands of the convict husband to the wife by way of alimony, where the husband was not represented by a trustee of his estate, was void, and a bill in equity proper to remove

the judgment from the record as a cloud on the husband's title. *McLaughlin v. McLaughlin* (1910) 228 Mo. 635, 187 Am. St. Rep. 680, 129 S. W. 21.

But it has been held that the proceeding for a divorce without alimony or sequestration of the property of the convict husband is a proceeding not affecting the estate of the convict, but relating solely to the status of the parties, and as such maintainable without the appointment of a trustee for the convict under the provisions of the statute (Rev. Stat. 1899, art. 2, chap. 141). *McLaughlin v. McLaughlin* (Mo.) supra.

In *Davis v. Duffie* (1861) 8 Bosw. (N. Y.) 617, affirmed in (1867) 1 Abb. App. Dec. 486, 4 Abb. Pr. N. S. 478, it was held that the early New York statute (2 Rev. Stat. 15) providing for the appointment of trustees of the estate of a convict was not exclusive, but that a mortgage might be foreclosed against the convict without the appointment of trustees, since the mortgagee would be entitled to a decree against the debtor personally, in the event of a deficiency, and even had trustees been appointed, the debtor would have been a necessary party. The court said: "Trustees could represent Davis [the debtor] only as to his estate, for the purpose of effecting a transfer of the title to his property, and paying his debts. They are not, ex officio, his attorneys to appear and answer suits brought against him, with a view to conclude him personally by the judgments that may be rendered therein, any further than to protect them in appropriating any of his estate that may be necessary to satisfy the debts, and to sell it to make satisfaction."

In *Trust Co. v. State Safe Deposit Co.* (1905) 109 App. Div. 665, 96 N. Y. Supp. 585, affirmed in (1907) 187 N. Y. 178, 79 N. E. 996, it was held that the provisions of the statute (Laws 1889, chap. 401) relative to the appointment of a committee for the estate of a life convict would be applicable, although the convict had been removed to a state hospital for the insane, the court saying: "All that it is necessary to

show to bring a case within the provisions of this act are the facts that a person has been convicted and sentenced to imprisonment for life."

And see *Stephani v. Stephani* (1894) 75 Hun, 188, 26 N. Y. Supp. 1089, wherein the court held that every requirement of the statute (Laws 1889, chap. 401), providing for the appointment of a committee for the estate of a life convict, as to the facts necessary to be established to confer jurisdiction on the court, must be established by common-law proof.

In *Merchant v. Shry* (1914) 116 Va. 437, 82 S. E. 106, Ann. Cas. 1916D, 1203, it was held that, under the provisions of a statute (Code, §§ 4115, 4116) relative to the appointment of a committee of the estate of a convict, it would be proper not only for his committee to sue in his behalf, but for him to be in turn proceeded against through them, and in tort as well as in contract. As to the effect of the delegation of authority to the committee, the court said: "By § 4115 a committee may be appointed on the motion of any party interested, who shall have charge of the whole estate, real and personal, of the convict until he is discharged from confinement. Such committee may sue and be sued in respect to debts due to or by such convict, and he may sue and be sued in respect to any other of the convict's estate. We do not think this language can be satisfied by applying it only to vindicate wrongs against the convict's estate,—with respect to them the committee can certainly sue, but he can also be sued in respect to any other of the convict's estate,—that is, his estate other than the debts due to him. We can conceive of no force to be attributed to the words which permit the committee to be sued with respect to the convict's estate other than the debts due by him, except that it meant to confer upon every person in interest, at whose instance the committee might be appointed, the right to bring a suit to establish whatever claim might be asserted, to be satisfied not only out of the debts due to the convict, but out of any other portion of his estate, real or personal, which

passed by operation of law to his committee. As to a debt due the committee, he is given the same right to retain as an administrator would have, and by § 4117 the committee is required to allow (subject to the claims of creditors) a sufficient maintenance out of the convict's estate for his wife and family, if any."

In the reported case (*HAYNES v. PETERSON*, ante, 1456), it is held that the statutory provision for the appointment of a committee to administer the estate of a convict (Code 1904, §§ 4110-4173c) does not apply where, previous to the appointment of a committee, the convict has exercised his right to contract and dispose of his property.

It seems, however, that the provisions of the Virginia statute (Code, §§ 4115, 4116) relative to the appointment of a committee of the estate of a person confined in a penitentiary of the state by a court thereof for more than a year are not applicable to a citizen of Virginia who has been confined in the penitentiary of another state under sentence by a court thereof. *Guarantee Co. of N. A. v. First Nat. Bank* (1898) 95 Va. 480, 28 S. E. 907.

Under the authority of the English Act of 1870 (33 and 34 Vict. chap. 23) providing that an administrator should be appointed for the estate of a convict, who, amongst other powers, "shall have absolute power to let, mortgage, sell, convey, and transfer any part of such property as to him shall seem fit," it was held that while this power must be exercised reasonably and properly, it was not restricted to sales for the purpose of meeting the financial obligations of the convict as expressly provided therein, but "it is an absolute power irrespective of any question as to whether money is wanted for payment of debts or not." And where a sale of jewelry and certain stock of the convict was attacked, the court said: "If I am right in my con-

struction of the Act of Parliament, all I have to do is to ascertain whether the administrator has made the sale bona fide. I agree that that involves that he shall not have made it blindly or carelessly, or without exercising any judgment or discretion upon it, but if he has sold bona fide, then that sale is to be binding, and the propriety of it and the sufficiency of the grounds upon which he made it are not to be in any way called into question by the convict." *Carr v. Anderson* [1903] 1 Ch. (Eng.) 90, appeal dismissed in [1903] 2 Ch. 279, 72 L. J. Ch. N. S. 534, 51 Week. Rep. 465, 88 L. T. N. S. 503, 19 Times L. R. 394.

In *Re Gaskell* [1906] 1 Ch. (Eng.) 440, 75 L. J. Ch. N. S. 203, 54 Week. Rep. 827, 94 L. T. N. S. 250, 22 Times L. R. 258, affirmed in [1906] 2 Ch. 1, 75 L. J. Ch. N. S. 503, 94 L. T. N. S. 658, 22 Times L. R. 464, it appeared that under the provisions of the Forfeiture Act 1870 (33 & 34 Vict. chap. 23) relating to the appointment of an administrator in whom should vest all the estate and interest of a convicted felon, and who should have full power to sell and convey any part of such property, an administrator had sold in fee simple property in which the convict was seized of an estate tail. The court held that the effect of these provisions was not as extensive as to authorize such a conveyance, but that they vested in the administrator only the real and personal property of the convict, and not any other estate or interest.

And see *Ex parte Graves* (1881) L. R. 19 Ch. Div. (Eng.) 1, 51 L. J. Ch. N. S. 1, 45 L. T. N. S. 397, 30 Week. Rep. 51, 46 J. P. 70, 14 Cox. C. C. 629, 15 Cox. C. C. 118, wherein it was held that the Act of 1870 (33 & 34 Vict. chap. 23) did not make it necessary for a creditor of a convict to obtain the appointment of an administrator of the convict's estate as therein provided, in order to take proceedings in bankruptcy against him. R. E. B.

INDUSTRIAL COMMISSION OF OHIO, Plff. in Err.,
v.
MARGARET ROTH et al.

Ohio Supreme Court — April 2, 1918.

(98 Ohio St. 34, 120 N. E. 172.)

Workmen's compensation — inhaling gas.

1. The accidental and unforeseen inhaling by an employee, in the course of his employment, of a specific, volatile poison or gas, resulting in injury or death, is not an "occupational disease."

[See note on this question beginning on page 1466.]

— occupational disease.

2. A disease contracted in the natural and ordinary course of employment, by a person engaged in a particular calling or occupation, which disease from common experience is known to be a usual and customary incident to such calling or occupation, is an "occupational disease," and not within the contemplation of the Workmen's Compensation Law.

Definition — occupation.

3. Occupation is that particular business, profession, trade, or calling which engages the time and efforts of an individual.

— accident.

4. An accident is some happening that occurs by chance, unexpectedly, and not in the usual course of events.

[See 14 R. C. L. 1238; 20 R. C. L. 18.]

Headnotes 1 and 2 by the COURT.

ERROR to the Court of Appeals for Jefferson County to review a judgment reversing a judgment of the Court of Common Pleas, sustaining a demurrer to and dismissing a petition filed under the Workmen's Compensation Act to recover compensation for the death of plaintiffs' decedent. **Affirmed.**

Statement by Donahue, J.:

In the fall of 1915, Edwin S. Roth, a boy about eighteen years of age, was employed by McFeeley Brothers as a common laborer. McFeeley Brothers had complied with the provisions of the Workmen's Compensation Law, and had paid premiums into the insurance fund of the state of Ohio, as required by that law.

On the 8th day of November, 1915, Roth, in the course of his employment, was ordered and directed to do some painting on a building in the process of construction. Roth, though not a painter, undertook to obey the orders given him; but the weather was so cold that the paint would not flow from the brush. He was then directed by his employers, through their foreman, to take the paint to a small building and heat it; which he did. This small build-

ing had no ventilation except the doors and windows, which were closed. The paint, when heated, gave off poisonous fumes and vapors, which were inhaled by Roth while heating it and also while at work with a bucket of hot paint directly under him. This process of heating was required to be done from time to time throughout that day and the next. On the evening of the second day, Roth became ill from the poisonous fumes and gases which he had inhaled, and his illness continued to increase from day to day until it resulted in his death on the 26th day of the same month.

An application was made to the Industrial Commission of Ohio by the defendants in error, who were all partially dependent upon the deceased for support, for compensation on account of the death of

Edwin S. Roth. The Commission refused to make any award of compensation, and denied defendants in error any right of compensation whatever, for the reason that, in the opinion of the Commission, death resulted from an occupational disease, and not from injuries received in the course of his employment. An appeal was taken from this order of the Industrial Commission of Ohio to the court of common pleas of Jefferson county. A petition was filed by the defendants in error, averring the above facts. To this petition the Industrial Commission of Ohio filed a general demurrer, which was sustained by the common pleas court, and, defendants in error not desiring to plead further, their petition was dismissed and judgment rendered against them for costs. Upon a proceeding in error, the court of appeals of Jefferson county reversed the judgment of the common pleas court, and this proceeding in error is now prosecuted in this court to reverse the judgment of the court of appeals.

Messrs. Joseph McGhee, Attorney General, William J. Ford, H. Stanley McCall, and Roy R. Carpenter for plaintiff in error.

Mr. C. L. Williams, for defendants in error:

Decedent died of injuries caused by the negligence and carelessness of his employers, and not of an occupational disease, and claimants are entitled to compensation.

Pickett v. Pacific Mut. L. Ins. Co. 144 Pa. 79, 13 L.R.A. 661, 27 Am. St. Rep. 618, 22 Atl. 871; *Paul v. Travelers' Ins. Co.* 112 N. Y. 472, 3 L.R.A. 443, 8 Am. St. Rep. 758, 20 N. E. 347; *Ismay v. Williamson* [1908] A. C. 437, 52 Sol. Jo. 713, 77 L. J. C. P. N. S. 107, 99 L. T. N. S. 595, 24 Times L. R. 881; *Brintons v. Turvey* [1905] A. C. 233, 74 L. J. K. B. N. S. 474, 53 Week. Rep. 641, 92 L. T. N. S. 578, 21 Times L. R. 444, 7 W. C. C. 1, 2 Ann. Cas. 187; *Adams v. Acme White Lead & Color Works*, 182 Mich. 157, L.R.A.1916A, 283, 148 N. W. 485, Ann. Cas. 1916D, 689, 6 N. C. C. A. 482.

Donahue, J., delivered the opinion of the court:

It is contended on the part of the plaintiff in error that it conclusively appears from the facts stated in the petition that Edwin S. Roth died from an occupational disease, and that injury or death resulting from such diseases contracted in the course of employment is not within the provisions of the Workmen's Compensation Act, and cannot be made the basis of a claim for compensation from the insurance fund provided by that act.

If this is true, it is the end of the case, and the judgment of the court of appeals must be reversed and that of the common pleas affirmed. *Industrial Commission v. Brown*, 92 Ohio St. 309, L.R.A.1916B, 1277, 110 N. E. 744.

In the brief of counsel for plaintiff it is said that "the question as to whether or not this is an occupational disease is a medical question rather than a question of law."

If that statement is correct, then it was error for the trial court to sustain the demurrer, and it should have submitted the question to a jury under proper instructions, upon such expert medical evidence as might have been offered by the parties to the suit.

There is, however, no dispute as to the facts in this case. Nevertheless, it does not always follow that where the facts are not in dispute the jury has no function to perform. Sometimes the ultimate question at issue is a proper one to be submitted to the jury, even where there is no dispute as to the primary facts and combination of circumstances from which the conclusion is to be deduced; as, for instance, in a negligence case, where the admitted facts do not constitute negligence per se, it is the province of a jury to determine whether they do or do not constitute negligence under the peculiar circumstances of each particular case. On the other hand, where the facts are admitted or conclusively established, and the proper judgment to be entered involves

only the construction of the law applicable to such facts, the question is for the court, and not for the jury. *Cornell v. Morrison*, 87 Ohio St. 215, 100 N. E. 817.

We are of the opinion that this case comes within the latter class, although it is very close to the dividing line, and we can readily see how a very slight variance in the facts, in a similar case, might present a jury question. In this case it is admitted that the deceased was a common laborer, and that the disease of lead poisoning is not incident to his regular occupation, but, on the contrary, is incident to the work in which he was employed for the two days preceding his illness.

"Occupation" has been defined by the courts of this and other states

**Definition—
occupation.**

to be "that particular business, profession, trade, or

calling which engages the time and efforts of an individual." In other words, the employment in which one regularly engages, or the vocation of one's life. A disease contracted in the usual and ordinary course of events, which, from the common

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occupational
disease.**

experience of humanity, is known to be incident to a particular employment,

is an occupational disease, and not within the contemplation of the Workmen's Compensation Law.

It is within the common knowledge of men that lead poisoning is a disease incident to the occupation of a painter, and if this young man, although employed as a common laborer, undertook, in the course of his employment, to do the work of a painter, and, by reason thereof, in the natural and due course of events, contracted this disease as an incident thereto, it is the end of the controversy. But it is also common knowledge that, in the occupation of a painter, the exposure is so slight that this disease is slow and insidious in its development, and chronic in its character. In fact, the history of the development of this disease in this occupation shows

that it is a matter of years instead of days, and that many escape altogether. There are many other occupations, perhaps as many as 85 in the aggregate, to which this disease is also incident, and in some of them the exposure is so great that the disease is of far more rapid development. Lead smelting and the making and handling of lead carbonates are by far the most hazardous of these employments, yet a case of lead poisoning developed in five weeks by a man employed in a white lead factory, who was furnished no respirator and was not advised that the white dust on his hands and mustache was poison, is reported by medical authorities as an extreme case of the rapid development of this disease. Lead poisoning, of course, may be acute if the exposure is so extraordinary and overwhelming as to produce immediate results. Time, after all, is but a relative circumstance, and the amount of time requisite for the development of this disease is always in the inverse ratio to the extent and character of the exposure.

In the construction of the law, it is the duty of a court to give to words their usual and ordinary meaning,—such meaning as they import to mankind in general, and not a forced or unusual definition, which may, in its last analysis, be technically correct, but wholly at variance with the common understanding of men. Applying this fair and reasonable rule of interpretation to the term "occupational disease," it follows that an occupational disease is not only a disease incident to a particular occupation, but that it is a disease developed in the usual and ordinary manner by reason of and because of the occupation in which the person suffering therefrom is or was engaged.

While the fact is well known and recognized generally that certain occupations are the prolific sources of lead poisoning, yet it by no means follows that a case of lead poisoning cannot be developed in other ways than by engaging in such occupa-

tion. There are cases recorded by reputable medical authorities where acute lead poisoning has developed immediately by sudden exposure to large quantities of dust, vapor, and gases from broken packages of lead, and from fumes of molten lead; but such cases are the result of accident or misadventure, that may happen to any person, regardless of his occupation. If, therefore, it were conceded that, in the occupation of a painter, the disease of lead poisoning might, in the ordinary and usual course of events, develop in two days, yet the facts pleaded in this petition, if true, conclusively show that this disease did not occur in that way, although the deceased was temporarily engaged in painting; but, on the contrary, that his injury was caused wholly and entirely by accident and misadventure, while heating the paint in

—*inhaling gas.* a small, unventilated room, where the deadly fumes pervaded the atmosphere he was compelled to breathe.

An "accident" is some happening that occurs by chance, unexpectedly, and not in the usual course of events. It is something that might possibly be prevented by the exercise of due care and caution. In this particular case, if the young man had understood the deadly nature of the fumes he was breathing, he could easily have escaped all danger by opening the doors and win-

**Definition—
accident.**

dows of the room in which the paint was being heated; and the fact that the accident might easily have been avoided readily distinguishes it from an occupational disease; for, notwithstanding the fact that more than two centuries ago occupational diseases had become so well known as to justify their treatment in a separate volume in the medical literature of that day, nevertheless science has been unable to discover any positive means and methods of prevention. These diseases are incident to certain employments, yet with full knowledge of that fact human foresight cannot defend against them. The fact that this injury resulted in a disease that is incident to divers occupations does not bring it within the doctrine announced by this court in the case of *Industrial Commission v. Brown*, supra; for this accident might have happened to any person, regardless of occupation, who had occasion to enter this building at the time this folly was being perpetrated.

We are therefore of the opinion that the term "occupational disease" must be restricted to a disease that is not only incident to an occupation, but the natural, usual, and ordinary result thereof; and held not to include one occasioned by accident or misadventure.

Judgment affirmed.

Wanamaker, Jones, and Matthias, JJ., concur.

ANNOTATION.

Injury from fumes or gases as accident or occupational disease within the meaning of the compensation statutes.

Compensation statutes generally contain the provision that compensation shall be payable for injuries by "accident." Practically all of the cases passing upon the question have decided that an industrial or occupational disease contracted by the inhaling of poisonous fumes or gases is not an "accident" within the meaning of the statutes.

Ptomaine poisoning contracted by

inhaling sewer gas while working around cesspools is not an accident. *Eke v. Hart-Dyke* [1910] 2 K. B. (Eng.) 677, 80 L. J. K. B. N. S. 90, 103 L. T. N. S. 174, 26 Times L. R. 613, 8 B. W. C. C. 482, 3 N. C. C. A. 230.

Nor is typhoid fever, contracted while handling sewage. *Finlay v. Tullamore Union* (1914) 48 Ir. L. T. 110, 7 B. W. C. C. 973.

Nor is enteritis, contracted by in-

haling sewer gas while working in a sewer. *Broderick v. London County Council* [1908] 2 K. B. (Eng.) 807, 77 L. J. K. B. N. S. 1127, 99 L. T. N. S. 569, 24 Times L. R. 822, 15 Ann. Cas. 385.

Nor is lead poisoning an accident. *Steel v. Cammell, L. & Co.* [1905] 2 K. B. (Eng.) 282, 74 L. J. K. B. N. S. 610, 53 Week. Rep. 612, 93 L. T. N. S. 357, 21 Times L. R. 490, 2 Ann. Cas. 142; *Williams v. Duncan* (1898; C. C.) 1 W. C. C. (Eng.) 123; *Adams v. Acme White Lead & Color Works* (1914) 182 Mich. 157, L.R.A.1916A, 283, 148 N. W. 485, Ann. Cas. 1916D, 689, 6 N. C. C. A. 482.

Lead poisoning is expressly designated as an industrial disease in § 8 of the English Act of 1906 which provides for compensation for incapacity resulting from certain designated industrial diseases.

The Connecticut and Ohio courts have held that lead poisoning is not a "personal injury" within the meaning of the Compensation Acts of those states, so as to entitle the workman to an award of compensation. *Miller v. American Steel & Wire Co.* (1916) 90 Conn. 349, L.R.A.1916E, 510, 97 Atl. 345, 14 N. C. C. A. 842; *Industrial Commission v. Brown* (1915) 92 Ohio St. 309, L.R.A.1916B, 1277, 110 N. E. 744.

On the other hand, the Massachusetts court has given a broader meaning to the term "personal injury," as used in the statute of that state.

Thus, lead poisoning has been held to be a "personal injury" within the meaning of the Massachusetts act. *Johnson's Case* (1914) 217 Mass. 388, 104 N. E. 735, 4 N. C. C. A. 843.

So, blindness because of optic neuritis, due to poisonous gases from a furnace upon which the injured person was obliged to work, is a "personal injury" within the meaning of that statute. *Hurle's Case* (1914) 217 Mass. 223, L.R.A.1916A, 279, 104 N. E. 336, 4 N. C. C. A. 527.

So, too, an employee who inhales damp smoke and is drenched with water and, as a result, contracts lobar pneumonia and dies, may be found to have suffered a "personal injury"

within the meaning of the Massachusetts act. *McPhee's Case* (1915) 222 Mass. 1, 109 N. E. 633; 10 N. C. C. A. 257.

Death from the disease of glanders, contracted through inhalation of the bacteria of glanders, does not result from an "accidental personal injury." *Richardson v. Greenburg* (1919) 188 App. Div. 243, 176 N. Y. Supp. 651. The court said: "Had it been the intention of the legislature to include within the meaning of 'injury,' or 'personal injury,' all diseases of whatever nature, it would not have been necessary expressly to mention, in addition to 'accidental injuries,' 'such disease or infection as may naturally and unavoidably result therefrom.' This express mention of a disease which is the consequence of injury would seem to exclude all diseases which are not. The particular disease must 'result' from 'accidental injury,'—that is to say, it must be preceded by such injury, and therefore cannot constitute the injury which it follows. Evidently 'disease' and 'accidental injury' are in contrast with each other, so that the former is never comprehended by the latter. The Workmen's Compensation Law was drawn with painstaking care, and it cannot be supposed that words and phrases found therein, particularly in the defining clauses, were needlessly, meaninglessly, or obscurely used. The plain meaning of its words, without the aid of judicial interpretation, induces the conclusion that the legislature intended to make compensable no condition or death resulting from disease, unless the disease itself followed a traumatic injury or other injury not partaking of the nature of a disease."

A disease contracted as a direct result of unusual conditions connected with the work, and not as an ordinary or reasonably to be anticipated result of pursuing the work, is to be considered as an accidental injury.

Thus, pneumonia caused by the inhalation of gas generated by an explosion is an accident. *Kelly v. Auchlenlea Coal Co.* [1911] S. C. 864, 48 Scot. L. R. 768, 4 B. W. C. C. 417.

So, in *Edmunds v. The Peterston*

(1911) 28 Times L. R. (Eng.) 18, the death of an engineer from gas fumes from a stove was found to be accidental, and to arise out of the employment, although he had been forbidden to have a fire at night, where some fire was necessary because of the extreme cold.

Injuries to the lungs, caused by the employer's negligently permitting poisonous gases and fumes to remain about the working place, are accidental injuries. *Naud v. King Sewing Mach. Co.* (1916) 95 Misc. 678, 159 N. Y. Supp. 910, affirmed per curiam (1918) 223 N. Y. 567, 119 N. E. 1061.

Blindness of a show card writer, who uses wood alcohol in his work, due to its excessive use during a rush period, is an accident within the meaning of the California statute. *Fidelity & C. Co. v. Industrial Acci. Commission* (1918) 177 Cal. 614, L.R.A.1918F, 856, 171 Pac. 429, 17 N. C. C. A. 784.

An employee who died of arsenical poisoning from inhaling fumes of molten zinc over which he was required to work may be held to have suffered death from accident arising out of the employment, although there was evidence that such poisoning is not usually acute, but is cumulative, and accumulates in the system until it gets to a point at which the poison springs into life, where there was evidence to show that the employee had been engaged in the same work for fifteen years without showing any indication whatever of such poisoning, and there was no evidence that any other employee engaged in the same work ever developed such poisoning. *Matthiessen & H. Zinc Co. v. Industrial Bd.* (1918) 284 Ill. 378, 120 N. E. 249.

In connection with the decision in the case last cited, attention is called to the decision of the Ohio supreme court in the reported case (*INDUSTRIAL COMMISSION v. ROTH*, ante, 1463), in which it was held that lead poisoning might be found to be an accident where it appeared that the injury was not the result of continued exposure to the fumes of lead, but was caused wholly and entirely by accident while the employee was heating paint in a small, unventilated room, and the deadly

fumes pervaded the atmosphere which he was compelled to breathe. The court pointed out that although industrial diseases had been well known for over two centuries, nevertheless science has been unable to discover any positive means or methods of prevention; but in the case at bar, the workman could readily have prevented any injury to himself by opening the doors and windows of the room in which the paint was being heated.

The death of an employee from suffocation by smoke and fumes while he was engaged in attempting to extinguish a fire upon the employer's premises may be found to have been caused by accident arising out of the employment, although the injury occurred after the hours of his regular employment. *Munn v. Industrial Bd.* (1916) 274 Ill. 70, 118 N. E. 110, 12 N. C. C. A. 652.

A messenger who, while on the employer's business, went into an oil and color warehouse, and was killed when the building was practically destroyed by hostile aircraft, and whose body was found in the ruins the same night, bearing no apparent marks of violence upon it, may be held to have suffered accident arising out of and in the course of the employment, where it appeared that he had died of suffocation from smoke, and while in the building he was subject to a special risk from fire and suffocation. *Bird v. Keep* [1918] 2 K. B. (Eng.) 629, 87 L. J. K. B. N. S. 1199, 118 L. T. N. S. 633, 34 Times L. R. 513, 62 Sol. Jo. 666, 11 B. W. C. C. 133.

A claimant for compensation does not satisfy the burden placed upon him by merely showing that the employee might have gone into the room where he was found dead from asphyxiation, for the purpose of performing some work for the employer. *Gray v. Sopwith Aviation Co.* (1918) 11 B. W. C. C. (Eng.) 63, 119 L. T. N. S. 194.

Death from inhaling gas was considered an accident in *Manziano v. Public Service Gas Co.* (1918) 92 N. J. L. 322, 105 Atl. 484, but the case turned on the question whether the death arose out of the employment, where a watchman at trenches dug to

locate leaks in gas mains was found in the morning asphyxiated in the bottom of the trench.

In *Kehoe v. Consolidated Teleg. & Electrical Subway Co.* (1916) 176 App. Div. 84, 162 N. Y. Supp. 482, recovery was denied for the death of a night watchman, caused by gas poisoning while he was in the office of his employer, but this was upon the ground that his employment was not extrahazardous, and not upon the ground that his death was not accidental within the meaning of the statute.

An award of compensation was sustained in *Hartford Acci. & Indemnity Co. v. Industrial Acci. Commission* (1917) 32 Cal. App. 481, 163 Pac. 225, in the case of an employee who, while engaged in the work of grinding and packing wheat and barley for feed, became afflicted with an affection of the nose and mouth which was diagnosed as actinomycosis. The contention in this case, however, was apparently that the disease could not have arisen out of the employment, and the fact that it might not have been an accident was not discussed.

In *General American Tank Car Corp. v. Borchardt* (1919) — Ind. App. —, 122 N. E. 433, an award of compensation was sustained in the case of the death of a workman employed in painting the inside of a tank car from inhaling the poisonous fumes of the paint, but the case in reality turned upon the question of the wilful mis-

conduct of the employee in failing to use a respirator.

In *Gurski v. Susquehanna Coal Co.* (1918) 262 Pa. 1, 104 Atl. 801, it was held that a death from inhaling poisonous fumes in a mine was the result of an accident, but the case turned rather upon the question whether or not the workman had been guilty of such negligent conduct in going to a forbidden place in the mine as to prevent a recovery.

In *Eldridge v. Endicott, J. & Co.* (1919) 189 App. Div. 53, 177 N. Y. Supp. 863, the appellate division sustained a finding by the Commission to the effect that the contracting of anthrax, consisting of the bite of the bacillus of anthrax, was an accidental injury within the meaning of the Compensation Act, and when the employee received his injury while engaged in handling hides in the course of his employment, he is injured within the protection of the Compensation Act.

Other cases holding that compensation may be recovered for death or injury from anthrax suffered while in the course of the employment are *Hiers v. Hull* (1917) 178 App. Div. 350, 164 N. Y. Supp. 767; *Higgins v. Campbell & Harrison* (1903) 6 W. C. C. (Eng.) 1; *Brintons v. Turvey* [1905] A. C. (Eng.) 230, 74 L. J. K. B. N. S. 474, 53 Week. Rep. 641, 92 L. T. N. S. 578, 21 Times L. R. 444, 7 W. C. C. 1, 2 Ann. Cas. 187. W. M. G.

CORA L. JOHNSON

v.

NORFOLK & WESTERN RAILWAY COMPANY, Plff. in Err.

West Virginia Supreme Court of Appeals — October 5, 1918.

(82 W. Va. 692, 97 S. E. 189.)

Arrest — parole — offer of release — effect.

1. If an officer, after having made an arrest, tenders the subject permission to go at large temporarily and return for trial, the permit so tendered is in the nature of an offer of parole, which the subject is not bound to accept, and which does not amount to a release or an abrogation of the

arrest. Rejection of such offer and an accepted submission leave the arrest in full force.

[See note on this question beginning on page 1475.]

False imprisonment — words.

2. An unlawful "arrest" constituting false imprisonment may be effected without manual seizure or touching of the subject of the arrest. Such words and conduct of a known officer as give reasonable ground for belief on the part of the subject that the officer has present intention to make the arrest, and submission on the part of the subject, in good faith and under the belief that he has been arrested or will be arrested immediately, are sufficient.

[See 11 R. C. L. 793.]

Trial — jury — arrest.

3. Intention and reasonable ground of belief, constituting the chief elements of an arrest so effected, are largely questions of fact for jury determination, in an action for damages for false imprisonment, founded upon such an arrest.

[See 16 R. C. L. 190.]

Principal and agent — wrongful acts — liability.

4. A principal is liable for wrongful acts of his agent, incidentally done in the exercise of the latter's authority

and within the scope thereof, and working injury to a third party.

[See 21 R. C. L. 844.]

— wrongful arrest.

5. A railroad company is liable for an unlawful arrest directed or induced by its station agent, as a means of effecting his wrongful detention of a passenger's baggage.

[See 4 R. C. L. 1178.]

Evidence — arrest — sufficiency.

6. In such case, words and conduct on the part of the agent fairly tending to prove co-operation with the officer in the making of the arrest, or encouragement thereof, justify a finding of instigation of the arrest on his part.

False imprisonment — malice.

7. Neither malice nor lack of probable cause is an essential element of a right of action for false imprisonment; and, if both false imprisonment and malicious prosecution are alleged, and the former proved, in an action, the existence of probable cause for the prosecution, if disclosed, constitutes no ground for a peremptory instruction to find for the defendant, nor for a motion to set aside a verdict for the plaintiff.

[See 11 R. C. L. 794, 819.]

ERROR to the Circuit Court for Mingo County to review a judgment in favor of plaintiff in an action brought to recover damages for alleged false arrest and malicious prosecution. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Theodore W. Reath and Holt, Duncan, & Holt, for plaintiff in error:

This action, as is disclosed by the writ, trespass on the case, the allegations in the declaration, and the proofs on trial, is clearly one for malicious prosecution.

Polonsky v. Pennsylvania R. Co. 184 Fed. 558; George v. Norfolk & W. R. Co. 78 W. Va. 347, 88 S. E. 1036; Williamson v. Glen Alum Coal Co. 72 W. Va. 288, 78 S. E. 94; Howell v. Wysor, 74 W. Va. 589, 82 S. E. 503, Ann. Cas. 1916C, 519.

Plaintiff had the burden of establishing not only absence of probable cause, but presence of malice, neither of which was established.

Southern R. Co. v. Mosby, 112 Va. 169, 70 S. E. 517; Womack v. Circle,

32 Gratt. 324; Porter v. Mack, 50 W. Va. 581, 40 S. E. 459.

Conviction of plaintiff before a magistrate, although reversed on appeal, was conclusive evidence of probable cause for believing plaintiff guilty of the offense charged.

Haddad v. Chesapeake & O. R. Co. 77 W. Va. 710, L.R.A.1916F, 192, 88 S. E. 1038.

There is no evidence tending to show that defendant, through its station agent, or otherwise, caused plaintiff's arrest, detention, or prosecution.

Comisky v. Norfolk & W. R. Co. 79 W. Va. 148, L.R.A.1917D, 220, 90 S. E. 385; Allen v. Lopinsky, 81 W. Va. 13, 94 S. E. 869.

Even if station agent, Boyd, could be said to have participated in the alleged arrest, imprisonment, or prosecution of

plaintiff, the railway company is not liable for his action in the premises, for the reason that the same was without the scope of his authority, and in no way authorized by the railway company.

Wikle v. Louisville & N. R. Co. 116 Ga. 309, 42 S. E. 525; Mulligan v. New York & R. B. R. Co. 129 N. Y. 506, 14 L.R.A. 791, 26 Am. St. Rep. 539, 29 N. E. 952; Pressley v. Mobile & G. R. Co. 4 Woods, 569, 15 Fed. 199; 1 Elliott, Railroads, 302, 303; McKain v. Baltimore & O. R. Co. 65 W. Va. 239, 23 L.R.A. (N.S.) 289, 131 Am. St. Rep. 964, 64 S. E. 18, 17 Ann. Cas. 634.

Messrs. Strother, Taylor, & Taylor and Wiles & Bias, for defendant in error:

The instructions offered by and given at the instance of the plaintiff were correct, and properly gave to the jury the law governing this action.

Gillingham v. Ohio River R. Co. 35 W. Va. 588, 14 L.R.A. 798, 29 Am. St. Rep. 827, 14 S. E. 243; Parsons v. Harper, 16 Gratt. 64; 19 Cyc. 343-368; 12 Am. & Eng. Enc. Law, 721-738; Catzen v. Belcher, 64 W. Va. 314, 131 Am. St. Rep. 908, 61 S. E. 930, 16 Ann. Cas. 715; Fetty v. Huntington Loan Co. 70 W. Va. 688, 74 S. E. 956; Williamson v. Glen Alum Coal Co. 72 W. Va. 288, 78 S. E. 94; 2 R. C. L. p. 445; 2 Am. & Eng. Enc. Law, 834; Whitman v. Atchison, T. & S. F. R. Co. Ann. Cas. 1912D, 729, note; Turk v. Norfolk & W. R. Co. 75 W. Va. 623, L.R.A.1915E, 145, 84 S. E. 569.

The court did not err in refusing to set aside the verdict, because the same was not contrary to the law, nor contrary to the evidence.

Lyons v. Davy-Pocahontas Coal Co. 75 W. Va. 739, 84 S. E. 744; Williamson v. Glen Alum Coal Co. 72 W. Va. 288, 78 S. E. 94; Turk v. Norfolk & W. R. Co. 75 W. Va. 623, L.R.A.1915E, 45, 84 S. E. 569; Fetty v. Huntington Loan Co. 70 W. Va. 688, 74 S. E. 956; Davis v. Chesapeake & O. R. Co. 61 W. Va. 246 9 L.R.A. (N.S.) 993, 56 S. E. 400; Bishop, Non-Contract Law, § 206; Parsons v. Harper, 16 Gratt. 64; State v. Emsweller, 78 W. Va. 214, 88 S. E. 788; Whitman v. Atchison, T. & S. F. R. Co. Ann. Cas. 1912D, 729, note; Comisky v. Norfolk & W. R. Co. 79 W. Va. 148, L.R.A.1917D, 220, 90 S. E. 385; Anania v. Norfolk & W. R. Co. 77 W. Va. 106, L.R.A.1916C, 439, 87 S. E. 167, 11 N. C. C. A. 1025.

Poffenbarger, P., delivered the opinion of the court:

The principal inquiries arising upon this writ of error to a judgment for \$1,000, obtained in an action for damages for an alleged false arrest and malicious prosecution, are: (1) Whether the evidence tends to prove such facts and circumstances as legally justified the jury in finding the plaintiff had been arrested; and (2) if so, whether the acts and conduct of the defendant's station agent were of such character as to make out a case of participation on the part of the defendant, in the arrest, or of instigation thereof.

The controversy had its origin in the accidental breaking of a quart bottle filled with whisky, in one of the plaintiff's two suit cases delivered to the defendant at its station at the city of Williamson, Mingo county, and there checked by it as personal baggage of the plaintiff, to be carried to another station known as Davy, McDowell county, from which point she intended to go on a visit to her mother, in Wyoming county. A train manifest delivered with the baggage to the station agent at Davy, by the baggageman and signed by the baggage-master at Williamson, said: "This suit case fell from the top of a trunk, and whisky run out of same as if though it was full of whisky."

On her arrival at Davy, the plaintiff, without having called for her baggage, went to a hotel at which she intended to spend the night, and sent the porter to the station with her checks for the baggage. In a few minutes, he returned and reported the refusal of the agent to surrender it. Thereupon she went with the porter to the station and demanded it. Fearing delivery of the baggage, with knowledge that it contained liquor, might be an act in violation of his duty or orders, or one subjecting the railroad company or himself to criminal liability, the agent had wired his superior officer for instructions as to what to do with it, and had not as yet had any

response to his telegram, nor did he receive one until the next day at about noon and after completion of the transactions relied upon as constituting a false arrest or imprisonment. When it came, it was unsatisfactory in another respect. It merely asked the agent what he had done with the baggage. Upon non-compliance with the plaintiff's demand for her baggage, a controversy arose between her and the agent, in the course of which she expressed her intention to call an attorney from Williamson for advice, whereupon he either threatened to call an officer, or she requested him to call him, after having been advised by him that there was one in town. As to this there is a conflict in the testimony. However the suggestion may have arisen, he sent a messenger for the officer, who returned without him, being unable to find him. She says he then called the officer by telephone. Soon afterwards, he came in, as he and the agent say, without request from any person and to ascertain the cause of the noise he had heard the plaintiff making in the station. Negotiations then took place between the plaintiff and him. After having examined the baggage and discovered evidence of the presence of whisky on one of the suit cases, he advised the agent not to deliver it, and the plaintiff says he then told her she was going to Welch with him the next morning at 8 o'clock. Welch was the county seat of the county. She further says the agent was not disrespectful to her until after Chinault, the officer, came in, and then, as she expressed it, "He seemed to be terrible set up, you know, and mad and had no reason about him, and told me I was no lady or I wouldn't be carrying whisky."

Communications were opened by telephone with A. C. Hufford, a justice of the peace, at Welch. The plaintiff first attempted to call him up, but was unable to use the telephone in the station. Then she went to the central telephone station, called him up, told him the circum-

stances, and asked him to direct or request the agent to let her have her baggage. He promised to do so, according to her testimony, and immediately called Boyd, the agent, and talked to him, while she listened to the conversation. Instead of complying with his promise, he told the agent he had her (the plaintiff) just where he wanted her and to take her clothing out of the suit cases and give it to her, and to examine them closely to see whether she had any more whisky. She having informed the justice that Davy was not her destination and that she was going from that point down into Wyoming county to visit her mother, on the next morning, he directed the agent to retain the suit cases and let her take her clothing, and added that on her return he would prepare a written instrument to be signed by her, releasing him. At this point, in order to let the justice know she had heard these directions, she broke in on the conversation, saying, "Squire, why can't I have my suit cases now?" Somewhat angered, she returned to the station, and there was further controversy between her and Chinault and Boyd, in the course of which she says Chinault said, "I'm going to take you to Welch at 8 o'clock in the morning," and, in reply to her protest of his lack of authority, "I can, and I will arrest you and take you before Squire Hufford in the morning." He says he threatened to arrest her for her boisterous conduct. She admits he did not lay hands upon her, but she says she deemed herself to be under arrest and waited to see what was to be done with her, and, in the absence of any further procedure, left the station and went to the hotel for the night, the hour being somewhat late. On the next morning, she went to the station, bought a ticket for Welch, and boarded the train for that place. At the same time, Chinault appeared, advised her that she need not go to Welch then and could go on and visit her mother and submit herself to trial on her return; but he too boarded the train, carry-

ing her suit case in which the liquor had been found, and went to Welch. At the justice's office, a warrant was issued on the complaint of Chinault. She protested her innocence and called an attorney. Both she and the attorney say the justice informed them that he would terminate the matter by the interposition of a fine of \$100, and remit it after she had demanded an appeal. Immediately afterwards, she was allowed to go and take her suit case with her. On opening it at the attorney's office, nothing was found in it except some of her clothes and some broken glass, not more than the quantity requisite for one bottle. It had originally contained 2 quarts of whisky besides the clothing. Not "to be outdone," as she puts it, she went from Welch to Pocahontas, Virginia, procured there 2 other quarts of whisky, came back to Davy, obtained her other suit case, stayed all night there, and then went on to visit her mother. That visit covered a period of two or three weeks, and, some time after her return to her home at Williamson, officers came with a commitment to take her to jail for a period of thirty days. She convinced them of her inability to go and then obtained an appeal from the judgment, which the circuit court reversed, after having sustained a motion to quash the warrant on the ground that it charged no offense.

Chinault denies that he threatened to arrest the plaintiff, that he had any intention to arrest her, that he told her she would have to go to Welch, that he took her suit case with him to Welch, and that he made any complaint. Boyd denies that he called Chinault of his own volition, protests that he called him at the request of the plaintiff, and insists that he did not, in any manner, direct her to be arrested. Hufford says he does not know whether Chinault brought the suit case to his office or not. The plaintiff says he did, Boyd says he took it from the station, and plaintiff's attorney says it was at the office of the justice and

taken from that place to his office. The justice issued a warrant in Chinault's presence, reciting that it was issued upon complaint made by him. Of course, the questions of veracity involved here and the facts were for jury determination.

All authorities agree that manual custody or restraint is not essential to the effectuation of an arrest, if the person claiming to have been arrested submits to a manifestation or claim of authority to make the arrest and an expres-

False imprisonment—words.

sion of intent to execute such authority. "In order to constitute a case of false imprisonment, it is essential that there should be some direct restraint of the person, but to constitute 'imprisonment,' in the sense in which the word is here used, it is not necessary that there should be confinement in a jail or prison. Any exercise of force, or express or implied threat of force, by which in fact the other person is deprived of his liberty, compelled to remain where he does not wish to remain, or to go where he does not wish to go, is an imprisonment. So, if an officer tells a person that he is under arrest, and he thereupon submits himself to the officer, going with him and obeying his orders, such person is deprived of his liberty, and if the act of the officer is unlawful this is a false imprisonment. While actual force is not necessary, it is generally held that the conduct of the person complained of must show that force will be used to detain the plaintiff, if necessary, or that the person detaining him does so by some legal authority." 11 R. C. L. 793. "An arrest is not consummated until there has been a taking of possession of the person by manual caption or otherwise, but the requisite control may be assumed without force, and in any manner by which the subject of the arrest is brought within the power or control of the person making it. Nor is manual touching necessary, where the subject of the arrest submits thereto, or is otherwise actual-

ly subjected to restraint." 5 C. J. 386. To the same effect, see 2 Am. & Eng. Enc. Law, 836, and 5 Enc. L. & P. 446.

In all cases in which there is no manual touching or seizure, nor any resistance, the intentions of the parties to the transaction are very important. There must have been intent on the part of one of them to arrest the other, and intent on the part of such other to submit, under the belief and impression that submission was necessary. *Searls v. Viets*, 2 *Thomp. & C.* 224; *Mowry v. Chase*, 100 *Mass.* 79; *Homer v. Battyn*, *Bull. N. P.* 62b; *Pocock v. Moore*, *Ryan & M.* 321; *Garnier v. Squires*, 62 *Kan.* 321, 62 *Pac.* 1005; *Jones v. Jones*, 35 *N. C.* (13 *Ired. L.*) 448; *State ex rel. Lawrence v. Buxton*, 102 *N. C.* 129, 8 *S. E.* 774; *Pike v. Hanson*, 9 *N. H.* 491; *Voorhees*, *Arrest*, § 70.

When the intention with which an act was done depends upon inferences arising from conduct, it is manifestly a question of fact, falling within the province of the jury for determination, and the intention of the parties, as an element or factor in an issue of arrest or no arrest, constitutes no exception to the rule. *Jones v. Jones*, 35 *N. C.* (13 *Ired. L.*) 448; *Dunlevy v. Wolferman*, 106 *Mo. App.* 46, 79 *S. E.* 1165. The jury could have found from the evidence that Chinault told the plaintiff he would arrest her and made her believe she was under arrest, although he did not say so; that she believed she was under arrest; that Chinault made a complaint on which a warrant was issued for her arrest; that he took the evidence of her supposed guilt to the office of the justice; that she believed he accompanied her to Welch as her custodian, although he says he did not, and she admits he did remain near her on the train; and that he considered her under arrest, notwithstanding the permission he gave her to go on her contemplated visit, for this permit was

accompanied by the statement or intimation that she would have to undergo a trial on her return. He denies having said anything to her at the station on the morning of the trip to Welch. If he did not, the case is much stronger against him, for he was there boarding the train with her suit case and going in the direction of the office of the justice to which he had told her he would take her. The leave granted for the visit did not nullify the arrest, if there was one. It was a mere offer of a parole which she was not bound to accept. Although the officer does not accompany the prisoner to the magistrate's office, there may be a constructive arrest and imprisonment within the meaning of the law. *Searls v. Viets*, 2 *Thomp. & C.* 224; *Herring v. State*, 3 *Tex. App.* 108; *Martin v. Houck*, 141 *N. C.* 317, 7 *L.R.A. (N.S.)* 576, 54 *S. E.* 291. She knew Chinault was an officer and that he and the justice of the peace deemed her guilty of an offense. In our opinion, the admitted facts, and those the jury were warranted in finding from the conflicting evidence, justified the finding of an arrest.

Nothing in the statute, as it then was, made the plaintiff's act unlawful. Under the statute then in force, she could lawfully carry as much as 2 quarts of liquor for her personal use, without a label on the container. Common carriers could not transport liquors for hire, but nothing in the statute made the act of checking personal baggage containing liquors not in excess of 2 quarts, criminal. Besides, the act had not been committed in the presence of the officer and he had no warrant for her arrest. It is not pretended in argument that there was any legal justification of the arrest.

The evidence affords an ample basis for the finding that the defendant's agent instigated or caused the arrest. Whatever his motive may have been, he

**Trial-jury--
arrest.**

**Arrest-parole
offer of release
-effect.**

**Evidence--
arrest-sufficiency.**

Principal and agent—wrongful arrest. baggage, under orders of the defendant, it is obviously liable, for the custody and proper handling of the baggage was within his authority, and his wrongs done in the execution of such authority are chargeable to his principal. The plaintiff was rightfully in the station, rightfully demanding her property, in consequence of the agent's wrongful refusal to deliver it. In conferring upon its agent authority to handle baggage, the defendant necessarily empowered him to determine questions of right as to delivery and the means of resisting what he deemed wrongful demands for delivery; and, even though he did wrongful acts in the execution of these powers, which the principal might not have au-

Although the declaration charges both false imprisonment and malicious prosecution, the trial proceeded, for the most part, on the theory of liability on the former charge, in which the doctrine of probable cause **False imprisonment—malice.** usually has no place. None of the instructions given for the plaintiff invoked that doctrine. Two instructions given for the defendant mention the other charge; but neither of them sets up the alleged conviction as being conclusive of the existence of probable cause, nor refers to it in any way. Hence the doctrine enunciated in *Haddad v. Chesapeake & O. R. Co.* 77 W. Va. 710, L.R.A.1916F, 192, 88 S. E. 1038, was not invoked in the trial. It does not sustain the defendant's overruled request for a peremptory instruction to find for the defendant, for the motion for a new trial, because the evidence sustains the charge of false imprisonment of which want of probable cause is not an essential element.

Perceiving no error in the judgment, we will affirm it.

False imprisonment as affected by offer to release plaintiff conditionally or temporarily.

Thus, in *McNay v. Stratton* (1881) 9 Ill. App. 215, it appeared that the appellee found the appellant at work in a corncrib, and drew a revolver, threatening to keep him there unless

he should answer certain questions propounded to him. It was held that this was a false imprisonment, regardless of whether the appellant might have been released if he had answered the questions put to him.

So, in *Smith v. State* (1846) 7 *Humph. (Tenn.)* 43, wherein it appeared that a ferry keeper prevented a person from proceeding on his journey until he paid the ferry charge, a recovery for false imprisonment was allowed.

In *Worden v. Davis* (1909) 195 N. Y. 391, 22 L.R.A. (N.S.) 1196, 88 N. E. 745, it appeared that the plaintiff was arrested under a warrant which was afterwards found to be void. He was released on his own recognizance, but the prosecution was continued and he was convicted before the magistrate. On appeal that conviction was reversed. In an action for false im-

prisonment it was contended that the plaintiff ceased to be under restraint, custody, or coercion after his release, and therefore his expenses incurred subsequently in defending against the prosecution were not necessary to free him from imprisonment, so that no recovery could be had as damages from the imprisonment. The court held that the temporary release of the plaintiff had no effect on the action to recover for injury suffered through false imprisonment; that he might recover any expense as a legal item of damages resulting from the commencement of the prosecution against him.

In the reported case (*JOHNSON v. NORFOLK & W. R. Co.* ante, 1469) an offer to allow the plaintiff to continue her journey and return for trial is held to be merely an offer of parole and not to affect an action for false imprisonment. M. J. Q.

B. F. PREWITT, Appt.,
v.
STATE OF MISSISSIPPI.

Mississippi Supreme Court — November 24, 1918.

(106 Miss. 82, 63 So. 330.)

Evidence — judicial notice — hereditary character of insanity.

1. The court takes judicial notice that insanity is hereditary.

[See note on this question beginning on page 1486.]

— as to hereditary character of insanity.

2. Upon the question of insanity where the evidence shows relatives of the person in question to have been insane, physicians may testify that insanity is hereditary.

[See 14 R. C. L. 619.]

— appeal — rejection of evidence — error.

3. It is not reversible error to refuse to permit physicians to testify that insanity is hereditary where the question involved is as to the insanity of a particular person whose relatives have been shown to have been insane.

[See 2 R. C. L. 253.]

Definition — heredity.

4. Heredity is that biological law by which all beings endowed with life tend to repeat themselves in their descendants.

Trial — rejection of evidence — correction by instruction.

5. Error in rejecting evidence that insanity is hereditary upon the issue of the insanity of a particular person is cured by an instruction that a predisposition or susceptibility to insanity on the part of such person has been proven and that such fact must be taken as established.

Witness — opinion as to insanity — form of question.

6. A witness cannot be permitted to give his opinion as to the insanity of a person based upon his personal knowledge of him, a portion of the evidence in the case, and an imperfect hypothetical statement of the facts.

[See 11 R. C. L. 581, 582.]

— when opinion permissible.

7. To permit an insanity expert to give his opinion as to insanity of a

particular person not based on his own knowledge, a hypothetical question must be propounded to him which assumes the truth of facts which the evidence tends to support, and which are stated in accordance with the theory of the examiner.

[See 11 R. C. L. 578, 579.]

—absence of conflict in evidence — opinion based on testimony.

8. One is not entitled as matter of right to have an insanity expert base his opinion upon the testimony in the case without submitting to him a hypothetical question, although there is little or no conflict in the evidence.

[See 11 R. C. L. 581.]

(Cook, J., dissents.)

Evidence — opinion as to insanity — juror's knowledge of facts.

9. To render admissible an expert's opinion as to insanity, the jury must know on what facts it is based.

[See 11 R. C. L. 600.]

—opinion as to insanity at particular time.

10. One cannot give his opinion as to the sanity of a person at a particular time, based on his observation of the person's condition, if he did not have him sufficiently under observation on the day in question to enable him to form an opinion as to that time.

[See 11 R. C. L. 601.]

APPEAL by defendant from a judgment of the Circuit Court for Attala County (Teat, J.) convicting him of assault and battery with intent to kill. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Adams & Dobbs for appellant.

Mr. George H. Ethridge, Assistant Attorney General, for the State:

The condition of defendant before the shooting, at the time of shooting, or after the shooting, was competent in a case of insanity.

Smith v. State, 95 Miss. 786, 27 L.R.A. (N.S.) 461, 49 So. 945, Ann. Cas. 1912A, 23; Ford v. State, 35 L.R.A. 117, note.

Defendant must point out the particular witness's testimony, and the part of the particular witness's testimony that is deemed objectionable, and cannot make a general assignment that the court erred in admitting evidence.

Richburger v. State, 90 Miss. 806, 44 So. 772.

Smith, Ch. J., delivered the opinion of the court:

This is an appeal from a conviction of the crime of assault and battery with intent to kill and murder. On the occasion in question appellant, who was a merchant in the town of Ackerman, was in the street near his store shooting a pistol. What then occurred can best be told in the language of the witness Chrismond, sheriff of the county and the person assaulted; there being no dispute as to the correctness thereof: "It was on the

afternoon of the 31st of October; I heard some shooting in town and I started on over there to investigate it; when I got there Mr. Prewitt was out on the street shooting promiscuously; when he saw me he hollered for me to go back, and when I didn't go back, he hollered and said he would kill me if I didn't. I went on anyway; had advanced only a few steps when he shot at me one time. I proceeded up near where he was at—he was telling me to stop all the time. I stopped and told him that I wasn't armed, and that I hadn't come over for any trouble,—just reasoning the matter with him,—told him the circumstances, that I was over there in an official capacity, and that I demanded order on the streets; just talked to him as fast as I could; don't remember exactly what all I did say. He was standing behind a tree till after I told him that I was not armed; he then came out from behind the tree and shot me." There was evidence indicating that appellant was drunk at the time of the shooting. His sole defense was insanity, and there was some evidence in support thereof, consisting principally of the opinions of witnesses who had known him, and of

the fact that his father, uncle, and five other blood relatives had been insane. The acts of appellant other than the shooting of Chrismond, on which the opinions of these witnesses were based, were few in number and of such character that the jury was well warranted in finding that they were not inconsistent with the conduct of a sane man. We find no reversible error in the record, and only two of the assignments thereof require special notice.

After introducing evidence of the insanity of his father and other blood relatives, appellant asked two of the physicians who testified in the case "whether or not insanity is hereditary and transmissible,"

**Evidence—
as to hereditary
character of
insanity.**

which question, on the objection of the state, the court declined to permit the witnesses to answer. The court might very properly have allowed this question to have been answered, but its declining so to do does not constitute a reversible error, if error, in fact, at all. That insanity is hereditary, as hereinafter explained, is a matter of common knowledge, and is therefore a fact not necessary to be proven. The court takes judicial notice of it.

The evidence of insanity among his blood relatives, which appellant had already introduced, was admissible solely on the ground that insanity is hereditary. At one time it seems to have been supposed that this fact must be proven in each case before evidence of insanity among the blood relatives could be received. *Reg. v. Tucket*, 1 Cox, C. C. 103. But we venture to say that no court of to-day would so hold. The fact seems now to be assumed by all of the courts and authorities without question. 1 Wigmore, Ev. § 232; 1 Wharton & S. Med. Jur. §§ 576 et seq.; *Baxter v. Abbott*, 7 Gray, 71; *State v. Christmas*, 51 N. C. (6 Jones, L.) 471.

**—judicial
notice—
hereditary
character of
insanity.**

To exclude facts from evidence which depend for their value upon the law of heredity for the reason that such law has not been proven is, or should be, as shocking to the judicial mind as the exclusion of facts from evidence depending upon the law of gravity for the reason that such law has not been proven. Heredity "is a universal law of organic life," and is defined as "that biological law by which all beings endowed with life tend to repeat themselves in their descendants." 1 Wharton & S. Med. Jur. § 576.

**Definition—
heredity.**

But even if we are mistaken in this, any possible error in the ruling complained of was cured by the granting of appellant's first instruction, for "it cannot be too definitely stated," in the language of 14 *Encyclopædia Britannica*, 11th ed. p. 597, subtitle "Inheritance," "that it is not the insanity which is inherited, but only the predisposition to the manifestation of mental symptoms in the presence of a sufficient exciting cause," and, in the language of the court in *Baxter v. Abbott*, supra, the admissibility of evidence of insanity of blood relatives "rests upon the ground of the hereditary character of insanity, that a predisposition to the disease is frequently transmitted from parent to child. With such predisposition, the malady may not show itself in the child; for the child may not be exposed to any exciting cause. But with such hereditary taint, insanity supervenes from slight causes,—causes apparently wholly inadequate to affect a mind without the predisposition." This first instruction is as follows: "The court instructs the jury that it has been proven in this case by undisputed testimony that there is insanity in the family of the defendant, and that a predisposition or susceptibility to insanity on the part of the defendant has been proven, and that in your consideration of this case you

**Trial—rejection
of evidence—
correction by
instruction.**

should treat these facts as established."

Dr. B. F. Prewitt, an uncle of appellant, was sworn as a witness in his behalf, and gave as his opinion, based on his personal knowledge and observation of appellant, that he was insane at times. He was not asked, and did not state, when and for what periods of time appellant had appeared to him to be insane. He was then qualified as an expert on insanity, and was asked if he had heard all of the testimony in the case, and he replied that he had heard "some of it," without stating what parts of it he had heard. He was then asked the following question, which was objected to by the state and the objection sustained: "From the testimony you have heard, and about the shooting as it occurred out there in front of Prewitt's store, his manner and conduct on that occasion, his conduct in his home, his statement on the way to jail, his statement to the deputy marshal at the jail,—taking all this testimony and facts stated about his manner of shooting inside of his store and promiscuously up and down the street and in his yard, what would you say about the defendant, at the time he shot Mr. Chrismond, as to his sanity or insanity?" After some further examination he was then asked this question: "Now, Doctor, I will ask you this question, having sat here and heard the testimony in the case, you also heard the testimony introduced here when this case was tried here about two weeks ago?" to which he answered, "Yes, sir." He was then asked the following question, which was objected to and the objection sustained, and these rulings of the court are assigned for error: "Knowing the defendant in the case as you have known him all your life, with reference to this question of mental disorder, the family having been affected, different members that come under your observation, and having heard the testimony which has been in-

troduced here, as to how this shooting occurred, the defendant being in his store firing off his pistol and shooting promiscuously up and down the street, with a wild and unnatural look on his face and in his eyes, his unusual manner and expression, going out on the streets after Chrismond, then shooting him, turning around, and going on to his residence, shooting around there in his own yard, taking all of these circumstances in detail, and the fact that Chrismond was not trying to do him any violence at the time he shot him, taking all these various statements from these different witnesses as being the facts as to his condition, acts, and demeanor, and that coupled with your own knowledge, I will ask you to state what your opinion was, whether B. F. Prewitt was sane or insane at the time when he shot Mr. Chrismond."

It will be observed that these questions follow none of the rules laid down for the examination of an expert witness. They mix an imperfect hypothetical statement of facts with the information obtained by the witness from listening to the testimony of the other witnesses, and the second question calls for an opinion based both on personal knowledge of the defendant and upon an examination of the facts testified to by the other witnesses at the trial.

Witness—
opinion as to
insanity—form
of question.

"The usual and proper method of examining an expert where it is sought to obtain his opinion is to propound to him a hypothetical question, i. e., one which assumes the truth of facts which the evidence tends to support, and which are stated in accordance with the theory of the examiner; and . . . where the witness is not testifying to his own knowledge the only proper course is to ask him a hypothetical question, and that it is important that the form of the question should be such as not to require or permit him to

—when opinion
permissible.

draw conclusions of fact from the evidence in the case, and that where the evidence is conflicting, or relates to many details, or where inference of fact must be drawn from the evidence, in order to be reasonably certain of the grounds on which an opinion is based, it is usually necessary that the facts should be stated hypothetically." 5 Enc. Ev. 615; *Reed v. State*, 62 Miss. 405.

It is true that there is very little conflict in the facts testified to by the various witnesses, and where there is no conflict in the evidence, it may be convenient to allow the witness to be asked his opinion generally upon the testimony, without embodying it in a hypothetical question, but allowing this to be

—absence of
conflict in
evidence—
opinion based
on testimony.

done is purely a matter of discretion with the court, and cannot be insisted upon as a

matter of right. *Reed v. State*, 62 Miss. 409. And, moreover, this witness expressly stated that he had only heard "some of" the evidence, and one of the questions was based partly on what he had heard of the evidence on a former trial with which the jury, before whom he was testifying, was, of course, not familiar. The jury must know on what facts the witness bases his

Evidence—
opinion as to
insanity—
juror's knowl-
edge of facts.

opinion in order that they may judge of the value thereof. They are also entitled to know

whether the opinion is based on facts coming under the witness's actual observation, or upon facts testified to by others.

Among other questions asked this witness were the two following, which were objected to, and the objection sustained: "I will put this question to you, Doctor. From your knowledge of his conduct for the last six or eight months, have you had an opportunity to observe his acts and conduct on various occasions? And, coupling all these things with your own personal

knowledge of his behavior and conduct, what would you say the condition of mind of this defendant was on the day it was done?" and, "from your own knowledge of the family history of Prewitt's family, you have treated seven members for mental diseases, your association and knowledge of the defendant here for the last ten or twelve years, his having clerked for you in the town of Ackerman, and your having observed his conduct on different occasions, what would you say as to his mental condition on the day of the shooting of Mr. Chrismond there in the town of Ackerman?" The objections to these questions were properly sustained if for no other reason than that it was not shown that the witness had had appellant sufficiently under observation on the day of the shooting to enable him to form

—opinion as to
insanity at
particular time.

an opinion. The only evidence on this line was that he had seen him at a distance, but had not spoken to him.

Affirmed.

Cook, J., dissenting:

There is no conflict in the evidence as to what occurred at the time of the shooting. Appellant was shooting up the town, and when the sheriff remonstrated, and was approaching him in a pacific manner and with soothing words, he deliberately, and for no reason at all, shot the sheriff. He was either drunk or crazy or both. There is absolutely no variance in the testimony of the witnesses in regard to what occurred at the time of and immediately preceding the shooting of the sheriff,—indeed, the testimony of the individual witnesses harmonized, dovetailed in fact,—the testimony of each was the testimony of all.

The undisputed and unquestioned facts are that the father of appellant was insane at the time appellant's mother was impregnated with the germ of his life; that his father's brother was insane and five other of his near blood relatives. It

seems clear from the record that appellant was, or at least had been, a chronic alcoholic. He had taken the "Keeley Cure" for the "drink habit" three times. In addition to the near blood relatives of appellant being insane, the Thompson family, to which he was related, were all insane, according to Dr. Prewitt. So, it would seem that appellant had the taint of insanity in his blood, and it is "common knowledge" chronic alcoholism is one of the symptoms of insanity.

Referring to the opinion of the court for the form of the questions propounded to Dr. Prewitt to obtain his professional opinion as to the condition of appellant's mind at the time of the shooting, it is difficult for me to see any flaw in the questions. As I have before stated, all of the eyewitnesses agreed as to what occurred and as to the appearance and language of the accused, and it seems to me that the court has drawn the line so fine that the ordinary practitioner at the bar will find many practical difficulties in tracking the exceedingly narrow path marked out by the opinion of the court.

I understood that it is the business of the courts to administer practical justice, and to accomplish this end precise and technical rules must be, and generally are, ignored by the trial courts of the state. It must be borne in mind that Dr. Prewitt was by far the best qualified witness, on account of his intimate personal acquaintance with appellant and his personal and professional knowledge of his family history, coupled with his scientific training, to aid the jury in arriving at a proper verdict in the case, and when the court refused to allow this witness to give his opinion as to appellant's mental condition at the time of the alleged crime, he excluded from the jury the very foundation of his defense. Mere technical errors of the trial court made in the progress of the trial may be

overlooked, and are frequently overlooked, by this court, and it seems to me, in approaching the questions involved in this appeal, the same wise, just, and practical rule should be followed, and the defendant should not be deprived of competent, pertinent, and exceedingly important testimony, because his counsel in propounding questions to a witness did not put them precisely and technically correctly. As I read the opinion of the court this is the basis of the affirmance. I do not agree with the court in its criticism of the form of the questions,—the form was immaterial because no two witnesses disagreed about the facts of the shooting.

My dissent is based upon the trial court's refusal to allow Dr. Prewitt to give the jury his opinion of the accused's mental condition at the time he fired upon the sheriff, and this court's approval of this action of the trial court. I refrain from any comment upon other features of the case to emphasize, my views on what I regard as a matter of great practical importance.

NOTE.

The reported case (*PREWITT v. STATE*, ante, 1476) makes an interesting contribution to the law upon the subject of the necessity of showing that the insanity of relatives is of a hereditary or transmissible type in order to render evidence thereof admissible, which question is treated in the annotation following *COM. v. DALE*, post, 1486. The *PREWITT CASE* is illustrative of those which regard it as unnecessary to establish that the insanity of the relatives was of a hereditary type, and points out that since heredity is a universal law of organic life, to exclude facts from evidence which depend for their value upon such law, for the reason that it has not been proven, would shock the judicial mind of the court.

COMMONWEALTH OF PENNSYLVANIA

v.

ALEXANDER DALE, Appt.

Pennsylvania Supreme Court — April 21, 1919.

(264 Pa. 362, 107 Atl. 743.)

Evidence — judicial notice — insanity as hereditary.

1. The court will not take judicial notice that a particular form of insanity is hereditary.

[See note on this question beginning on page 1486.]

Criminal law — burden of proof of insanity.

2. One pleading insanity in defense of a charge of murder has the burden of proving by a fair preponderance of the evidence that he was insane when the homicide occurred.

[See 13 R. C. L. 712; 14 R. C. L. 624.]

Witness — testimony as to insanity of himself.

3. Upon the question of the insanity of one accused of a crime, his father cannot be permitted to testify to his own insanity or to acts from which insanity might be inferred.

Evidence — insanity of relatives.

4. Upon the question of the insanity of an individual, evidence is admissible of insanity of his blood relatives in the ancestral line, either direct or collateral, in corroboration of evidence showing insanity in himself.

[See 13 R. C. L. 714; 14 R. C. L. 619.]

Criminal law — hereditary insanity as defense.

5. Hereditary insanity, of itself, cannot be used as a defense to crime, but may be used to corroborate other more direct proof of insanity in the accused.

[See 13 R. C. L. 714, 715.]

Trial — order of proof — insanity.

6. Before receiving evidence of he-

reditary insanity in support of a defense to prosecution for crime, there must be some evidence showing insanity in accused.

[See 14 R. C. L. 619.]

Evidence — insanity — collateral relatives.

7. Upon the question of the insanity of accused evidence is admissible of insanity in collateral relatives without showing insanity in the direct ancestry, if the insanity with which he suffered is transmissible or hereditary.

[See 14 R. C. L. 619.]

Witness — competency — insanity of relative.

8. A witness to insanity in an ancestor of accused, either direct or collateral, must testify from personal knowledge and observation, and not from reputation.

[See 14 R. C. L. 618, 620.]

Evidence — offer — insanity — sufficiency.

9. A mere offer of evidence that collateral relatives of one accused of crime had been committed to an insane asylum is not sufficient without showing that the form of insanity with which they were afflicted was hereditary.

[See 14 R. C. L. 619.]

APPEAL by defendant from a judgment of the Court of Oyer and Terminer for Schuylkill County, convicting him of murder in the first degree. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. W. B. Durkin and E. P. Leuschner for appellant.

Messrs. C. A. Whitehouse, M. F. Duffy, and John J. Moran for the Commonwealth.

Kephart, J., delivered the opinion of the court:

The defense of the accused was

insanity, and the burden was on him to prove, by fair preponderance of the evidence, that he was insane when he killed Swartz. This burden rested on him throughout the trial, and he was required, not only to adduce evidence

*Criminal law—
burden of proof
of insanity.*

as to his own insanity, but also such corroborating proofs as he desired to submit. He proposed (a) to show, by his father, that he, the father, was of a nervous temperament, excitable, and eccentric, or, in other words, the witness was called upon to prove his own insanity; (b) to show, by the same witness, that he had two children who had been committed to insane asylums, that a sister of the accused's mother was of unsound mind, and children of the mother's brother are of unsound mind,—this for the purpose of showing "an hereditary tendency to insanity."

For obvious reasons, under the circumstances of this case, the witness should not be permitted to testify to his own insanity, or such acts from which insanity might be inferred. It would open the door to a very wide field, into which much fraud, dishonesty, and perjury may creep, to say nothing of the ability of the witness to judge of the matter. *O'Connell v. Beecher*, 21 App. Div. 298, 47 N. Y. Supp. 384.

As to the second proposition, it was once ruled that it was not permissible to prove, either in criminal or civil cases, that other members of the same family have been decidedly insane. *People v. Garbutt*, 17 Mich. 9, 17, 97 Am. Dec. 162; 16 Am. & Eng. Enc. Law, 613. But that rule no longer obtains, as science teaches: "That insanity of some varieties may be, and even tends to be, transmitted to descendants, is [now] an accepted pathological fact. Moreover, since it is equally true that it may pass over a generation or an individual before reappearing, it follows that insanity in collateral relatives may indicate an anterior ancestral tendency capable of appearing in other collateral branches." 1 Wigmore, Ev. § 232, p. 288.

And the general rule is, where the insanity of an individual is in ques-

tion, the insanity of his blood relations in the ancestral line, either direct or collateral, may be shown in corroboration of the evidence showing insanity in the individual. *Re Myer*, 184 N. Y. 54, 76 N. E. 920, 6 Ann. Cas. 26; *Walsh v. People*, 88 N. Y. 458; *Com. v. Winnemore*, 1 Brewst. (Pa.) 356; *People v. Garbutt*, supra; *Prentiss v. Bates*, 88 Mich. 567, 50 N. W. 637; *id.* 93 Mich. 234, 17 L.R.A. 494, 53 N. W. 153; *State v. Windsor*, 5 Harr. (Del.) 512; *Murphy v. Com.* 92 Ky. 485, 18 S. W. 163; *Watts v. State*, 99 Md. 80, 57 Atl. 542. Owing to the great abuse that has been made by the use of insanity as a defense in criminal prosecutions, or as a reason for setting aside instruments in writing,—wills, contracts and deeds,—and the possibility of a trial being clogged with endless collateral issues, the courts have been compelled to impose limitations on the admissibility of evidence showing a taint of insanity in direct or collateral kinsmen.

Therefore, it has been ruled that hereditary insanity, of itself, is not independent proof of the insanity of the prisoner, but it is circumstantial evidence used to corroborate other more direct proof of insanity in the accused. Of itself it cannot be used as a defense. 1 Wharton & S. Med. Jur. § 221; *People v. Gambacorta*, 197 N. Y. 181, 90 N. E. 809, 18 Ann. Cas. 425; 1 Wigmore, Ev. § 232; *State v. Cunningham*, 72 N. C. 469, 474; *Guiteau's Case* (D. C.) 10 Fed. 161.

Before receiving such evidence as grounds for a presumption of possible insanity, there must be some evidence showing insanity in the accused. *Laros v. Com.* 84 Pa. 200; *People v. Gambacorta*, 197 N. Y. 181, 90 N. E. 809, 18 Ann. Cas. 425; *Bradley v. State*, 31 Ind. 492; *Berry v. Safe Deposit & T. Co.* 96 Md. 45, 65, 53 Atl. 720; and authorities above enumerated.

Evidence—
insanity of
relatives.

Witness—
testimony as to
insanity of
himself.

Criminal law—
hereditary in-
sanity as
defense.

Trial—order of
proof—insanity.

It must also appear that the disease is hereditary, or transmissible, so as to taint the family blood. *Walsh v. People*, 88 N. Y. 458; *Reichenbach v. Ruddach*, 127 Pa. 564, 18 Atl. 432; *State v. Van Tassel*, 103 Iowa, 11, 72 N. W. 497; *Re Myer*, *supra*.

This last proposition is not entirely free from doubt in some states, and, though the insanity may be transmissible, the line in which it must appear is a little uncertain. The court below declined to receive the evidence, because there was no proof of insanity in the direct ancestral line, and while it was in error in so holding, under the offer and the record as it now stands, its action in declining to receive this evidence must be approved. The question, as it bears on the last proposition of law, may be stated thus: In the absence of any proof whatever of insane conduct on the part of the accused's direct ancestry, may such existence be inferred from evidence to the effect that the accused and his collateral ancestors of near degree were suffering from hereditary or transmissible insanity, or had so suffered? Illustrations have been given in the textbooks and digests of instances where evidence of insanity in blood relations of the accused, such as nieces, nephews, brothers, sisters, uncles, and aunts, has been received. In many of these cases it does not clearly appear that insanity in the direct ancestral line had been previously shown. The reasons why such evidence should not be required are well stated in a discussion of this subject in *Wharton & Stillé's Medical Jurisprudence*, chap. 30, and summed up by *Wigmore*, *supra*, in the statement that hereditary insanity may pass over a generation or individual before reappearing later on. The difficulty in obtaining proof in the direct ancestry is apparent. In *People v. Garbutt*, *supra*, where it was not claimed that either parent or any direct ancestor had been insane, but the defense offered to show insanity in the brother and sister, arising

from a cause similar to that which it was alleged induced the destructive act of the defendant, Chief Justice Cooley says: "If a family of several children should be found, without known cause, to be idiotic, or subject to mental delusions, the inference of hereditary transmission would, in many cases, be entirely conclusive, notwithstanding the inability to point out anything of a similar character in any ancestor. Insanity in a part of the children only would be less conclusive; but the admissibility of the evidence in these cases cannot depend upon its quantity, and it could never be required that it should amount to a demonstration. In some cases its force must be small; in others it will prove hereditary taint with great directness. We think evidence of mental unsoundness on the part of a brother or sister of the person whose competency is in question is admissible, and that the jury should be allowed to consider it in connection with all the other evidence bearing upon that subject."

In *Walsh v. People*, *supra*, a leading case, one of the defenses interposed was that the accused was afflicted with insanity superinduced by epilepsy. An effort was made to show that the brother was suffering from the same malady. The trial court ruled that it was not shown that epilepsy induced, or tended to induce, insanity, or that the disease was transmissible. The court said: "The insanity of parents or relatives is also admissible upon the issue of insanity. It tends to show an hereditary taint, and supplements evidence of insanity of the accused. When the question as to the conduct of the plaintiff's brother was asked, it had neither been shown that the father was insane, nor that the prisoner was afflicted with epilepsy, or other disease. The conduct of the brother, as an isolated independent fact, was wholly immaterial, and the question asked did not necessarily point to evidence of insanity in him. We think the fair construction of the

ruing of the court was, that the defense should first show that epilepsy is, or tends to produce, insanity, and that the disease is transmissible, before entering into the general subject of the conduct of the brother."

In *Re Myer*, supra, the court says: "The case is barren of facts which tend to show that the paresis with which the mother and brother of testatrix are said to have been afflicted was acquired by them under circumstances that would render it transmissible so as to taint the family blood. . . . The medical writers differ as to its cause or causes. . . . Whether the particular form of the disease from which the testatrix and her family suffered was of such a transmissible character that she might be said to have derived it from her ancestors cannot be determined from the evidence in the record. . . . There must be evidence tending to show at least that such diseases are hereditary or transmissible."

It is clear that the great weight of authority seems to be that if insanity is shown in the accused, and insanity be shown in collateral kindred of not too remote a degree, and the insanity with which each suffers is transmissible or hereditary, in that it may or will reappear in some form or symptom in a descendant, no matter what symptom it may take in the descendant,

such evidence may be introduced without showing insanity in the direct

line; i. e., parents or grandparents. This would dispose of the objection by the court below, and it is further emphasized by the fact that the witnesses who testify to insanity in

the ancestors, either direct or collateral, should do so from personal knowledge

and observation, and not from reputation. *Walker v. State*, 102 Ind. 502, 1 N. E. 856; *People v. Koerner*, 154 N. Y. 355, 48 N. E. 731; *State v. Windsor*, 5 Harr. (Del.) 512. But it must still be shown that the dis-

ease was hereditary or transmissible, as indicated.

There is not a scintilla of evidence to show the form or symptom of the disease with which the collateral kinsmen suffered. The accused was afflicted with melancholia. Was it acquired by him under such circumstances that the jury might find it had been transmitted to him by some ancestor, and that the brother, sister, aunt, and cousins were in turn suffering from an insanity likewise transmissible? Not that they suffered from the same symptom, but a transmissible symptom. The various forms of this disease are so numerous and complex, the subject so difficult, that in due protection of the orderly administration of the criminal law it becomes necessary to insist that, before evidence to establish hereditary taint be introduced, proof should be present that the insanity in the collateral kinsmen was transmissible, and not nonhereditary, for it is just as probable in this case that the insanity of the collaterals was produced from some exciting cause, such as grief, terror, disappointed affection, anxiety, great joy, or intense worry, or from some physical cause such as drunkenness, use of opium or other narcotics, a blow on the head, exposure to severe heat or cold, or other physical causes. As the offer was merely

to show that they were in an insane asylum, or were of unsound mind, it was clearly insufficient, and as there are many and varied forms of insanity, the court, of course, could not take judicial notice of a physiological fact on which the medical profession is not in unanimous accord. Nor should the evidence have been received, and the commonwealth by cross-examination be required to show nonhereditary cause. As we said in opening, the burden is on the accused to lay his foundation for the admission of such evidence. The

Evidence—offer
—insanity—
sufficiency.

—judicial notice
—insanity as
hereditary.

benefit (if such it was) of this evidence was not entirely lost, for reference to one of the children being in an asylum was made in the testimony.

The facts show a wilful, premeditated murder, the case was submitted by a charge free from substantial complaint, the defendant had

the benefit of able counsel, and there is no error of law to disturb the judgment entered by the court below.

The assignments of error are all overruled, the judgment is affirmed, and the record is remitted for the purpose of execution according to law.

ANNOTATION.

Necessity of showing that insanity of relatives was of a hereditary or transmissible type in order to render evidence thereof admissible.

In the English case of *Reg. v. Tucket* (1844) 1 Cox, C. C. (Eng.) 103, 4 L. T. N. S. 50, it was held that to render admissible in proof of a plea of insanity evidence as to the insanity of defendant's grandfather, it must be proved in the first instance and by the testimony of medical men that insanity is often hereditary in a family, the question of the hereditary taint being a matter of fact, and not one of law.

And while no other cases seem to have expressly required as a condition precedent to the admission of evidence of insanity among the blood relatives of a person whose sanity was under consideration expert testimony to the effect that insanity was hereditary, there are a number of decisions to the effect that the hereditary taint must be established.

For instance, in *Reg. v. Oxford* (1840) 9 Car. & P. (Eng.) 525, where evidence was admitted as to insanity in defendant's direct ancestors, it was held that the questions for decision were whether they were insane, and, if insane, whether or not the insanity was of a hereditary type; from which it would seem that the court was of the opinion that it must be shown that the insanity of the ancestors was hereditary in order to render it of weight upon the question of the defendant's sanity or insanity.

And in *COM. v. DALE* (reported herewith) ante, 1482, it was squarely held that before evidence to establish a hereditary taint in the blood of a person whose sanity is in question can be introduced, proof must be made that

the insanity of his relatives was transmissible, and not nonhereditary. In this case the defendant was afflicted with melancholia, and the excluded evidence was merely to the effect that his brother, sister, and aunt, and some cousins, were in an insane asylum and were of unsound mind. The exclusion was upon the theory that there are many and varied causes of insanity, and that the court could not take judicial notice of the fact, if such it was, that the affliction of the defendant's relatives was of a hereditary or transmissible type, it being said that the cause and transmissibility of the various types and forms of insanity are physiological facts on which the medical profession is not in unanimous accord.

So in *Reichenbach v. Ruddach* (1889) 127 Pa. 564, 18 Atl. 432, where it was shown that a testator was afflicted with chronic alcoholic insanity, with dementia, it was held that evidence to the effect that the testator's father was confined in a hospital for the insane, as a result of intemperance resulting in melancholia, was irrelevant in the absence of proof or offer of proof that the father's species of melancholia was hereditary. It was said that "it may be or it may not be that this form of mental affection is transmissible by inheritance, but we cannot assume that it is in the absence of proof."

And in *State v. Christmas* (1859) 51 N. C. (6 Jones, L.) 475, where insanity was relied upon as a defense to crime, it was held that, in order to render admissible evidence tending to

show that both an uncle and a brother of defendant were insane, it must appear that their insanity was the same kind as that with which the defendant was alleged to be afflicted. In other words, it must be shown that the blood relatives' maladies were hereditary. In connection with this decision, it is worthy of note that it has been criticized by various text-writers on the ground that the qualification as to proof of kind and character of insanity cannot be sustained for the reason that it rarely descends in the same common type, but varies with individuals. See, for instance, Whart. Crim. L. § 83, which cites 1 Whart. & S. Med. Jur. § 376, and Whart. Crim. Ev. § 731.

Again, in *State v. Cunningham* (1875) 72 N. C. 469, it was said that when a foundation is laid by some evidence tending to show insanity in the person in controversy, it is admissible in corroboration and as an additional link in the chain of circumstances to give in evidence "a hereditary taint in the blood of a like malady." And see *State v. Van Tassel* (1897) 103 Iowa, 6, 72 N. W. 497, wherein the language used seems to indicate that in the opinion of the court evidence of the insanity of one's ancestors is not admissible unless it appears that such insanity was of a hereditary character. And see *Hawley v. Griffin* (1900) — Iowa, —, 82 N. W. 905, wherein it was held that the fact that one's grandchild was incurably insane did not constitute proof of the grandfather's insanity, it not appearing that the insanity of such child was of a hereditary character.

And in New York the rule is that where a specific disease or form of insanity is shown, it must also appear that it is of a hereditary or transmissible type. Thus in *Re Myer* (1906) 184 N. Y. 54, 76 N. E. 920, 6 Ann. Cas. 26 (set out and quoted in *COM. v. DALE*, ante, 1482), the court, while admitting that the general rule is that where the mental soundness of an individual is in question, the insanity of blood relatives in the ancestral line may be shown in corroboration of other evidence showing insanity in the individual, limited such rule by holding that

it "does not permit indiscriminate and unexplained evidence of diseases afflicting such relations and affecting their mental faculties." And, applying this limitation, it was held that evidence that testatrix's mother and brother had been afflicted with "general paresis" was inadmissible on the issue of testatrix's mental incapacity, which was alleged to have resulted from paresis with which she had been afflicted, in the absence of evidence tending to show that the paresis of the mother and brother was acquired by them under circumstances which would render it transmissible so as to taint the family blood. It was also pointed out that it is a scientific fact of common knowledge that the transmissibility of the malady known as "general paresis" depends to a great extent upon the conditions underlying the disease, and that medical writers differ as to its cause or causes. And in *Walsh v. People* (1882) 88 N. Y. 456 (set out and quoted in *COM. v. DALE*), where insanity superinduced by epilepsy was a defense, the court laid down the same general rule set out in the preceding case, and held that to render evidence of the fact that defendant's brother was afflicted with epilepsy admissible, it must first be shown that epilepsy is or tends to produce insanity, and that the disease is transmissible, it being said that the conduct of the brother as an isolated independent fact was wholly immaterial. And in connection with this case see *People v. Gambacorta* (1910) 197 N. Y. 181, 90 N. E. 809, 18 Ann. Cas. 425. The cases of *Walsh v. People* and *Re Myer* (N. Y.) *supra*, do not seem to go quite as far as the decision in the *DALE CASE*, where the collateral relatives whose mental conditions were under consideration were spoken of generally as insane.

In *State v. Hoyt* (1880) 47 Conn. 518, 36 Am. Rep. 89, it was held that there was no possible ground for the admission of evidence showing that defendant's sister was insane, unless such evidence tended to show a taint of insanity descending with the parental blood, and, therefore, since one of several children might be insane from

many causes which could not possibly affect the others, it was permissible for the prosecution on cross-examination to inquire what caused the insanity of the sister in order to show that it was not hereditary. It was said that "the cross-examination was strictly legitimate as calculated to furnish an instant and perfect test of the value of the testimony."

It cannot be said, however, that the weight of authority requires proof that insanity is hereditary or of a transmissible type, since the majority of the cases seem to regard such proof as unnecessary.

For instance, it has been held that while evidence of insanity among one's relatives is admissible solely upon the ground that insanity is or may be hereditary, the fact that insanity is actually hereditary need not be proved, for the courts will take judicial notice that such is the case, it being regarded as matter of common knowledge that insanity actually is hereditary. This was expressly ruled in *PREWITT v. STATE* (reported herewith) ante, 1476, wherein, in holding that testimony that defendant's father, uncle, and five other blood relatives had been insane was admissible without proving that such insanity was hereditary, the court said: "To exclude facts from evidence which depend for their value upon the law of heredity, for the reason that such law has not been proved, is, or should be, as shocking to the judicial mind as the exclusion of facts from evidence depending upon the law of gravity for the reason that such law has not been proved. Heredity 'is a universal law of organic life' and is defined as 'that biological law by which all beings endowed with life tend to repeat themselves in their descendants.'"

Again, in *James v. State* (1915) 193 Ala. 55, 69 So. 569, Ann. Cas. 1918B, 119, the court expressly rejected the rule that proof of insanity among the relatives of the defendant is admissible only in connection with expert testimony that the insanity is in fact hereditary, and held that courts must know judicially, as an established truth of medical science, that many

forms of insanity—or, at least, the physical and neurotic conditions which tend to produce or invite such forms—are transmissible from parents to children, and may recur in the various individuals collaterally descended from a common source, so that evidence of insanity of one or more members of the defendant's family immediate or collateral, is admissible to show a hereditary taint in the accused member's blood as in corroboration of direct testimony to the effect that defendant is insane. But in applying this rule the court seems to have somewhat limited its application, for it was held that, although the bare fact that a parent of defendant is insane and under confinement on that account might be admissible as tending to show hereditary insanity in the defendant, which, however, was not decided, the bare fact that a maternal aunt was insane and confined in an insane asylum without any evidence to show the nature, extent, duration, or symptoms of her mental disorder, and nothing to suggest that it had arisen from causes or conditions which were transmissible, as distinguished from those which are purely personal or ephemeral, did not furnish any rational basis from which could be inferred the existence of hereditary insanity in the family of the defendant.

And in Illinois it has been squarely held that where the sanity or insanity of an individual is the subject of judicial investigation, and there is primary evidence tending to show mental unsoundness, it is competent to show the insanity of his collateral blood relatives, not further removed than uncles and aunts, "without making proof that the insanity from which they suffered was hereditary in character." This rule was laid down in *Dillman v. McDanel* (1906) 222 Ill. 276, 113 Am. St. Rep. 400, 78 N. E. 591, in overruling the contention that evidence that a paternal aunt of the person whose sanity was in question was "crazy" was "incompetent for the reason that it was not supplemented by any evidence showing that the insanity from which the aunt suffered was hereditary." So, in *Martin v. Beatty* (1912) 254 Ill. 615,

98 N. E. 996, the same rule was followed, it having been held error to exclude evidence of the fact that two brothers, two sisters, and a nephew of the testator, whose sanity was in question, had been insane.

And in a number of cases which have held that proof that some of one's blood relatives were insane was admissible in corroboration of evidence tending to show defendant's own insanity, it seems to have been assumed that such a showing of insanity itself raises an inference of hereditary insanity, or at least of a hereditary taint in the blood of the person whose sanity is under consideration.

This evidently was the situation in *Green v. State* (1898) 64 Ark. 523, 43 S. W. 973, wherein the court, in holding that evidence to the effect that defendant's mother, grandmother, great-uncle, and great-aunt were insane, was admissible in corroboration of direct evidence as to defendant's insanity, characterized the same as "evidence of hereditary insanity," although the evidence as reported merely was to the effect that they were so "crazy" that they had to be confined.

And in *Baxter v. Abbott* (1856) 7 Gray (Mass.) 71, where it was sought to show "that the testator's family, both on his father's and mother's side, were subject to insanity, and that his father and mother and an uncle of his were insane," it was held that the proper practice was to admit such evidence. The court said: "We think the practice is right in principle. It rests upon the ground of the hereditary character of insanity, that a predisposition to the disease is frequently transmitted from parent to child. With such predisposition, the malady may not show itself in the child; for the child may not be exposed to any exciting cause. But with such hereditary taint, insanity supervenes from slight causes,—causes apparently wholly inadequate to affect a mind without the predisposition. In making a diagnosis of such a case, we suppose that among the first questions which would be put would be, whether the parents of the patient were or had been insane. With the fact that the

6 A.L.R.—94.

father and mother, or either of them, had been insane, that the insanity had appeared in them about the same age, and in the same form, its existence in the child is rendered more probable, and is believed upon less perfect evidence. The transmission of this predisposition to insanity is matter of general observation, and is recognized by the best medical authorities. Esquirol says this hereditary taint is the most common of all the causes to which insanity can be referred. Esquirol, *Mental Maladies*, translated by Hunt, 49."

And in *People v. Garbutt* (1868) 17 Mich. 9, 97 Am. Dec. 162, in holding that evidence was admissible to show the insanity of a brother of the defendant for the purpose of showing a hereditary tendency to insanity on the part of the latter, or at least some light on his conduct and accountability, Cooley, Ch. J., among other things, said: "Although this evidence could not be very satisfactory in character, we think it was legally admissible. It is now generally believed that other things besides actual mental disease in the parents may cause the transmission of taints to their offspring, which result, in some cases, in idiocy or insanity. . . . If a family of several children should be found, without known cause, to be idiotic, or subject to mental delusions, the inference of hereditary transmission would, in many cases, be entirely conclusive, notwithstanding the inability to point out anything of a similar character in any ancestor. Insanity in a part of the children only would be less conclusive; but the admissibility of the evidence in these cases cannot depend upon its quantity, and it could never be required that it should amount to a demonstration. In some cases its force must be small; in others it will prove hereditary taint with great directness. We think evidence of mental unsoundness on the part of a brother or sister of the person whose competency is in question is admissible, and that the jury should be allowed to consider it in connection with all the other evidence bearing upon that subject."

And in *Hagan v. State* (1875) 5 Baxt. (Tenn.) 615, in holding that where there is evidence tending to show the insanity of a defendant in a criminal prosecution, it was error to refuse to permit an inquiry into the mental condition of his brother, the court said: "If medical science has determined any one question more clearly than another, it is that insanity is hereditary. . . . If medical men, in determining the sanity or insanity of a party, inquire minutely into the mental condition of his immediate family, why is it that a court, seeking after truth of the sanity or insanity of a party, refuses to inquire after the mental condition of his ancestry or immediate family? While the science of law is hoary with age, yet that its great object and aim it has never refused to avail itself of all the means and aids which any modern science has demonstrated to be available in the investigation after truth."

So, in *State v. Penna* (1907) 35 Mont. 535, 90 Pac. 787, where defendant, in support of his plea of insanity, offered evidence tending to show that his father was insane, the court spoke of evidence offered by the prosecution "to rebut the inference of hereditary insanity in defendant." And in *People v. Pine* (1848) 2 Barb. (N. Y.) 566, in holding that evidence that defendant's paternal uncle and cousin were insane was admissible, the court spoke of it as "hereditary insanity."

And perhaps an even stronger support for the rule that evidence of insanity in one's blood relatives is admissible as tending to show a hereditary taint of insanity in such person is *Prentis v. Bates* (1892) 98 Mich. 234, 17 L.R.A. 494, 53 N. W. 153, reversing on this point on rehearing (1891) 88 Mich. 567, 50 N. W. 637. In this case it was held on rehearing that testimony that a sister of testatrix, whose mental condition was under consideration, had become insane, and that her niece had received treatment at an insane asylum for mental disorders, was admissible as tending to show a hereditary taint of insanity in deceased, and that its weight was for the jury. In reaching this conclusion the court

applied the rule laid down in *People v. Garbutt* (Mich.) *supra*, and overruled its decision on the original hearing (1891) 88 Mich. 567, 50 N. W. 637, wherein the *Garbutt* Case had been distinguished on the ground that it was a criminal case, whereas the one under consideration was civil, and the rule laid down that the evidence of insanity of testatrix's relatives was not admissible because no insanity had been shown in any of her ancestors, and for the further reason that the insanity of the sister had been attributed by the physicians in charge of her case at the asylum to disease, and that the characteristics of the malady in her sister and niece were in no respects similar to those claimed in her case, so that no case of hereditary insanity had been established. The decision on rehearing, therefore, is to the effect that evidence of insanity of one's near relatives is admissible as tending to show a hereditary taint of insanity, notwithstanding the fact that the characteristics of the maladies of the various persons apparently are entirely different.

In *State v. Wetter* (1905) 11 Idaho, 433, 83 Pac. 341, in denying an application for continuance in order that the defendant might show that he had a brother who at some time had been confined in an insane asylum, the court said: "It is not shown or intimated the nature or cause of such insanity, or whether it was hereditary; unless hereditary, it would certainly be of but little assistance to the defendant in his defense on the plea of insanity. . . . We do not wish to be understood as holding that hereditary insanity, or the insanity of a brother or sister, or the insanity of any near blood relation of the party charged may not be shown; to the contrary we are of opinion that such evidence is entirely competent, and when introduced should be carefully considered by the jury. The question is, Was the showing sufficient, under the facts in this case, to warrant the court in granting a continuance of the case? . . . It will be observed that there is no positive statement that hereditary insanity exists in the family of

the defendant. There is a positive statement that a brother of defendant had been confined in an insane asylum in California. This may have been an isolated case in that family. There are numerous causes for this dreaded malady and by no means always traceable to heredity."

And see *State v. Leuth* (1890) 5 Ohio C. C. 94, 3 Ohio C. D. 48, wherein evidence as to the insanity of some of defendant's near blood relatives was considered and in which it was said that such evidence was "designed to show hereditary taint and bad health" in defendant himself.

There is also a line of cases in which it has been held, without express reference to the question whether or not the insanity under consideration was of a hereditary or transmissible type, that where there is direct testimony tending to prove that the person in question is insane, evidence as to the insanity of his blood relatives is admissible in corroboration of such direct testimony. These decisions (cited below), however, do not necessarily mean that it is unnecessary to show that the insanity was hereditary or transmissible, because the point may have been overlooked or the condition may have been satisfied by actual proof; and are cited for what they are worth.

United States. — *Guiteau's Case* (1882) 10 Fed. 161.

Alabama. — *Braham v. State* (1905) 143 Ala. 28, 38 So. 919; *Wear v. Wear* (1916) — Ala. —, 76 So. 111; *Russell v. State* (1918) — Ala. —, 78 So. 916.

Arkansas. — *Shaeffer v. State* (1895) 61 Ark. 241, 32 S. W. 679.

California. — *People v. Smith* (1866) 31 Cal. 467; *People v. Goldenson* (1888) 76 Cal. 828, 19 Pac. 161; *People v. Harris* (1914) 169 Cal. 53, 145 Pac. 520.

District of Columbia. — *Coughlin v. Poulson* (1875) 2 MacArth. 308.

Georgia. — *Taylor v. State* (1898) 105 Ga. 746, 31 S. E. 764.

Iowa. — *State v. Felter* (1868) 25 Iowa, 67; *Ross v. McQuiston* (1876) 45 Iowa, 145.

Kentucky. — *Murphy v. Com.* (1891) 92 Ky. 485, 18 S. W. 163; *Wright v.*

Com. (1903) 24 Ky. L. Rep. 1838, 72 S. W. 340.

Maine. — See *St. George v. Biddeford* (1885) 76 Me. 593.

Maryland. — *Berry v. Safe Deposit & T. Co.* (1902) 96 Md. 45, 53 Atl. 720; *Watts v. State* (1904) 99 Md. 30, 57 Atl. 542.

Massachusetts. — *Com. v. Johnson* (1905) 188 Mass. 382, 74 N. E. 939.

Missouri. — *State v. Simms* (1878) 68 Mo. 305; *State v. Baker* (1912) 246 Mo. 357, 152 S. W. 46.

New Jersey. — *State v. Spencer* (1846) 21 N. J. L. 197.

New York. — *People v. Sprague* (1849) 2 Park. Crim. Rep. 48.

Ohio. — See *Wheeler v. State* (1878) 34 Ohio St. 394, 32 Am. Rep. 372.

Texas. — *McLeod v. State* (1892) 81 Tex. Crim. Rep. 331, 20 S. W. 749.

Vermont. — *State v. Warner* (1917) — Vt. —, 101 Atl. 149.

More specifically it has been so held with respect to "immediate relatives" (*Guiteau's Case* (Fed.) *supra*); parents, either father or mother (*Wear v. Wear* (1916) — Ala. —, 76 So. 111; *People v. Smith* (Cal.); *Coughlin v. Poulson* (D. C.); *State v. Felter* (Iowa) *Ross v. McQuiston* (Iowa); *Murphy v. Com.* (Ky.) and *Watts v. State* (Md.) *supra* [evidence was that mother's "mind was gone"]); grandparents on either side (*People v. Goldenson* (1888) 76 Cal. 328, 19 Pac. 161; *Murphy v. Com.* (Ky.); and *Watts v. State* (Md.) *supra* [grandmother's "mind left her entirely and she was crazy"]); *People v. Sprague* (N. Y.) *supra*. And see *State v. Soper* (1898) 148 Mo. 217, 49 S. W. 1007; brothers or sisters of the one whose sanity is under consideration (*Braham v. State* (Ala.); *Wear v. Wear* (Ala.); *Shaeffer v. State* (Ark.); *Taylor v. State* (Ga.); and *Watts v. State* (Md.) *supra* [brother "had fits and had a very weak mind"]); *State v. Simms* (Mo.) and *McLeod v. State* (Tex.) *supra*. But see the English case of *Doe ex dem. Mather v. Whitfoot* (1838) 8 Car. & P. (Eng.) 273, where it was sought to show that a grantor was insane at the time she executed the deed in controversy, and in which it was held that it was not competent to show that the

grantor's sister was insane. This ruling was made in answer to the objection that the court was not trying the sanity of the grantor's sister); paternal uncles or aunts (*People v. Smith* (Cal.); *People v. Harris* (Cal.); *State v. Simms* (Mo.); *State v. Baker* (Mo.); *People v. Sprague* (N. Y.) and *McLeod v. State* (Tex.) *supra*); a grand-uncle (*Russell v. State* (Ala.) *supra*, holding it error not to have allowed the defendant to prove by the "probate records that his granduncle had been declared a non compos mentis and had a legal guardian"); and blood cousins (*Russell v. State* (Ala.) *supra* [holding it error not to have allowed defendant to show that his cousin "had been committed to an insane asylum and died while an inmate of said institution"]; *Taylor v. State* (Ga.) and *Murphy v. Com.* (Ky.) *supra*; *State v. Baker* (1912) 246 Mo. 357, 152 S. W. 46. But see *State v. Pagels* (Mo.) as set out *infra*). In *Russell v. State* (Ala.) *supra*, where the court admitted evidence of the insanity of defendant's granduncle and cousin, it was said that while the relationship was rather remote, such remoteness merely affected the weight and probative force of the evidence, and not its competency.

However, it seems that, irrespective of the question of heredity, evidence as to the insanity of collateral kindred is inadmissible where it is not shown that the person whose sanity is in question is descended from that blood which bore the taint of insanity. This was the ground taken in *State v. Soper* (Mo.) *supra*, wherein evidence that a cousin of defendant's father was at one time an inmate of an insane asylum was excluded. And again, in *State v. Baker* (Mo.) *supra*, a similar ruling was made as to evidence of the insanity of second cousins and other collateral kindred of the defendant. And in *State v. Pagels* (1887) 92 Mo. 300, 4 S. W. 931, where evidence was offered to the effect that defendant's blood cousin (mother's brother's son) was insane and that such insanity was "hereditarily transmitted from the paternal ancestors," it was held that such evidence apparently was not material, since it did not appear that such "paternal ancestors" of the in-

sane cousin were the paternal ancestors of the defendant. In *Com. v. Brubaker* (1906) 82 Pa. Co. Ct. 844, it was said that evidence of the insanity of defendant's father's brother's children was too remote and uncertain to afford a basis for an inference of insanity in defendant's ancestry, especially where it was not shown whether such insanity came from the father's or the mother's side, the latter being, of course, of ancestry foreign to the defendant.

And on the other hand there seems to be no question, even in jurisdictions which generally exclude proof of insanity in one's blood relatives in the absence of a showing of a hereditary taint, but that evidence of insanity among a person's near blood relatives is admissible in corroboration of direct evidence tending to show the insanity of such descendant, where it is also established and found that the insanity of the ancestors is hereditary and of the same kind as that with which the person under consideration is alleged to be afflicted. See *People v. Gambacorta* (1910) 197 N. Y. 181, 90 N. E. 809, 18 Ann. Cas. 425 (holding that proof of "an hereditary tendency" might be shown); *State v. Kramer* (1853) 5 Clark (Pa.) 226, followed in *Com. ex rel. Haskell v. Haskell* (1868) 2 Brewst. (Pa.) 491; *Com. v. Smith* (1858; Pa.) 6 Am. L. Reg. (O. S.) 257, as set out in 14 Century Dig. col. 1989; *Com. v. Winnemore* (1867) 1 Brewst. (Pa.) 356 (holding that proof of insanity in the defendant's family was admissible provided it was found to be hereditary); and *Reg. v. Vyse* (1862) 3 Fost. & F. (Eng.) 247 (holding that proof as to the insanity of defendant's mother, grandfather, brother, uncle, great-aunt, and other blood relatives was admissible upon the question of defendant's insanity, there being evidence of the latter's insanity, and medical men having testified that insanity was hereditary). And see *Rex v. Ferrers* (1760) 19 How. St. Tr. (Eng.) 885, wherein evidence as to the insanity of defendant's maternal uncle and aunt was admitted as competent upon the issue raised by the defense that defendant was afflicted with hereditary insanity. G. J. C.

JAMES TIFFANY, Respt.,
v.
PACIFIC SEWER PIPE COMPANY, Appt.

California Supreme Court (Dept. No. 1)—July 5, 1919.

(— Cal. —, 182 Pac. 428.)

Master and servant — contract of employment — performance to "satisfaction" of employer.

Under a contract employing a glaze man by a brick manufacturer, which provides that the employee will not hold the employer liable under the contract in case the employer is unable to turn out glazed brick in quantities equal to the present quality "and satisfactory" to the employer, the employer's decision that he is not satisfied is conclusive on the employee and on the court.

[See note on this question beginning on page 1497.]

APPEAL by defendant from a judgment of the Superior Court for Los Angeles County (Nicol, J.) in favor of plaintiff in an action brought to recover damages for alleged breach of a contract of employment. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Swanwick & Donnelly, for appellant:

The discharge itself operates as a notice, and the employer is liable only for the amount of wages which would have been earned by the employee under the contract during the notice period had one been given.

Howay v. Going-Northrup Co. 6 L.R.A.(N.S.) 116, note; Fisher v. Monroe, 2 Misc. 326, 21 N. Y. Supp. 995; 26 Cyc. 1012; Derry v. Board of Education, 102 Mich. 631, 61 N. W. 61; Watson v. Russell, 149 N. Y. 388, 44 N. E. 161; Warth v. Liebovitz, 179 N. Y. 200, 71 N. E. 734.

Defendant's dissatisfaction gave absolute right to discharge, regardless of reasonableness of the dissatisfaction.

Parkside Realty Co. v. MacDonald, 166 Cal. 426, 137 Pac. 21; Allen v. Pockwitz, 103 Cal. 85, 42 Am. St. Rep. 99, 36 Pac. 1039; Church v. Shanklin, 95 Cal. 626, 17 L.R.A. 207, 30 Pac. 789; Simmons v. Zimmerman, 144 Cal. 256, 79 Pac. 451, 1 Ann. Cas. 850; Brown v. Retsof Min. Co. 127 App. Div. 368, 111 N. Y. Supp. 594; Hummel v. Stern, 21 App. Div. 544, 48 N. Y. Supp. 523; Erikson v. Ward, 266 Ill. 259, 107 N. E. 593, Ann. Cas. 1916B, 497; Kendall v. West, 196 Ill. 224, 89 Am. St. Rep. 317, 63 N. E. 638; Alexis Stoneware Mfg. Co. v. Young, 59 Ill. App. 229;

Stevens v. Chicago Feather Co. 178 Ill. App. 458; Schmand v. Jandorf, 175 Mich. 88, 44 L.R.A.(N.S.) 680, 140 N. W. 996, Ann. Cas. 1915A, 746; Brown v. Foster, 113 Mass. 136, 18 Am. Rep. 468; Williams Mfg. Co. v. Standard Brass Co. 173 Mass. 356, 53 N. E. 862; Corgan v. George F. Lee Coal Co. 218 Pa. 386, 120 Am. St. Rep. 891, 67 Atl. 655, 11 Ann. Cas. 838; Mackenzie v. Minis, 132 Ga. 323, 23 L.R.A.(N.S.) 1003, 63 S. E. 904, 16 Ann. Cas. 723; Gwynne v. Hitchner, 66 N. J. L. 97, 48 Atl. 571; Rossiter v. Cooper, 23 Vt. 522; Frary v. American Rubber Co. 52 Minn. 264, 13 L.R.A. 644, 53 N. W. 1156; Harder v. Marion County, 97 Ind. 455; Bush v. Koll, 2 Colo. App. 48, 29 Pac. 919; American Music Stores v. Kussel, L.R.A.1916F, 882, 146 C. C. A. 354, 232 Fed. 306.

Mr. Donald Gallagher, for respondent:

It is enough if there is evidence that the defendant ought reasonably to have been satisfied.

Oullahan v. Baldwin, 100 Cal. 648, 35 Pac. 310; Coplew v. Durand, 153 Cal. 278, 16 L.R.A.(N.S.) 791, 95 Pac. 38; Gladding, McB. & Co. v. Montgomery, 20 Cal. App. 276, 128 Pac. 790; Nolan v. Whitney, 88 N. Y. 648; Doll v. Noble, 116 N. Y. 230, 5 L.R.A. 554, 15 Am. St. Rep. 898, 22 N. E. 406;

Bowery Nat. Bank v. New York, 63 N. Y. 336; Keeler v. Clifford, 165 Ill. 544, 46 N. E. 248; Hummel v. Stern, 15 Misc. 27, 36 N. Y. Supp. 443; Hummel v. Stern, 21 App. Div. 544, 48 N. Y. Supp. 528; Sullivan v. Frazier, 40 App. Div. 288, 57 N. Y. Supp. 1008; Fischer v. Conhaim, 35 Misc. 125, 71 N. Y. Supp. 315; Brall v. Clausen, 35 Misc. 129, 71 N. Y. Supp. 311; Marcus v. Nelson, 119 N. Y. Supp. 1085; Greenberg v. Lumb, 129 N. Y. Supp. 182; Erikson v. Ward, 266 Ill. 259, 107 N. E. 598, Ann. Cas. 1916B, 497; Green v. Russell, 108 Mich. 638, 61 N. W. 885; Algate v. Lansing, 180 Mich. 484, 147 N. W. 561; Handy v. Bliss, 204 Mass. 513, 134 Am. St. Rep. 673, 90 N. E. 864; Tobin v. Kells, 207 Mass. 304, 93 N. E. 596; Dubinsky v. Wells Bros. Co. 218 Mass. 282, 105 N. E. 1004; Higgins Mfg. Co. v. Pearson, 146 Ala. 528, 40 So. 579; Waite v. Shoemaker & Co. 50 Mont. 264, 146 Pac. 736; Richison v. Mead, 11 S. D. 639, 80 N. W. 131.

Shaw, J., delivered the opinion of the court:

Plaintiff sued for damages caused by an alleged wrongful discharge of plaintiff from the defendant's service. The court below made findings and entered judgment in favor of the plaintiff for \$3,617.17, being the full amount prayed for in the complaint. Defendant appeals.

The defendant was engaged in the business of manufacturing glazed brick. Plaintiff was employed by the defendant as an "expert glazeman" for the term of three years, beginning February 10, 1914, under a contract in writing made on February 12, 1914, and modified on May 12, 1914. The first contract provided that Tiffany should be employed by the defendant as expert glaze man for one year at \$3,000 a year, with the privilege to defendant of changing the employment to three years at \$2,000 per year at any time within six months, "providing a product satisfactory to the defendant" was obtained within sixty days from the date of the contract. Tiffany began work, and continued until May 12, 1914, on which date a modification of the contract was made, whereby

the defendant employed Tiffany for three years from February 10, 1914, at \$175 per month, upon the following condition:

"In consideration of the above provisions Mr. Tiffany will not hold the Pacific Sewer Pipe Company liable under said contract, in case for any reason the Pacific Sewer Pipe Company are unable to turn out enameled and glazed brick in quantities equal to the present quality and satisfactory to the Pacific Sewer Pipe Company.

"In the latter case Mr. Tiffany is to have ninety days' notice before making a change."

Tiffany was discharged on May 10, 1915, without notice. The court found that up to that time plaintiff had fully performed his contract with a reasonable degree of skill, and that the defendant, after the making of the contract, was at all times able to turn out enameled and glazed brick in quantities equal to the quality which was being turned out on May 11, 1914, and which was satisfactory to said defendant. It is claimed that this finding is contrary to the evidence.

In the making of brick, the mud or clay is first pressed and molded to the shape desired, the glaze or enamel is then applied, and when a sufficient quantity to fill a kiln is thus prepared, the bricks are placed in the kiln and burned to the required degree. The principal duty of the plaintiff was to prepare and mix the glaze or enamel so that it would, when burned, have the hardness and other qualities necessary to make it durable and the brick salable. The glaze or enamel was a liquid into which the bricks were dipped so as to form a coat of the liquid on their surfaces.

It will be observed that the conditions expressed in the modification above quoted embraced three propositions: First, that the defendant should be able to turn out enameled and glazed brick in quantities; second, that the brick turned out should be equal to the present quality. This obviously refers to the provision of

the first contract that the three years' employment would be made if "a product was obtained within sixty days from its date which was satisfactory to the defendant." It appears from the evidence that at the time the second contract was made Tiffany was producing a quality of enameled and glazed brick which satisfied the defendant and induced it to enter into the second contract. The third proposition embraced in the added condition was that the enameled and glazed brick produced by the service of plaintiff should not only be equal in quality to that being produced on May 12, 1914, but also that in quantities and quality it should be "satisfactory to the Pacific Sewer Pipe Company." It is contended that there is no evidence to show that the defendant was satisfied with either the quantity or the quality of the enameled and glazed brick produced by the plaintiff for the defendant thereafter. The law governing the rights of the parties under a contract which requires one party to do something which is satisfactory to the other party is thus stated in 13 C. J. at page 675: "Contracts in which one party agrees to perform to the satisfaction of the other are ordinarily divided into two classes: (1) Where fancy, taste, sensibility, or judgment are involved; and (2) where the question is merely one of operative fitness or mechanical utility. In contracts involving matters of fancy, taste, or judgment, when one party agrees to perform to the satisfaction of the other, he renders the other party the sole judge of his satisfaction without regard to the justice or reasonableness of his decision, and a court or jury cannot say that such party should have been satisfied where he asserts that he is not." Section 768.

The next section declares: "The rule stated in the preceding section is also applied to cases of operative fitness or mechanical utility when the contract clearly provides that

performance shall be satisfactory to the promisor."

Similar statements will be found in 9 Cyc. at pages 618-620.

A different rule applies where the contract provides for the construction of a building or the like, in accordance with plans and specifications fixed by the contract, to the satisfaction of the owner or of an architect employed by him. In these cases it is usually held that if the contract is performed as required by the plans and specifications, the person whose judgment is invoked must accept the performance, and his mental condition as to satisfaction is immaterial. In such cases the question whether the work is satisfactorily done or not arises after the contract has been executed, either in whole or in part, and the satisfaction refers to that which is already done. Elliott states the rule to be that such a contract does not justify the promisor in arbitrarily, unreasonably, and capriciously claiming that he is not satisfied, in order to evade liability, "and the courts in doubtful cases, especially when the thing furnished is so attached to the real property of the buyer that its value would be lost to the seller, either wholly or in great part, unless paid for, are inclined to construe such a stipulation as one to furnish such a thing as ought reasonably to satisfy the buyer. But where there is nothing to justify the contrary construction, the general rule is that the party to be satisfied is the judge of his own satisfaction, subject only to the limitation in most jurisdictions that he must act in good faith, and if he does so act and is really dissatisfied, he may reject the work or the article on the ground that it is not satisfactory to him. This rule is particularly applicable where the subject-matter of the contract involves personal taste or feeling, as where an artist agrees to paint a portrait of another or some member of his family, to the satisfaction of such other or the like, but, as shown by the authorities cited in the last pre-

ceding note, the rule is not confined to such cases." 3 Elliott, Contr. § 1881. "It has been held that a contract for personal services, so long as they are satisfactory to the employer, may be terminated by him whenever he is dissatisfied in good faith. . . . Similar rulings have been made in cases of contracts to manufacture or furnish articles to the satisfaction of the other party, even though a reasonable man would or ought to have been satisfied." Id. § 1882.

The decisions in this state have not attempted to state the rule with reference to cases like the present. In *Copley v. Durand*, 153 Cal. 278, 16 L.R.A. (N.S.) 791, 95 Pac. 38, which involved a building contract, there were elaborate plans and specifications, as is usual in such cases, and the work was "to be done to the entire satisfaction of the owner and the architect." Before each payment was made a certificate was to be obtained signed by the architect. After the work was done both owner and architect stated that they were satisfied with it, but the architect refused to make a certificate. It appeared that the work was done conformably to the plans and specifications. The court merely held that under the circumstances the refusal of the certificate was unreasonable, and that the contractor was entitled to recover as if it had been issued. In *Gladding, McB. & Co. v. Montgomery*, 20 Cal. App. 279, 128 Pac. 792, the district court of appeal remarked that "a stipulation in a contract to perform to the satisfaction of one of the parties only calls for such performance as should be satisfactory to a reasonable person." This remark also referred to a building contract and with reference to portions of the work already done. Furthermore, it was an obiter dictum, the question not being involved in the case. In *Bryan Elevator Co. v. Law*, 31 Cal. App. 205, 160 Pac. 170, a building contract was also under consideration. The plaintiff agreed to construct an elevator in the defendant's building,

that its operation "shall give satisfaction in every particular," and that if the controlling device proved unsatisfactory, plaintiff would replace it with another "satisfactory to the owner." The court followed the rule applying to building contracts in general, and held that the contract only called "for such performance as should be satisfactory to a reasonable person." In other cases, where the question of judgment was involved, the opposite rule has been applied. In *Parkside Realty Co. v. MacDonald*, 166 Cal. 426, 137 Pac. 21, a real estate contract, the seller agreed to make the title satisfactory to the buyer and his attorneys. The court said that the question was "not whether the title was in fact a good or marketable one, but whether it was acceptable to the respondent and his attorneys," citing *Allen v. Pockwitz*, 103 Cal. 88, 42 Am. St. Rep. 99, 36 Pac. 1039, and *Church v. Shanklin*, 95 Cal. 627, 17 L.R.A. 207, 30 Pac. 789. The two cases cited involved a similar question and were to the same effect.

The contract in the present case was an executory one. The question does not involve the acceptance of any work already done by Tiffany under his employment. He was discharged from further employment because the defendant was not satisfied with the quality of his work. There is no sufficient evidence to support the finding that the defendant was satisfied with his work. During the time of his service many kilns of brick were burned which were glazed by him, and there is evidence as to some of these that the defendant's manager expressed himself satisfied. But there is no evidence, and no declaration or admission by any person authorized to speak for the defendant, that it was satisfied with his work as a whole. The contract authorized the defendant to discharge the plaintiff if his work was not satisfactory as a whole, although at times he might be producing brick of the finest quality. The object of the defend-

ant in employing the plaintiff was to obtain glazed and enameled brick for sale to its customers. The quantity of good brick produced out of each kiln, that is, the proportion of good brick to bad brick therein, was an important matter to them. For example, there is evidence that one customer agreed to buy 1,815 glazed brick known as "bullnosed," that is, with one or more corners rounded, that the glaze was mixed and applied by plaintiff, and 15,000 bricks were so glazed and burned in order to obtain 1,815 good ones. Other evidence fixed the number burned for that job at 5,000 to obtain the required number. Quality was also important, for if the glaze was not rightly mixed it would scale off, or crack, after being burned, and if the color or transparency was not satisfactory to purchasers the brick would not be as easily sold. All these matters would, of necessity, be determinable by the taste or judgment of the defendant's managers. And as their experience in the business was an essential element in the exercise of that judgment, it could not have been intended that some other person's judgment should determine the question of satisfactory performance. An express stipulation or necessary implication would be

necessary to give such a contract that meaning. This contract neither declares it directly, nor requires it by implication. The terms of the contract imply that the defendant was not compelled to be satisfied if the quality produced equaled that which was being produced at the time the contract was made. The addition of the phrase, "and satisfactory to the Pacific Sewer Pipe Company," implied a complete satisfaction, and authorized the defendant to reject the brick or discharge Tiffany under the terms of the contract if for any reason of any character the quality or quantity of the product was not satisfactory. We think the contract falls within the rule applicable to cases where the judgment of the promisor is involved, and that his decision that he is not satisfied is conclusive on the other party and upon the court to which the question is presented.

Master and servant—contract of employment—performance to "satisfaction" of employer.

The judgment for the amount awarded cannot be supported without the finding in question. None of the other findings supplies its place. The appeal must therefore be sustained.

The judgment is reversed.

We concur: Olney, J.; Lawler, J.

ANNOTATION.

Right to discharge one employed to produce a result of a more or less mechanical nature because his work is not to the "satisfaction" of the employer as the contract requires.

- I. In general, 1497.
- II. Decisions requiring reasonable grounds for dissatisfaction, 1500.
- III. Genuineness of dissatisfaction a question for the jury, 1500.
- IV. Conclusion, 1502.

I. In general.

There are many cases supporting the rule that where a contract of employment is conditional on the satisfactory character of the services rendered, the employer has the right to discharge the employee if the former

is actually dissatisfied with the work, irrespective of whether there is reasonable ground for such dissatisfaction, and the jury cannot inquire into the reasonableness of such dissatisfaction, provided it is genuine, and not set up in bad faith merely to conceal some other insufficient excuse. Eliminating such cases as those involving salesmen, actors, musicians, architects, and professional men generally, and referring only to those where the services were of a somewhat mechani-

cal nature, though perhaps not exclusively so, attention is called to the following cases supporting the above rule:

Alabama.—*Allen v. Mutual Compress Co.* (1893) 101 Ala. 574, 14 S. E. 362.

California. — *TIFFANY v. PACIFIC SEWER PIPE Co.* (reported herewith) ante, 1493.

Illinois.—*Alexis Stoneware Mfg. Co. v. Young* (1894) 59 Ill. App. 226; *Krompfer v. Spivek* (1912) 170 Ill. App. 621; *Stevens v. Chicago Feather Co.* (1913) 178 Ill. App. 455; *Weidenmann v. Mt. Hope Cemetery Asso.* (1915) 194 Ill. App. 464.

Michigan.—*Koehler v. Buhl* (1893) 94 Mich. 496, 54 N. W. 157; *Sax v. Detroit, G. H. & M. R. Co.* (1900) 125 Mich. 252, 84 Am. St. Rep. 572, 84 N. W. 314; *Schmand v. Jandorf* (1913) 175 Mich. 88, 44 L.R.A. (N.S.) 680, 140 N. W. 996, Ann. Cas. 1915A, 746.

Missouri.—*Williams v. Kansas City Suburban Belt R. Co.* (1900) 85 Mo. App. 103.

New Jersey.—*Gwynne v. Hitchner* (1901) 66 N. J. L. 97, 48 Atl. 571; *Gwynn v. Hitchner* (1902) 67 N. J. L. 654, 52 Atl. 997.

New York.—*Spring v. Ansonia Clock Co.* (1881) 24 Hun, 175; *Ginsberg v. Friedman* (1911) 146 App. Div. 779, 131 N. Y. Supp. 517 (contract expressly making employer sole judge); *Diamond v. Mendelsohn* (1913) 156 App. Div. 636, 141 N. Y. Supp. 775; *Messmer v. Henry W. Boettger Silk Finishing Co.* (1914) 160 App. Div. 519, 145 N. Y. Supp. 560 (satisfaction of the trade); *Daversa v. William H. Davidow's Sons Co.* (1915) 89 Misc. 418, 151 N. Y. Supp. 872; *Seitless v. Goldstein* (1917) 164 N. Y. Supp. 682; *De-lano v. Columbia Mach. Works & Malleable Iron Co.* (1917) 179 App. Div. 153, 166 N. Y. Supp. 103, affirmed in (1919) 226 N. Y. 660, 123 N. E. 862; *Rosen v. Druse* (1919) 178 N. Y. Supp. 259.

Pennsylvania.—*Corgan v. George F. Lee Coal Co.* (1907) 218 Pa. 386, 120 Am. St. Rep. 891, 67 Atl. 655, 11 Ann. Cas. 838.

The rule above indicated was applied in an action for breach of a con-

tract of employment of a clock case maker; where the contract provided that the employer should pay a stated salary provided the employee's work and services were to the employer's satisfaction. *Spring v. Ansonia Clock Co.* (N. Y.) supra.

The rule has been applied also in the case of employment of a color mixer by a manufacturer of wall paper, where the contract provided that the services should be rendered in a skilful and workmanlike manner and to the satisfaction of the employer. *Gwynn v. Hitchner* (1902) 67 N. J. L. 654, 52 Atl. 997; *Gwynne v. Hitchner* (1901) 66 N. J. L. 97, 48 Atl. 571.

The rule was applied in *Schmand v. Jandorf* (Mich.) supra, in the case of the employment of an expert candy maker, where the contract provided that the employment should continue for a certain period, "subject to the general control and to the satisfaction" of the employer, and that the employee should, "subject to the control of and to the satisfaction of" the employer, perform all of his duties as a candy maker, and should serve the employer diligently and according to his best ability in all respects.

In *Corgan v. George F. Lee Coal Co.* (Pa.) supra, the rule indicated above was applied to a contract of employment of a mine foreman, where the contract provided for employment for so long a time, up to five years, as the employee satisfactorily performed his duties as foreman.

And the rule was applied in the case of employment of one as landscape engineer and gardener and superintendent of cemetery grounds, where the contract provided for payment at stated monthly periods during the term of employment or such portion of the term as the services of the employee should be satisfactory to the employer. *Weidenmann v. Mt. Hope Cemetery Asso.* (1915) 194 Ill. App. 464.

Where a contract to sew and tie cotton bales for a specified period contained a provision to "guarantee to give satisfaction in sewing, tying, or any other work" that the employee might be required to do, it was held

in *Allen v. Mutual Compress Co.* (1893) 101 Ala. 574, 14 So. 362, that the employer was invested with full power to decide whether the services were satisfactory, and that the reasonableness of the grounds of dissatisfaction was not a matter for inquiry by the court.

Under a contract of employment by which the employee agreed to perform the duties of foreman completely and energetically to the best of his ability "and complete satisfaction" of his employer, the employer may discharge the employee because the latter does not perform his duties to the employer's complete satisfaction, and it is not proper to submit to the jury the question whether the employer ought to have been satisfied. *Diamond v. Mendelsohn* (1913) 156 App. Div. 686, 141 N. Y. Supp. 775.

A contract of employment of a brewer for a year if he did his work well, interpreted to mean to the satisfaction of the employer, was held in *Finger v. Koch & S. Brewing Co.* (1888) 18 Mo. App. 310, to be terminable at the pleasure of the employer.

In an action against a manufacturing company for breach of a contract of employment whereby the employee agreed to perform such labor as might be required of him in the erection of buildings and the preparation of a pottery plant, and that if his work should not prove satisfactory to the officers of the company they should have the right to discharge him, it was held error to instruct the jury that the employer could not legally discharge the employee unless it was shown that the employer not only acted in good faith, but in a reasonable, and not in an arbitrary, manner, since from this instruction the jury might infer that unless the dissatisfaction was founded in reason, the employer had no right to discharge the employee, and that it would be arbitrary to discharge him if there were no other good grounds for the discharge than the feeling of dissatisfaction. *Alexis Stoneware Mfg. Co. v. Young* (1895) 59 Ill. App. 226.

Where a contract of employment of a silk finisher provided that the work

should be done in a skilful and competent manner, "satisfactory to the trade and customers" of the employer, and that, if the work was not done satisfactory to the trade and customers, the employer should have the right at any time to discharge the employee, it was held that it was a sufficient defense to an action for breach of the contract that the employer's customers were dissatisfied, without showing that cause for dissatisfaction actually existed. *Messmer v. Henry W. Boettger Silk Finishing Co.* (1914) 160 App. Div. 519, 145 N. Y. Supp. 560.

Under a contract employing a glaze man by a brick manufacturer, which provides that the employee will not hold the employer liable under the contract in case the employer is unable to turn out glazed brick in quantities equal to the present quality "and satisfactory" to the employer, the employer's decision that he is not satisfied is conclusive on the employee and on the court. *TIFFANY v. PACIFIC SEWER PIPE CO.* (reported herewith) ante, 1493.

Attention is called also to several cases bearing on the question under consideration, although the contracts were not, strictly speaking, of the same nature as the others cited in the annotation.

Thus, where the contract was to employ the plaintiff as brakeman on a train, as long as his services were satisfactory, the court, in *Sax v. Detroit, G. H. & M. R. Co.* (1900) 125 Mich. 252, 84 Am. St. Rep. 572, 84 N. W. 814, stated that the employer had the right to terminate the employment whenever the plaintiff did not perform his duties to the employer's entire satisfaction, and that under the rule as settled in that state the reasons for or justice of the employer's satisfaction could not be inquired into.

And where, in consideration of a release for a claim for personal injury sustained by a railway conductor, the railway company agreed to re-employ the conductor so long as his services should prove satisfactory to the company, the court, in *Williams v. Kansas City Suburban Belt R. Co.* (1900) 85 Mo. App. 103, construed the con-

tract as meaning that faithful and efficient service did not meet the requirements, but that the railway company would have the right to dispense with the employee's services if they were not satisfactory to it, even though the dissatisfaction was unreasonable and capricious, provided such dissatisfaction was honestly entertained; the railway company, however, had no right falsely and fraudulently, merely for the wilful purpose of breaking its contract, to assert that the services were not satisfactory.

Attention is called also, as supporting the above rule, to the following cases, among possible others of a similar nature, which concern contracts involving somewhat more of taste and fancy than those above cited. *Krompier v. Spivek* (1912) 170 Ill. App. 621 (designer of ladies' dresses and capes); *Stevens v. Chicago Feather Co.* (1913) 178 Ill. App. 455 (milliner); *Koehler v. Buhl* (1893) 94 Mich. 496, 54 N. W. 157 (furrier employed as a fitter and designer); *Ginsberg v. Friedman* (1911) 146 App. Div. 779, 181 N. Y. Supp. 517 (designer and cutter in a cloak and suit factory); *Daversa v. William H. Davidow's Sons Co.* (1915) 89 Misc. 418, 151 N. Y. Supp. 872 (designer of women's clothing); *Beck v. Only Skirt Co.* (1917) 176 App. Div. 867, 168 N. Y. Supp. 786 (designer and maker of ladies' skirts).

The note does not include cases applying the above rule, but not involving the relation of master and servant, for the reason that other principles are involved in the latter class of cases. As an illustration of this class, see *Seitless v. Goldstein* (1917) 164 N. Y. Supp. 682, where a garment manufacturer entered into a contract with the defendant to make garments for a certain period in a proper and workmanlike manner and to the entire satisfaction of the defendant, and it was held erroneous to instruct the jury that the defendant must be fair and act reasonably in judging the work, and to leave to the jury the question whether the defendant ought to have been satisfied, the court taking the position that if the dissatisfaction of the defendant was real and not assumed,

it was of no consequence whether or not the jury thought that the defendant should have been satisfied.

II. Decisions requiring reasonable grounds for dissatisfaction.

There are, of course, many cases of contracts of sales of chattels, which hold that the contract provision to the effect that the article sold shall be satisfactory requires that the dissatisfaction shall be reasonable, in order to excuse a breach of the contract. And this conclusion has been reached in a few cases involving the relation of master and servant, some of which, however, do not come within the scope of the present annotation.

In *Bridgeford & Co. v. Meagher* (1911) 144 Ky. 479, 139 S. W. 750, the court held that, in view of the situation of the parties at the time the contract of employment was made, a provision in a contract to employ the plaintiff as foreman of a molding shop, with a guaranty of a steady position as such foreman for a specified term "or as long as he performs his duties in a successful or satisfactory manner," was properly interpreted as long as he performed his work in a "good, efficient, and workmanlike manner." The particular circumstances which the court considered were that the plaintiff at the time the contract was made was holding the same position guaranteed him by the contract; that the contract was made at a time when the defendant was converting his establishment into a nonunion plant and as an inducement for the plaintiff to remain in the employment; also that the contract was subject to the condition of the continued existence of the employer company,—all of these conditions showing an intent that the employee should be given employment during the specified term if his services were performed in an efficient and workmanlike manner.

See in this connection IV. *infra*, p. 1502.

III. Genuineness of dissatisfaction a question for the jury.

Assuming that, under a contract of employment where services satisfactory to the employer are required, he

is the sole judge as to whether the services are satisfactory, and the jury cannot pass on the reasonableness of his dissatisfaction, it is proper to submit to the jury, where the evidence is conflicting, the questions whether the dissatisfaction is genuine or merely feigned, and whether it was the cause of the discharge. There are many authorities supporting this proposition which are not within the scope of the annotation, for the reason that the employment could not be said to be one for the production of a mechanical result. But the following cases will illustrate its application in the class of cases under consideration: *Gwynn v. Hitchner* (1902) 67 N. J. L. 654, 52 Atl. 997; *Summers v. Colver* (1899) 38 App. Div. 553, 56 N. Y. Supp. 624; *Diamond v. Mendelsohn* (1913) 156 App. Div. 636, 141 N. Y. Supp. 775; *Zahler v. Mann* (1916) 97 Misc. 19, 160 N. Y. Supp. 1085; *Beck v. Only Skirt Co.* (1917) 176 App. Div. 867, 163 N. Y. Supp. 786; *Delano v. Columbia Mach. Works & Malleable Iron Co.* (1917) 179 App. Div. 153, 166 N. Y. Supp. 103, affirmed in (1919) 226 N. Y. 660, 123 N. E. 862; *Beiner v. Goetz* (1918) 81 Misc. 244, 142 N. Y. Supp. 580; *Rosen v. Druss* (1919) 178 N. Y. Supp. 259.

Where an automobile expert and mechanic who had obtained a patent for a starting and lighting device on automobiles, and was employed in connection with the manufacture of this patented device, entered into a contract of employment for a year, provided his services were satisfactory to the employer, it was held that the genuineness of the alleged dissatisfaction was a question of fact for the jury, where, although the employer's evidence was to the effect that the plaintiff was discharged because of unsatisfactory services, the plaintiff's evidence was in effect that the discharge was because the employer desired to enter upon the manufacture of munitions, and to discontinue the manufacture of the device in question. *Delano v. Columbia Mach. Works & Malleable Iron Co.* (1917) 179 App. Div. 153, 166 N. Y. Supp. 103.

And where a contract for the employment of a color mixer by a manufacturer of wall paper provided that the services should be rendered in a skilful and workmanlike manner and to the satisfaction of the employer, it was held in *Gwynn v. Hitchner* (1902) 67 N. J. L. 654, 52 Atl. 997, that, although the employer in work of this kind, the result of which was to some extent a matter of taste, reserves to himself by such a contract the right to pass upon the excellence of the work, and it should not be left to the jury to say whether the employer ought to have been satisfied, evidence might properly be admitted on the question whether the employer was dissatisfied and whether such dissatisfaction was the cause of the employee's discharge; and that where the evidence on these questions was in conflict, the direction of a verdict for the employer in an action for breach of the contract of employment was erroneous.

Assuming that a publishing company which employs a foreman of its pressrooms on condition that the management of the presswork is "artistically and financially satisfactory" is the sole judge whether this condition is fulfilled, its decision must be exercised in good faith; and it cannot discharge the employee for the purpose of reducing expenses, and arbitrarily say that it was not satisfied with the artistic and financial management of its pressroom by the employee; and where the evidence is conflicting as to whether the employer was dissatisfied and whether this was the cause of the employee's discharge, or whether the dismissal was for other reasons, the question is for the jury. *Summers v. Colver* (1899) 38 App. Div. 553, 56 N. Y. Supp. 624.

Where there was evidence that a foreman's discharge was because the season was slack and the employer wished to cut down expenses, and not because the employee's services were not to the "satisfaction" of the employer, as the contract required, it was held that the question as to whether the discharge was because the work was unsatisfactory was for the jury.

Diamond v. Mendelsohn (1913) 156 App. Div. 636, 141 N. Y. 775.

In *Beiner v. Goetz* (1913) 81 Misc. 244, 142 N. Y. Supp. 530, the evidence was held to sustain a finding in an action for breach of contract of employment of the plaintiff as an expert designer, that the expressed dissatisfaction of the defendant was not real, but was a mere subterfuge.

IV. Conclusion.

A study of the cases involving so-called "satisfaction contracts," that is, contracts for a specified period, with a proviso that the services are to be to the satisfaction of the employer, discloses the fact that the courts have confused the cases involving the relation of master and servant with those of mere sales; and they have attempted to divide all these cases into two classes, as in *Isbell v. Anderson Carriage Co.* (1912) 170 Mich. 304, 136 N. W. 457, in which, on facts not within the scope of the note, the court said: "If parties voluntarily assume the obligations and hazards of a satisfaction contract, their legal rights are to be determined and adjudicated according to its provisions. It is elementary that courts cannot make contracts for parties nor relieve them of the consequences of their contracts, however ill-advised. In many cases of this nature which have been before various tribunals, there are recognized two quite well-defined classes,—one where the personal taste, feeling, sensibility, fancy, or individual judgment of the party to be satisfied is especially involved; the other where mechanical utility or operative fitness in relation to which some standard is available is bargained for. In the former class the authorities preclude disputing the propriety or reasonableness of the declaration of dissatisfaction on the part of the individual entitled to exercise it. It is said to be with him purely a personal matter of which he is made the sole judge. It being his right to say whether he is satisfied or not, it cannot be left to another to say that he ought to be satisfied. In the latter class of cases the authorities are more conflicting."

Seldom, however, have the courts in a case involving the relation of master and servant applied the doctrine in actions for breach of the contract that reasonable cause for dissatisfaction must exist. As was said in *Glyn v. Miner* (1894) 6 Misc. 687, 56 N. Y. S. R. 341, 27 N. Y. Supp. 341: "The relations of master and servant are private, confidential, intimate, and personal. . . . Here we have a stipulation that the party is to perform the duties of his position so as to be deemed satisfactory by the employer, and we find in that an equivalent to the agreement that his engagement is dependent upon his service being personally agreeable to his employer."

Attention is called to the fact that in some cases the question whether there must be reasonable cause for dissatisfaction is in no way dependent on the question whether taste or fancy is involved. Other considerations of a personal nature may be controlling. Thus, in an action by a traveling salesman for breach of contract providing that the plaintiff should perform his duties to the "entire personal satisfaction" of the employer, the court stated in *Kramer v. Wien* (1915) 92 Misc. 159, 155 N. Y. Supp. 193, that the services being those of an ordinary traveling salesman, no question of the taste or fancy was involved; and that it was merely necessary to apply the ordinary rule that defendant had the right to discharge the plaintiff if he was in fact honestly dissatisfied with his work and did not use such dissatisfaction as a mere pretense.

In view of the personal relationship between master and servant and the various possible grounds for dissatisfaction of an employer with a skilful employee, who, although he produced an article of first-class quality, might, for instance, conceivably be detrimental to the business because of his effect on other employees, and the difficulty of a jury's judging of questions of this kind, it seems that the reasonableness of the employer's dissatisfaction should seldom, if ever, be a question for the jury, unless there are special provisions in the contract or extraordinary circumstances in the

situation of the contracting parties requiring such a construction of the contract. And it appears to be clear that a case holding that reasonable cause for dissatisfaction must exist in order to justify rejection by the buyer

in case of a contract of sale of a chattel is distinguishable on principle from the usual case of continuing personal services in contracts of employment involving the relation of master and servant.
R. E. H.

J. F. SANDERS, Appt.,
v.
SUTLIVE BROTHERS & COMPANY et al.

Iowa Supreme Court—October 14, 1919.

(— Iowa, —, 174 N. W. 267.)

Life tenant — effect of lease by — rights of remainderman.

1. To entitle a lessee of a life tenant to continued possession after the death of the life tenant he must show a contract establishing the relation of landlord and tenant between himself and the remainderman.

[See note on this question beginning on page 1506.]

Landlord and tenant — adoption of lease — by remainderman.

2. A new lease is not necessary upon death of a life tenant to establish the relation of landlord and tenant between the tenant and remainderman, but the original lease may be adopted by the parties.

Judgment — law of case — finding on first appeal.

3. A finding of adoption by remaindermen of a lease by the life tenant is binding on subsequent appeal, unless additional evidence warrants a different conclusion.

[See 2 R. C. L. 224, 225.]

Landlord and tenant — adoption of lease — acceptance of rent.

4. The acceptance for a long period by remaindermen of rents under a lease by the life tenant after the lat-

ter's death may, in connection with all the circumstances of the case, justify a finding of adoption of the lease.

[See 16 R. C. L. 602.]

Life tenant — receipt of rent by administrator of life tenant.

5. The receipt by the administrator of the life tenant of rent continued occupation of the premises after death of the life tenant, with the express understanding that it is not to apply on a renewal lease executed by the life tenant, is not a ratification or adoption of the new lease on the part of the remainderman.

Appeal — findings of court — conclusiveness.

6. The findings of fact by a court sitting without a jury are as conclusive on appeal as the verdict of a jury.

[See 2 R. C. L. 206.]

APPEAL by plaintiff from a judgment of the District Court for Lee County (Hamilton, J.) in favor of defendants in an action brought to recover possession of certain real property, and for damages. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. William C. Howell and John M. Dawson, for appellant:

The decision of this court (163 Iowa, 172), is not binding on the trial court, when the evidence in the case is materially changed on a trial anew, when the evidence made a changed state of facts.

Sanders v. Sutlive Bros. 175 Iowa, 582, 154 N. W. 610; Landis v. Interur-

ban R. Co. 173 Iowa, 466, 154 N. W. 607.

Upon the last trial the appellant had the right and was able to, and did, make out a case, upon which it was the duty of the trial court to give him judgment.

Artz v. Chicago, R. I. & P. R. Co. 38 Iowa, 294; Russ v. American Cereal Co. 110 Iowa, 743, 81 N. W. 796, 121

Iowa, 641, 96 N. W. 1092, 7 Am. Neg. Rep. 234; Vogt v. Grinnell, 183 Iowa, 364, 110 N. W. 603; Sanders v. Sutlive Bros. *supra*.

Upon the death of Mrs. Rigler, March 6, 1910, the further occupancy of the lessees with the consent of the owners would be assumed to be as tenants at will.

O'Brien v. Troxel, 76 Iowa, 760, 40 N. W. 704; German State Bank v. Heron, 111 Iowa, 25, 82 N. W. 430; Andrews v. Marshall Creamery Co. 118 Iowa, 598, 60 L.R.A. 399, 96 Am. St. Rep. 412, 92 N. W. 706.

A party is not allowed to impeach or discredit his own witness.

Hall v. Manson, 99 Iowa, 698, 34 L.R.A. 207, 68 N. W. 922; Hunt v. Hoover, 34 Iowa, 79; Hall v. Chicago, R. I. & P. R. Co. 84 Iowa, 816, 51 N. W. 150; Darr v. Darrow, 120 Iowa, 29, 94 N. W. 245; Smith v. Dawley, 92 Iowa, 312, 60 N. W. 625; Humble v. Shoemaker, 70 Iowa, 223, 80 N. W. 492.

Mr. F. T. Hughes for appellees.

Ladd, Ch. J., delivered the opinion of the court:

Lorenz Rigler died intestate October 13, 1903, seised of the west one half of lot 3 of block 29 in the city of Keokuk. He was survived by his wife, Margaret Rigler, and their two daughters, Naoma Webber and Sarah Speisz. On October 28, 1903, these daughters executed a deed to their mother, Margaret Rigler, of the above-described real estate for her natural life, providing therein that she should receive all income and profits therefrom during said period, and upon her death said real estate should revert to the grantors. Thereafter Margaret Rigler entered into a contract leasing the premises to the defendants for a period of five years from March 15, 1905, and on September 18, 1908, executed another lease of the premises to the defendants for a period of ten years, to commence at the expiration of the previous lease, to wit, May 15, 1910. The lessor, Margaret Rigler, died intestate March 6, 1910, a few days more than two months prior to the expiration of the first lease. One Neusch was appointed administrator of her estate.

Whether the widow retained a

distributive one-third interest in the premises and the daughters acquired the same by inheritance, or in some way her one-third interest was converted into a life estate with the remainder in the daughters, is not touched in the argument. The cause is submitted on the theory that Mrs. Rigler was a tenant for life, and therefore the leases terminated upon her death, and the daughters, as remaindermen, were entitled to immediate possession. *Re Hubbell Trust*, 135 Iowa, 637, 13 L.R.A. (N.S.) 496, 113 N. W. 512, 14 Ann. Cas. 640. Conceding this to be so, the issue is whether subsequently the daughters and defendants adopted the ten-year lease as of their own. That portion of the lease after the lessor's death only was void (*Hubbell v. Hubbell*, 172 Iowa, 538, 154 N. W. 867), and the daughters as remaindermen and the lessees did not occupy the relation of landlord and tenant. If that relation ever existed, it must have sprung from a subsequent contract, either expressed or implied, between them. This was the court's view in *Lowrey v. Reef*, 1 Ind. App. 244, 27 N. E. 626, where it was said that, "to entitle the appellee to any other interest in the lands for a period after the death of the lessor, he must have shown that a contract existed between himself and the appellants by virtue of which there arose the relation of landlord and tenant, and that this relation existed at the time when the alleged trespasses occurred."

Life tenant—
effect of lease
by—rights of
remainderman.

Such a contract need not necessarily be one entered anew, but may as well be an agreement between other parties and subsequently adopted by the remaindermen and defendants as their own. Was this done by the remaindermen and the lessees of the life tenant? On the former appeal the evidence was held to conclusively establish such adoption. 163 Iowa, 172,

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(— Iowa, —, 174 N. W. 287.)

143 N. W. 492, 175 Iowa, 582, 154 N. W. 610. However much that ruling may be ques-

Judgment—
law of case—
finding on
first appeal.

tioned, it is the law of the case and must stand, unless it can

be said other evidence subsequently adduced warranted a different finding. Something more than mere continued occupation was essential to the ratification or adoption of the ten-year lease. McIntosh v. Lee, 57 Iowa, 356, 10 N. W. 895. So, too, had the defendants merely been holding over with the consent of the landlord, payment of rent as provided in the lease could not well be construed as evidence of ratification, for the lessee in that situation would be under obligation so to pay the rent stipulated in the lease. German State Bank v. Herron, 111 Iowa, 25, 82 N. W. 430. But the remaindermen were not landlords, and there was no lease between them and defendants, and the ruling in the cited case is not applicable. By continuing in possession, the lessees became liable on an implied promise, for a quantum meruit, not for the rent stipulated in the lease, terminated and void as to the present owners. Accepting the rent according to the terms of the void lease, then, without other arrangement, was in the nature of a recognition of its binding force, and, if continued long enough, might, in connection with other

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tenant—
adoption of
lease—accept-
ance of rent.

circumstances, warrant the inference that the parties had adopted the lease as expressing the un-

derstanding between them. Such was the holding on the former appeal. The evidence on which that decision was based appears in the opinion.

On the last trial the testimony of Neusch contained in two depositions was introduced. In the first of these, he swore that he told H. L. Sutlive that the ten-year lease would not stand, and was void; that he collected the rent as administra-

tor, and because he supposed it his duty as such to do so; that he had nothing to do with the daughters about the rent; that he never acted as agent for them, and had no authority from them to collect the rent; that he accounted for the rent as administrator, and in no other manner; that he was advised by his attorney not to accept rent on the ten-year lease or act as agent for the daughters; that he was agent for them in the sale of the property to plaintiff; that he told the latter that there was no lease on the property, and that he ought not to recognize the ten-year lease. The Sutlives testified that at the beginning of the ten-year lease they called on Neusch and asked him if he intended to carry out the ten-year lease, to which he replied that he had no thought of not doing so and would make them no trouble; that the heirs looked on the lease as their mother did; that they then explained to him that the check for a month's rent handed to him was for the first month on the ten-year lease. This conversation was denied by Neusch, though admitting the call. This evidence was not before the court on the former trial, and it is plain that, with such additional evidence before the court, a different conclusion might be reached. If Neusch received rent only as administrator, and not as agent of the daughters, and such rents were paid and re-

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receipt of rent
by administra-
tor of life
tenant.

ceived for the use of the premises, and not as rent on the ten-year lease, and this was so understood between him and defendants, then there was no ratification or adoption of the ten-year lease, and no lease on the property to assume, and the reference to contracts in the deed might have been found to relate to that concerning the furnace. But the court was not bound so to find, as appears from the testimony of the Sutlives, and evidence alluded to in the former opinion.

From a careful comparison of the records at the two trials, we reach the conclusion that the evidence first adduced at the last trial, considered in connection with that on the former trial, read in pursuance of a stipulation, raised an issue of fact which should have been submitted to a jury, had it not been waived.

The finding of the court on an issue of fact is as conclusive as the verdict of a jury, and for this reason its finding and judgment cannot be disturbed.

Appeal—Findings of court—conclusiveness.

Affirmed.

Weaver, Gaynor, and Stevens, JJ., concur.

ANNOTATION.

Death of life tenant as affecting rights under lease executed by him.

- I. View that death of life tenant terminates lease:
 - a. General rule, 1506.
 - b. Lessee as trespasser, 1507.
 - c. Lessee as tenant at sufferance, 1508.
 - d. Lessee as tenant at will, 1508.
 - e. Effect as regards rents, 1508.

I. View that death of life tenant terminates lease.

a. General rule.

In the majority of jurisdictions it is held that the death of a life tenant terminates a lease executed by him, though there is some disagreement (see *infra*, the three following subdivisions) as to the resulting status of his lessee.

Alabama.—Price v. Pickett (1852) 21 Ala. 741; Terrell v. Reeves (1893) 108 Ala. 264, 16 So. 54.

California.—Blaeholder v. Guthrie (1911) 17 Cal. App. 297, 119 Pac. 524.

Connecticut.—Bradley v. Bailey (1888) 56 Conn. 374, 1 L.R.A. 427, 7 Am. St. Rep. 316, 15 Atl. 746.

Illinois.—Woman's American Baptist Home Mission Soc. v. Rayburn (1916) 203 Ill. App. 577; Hoagland v. Crum (1885) 113 Ill. 365, 55 Am. Rep. 424.

Indiana.—Dorsett v. Gray (1884) 98 Ind. 273; Henry v. Stevens (1886) 108 Ind. 281, 9 N. E. 356; Lowery v. Reef (1890) 1 Ind. App. 244, 27 N. E. 626.

Iowa.—Carman v. Mosier (1898) 105 Iowa, 367, 75 N. W. 323; Gudgel v. Southerland (1902) 117 Iowa, 309, 90 N. W. 623; Ray v. Young (1913) 160 Iowa, 613, 46 L.R.A. (N.S.) 947, 142 N. W. 393, Ann. Cas. 1915D, 258; SAN-

I.—continued.

f. Rights as regards emblements, 1512.

g. Rights as regards fixtures, 1513.

h. Waiver of forfeiture of lease, 1514.

II. View that death of life tenant does not terminate lease, 1515.

DERS v. SUTLIVE BROS. (reported herewith) ante, 1503.

Kentucky.—Haynes v. Harris (1892) 14 Ky. L. Rep. 303; Duker v. Kaelin (1906) 28 Ky. L. Rep. 900, 90 S. W. 959. Compare Grigsby v. Cleary (1827) 5 T. B. Mon. 514; Norris v. Cheatham (1884) 6 Ky. L. Rep. 223.

Maryland.—Bevans v. Briscoe (1812) 4 Harr. & J. 139.

Massachusetts.—Page v. Wight (1867) 14 Allen, 182.

Michigan.—Harrington v. Sheldon (1917) 196 Mich. 383, 163 N. W. 64.

Mississippi.—Stewart v. Matheny (1888) 66 Miss. 21, 14 Am. St. Rep. 538, 5 So. 387.

Missouri.—Hamilton v. Wright (1895) 28 Mo. 199; Matlack v. Kline (1856) — Mo. App. —, 190 S. W. 408.

Nebraska.—Guthmann v. Vallery (1897) 51 Neb. 824, 66 Am. St. Rep. 475, 71 N. W. 731; Edghill v. Mankey (1907) 79 Neb. 347, 11 L.R.A. (N.S.) 688, 112 N. W. 570.

New Jersey.—Bidwell v. Piercy (1906) 71 N. J. Eq. 83, 63 Atl. 261.

New York.—Torrey v. Torrey (1856) 14 N. Y. 430; Barson v. Mulligan (1910) 198 N. Y. 24, 90 N. E. 1127; McIntyre v. Clark (1894) 6 Misc. 377, 26 N. Y. Supp. 744; Snedecker v. Thompson (1899) 26 Misc. 160, 56 N. Y. Supp. 775; Hinton v. Bogart (1912)

78 Misc. 46, 187 N. Y. Supp. 697; Hinton v. Bogart (1915) 166 App. Div. 155, 151 N. Y. Supp. 796; Nesbitt v. Thompson (1916) 93 Misc. 251, 157 N. Y. Supp. 166; Coakley v. Chamberlain (1869) 38 How. Pr. 483; Williams v. Alt (1918) 170 N. Y. Supp. 506.

Ohio.—Van Hayes v. West (1888) 2 Ohio C. D. 37; Hallick v. Stober (1860) 11 Ohio St. 482; Capelle v. Wieman (1907) 29 Ohio C. C. 542.

Pennsylvania.—Lake Erie Gas Coal & Coke Co. v. Patterson (1898) 184 Pa. 364, 39 Atl. 68; White v. Arndt (1836) 1 Whart. 90; Fee v. Lu'z (1916) 75 Pa. Super. Ct. 188.

Tennessee. — Arnold v. Hodges (1849) 10 Humph. 40; Collins v. Crownover (1900) — Tenn. —, 57 S. W. 357; Turner v. Turner (1915) 182 Tenn. 592, 179 S. W. 182.

West Virginia.—Jones v. Shufflin (1898) 45 W. Va. 729, 72 Am. St. Rep. 848, 31 S. E. 975; Shufflin v. House (1898) 45 W. Va. 731, 72 Am. St. Rep. 851, 31 S. E. 974; Holden v. Boring (1902) 52 W. Va. 37, 43 S. E. 86.

England.—Hawkins v. Kelly (1803) 8 Ves. Jr. 309, 32 Eng. Reprint, 373; Pagget v. Gee (1753) 9 Mod. 482, 88 Eng. Reprint, 589; Clarkson v. Scarborough (1819) 1 Swanst. 354, 86 Eng. Reprint, 413; Vernon v. Vernon (1789) 2 Bro. Ch. 659, 29 Eng. Reprint, 366; Wykham v. Wykham (1810) 3 Taunt. 331, 128 Eng. Reprint, 126; Whitfield v. Pindar (1781) 2 Bro. Ch. 662, 29 Eng. Reprint, 367; Ex parte Smyth (1818) 1 Swanst. 337, 86 Eng. Reprint, 412; Hool v. Bell (1842) 1 Ld. Raym. 172, 91 Eng. Reprint, 1011; Strafford v. Wentworth (1720) Prec. in Ch. 555, 24 Eng. Reprint, 249; Rockingham v. Penrice (1711) 1 P. Wms. 177, 24 Eng. Reprint, 345, 2 Salk. 578, 91 Eng. Reprint, 487; Myles v. Willoughby (1596) Cro. Eliz. pt. 2, p. 547, 78 Eng. Reprint, 793; Lambert v. Austin (1596) Cro. Eliz. pt. 1, p. 332, 78 Eng. Reprint, 582; Prescott v. Boucher (1832) 3 Barn. & Ad. 857, 110 Eng. Reprint, 312; Turner v. Lee (1792) Cro. Car. 471, 79 Eng. Reprint, 1007; Jenner v. Morgan (1717) 1 P. Wms. 392, 24 Eng. Reprint, 439. Compare Haines v. Welch (1868) L. R. 4 C. P. 91, 38 L. J. C. P.

N. S. 118, 19 L. T. N. S. 422, 17 Week. Rep. 163.

A lease made by a tenant for life terminates 'eo instante' on his death, and if there is a covenant, express or implied, for quiet enjoyment, the estate of the lessor is liable for a breach thereof. Duker v. Kaelin (1906) 28 Ky. L. Rep. 900, 90 S. W. 959; Hamilton v. Wright (Mo.) supra; Snedecker v. Thompson (1899) 26 Misc. 160, 56 N. Y. Supp. 775; McIntyre v. Clark (1894) 6 Misc. 377, 26 N. Y. Supp. 744.

It was held in Bidwell v. Piercy (N. J.) supra, that where a wife died, her husband and children surviving her, and the husband leased the premises of which the wife died seised, the children not joining in the lease, on the death of the husband, the lease terminated. See also the reported case (SANDERS v. SUTLIVE BROS. ante, 1503) wherein a lease by a surviving wife is held to terminate on her death.

But in Haines v. Welch (Eng.) supra, it appeared that a lessor, having only a life interest in the land, died during the term of the tenancy; the remainderman, at the expiration of the current year, distrained for the portion of the rent due after the death of the lessor. It was held that, under § 1 of 14 & 15 Vict. chap. 25, although the tenancy was determined by the death of the life tenant, the lease would be extended until the expiration of the current year, instead of claims to emblements, and the succeeding owner should be entitled to recover from the lessee a fair portion of the rent, for the period after the death of the life tenant.

b. Lessee as trespasser.

It has been held that a lessee of a life tenant becomes a trespasser after the death of the lessor. Torrey v. Torrey (1856) 14 N. Y. 430, wherein it appeared that the undertenant became a trespasser by holding over after the death of the lessor, a life tenant, and was not entitled to notice to quit.

In Williams v. Alt (1918) 170 N. Y. Supp. 506, it appeared that the life tenant leased the premises for a term of ten years and died before the expiration of the term. The remaindermen served notice on the lessee to

quit, and on his failure to do so, brought proceedings to remove him summarily. It was held that though the lease expired by the death of the life tenant, the lessee could not be summarily removed as a tenant at sufferance under Code Civ. Proc. § 2231; that his holding over amounted to a trespass under the provisions of § 1664, and he might be ousted by an act of ejectment.

c. Lessee as tenant at sufferance.

In some jurisdictions a lessee becomes a tenant at sufferance by holding over after the death of the life tenant. *Page v. Wight* (1867) 14 Allen (Mass.) 182; *Harrington v. Sheldon* (1917) 196 Mich. 388, 163 N. W. 64; *Guthmann v. Vallery* (1897) 51 Neb. 824, 66 Am. St. Rep. 475, 71 N. W. 784.

In *Guthmann v. Vallery* (Neb.) *supra*, the lessee of a life tenant, who had a lease for one year and had given rent note due at the end of the year, remained in possession of the premises after the life tenant's death (whether with the consent of the reversioner or not did not appear) until the expiration of the lease, and then paid the rent note for the entire year to the lessor's administrator. The reversioner brought suit against the life tenant's administrator to recover the rent paid to him for the period from the death of the life tenant until the expiration of the lease. It was held that there could be no recovery; that although the tenancy terminated at the death of the lessor, and the lessee became a tenant at sufferance, it did not follow that, because the reversioner had the right of possession, she was entitled to the moneys which the lessee saw fit to pay to the estate of the life tenant in discharge of the contract between him and the life tenant.

In *Page v. Wight* (1867) 14 Allen (Mass.) 182, an action to recover possession of a tenement, it appeared that a reversioner, acting as agent for his mother, who was life tenant, leased the tenement for a term of three years; in the second year of the term, the life tenant, lessor, died, and the reversioner sold the premises to the

plaintiff. It was held that the lease bound the tenant for life, and not the reversioner, and hence at her death the lease terminated, and the lessee became a tenant at sufferance.

d. Lessee as tenant at will.

In other jurisdictions, after termination by death of a lease by a life tenant, the lessee becomes a tenant at will by remaining in possession.

In *Jenner v. Morgan* (1717) 2 Eq. Cas. Abr. 104, pl. 1, 22 Eng. Rep. 592, 1 P. Wms. 392, 24 Eng. Reprint, 439, it appeared that a tenant for life leased premises for a term of years at a rent to be rendered quarterly, and died between two quarter days. The lessee held over after the death of the life tenant. The plaintiff remainderman claimed to be entitled to the rent due for the quarter in which the life tenant died because, by the lessee's holding over, he showed his intention of continuing tenant at will to the plaintiff. The court held that, as to the rent from the preceding quarter day to the death of the tenant for life, the lessee should pay nothing; but for the rents from the death of the life tenant, the lessee was liable to the plaintiff, being a tenant at will during the period of his holding over.

In *Sanders v. Sutlive Bros.* (1913) 163 Iowa, 172, 143 N. W. 492, a former appeal of the reported case (*SANDERS v. SUTLIVE BROS.* ante, 1508), the life tenant died before the time fixed for the commencement of a renewal lease executed by himself. It was held that a holding by the lessor under these circumstances amounted to a tenancy at will under the provisions of the statute (Code, § 2991), in the absence of proof of the existence of any other form of tenancy; that no rights could be claimed under the lease unless the remaindermen acquiesced in it.

e. Effect as regards rents.

At common law, prior to the Statute 11 Geo. II. chap. 19, if the life tenant died before the rent day, his executor could not recover from the undertenant the rent or any portion thereof; nor could anyone else collect it. The undertenant went rent free, and all

his interest in the land terminated except right of ingress and egress for protection of emblements. *Jones's Bl. Com.* bk. 2, chap. 8, p. 123; 1 *Co. Litt.* 162b, and cited cases. *Van Hayes v. West* (1888) 2 *Ohio C. D.* 37.

But by statutes now existing in most jurisdictions, on the death of a tenant for life, his personal representatives may recover for rent due up to that time.

Alabama.—*Terrell v. Reeves* (1893) 103 *Ala.* 264, 16 *So.* 54.

Illinois.—*Hoagland v. Crum* (1885) 113 *Ill.* 365, 55 *Am. Rep.* 424; *Woman's American Baptist Home Mission Soc. v. Rayburn* (1916) 203 *Ill. App.* 577.

Indiana.—*Henry v. Stevens* (1886) 108 *Ind.* 281, 9 *N. E.* 356; *Lowery v. Reef* (1890) 1 *Ind. App.* 244, 27 *N. E.* 626.

Iowa.—*Gudgel v. Southerland* (1902) 117 *Iowa*, 309, 90 *N. W.* 623.

Kentucky.—*Haynes v. Harris* (1892) 14 *Ky. L. Rep.* 303. Contrary view in earlier cases. *Grigsby v. Cleary* (1827) 5 *T. B. Mon.* 514, and *Norris v. Cheatham* (1884) 6 *Ky. L. Rep.* 223.

Ohio.—*Capelle v. Wieman* (1907) 29 *Ohio C. C.* 542.

Tennessee.—*Arnold v. Hodges* (1849) 10 *Humph.* 140; *Turner v. Turner* (1915) 132 *Tenn.* 592, 179 *S. W.* 132.

England.—*Hawkins v. Kelly* (1803) 8 *Ves. Jr.* 309, 32 *Eng. Reprint*, 373; *Pagget v. Gee* (1753) 9 *Mod.* 482, 88 *Eng. Reprint*, 589; *Vernon v. Vernon* (1789) 2 *Bro. Ch.* 659, 29 *Eng. Reprint*, 366; *Wykham v. Wykham* (1810) 3 *Taunt.* 331, 128 *Eng. Reprint*, 126; *Whitfield v. Pindar* (1781) 2 *Bro. Ch.* 662, 29 *Eng. Reprint*, 367; *Clarkson v. Scarborough* (1819) 1 *Swanst.* 354, 36 *Eng. Reprint*, 413; *Ex parte Smyth* (1818) 1 *Swanst.* 337, 36 *Eng. Reprint*, 412; *Hool v. Bell* (1842) 1 *Ld. Raym.* 172, 91 *Eng. Reprint*, 1011; *Strafford v. Wentworth* (1720) *Prec. in Ch.* 555, 24 *Eng. Reprint*, 249; *Rockingham v. Penrice* (1711) 1 *P. Wms.* 177, 24 *Eng. Reprint*, 345, 2 *Salk.* 578, 91 *Eng. Reprint*, 487; *Myles v. Willoughby* (1596) *Cro. Eliz.* pt. 2, p. 547, 78 *Eng. Reprint*, 793; *Lambert v. Austin* (1596) *Cro. Eliz.* pt. 1, p. 332, 78 *Eng. Reprint*, 582; *Prescott v. Boucher* (1832) 3 *Barn. & Ad.* 857, 110 *Eng. Reprint*,

312; *Turner v. Lee* (1792) *Cro. Car.* 471, 79 *Eng. Reprint*, 1007.

In *Turner v. Lee* (*Eng.*) *supra*, it was held that the Statute 32 Hen. VIII. did not extend the remedy by distress to those persons who had a remedy by action at law, and therefore that the executors of a tenant for life could not distrain against the undertenant. That case was apparently overruled in *Prescott v. Boucher* (1832) 3 *Barn. & Ad.* 857, 110 *Eng. Reprint*, 312, and in *Lambert v. Austin* (1596) *Cro. Eliz.* pt. 1, p. 332, 78 *Eng. Reprint*, 582, the court seems to have taken it for granted that the statute was not so restrictive. See to the same effect *Myles v. Willoughby* (1596) *Cro. Eliz.* pt. 2, p. 547, 78 *Eng. Reprint*, 793.

In *Rockingham v. Penrice* (1711) 1 *P. Wms.* 177, 24 *Eng. Reprint*, 345, *Salk.* 578, 91 *Eng. Reprint*, 487, wherein it appeared that a tenant for life, with power to lease, died on the day rent was due from tenants under leases executed by him, the rent was declared payable not to the executor, but to the remainderman, on the ground that the lessor, dying, before sunset, had no remedy before his death to compel payment, and the rent therefore passed with the reversion. The court stated that the rent, having been paid that morning, was good as to the lessee, but directed the executor of the tenant for life to account for it to the reversioner.

In *Strafford v. Wentworth* (1720) *Prec. in Ch.* 555, 24 *Eng. Reprint*, 249, where a tenant for life made a lease, reserving rent on a certain day, and died about 12 o'clock, noon, on that day, it was held that the rent would go to his executor, and not to the remainderman; but if such a tenant had a power of leasing, and had died in this manner, the rent would have gone to the remainderman as an incident to the remainder.

Hool v. Bell (1842) 1 *Ld. Raym.* 172, 91 *Eng. Reprint*, 1011, also denied the rule in *Turner v. Lee* (*Eng.*) *supra*, holding that the Statute 32 Hen. VIII. extended to all tenants for life; and the undertenant was held to be

liable to the executors of the life tenant for arrears.

In *Ex parte Smyth* (1818) 1 Swanst. 337, 36 Eng. Reprint, 412, it was held that the interest of the lessee determined with the life of the lessor, a life tenant, and the rent was apportionable. Statute 11 Geo. II. chap. 19, § 15, provided that where any tenant for life should die before or on the day on which any rent was reserved, or made payable on any demise which determined on the death of such tenant for life, his executors might recover from the undertenant, if such tenant for life died on the day on which the same was made payable, the whole, or, if before such day, then a proportion of such rent according to the time such tenant for life lived.

Clarkson v. Scarborough (1819) 1 Swanst. 354, 36 Eng. Reprint, 413, established the general doctrine that, under a demise from year to year by a tenant for life with power to lease, not executed conformably to his power, the lessee, in the absence of special circumstances, was not entitled to the aid of equity to sustain his interest against the remainderman, and the tenure determining with the life of the lessor, by the terms of the statute, the rent became apportionable.

In *Whitfield v. Pindar* (1781) 2 Bro. Ch. 662, 29 Eng. Reprint, 367, the court of common pleas declared the representatives of a tenant in tail, who had demised the entailed estate by a lease void against the remainderman, to be entitled to apportionment, deciding that a tenant in tail was, within the description of the statute, a lessor having only an estate for life.

Likewise *Wykham v. Wykham* (1810) 3 Taunt. 331, 128 Eng. Reprint, 126, held that an executor of a tenant "pur autre vie" was entitled to recover from the lessee a portion of the rent from the last quarter day under the Statute of 11 Geo. II. See to the same effect, *Vernon v. Vernon* (1789) 2 Bro. Ch. 659, 29 Eng. Reprint, 366, in which the lessees under a demise from year to year by the testamentary guardian of an infant tenant in tail, who died between two rent days, hav-

ing paid the rent to the receiver, the court held that the representatives of the infant were entitled to apportionment.

See *Pagget v. Gee* (1753) 9 Mod. 482, 88 Eng. Reprint, 589, wherein the rents in arrear at the time of the death of a tenant in tail, who made the lease, were apportioned between the personal representative of the tenant in tail and the remainderman in fee by virtue of the statute.

In *Hawkins v. Kelly* (1803) 8 Ves. Jr. 309, 32 Eng. Reprint, 373, it was held that a lease by a life tenant having ceased by his death, and the succeeding incumbent having received from the lessee rent for the whole year in which the lessor died, the executor was entitled to an apportionment under the statute.

In *Woman's American Baptist Home Mission Soc. v. Rayburn* (1916) 203 Ill. App. 577, it appeared that a tenant for life of certain premises executed a lease for a year, and died before its expiration. The rent having been paid to her executor, the reversioner sought to recover the amount due from the death of the lessor. By a statute (Act of July 1, 1897), it was provided that when a life tenant died on or before the day on which rent was due, his executors might not recover from the undertenant the whole rent due, but only the portion due up to the death of the lessor; that the reversioner was not bound to allow the lessee to remain in possession, but if he did, he was entitled to rent from the death of the lessor. It was held, that under the statute, the reversioner was entitled to recover.

In *Hoagland v. Crum* (1885) 113 Ill. 365, 55 Am. Rep. 424, it appeared that a widow who had a life estate in certain lands leased the lands for one year, and died before the rent fell due. The lessee continued to hold after the death of the lessor. It was held that the reversioner could recover the reasonable value of the use of the land from the determination of the lease by the death of the lessor.

It was held in *Haynes v. Harris* (1892) 14 Ky. L. Rep. 303, that the rents should be apportioned between

the personal representative of the life tenant and the remainderman, unless the will otherwise directed, under an act (Gen. Stat. chap. 39, art. 2, § 30), and the amount to which they were entitled was in proportion to the time the tenant lived after the execution of the lease.

But in *Norris v. Cheatham* (1884) 6 Ky. L. Rep. 223, the court took the view that the lease extended beyond the death of the lessor, and it was held that the rent, which the statute provided should be paid by the lessee of a life tenant who leased land for the year and died after the 1st day of March, was a reasonable rent, and not that agreed on in the lease.

In *Grigsby v. Cleary* (1827) 5 T. B. Mon. (Ky.) 514, the life tenants of slaves leased the slaves, and on the death of the life tenant one of the remaindermen took the slave in question from the lessee before the expiration of the year for which the lease was given. It was held that, under the statute concerning executors and administrators, the lessee had the right to hold the slave until the last of December of that year.

In *Capelle v. Wieman* (1907) 29 Ohio C. C. 542, it was held that rent which was due after the death of the life tenant, lessor, might be apportioned between all the claimants.

In *Turner v. Turner* (1915) 182 Tenn. 592, 179 S. W. 132, it appeared that the mother of the complainant was the life tenant of a tract of land, which she leased to the defendants for the year of 1912. She died in June, 1912, and the complainant remainderman set up a claim to compensation from the lessees for the use and possession of the land for the entire year of 1912. Under the provisions of § 4184 of Shannon's Code (Acts 1877, chap. 159) it was provided that if the life tenant die before the expiration of the lease, and before the term fixed for payment of rent, the rent might be apportioned, and the executor or administrator of the life tenant might recover of the lessee up to the death of the life tenant. The court held that the statute was not intended to give the life tenant power to create a

lease upon the land which would extend beyond his death, the remainderman not joining, but that its purpose was to correct the harsh and artificial rule of the common law to the effect that such a contract of lease was so far an entirety that rent so arising could not be apportioned, and the lessee might quit the premises, upon the death of the life tenant, and pay no rent to anyone; that, under Shannon's Code, that the remainderman, in order to recover compensation from the lessee for use, must have ratified the lease contract. It was also held that the remainderman was entitled to emblements without payment of rent for use of the land to cultivate and gather them.

In *Gudgel v. Southerland* (1902) 117 Iowa, 309, 90 N. W. 623, the executor of a life tenant contended that he was entitled to a ratable rent up to the death of the life tenant, under a statute (Code, § 2988) providing that the executor of a tenant for life may recover the proportion of rent which has accrued at the time of the death of the life tenant. The court held that there could be no apportionment because there was nothing before the court by which the amount of a pro rata rent could be determined, either in shares of crops or in cash.

In *Arnold v. Hodges* (1849) 10 Humph. (Tenn.) 140, it appeared that a woman at the time of her marriage was seised of a tract of land, and after her marriage her husband leased the land for one year, and died during the term; the executor of the husband collected the rents, and the wife, having remarried, brought suit for the rents. It was held that she was entitled to move. The court said: "In this case the husband had but a life estate in the lands of his wife, and the moment his death took place his interest ceased, and, the coverture being at an end, the wife became sole and absolute owner of the real estate which belonged to her previous to the marriage. If the husband alone could lease the land of his wife for one year, which would continue for the benefit of his representatives after his death, why not for two or more years? The

doctrine of emblements which seems to have been thought applicable to this case by the court below has no relation to it."

In *Terrell v. Reeves* (1893) 103 Ala. 264, 16 So. 54, it appeared that a life tenant executed a lease, taking a rent note for the current year, which he assigned to a third person, to whom the lessee paid the rent. The life tenant died in the same year. The remainderman attempted to recover rent from the lessee for the year. It was held that the grantee was not liable to the remainderman.

In *Henry v. Stevens* (1886) 108 Ind. 281, 9 N. E. 356, it was held that the legal representatives of a deceased life tenant were entitled to recover rents under a lease executed by him up to the time of his death under a statute (Rev. Stat. 1881, § 5223).

In *Lowery v. Reef* (1890) 1 Ind. App. 244, 27 N. E. 626, it appeared that the lessee for a term of years went into possession of the leased land and cultivated the same; that the lessor, a life tenant of the land, died during the year. The lessee remained in possession after the lessor's death, and with the knowledge of the remainderman, until the latter caused notice to be served on the lessee to give up possession at the end of the current year. On the question of the amount of rent due the remainderman, the court held that the lessee was liable to the remainderman only for what was due after the death of the lessor, and to the lessor's representatives for the amount which accrued previous to the lessor's death.

f. Rights as regards emblements.

After the termination of a lease, by a life tenant, by his death during the term, the lessee has a right of entry on the land to cultivate and remove crops growing thereon.

Alabama.—*Price v. Pickett* (1852) 21 Ala. 741.

California.—*Blaeholder v. Guthrie* (1911) 17 Cal. App. 297, 119 Pac. 524.

Connecticut.—*Bradley v. Bailey* (1888) 56 Conn. 374, 1 L.R.A. 427, 7 Am. St. Rep. 316, 15 Atl. 746.

Indiana.—*Dorsett v. Gray* (1884) 98 Ind. 278.

Iowa.—*Carman v. Mosier* (1898) 105 Iowa, 367, 75 N. W. 323.

Maryland.—*Bevans v. Briscoe* (1812) 4 Harr. & J. 139.

Nebraska.—*Edghill v. Mankey* (1907) 79 Neb. 347, 11 L.R.A. (N.S.) 688, 112 N. W. 570.

Tennessee.—*Collins v. Crownover* (1900) — Tenn. —, 57 S. W. 357; *Turner v. Turner* (1915) 132 Tenn. 592, 179 S. W. 132.

West Virginia.—*Shufflin v. House* (1898) 45 W. Va. 731, 72 Am. St. Rep. 581, 31 S. E. 974.

In *Edghill v. Mankey* (Neb.) *supra*, it appeared that one Dopke had a life estate in a certain farm which the defendant occupied as his tenant under a lease to expire March 1, 1905. The defendant sowed a portion of the land to wheat. In December, 1904, Dopke died. In March, 1905, the plaintiff, who was seised in fee of the land in question, brought proceedings to obtain possession. The defendant claimed that, by virtue of sowing the ground to wheat, he was entitled to possession. It was held that the lessee of the life tenant was charged with notice of the extent of his landlord's title, and that on the termination of the life estate his estate also ended; that, as regards possession, the defendant had no rights other than the right of entry to cultivate and remove his wheat.

In *Bevans v. Briscoe* (Md.) *supra*, the remainderman brought suit to recover rent from the death of the lessor until the end of the year. It was held that the remainderman was not entitled to rent for this period; that the lessee was entitled to enter on the land to protect his crop until it was mature and taken away, and was not liable to pay for that use of the land.

But where there are no growing crops, the lessee has no further right of occupation after the death of the tenant for life. *Carman v. Mosier* (Iowa) *supra*.

So in *Collins v. Crownover* (Tenn.) *supra*, it appeared that a lessee did some preparing of the land, which he leased of a tenant for life, for planting; the lessor died before the expiration of the term of the lease, and

before the lessee had planted any seed on the land he had prepared. It was held that the statute (Shannon's Code, § 4184) authorizing apportionment of rent and recovery until the death of the lessor did not authorize the lessee to retain, as against the remainderman, possession of the land, prepared for a crop, but on which no crop had been planted, and did not allow a lease to extend beyond the life estate.

In *Bradley v. Bailey* (Conn.) supra, it appeared that a tenant for life of a certain tract of land leased the tract to the plaintiff for three years; that the plaintiff sowed a part of the tract with rye, and in the same year the lessor died; that the remaindermen plowed up the said rye after the death of the lessor. The lessee brought this action to recover from the defendant remaindermen for the destruction of the rye. It was contended by the defendants that if the plaintiff did anything upon the premises, he did so with knowledge of the fact that the lessor was dying. It was held that the plaintiff was entitled to recover for the rye. The court said: "To hold that this right may be defeated after the tenant's death, by evidence of his condition of health, or by his declarations or those of his lessee imputing a belief, however well founded, or knowledge, if such knowledge be possible, that his life would not continue until harvest time, would in many cases subvert an important object of the rule,—the encouragement of husbandry,—and open a fruitful source of unseemly litigation. A tenant in failing health, especially if he had expressed a belief that his end was near, would naturally hesitate to put in crops which might be successfully claimed by his successor in title, or in respect to which his estate might become involved in litigation."

In *Blaeholder v. Guthrie* (1911) 17 Cal. App. 297, 119 Pac. 524, it was held that an undertenant was entitled to crops resulting from his labor, as against the remainderman, on the death of the life tenant.

In *Shufflin v. House* (1898) 45 W. Va. 731, 72 Am. St. Rep. 851, 31 S. E. 974, it was held that the statute (Code

chap. 84, § 1) which provides that if a tenant for life lease land, the lessee may hold the land until the end of the current year by paying rent therefor, applies only to agricultural land, its purpose being to secure the harvest to the tenant. The land was leased in lots for building purposes, and the court held that the statute did not apply, and that the lease terminated upon the death of the life tenant.

In *Price v. Pickett* (1852) 21 Ala. 741, it appeared that a tenant for life rented certain land for the year of 1847, commencing on the 1st of January; he died in March, 1847; a part of the land had been planted. In this case it was held that the plaintiff remainderman was entitled to rents from March until the end of the year, but subject to the lessee's right of emblements.

In *Dorsett v. Gray* (1884) 98 Ind. 278, a lessee under a lease executed by a life tenant planted crops on the land, and the lessor died before the crops were gathered. The lessee remained in possession of the land after the death of the lessor. An action was brought for the wrongful appropriation of growing crops and for use and occupation of the land. It was held that the lease terminated at the death of the lessor, subject to the right of the lessee in crops planted by him during the term of his tenancy.

g. Rights as regards fixtures.

The cases differ as to whether fixtures of such a character as to be removable by a tenant during his term may be removed by the lessee of a life tenant after the termination of his tenancy by the death of his lessor. That they are not so removable is held in *White v. Arndt* (1836) 1 Whart. (Pa.) 91 (frame buildings) and *Jones v. Shufflin* (1898) 45 W. Va. 729, 72 Am. St. Rep. 848, 31 S. E. 975 (frame building). But in *Ray v. Young* (1913) 160 Iowa, 613, 46 L.R.A. (N.S.) 947, 142 N. W. 393, Ann. Cas. 1915D, 258, it is held that where fixtures are, as between the lessor and lessee, removable as trade fixtures, the lessee from a tenant for life is entitled to a reasonable time in which to remove them after the termination of his ten-

ancy by the death of the lessor. And in *Haflick v. Stober* (1860) 11 Ohio St. 482, it is intimated that fixtures which the tenant is, during the tenancy, entitled to remove as a matter of legal right, without reference to any contract on the subject, may be removed after the termination of the tenancy by the death of the lessor.

Where the fixtures are of such a character that, in the absence of any contract on the subject, they would, in law, constitute a permanent accession to the estate, it has been held that a tenant for life cannot, by contract with his tenant, so far bind the remainderman as to authorize their removal by his lessee after the termination of the life estate. *Denby v. Parse* (1890) 53 Ark. 526, 12 L.R.A. 87, 14 S. W. 899 (house); *Haflick v. Stober* (1860) 11 Ohio St. 482 (barn); *White v. Arndt* (Pa.) *supra*.

The acceptance of rent by the remainderman cannot be considered as a ratification of such an agreement, where it was collateral to the lease, and of which it did not appear that the remainderman was in any manner apprised. *White v. Arndt* (Pa.) *supra*.

h. Waiver of forfeiture of lease.

Although a lease by a tenant for life is forfeited by his death, the forfeiture may be waived by the remainderman or reversioner. *Matlack v. Kline* (1856) — Mo. App. —, 190 S. W. 408; *Barson v. Mulligan* (1910) 198 N. Y. 24, 90 N. E. 1127; *Nesbitt v. Thompson* (1916) 98 Misc. 251, 157 N. Y. Supp. 166; *Coakley v. Chamberlain* (1869) 38 How. Pr. (N. Y.) 483; *Hinton v. Bogart* (1912) 78 Misc. 46, 137 N. Y. Supp. 697; *Hinton v. Bogart* (1915) 166 App. Div. 155, 151 N. Y. Supp. 796; *Lake Erie, Gas, Coal & Coke Co. v. Patterson* (1898) 184 Pa. 364, 39 Atl. 68; *Fee v. Lutz* (1916) 65 Pa. Super. Ct. 188; *Holden v. Boring* (1902) 52 W. Va. 37, 43 S. E. 86.

In *Hinton v. Bogart* (1912) 78 Misc. 46, 137 N. Y. Supp. 697, affirmed in (1915) 166 App. Div. 155, 151 N. Y. Supp. 796, it appeared that a life tenant leased certain premises in 1901 to the defendant, who agreed to pay taxes as part of the rent; that the life tenant

died in 1906, and the defendant held over the premises until 1912; that, after the life tenant's death, the remainderman gave notice to the defendant of his willingness that the latter should hold the premises according to the agreement under which he previously held. In 1910 the remainderman served statutory notice to quit; the defendant continued to hold over until 1911 and part of 1912, paying rent, but refusing to pay the taxes for that period. It was held that, on the death of the life tenant, the tenancy ceased at the option of the remainderman, and that the latter waived the right of forfeiture, so that the relation of landlord and tenant continued under the terms of the original contract. See to the same effect, *Barson v. Mulligan* (1910) 198 N. Y. 24, 90 N. E. 1127, and the reported case (*SANDERS v. SUTLIVE BROS.* ante, 1503).

A mere acceptance of rent after the termination of a lease by the death of the life tenant does not effect an adoption of the term. *Nesbitt v. Thompson* (1916) 98 Misc. 251, 157 N. Y. Supp. 166. In that case the action was by a remainderman, after the death of the life tenant, to partition the farm which the tenant occupied under a lease from the life tenant. The tenant claimed that the acceptance of rent after the termination by the death of the life tenant amounted to an adoption of the term. It was held that the acceptance of rent in this manner did not effect an adoption of the term, but only an adoption for the balance of the farm year.

In *Coakley v. Chamberlain* (1869) 38 How. Pr. (N. Y.) 483, an action for breach of covenant of quiet enjoyment contained in a lease executed by a life tenant, it appeared that the lease was executed for a term of eleven years, and before the expiration of the term the lessor died. The remainderman received rents after the expiration of the term, and this action was brought to recover, as damages, the value of the unexpired term. It was contended that the acceptance of rent after the expiration of the lease amounted to a waiver of the forfeiture of the lease. The court held that the mere accept-

ance of rent did not operate as a forfeiture, and an adoption of the covenant; that the lease became void by the death of the life tenant, and the unexpired lease constituted no lien on the premises. See to the same effect, *Fee v. Lutz* (1916) 65 Pa. Super. Ct. 188.

But in *Holden v. Boring* (W. Va.) supra, it was held that where a life tenant died, terminating a lease executed by him, and the lessee remained in possession at the end of the current year, and after this time the remainderman continued to accept rent, the latter recognized the previous lease for another year as renewed.

In *Lake Erie Gas, Coal & Coke Co. v. Patterson* (1898) 184 Pa. 364, 39 Atl. 68, it appeared that a life tenant in certain coal lands leased the lands to a coal company for a term of years, agreeing, if the lessee should be dispossessed of the lands, to reimburse the lessee for all improvements made, all covenants binding on executors, administrators, and assigns. At the lessor's death all the coal owned by the lessor for life had been taken out, and the lessee sought to cancel the lease. The heirs of the lessor agreed that the lessee should not be dispossessed during the term of the lease. The court held that the lease extended until the end of the term, and the lessee could not cancel it.

Although a lease terminates on the death of a life tenant, lessor, the remainderman may give consent to the execution of a lease for a longer term than the lessor's life, in which case the lease does not terminate, but the remainderman is entitled to rent from the death of the lessor. *Matlack v. Kline* (1856) — Mo. App. —, 190 S. W. 408. The lease in question in that case was executed for a period of twenty years. It appeared that the lessor owned only a life estate in the property, and the remaindermen signed an agreement to the effect that they consented to said lease. It was held that the giving consent by the remaindermen prevented the lease from terminating at the death of the lessor, but the rent would go to the remaindermen after such death, since

the right to the rent follows the ownership of the land. See the reported case (*SANDERS v. SUTLIVE BROS.* ante, 1508).

II. View that death of life tenant does not terminate lease.

By statute in at least two jurisdictions, a lease is continued beyond the life of the lessor until the end of the current year, for the purpose of protecting the lessee against loss by immediate termination upon the death of the life tenant, lessor. *Story v. Butt* (1907) 2 Ga. App. 119, 58 S. E. 388; *Hines v. McCombs* (1907) 2 Ga. App. 675, 58 S. E. 1124; *Mitchell v. Ruthersford* (1911) 9 Ga. App. 722, 72 S. E. 302; *May v. Thomas* (1912) 94 S. C. 158, 78 S. E. 85; *Freeman v. Tompkins* (1845) 20 S. C. Eq. (1 Strobb.) 53.

Earlier cases in both jurisdictions maintained a contrary view. *Johnson v. Grantham* (1898) 104 Ga. 558, 30 S. E. 781; *Williams v. Caston* (1846) 32 S. C. L. (1 Strobb.) 130.

In *May v. Thomas* (1912) 94 S. C. 158, 78 S. E. 85, it appeared that a life tenant leased his agricultural lands for a year, and died within the year. The issue concerned the amount the various remaindermen could recover from the lessee. It was held that the remaindermen could recover only the amount of rent contracted for with the life tenant; that under the statute (1 Code of Laws 1912, § 3496) the lessee should not be dispossessed until the crop of that year was finished, having secured the payment of rent when due.

It is the duty of the undertenant to comply with his contract with the life tenant; and if he does, he is not accountable to the remainderman for any part of the year's rent, although the life tenant dies before any crops are planted. *Story v. Butt* (1907) 2 Ga. App. 119, 58 S. E. 388. In that case it appeared that one Mrs. Story had a life estate in certain lands which she rented to the plaintiff for the year of 1905. She died February, 1905, having previously transferred to another the rent note. The defendant remainderman demanded payments of rent of the plaintiff from the death of

the life tenant until the end of the year. The ground had been plowed at Mrs. Story's death, but crops had not been planted. The trial court held that the remainderman was entitled to rent for the year, notwithstanding the plaintiff had paid the rent to the holder of the note. The court of appeals held that although, under the Civil Code of 1895, § 3092, a remainderman was entitled to rent from the death of the life tenant until the end of the year, during which time the statute allowed the undertenant's lease to continue, the plaintiff, having complied with his contract with the life tenant, was entitled to the possession of the premises until the end of the year, and that he was not additionally liable to the remainderman for rent.

In *Hines v. McCombs* (1907) 2 Ga. App. 675, 58 S. E. 1124, it appeared that under a will a life tenant was not only the devisee of the life estate, but was also executor of the will and trustee of a fee, and was given full power of disposition of all the property, both real and personal, to use the income for his and his children's support. The life tenant executed a lease for two years and took a rent note which he assigned to another. The court held that the lease did not expire at the death of the life tenant, but continued until the end of the period for which the land was leased, and that the rights of the transferee of the rent note were superior to those of the remainderman. The court, in reviewing earlier English decisions, said: "However, a review of the English cases will show that long before the enactment of Stat. 14 & 15 Vict. chap. 25 (from which our § 3093 of the Civil Code of 1895 was adopted), which gives the statutory power to the life tenant of making a rent contract binding to the end of the year of his death, or of the British Land Settlement Acts, which have further extended this power, it was not uncommon for grantors and testators to confer upon life tenants or trustees for life estates the power of making leases which would be binding after the death of the life tenant; and the right of grantors and

testators to make the grant of such powers has never been questioned, either before or since the passage of the statutes referred to above. Under the will before us, H. E. Hendrix [the life tenant] had not only the right to enjoy the estate for life, but also to dispose of any or all of it, and especially to derive an income therefrom; and the remaindermen, by express terms of the will, took an estate in only the "property remaining" undisposed of at his death. We do not mean to say that, if he had attempted to sell any of the lands, he would not have been compelled to expose it at public outcry under Civ. Code 1895, § 3460; but to rent lands for two years is not to sell them."

In *Mitchell v. Rutherford* (1911) 9 Ga. App. 722, 72 S. E. 302, it appeared that a life tenant rented lands for a year, taking a negotiable promissory note for the year's rent, which he transferred to a third person to secure an indebtedness to the third person. The life tenant died before he had collected any rent from the undertenant. The transferee sought to recover the full amount on the note, and the remainderman claimed to be entitled to any excess of the note over the debt actually due to the transferee, for which the note was given as collateral security. It was held, in construing the provisions of the statute (Civ. Code 1910, § 3669), that where the life tenant transferred a negotiable promissory note for value to a third person, under these circumstances, the transferee would ordinarily have the right to collect the full amount of the rent note; but where the note was transferred to secure the payment of a debt, the transferee would be able to recover the full amount of the note, accounting to the remainderman for excess over the debt which he held against the life tenant.

However, an earlier Georgia case apparently took the view that the lease was terminated *eo instanti* upon the lessor's death. *Johnson v. Grant-ham* (1898) 104 Ga. 558, 30 S. E. 781, wherein it appeared that a life tenant executed a lease of certain lands, to go into effect at a future date. Before

it went into effect, the lesser died, and the executors confirmed and continued the lease; thereafter the executors sold the land, and purchaser entered on the land and cut trees. An action was brought by the lessee to restrain the purchaser from removing trees. The court held that the lease was absolutely void on the death of the tenant for life, and that the purchaser of this land, held by another under a void lease, might set up its invalidity.

It was held in *Freeman v. Tompkins* (1845) 20 S. C. Eq. (1 Strobb.) 53, that where a life tenant leased land with slaves to a lessee who employed the slaves in planting on the land, and the life tenant died within the year, the lessee should continue in possession until the crop of that year was finished, but that the remainderman

was entitled to rents from the death of the life tenant.

In *King v. Foscue* (1884) 91 N. C. 116, it appeared that one Harrison, a tenant for life, leased the land to a tenant for the year 1881. Harrison died within the year, and in the fall of that year the executor of the deceased collected all the rents for the leased premises. The plaintiff sued for rents to which she claimed to be entitled in remainder. It was held that the statute (Code, § 1749) continued the lease until the end of the lease year, so that the lessee might care for and gather crops, but that the lessee was obliged to pay the remainderman the rent due from the time his lease expired, at the death of the life tenant, until the end of the current year. M. J. Q.

CARL BUSHNELL, Appt.,

v.

HOMER H. COOPER, Admr., etc., of Mary B. Bushnell, Deceased.

Illinois Supreme Court—October 27, 1910.

(289 Ill. 260, 124 N. E. 521.)

Bill of review — decree passed after death of party.

1. A bill of review is the proper remedy to bring before the court, after lapse of the term at which a decree for separate maintenance was passed, the fact that the wife, without knowledge of defendant, died before the decree was made.

[See note on this question beginning on page 1524.]

Abatement — death — action for divorce.

2. Death of one of the parties abates an action for divorce.

[See 1 R. C. L. 44; 9 R. C. L. 414.]

— action for separate maintenance.

3. Death of one of the parties abates an action by a wife for separate maintenance.

Bill of review — classification.

4. Bills of review are of three classes: For error apparent on the face of the record; to impeach a decree for fraud; and to review a decree on account of new matter or subsequently discovered evidence.

[See 10 R. C. L. 568.]

— discretion of court.

5. A bill of review for newly discovered evidence may be filed only upon the sound discretion of the court.

[See 10 R. C. L. 569.]

— when may be filed.

6. Bills of review for new matter lie only at the close of the term at which the decree was rendered, and must show that the matter was not discovered, and by the exercise of reasonable diligence could not have been discovered, until after the original decree was entered.

[See 10 R. C. L. 573.]

Judgment — entry after death of party — effect.

7. One obtaining a reference upon

the question of attorney's fees to be allowed his wife, who has established a right to separate maintenance against him, cannot avoid liability because the wife dies a few hours before the decree is entered, if he failed to bring that fact to the attention of the court until after the expiration of the term.

[See 15 R. C. L. 691.]

Bill of review — to set aside decree for death of party.

8. One who fails to make known to the court the death of his adversary before entry of the decree, before the expiration of the term at which the decree was entered, is not entitled to a bill of review to set aside the decree because of such death.

[See 10 R. C. L. 574.]

APPEAL by petitioner from a decree of the Appellate Court, First District, affirming a decree of the Superior Court for Cook County (Foell, J.) denying a petition filed for a bill of review to set aside a decree granting to petitioner's wife separate maintenance, fixing alimony and solicitor's fees, and taxing costs against petitioner. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Norman K. Anderson and Benjamin Clarke, for appellant:

This cause being an action of divorce and separate maintenance, the death of Mrs. Bushnell two hours or more before the signing of the decree by the judge, and before the entry of the decree by the clerk, put an end to the action, and this without the necessity of any order of court.

Danforth v. Danforth, 111 Ill. 236; Wilson v. Wilson, 73 Mich. 620, 41 N. W. 817; Strickland v. Strickland, 80 Ark. 452, 97 S. W. 659; Re Crandall, 196 N. Y. 127, 134 Am. St. Rep. 830, 89 N. E. 578, 17 Ann. Cas. 874; McCurley v. McCurley, 60 Md. 185, 45 Am. Rep. 717; Seibert v. Seibert, — N. J. —, 86 Atl. 535; Chase v. Webster, 168 Mass. 228, 46 N. E. 705; Swan v. Harrison, 2 Coldw. 534; Kellogg v. Stoddard, 89 App. Div. 137, 84 N. Y. Supp. 1015; Zoellner v. Zoellner, 46 Mich. 511, 9 N. W. 831; Pearson v. Darrington, 32 Ala. 227; Kimball v. Kimball, 44 N. H. 122, 82 Am. Dec. 194; Dunham v. Dunham, 82 N. J. Eq. 395, 89 Atl. 281; Nickerson v. Nickerson, 34 Or. 1, 48 Pac. 423, 54 Pac. 277.

The death of Mrs. Bushnell was prior to the signing of any decree in the nisi prius court, and therefore cases in which the death of one of the parties to a divorce or separate maintenance suit occurs after the entry of a decree do not apply, but the suit is ended without other action, by the death of the party prior to the entry of any decree.

Danforth v. Danforth, *supra*; Strickland v. Strickland, 80 Ark. 452, 97 S. W. 659; Thomas v. Thomas, 57 Md. 504; Re Crandall, 196 N. Y. 127, 134 Am. St. Rep. 830, 89 N. E. 578, 17

Ann. Cas. 874; Wilson v. Wilson, 73 Mich. 620, 41 N. W. 817.

Where a divorce or separate maintenance suit is terminated by the death of one of the parties prior to the entry of any decree, all incidental matters to the obtaining of said decree, such as solicitor's fees and costs, fall with the proceedings, and the court loses all power to enter a decree and also to pass upon such incidents.

McCurley v. McCurley, 60 Md. 185, 45 Am. Rep. 717; Pearson v. Darrington, 32 Ala. 227; Seibert v. Seibert, — N. J. —, 86 Atl. 535; Millady v. Stein, 19 Misc. 652, 48 N. Y. Supp. 408; Kellogg v. Stoddard, 89 App. Div. 137, 84 N. Y. Supp. 1015; People ex rel. McPherson v. Western Life Indemnity Co. 261 Ill. 513, 104 N. E. 219, Ann. Cas. 1915A, 266; Hopkins v. Hopkins, 21 N. Y. Week. Dig. 174.

A decree must be prepared by the solicitor for the party in whose favor it is announced, and approved by the signature of the chancellor, before it can be filed by the clerk, and it is not entered until so filed by the clerk.

Cameron v. Clinton, 259 Ill. 599, 102 N. E. 1000; Hughes v. Washington, 65 Ill. 245; Chicago G. W. R. Co. v. Ashelford, 268 Ill. 91, 108 N. E. 761; Horn v. Horn, 234 Ill. 268, 84 N. E. 904; Dunning v. Dunning, 37 Ill. 306.

The fact that Mrs. Bushnell died prior to the approval of the master's report and the entry of the decree, being vital, can be relied upon.

Dooley v. Ahern, 191 Ill. App. 140; Grosvenor v. Magill, 37 Ill. 240; Louisville v. Savings Bank, 104 U. S. 474, 26 L. ed. 776; Ex parte Massie, 131 Ala. 62, 56 L.R.A. 671, 90 Am. St. Rep. 20, 31 So. 483; Patterson Appeal, 96

Pa. 93; *Coe v. Hallam*, 173 Ill. 462, 50 N. E. 1072; *United States v. Edwin S. Hartwell Lumber Co.* 73 C. C. A. 548, 142 Fed. 432.

A party has, by law, the same time in which to file a bill of review to set aside a decree as he has to prosecute a writ of error, unless there are special facts requiring more prompt action.

Chicago Bldg. Soc. v. Haas, 111 Ill. 176.

The bill sought to be filed is the proper manner of procedure, the term having passed, and can be sustained as an original bill in the nature of a bill of review to impeach the decree for fraud in fact, or fraud in law, or for other sufficient cause.

Griggs v. Gear, 8 Ill. 3; *Tobias v. Tobias*, 193 Ill. App. 96; *Ernst Tosetti Brewing Co. v. Koehler*, 200 Ill. 369, 65 N. E. 636; *McClelland v. Moore*, 48 Tex. 355; *Scott v. Blaine, Baldw.* 287, Fed. Cas. No. 12,525; *Best v. Nix*, 6 Tex. Civ. App. 349, 25 S. W. 130; *Davies v. Coryell*, 37 App. 505; *Gould v. Sternberg*, 128 Ill. 510, 15 Am. St. Rep. 138, 21 N. E. 628; *Harrigan v. Peoria County*, 262 Ill. 36, 104 N. E. 172.

Messrs. S. C. Irving and Daniel Riley McMaster, for appellee:

Matters of abatement will not furnish ground for bill of review.

Story, Eq. Pl. 10th ed. § 411; *Dexter v. Arnold*, 5 Mason, 312, Fed. Cas. No. 3,856; *Adams*, Eq. Pl. Am. ed. p. 47; *Lube*, Eq. Pl. § 153; *Rapalje's Am. ed.* p. 122; *Jeremy's Mitford*, Eq. Pl. 182; *Crook v. Turpin*, 10 B. Mon. 245.

Mrs. Bushnell's right to maintenance and costs was not impaired by her death.

Bell v. Bell, 181 U. S. 175, 45 L. ed. 804, 21 Sup. Ct. Rep. 551; *Danforth v. Danforth*, 111 Ill. 236; *Downer v. Howard*, 44 Wis. 82; 1 Freem. Judgm. 4th ed. § 153; *Fulton v. Fulton*, 8 Abb. N. C. 210.

The record imports that Mary B. Bushnell was living when the decree was entered; and to receive evidence aliunde contradicting this record is an attempt to go behind the decree and to impugn the record, and this the law will not allow.

Carr v. Townsend, 63 Pa. 202; *Warder v. Tainter*, 4 Watts, 270; *Metzler v. Kilgore*, 3 Penr. & W. 245, 23 Am. Dec. 76; *Helbut v. Held*, 2 Ld. Raym. 1414, 92 Eng. Reprint, 420; *Berry v. Clements*, 9 Humph. 312; *Ballerino v. Superior Ct.* 2 Cal. App. 759, 84 Pac. 225; *Mitchell v. Schoonover*, 16 Or. 211, 8 Am. St. Rep. 232, 17 Pac. 367;

Coleman v. McAnulty, 16 Mo. 173, 57 Am. Dec. 229; *Harman v. Moore*, 112 Ind. 221, 13 N. E. 718; *Reid v. Mitchell*, 93 Ind. 469; *Littleton v. Smith*, 119 Ind. 230, 21 N. E. 886; *Van Fleet, Colateral Attack*, § 4, p. 7; *Johnson v. Edde*, 58 Misc. 664; *Sheahan v. Madigan*, 275 Ill. 372, 114 N. E. 135.

The decree sought to be vacated here states that the court that entered it had jurisdiction both of the subject-matter and of the parties. This recital showing jurisdiction cannot be drawn in question by the affidavits of the solicitors for Carl Bushnell, or by any evidence dehors the record.

1 Freem. Judgm. §§ 130, 134; *Barnett v. Wolf*, 70 Ill. 76; *Harris v. Lester*, 80 Ill. 307; *Osgood v. Blackmore*, 59 Ill. 261; *Camden v. Robertson*, 3 Ill. 507; *Parsons v. Weis*, 144 Cal. 410, 77 Pac. 1007; *Ballerino v. Superior Ct.* 2 Cal. App. 759, 84 Pac. 225; *Homer v. Fish*, 1 Pick. 435, 11 Am. Dec. 218; *Bennett v. Roys*, 212 Ill. 232, 72 N. E. 380; *West Chicago Street R. Co. v. Morrison, A. & A. Co.* 160 Ill. 288, 43 N. E. 393; *Hansen v. Schlesinger*, 125 Ill. 230, 17 N. E. 718; *Roche v. Bel-dam*, 119 Ill. 320, 10 N. E. 191; *Koren v. Roemheld*, 7 Ill. App. 646; *People v. Hamilton*, 268 Ill. 390, 109 N. E. 329; *Garfield v. Douglass*, 22 Ill. 100, 74 Am. Dec. 137; *Wiley v. Southerland*, 41 Ill. 25; *Baker v. Singer*, 35 Ill. App. 271.

A court of equity will not interfere merely for a defect of jurisdiction in the court where the judgment was rendered.

Blackburn v. Bell, 91 Ill. 434; 2 *Story*, Eq. Jur. § 898; *Stokes v. Knarr*, 11 Wis. 391; *Colson v. Leitch*, 110 Ill. 504; *Young v. Deneen*, 220 Ill. 350, 77 N. E. 193; 2 *Street*, Fed. Eq. Pr. § 2151.

A bill of review is never allowed as a substitute for appeal.

Simmons v. Conklin, 129 Mich. 190, 88 N. W. 625; *Murphy v. Schoder*, 126 Mich. 607, 85 N. W. 1080; *Central Georgia Bank v. Iverson*, 73 Ga. 19; *Vary v. Thompson*, 168 Ala. 367, 52 So. 951.

Bill of review will not be allowed where the original bill did not contain matter which would entitle the complainant to relief.

Puterbaugh, Pl. & Pr. 5th ed. 256; *Todd v. Laughlin*, 3 A. K. Marsh, 535; *Blackburn v. Bell*, supra; *Hargraves v. Lewis*, 7 Ga. 110; *D'Anguilar v. D'Anguilar*, 1 Hagg. Eccl. Rep. 773; 2 Freem. Judgm. §§ 486, 487.

Where a judgment has not been rendered on the verdict, or a decree rendered on final submission, or cause not reached on proceedings in error or the like, and the delay was not caused by the act of the party, and one of the parties dies, the final judgment may be entered as of a day during the term while he was alive.

O'Sullivan v. People, 144 Ill. 604, 20 L.R.A. 143, 32 N. E. 192; 1 Freem. Judgm. 4th ed. § 153; Danforth v. Danforth, 111 Ill. 236; Moore v. Shook, 276 Ill. 47, 114 N. E. 592; Seymour v. O. S. Richardson Fueling Co. 205 Ill. 77, 68 N. E. 716; Mitchell v. Schoonover, 16 Or. 211, 8 Am. St. Rep. 282, 17 Pac. 867; Mitchell v. Overman, 103 U. S. 62, 26 L. ed. 369; Richardson v. Green, 130 U. S. 104, 116, 32 L. ed. 872, 876, 9 Sup. Ct. Rep. 443; Blaisdell v. Harris, 52 N. H. 191; Den v. Tomlin, 18 N. J. L. 14, 35 Am. Dec. 525; Perry v. Wilson, 7 Mass. 393; Springfield v. Worcester, 2 Cush, 52; Brown v. Wheeler, 18 Conn. 199; Collins v. Prentice, 15 Conn. 423; Dial v. Holter, 6 Ohio St. 228; Griffith v. Ogle, 1 Binn. 172; Emery v. Parrott, 107 Mass. 95; Citizens' Bank v. Brooks, 23 Blatchf. 137, 23 Fed. 21; Diefendorf v. House, 9 How. Pr. 243; Arthur v. Schriever, 28 Jones & S. 59, 16 N. Y. Supp. 610; Stickney v. Davis, 17 Pick. 169; Wilkins v. Wainwright, 173 Mass. 212, 53 N. E. 397; Kelley v. Riley, 106 Mass. 339, 8 Am. Rep. 336; Hocks v. Sprangers, 113 Wis. 125, 87 N. W. 1101, 89 N. W. 118; Singer v. Singer, 41 Barb. 139; Bridges v. Smyth, 8 Bing. 29, 131 Eng. Reprint, 311, 1 Moore & S. 93, 1 Dowl. P. C. 242, 1 L. J. C. P. N. S. 33; Green v. Cobden, 4 Scott, 486; Jackson v. Berwick, 1 Mod. 38, 86 Eng. Reprint, 713; Evans v. Rees, 12 Ad. & El. 167, 113 Eng. Reprint, 774, 4 Perry & D. 36, 9 L. J. Q. B. N. S. 317; Blewett v. Tregonning, 4 Ad. & El. 1002, 111 Eng. Reprint, 1060; Thompson's Case, 3 P. Wms. 195, 24 Eng. Reprint, 1027.

Allowing a bill for newly discovered evidence rests in the sound discretion of the court.

Griggs v. Gear, 8 Ill. 3; Schaefer v. Wunderle, 154 Ill. 577, 39 N. E. 623; Elzas v. Elzas, 183 Ill. 132, 55 N. E. 673; Ricker v. Powell, 100 U. S. 104, 25 L. ed. 527; Hopkins v. Hebard, 235 U. S. 287, 290, 291, 59 L. ed. 232-234, 35 Sup. Ct. Rep. 28; Hargraves v. Lewis, 7 Ga. 110; Winkleman v. White, 147 Ala. 481, 42 So. 411; Vary v. Thompson, 168 Ala. 367, 52 So. 951.

Petitioner is in no position to file a bill of review because he has not performed the decree which he seeks to set aside.

Griggs v. Gear, *supra*; Kuttner v. Haines, 135 Ill. 382, 25 Am. St. Rep. 370, 25 N. E. 752; Ricker v. Powell, 100 U. S. 104, 108, 25 L. ed. 527, 528; Swan v. Wright, 3 Woods, 587, Fed. Cas. No. 13,670.

Thompson, J., delivered the opinion of the court:

March 6, 1917, appellant filed his petition in the superior court for leave to file a bill of review to set aside a decree entered by that court June 9, 1916, granting to appellant's wife, cross complainant in the original case, separate maintenance, fixing alimony and solicitor's fees, and taxing costs against appellant. It is sought to set aside the decree because, at the time it was entered, the cross complainant was dead. On the hearing the court denied the petition and refused to permit the bill to be filed. On appeal to the appellate court for the first district, the decree of the lower court was affirmed. A certificate of importance was granted, and this appeal prosecuted.

It appears from the pleadings and the proofs heard on the application for leave to file the bill that February 28, 1914, appellant filed his bill for divorce in the superior court, charging Mary Bushnell, his wife, with desertion; that she answered, and filed a cross bill, charging infidelity and cruelty, and prayed for separate maintenance and support for herself and minor son. The cause came on for hearing before one of the judges of the superior court on November 17, 1915, and the following day the court announced that the equities of the case were with the cross complainant, and that a decree would be entered dismissing the original bill for want of equity, and granting to cross complainant the relief asked in her cross bill, with alimony at the rate of \$100 a month for herself and \$20 a month for the support of her minor child, and directed her solicitor to prepare a decree in conformity

with such finding. Thereafter a decree of separate maintenance was prepared and submitted to the court December 3, 1915. At this time counsel for Mary Bushnell asked for an order fixing the amount of her reasonable solicitor's fees. The parties were unable to agree upon the amount, and the matter came on for hearing before the court December 8, 1915. A partial hearing was had, and over the protest of counsel for Mary Bushnell an order was entered referring the matter to a master in chancery to take proof upon that question. A hearing was had before the master, some 500 pages of testimony were taken, and May 23, 1916, a finding and recommendation made that the cross complainant be allowed \$1,500 as her reasonable solicitor's fees, together with something like \$175 advanced by her as master's fees. June 9, 1916, exceptions filed to the master's report were heard and overruled, and the report was approved and confirmed. A decree was entered dismissing the original bill for want of equity, and finding the facts substantially as set forth in the cross bill. Mary Bushnell was granted a decree of separate maintenance, with an allowance of \$1,200 a year from December 1, 1915, for her support, and \$240 a year for the support of her minor child, together with the household goods at 4141 Lowell avenue, Chicago, her solicitor's fees of \$1,500 and the master's fees of \$175 advanced by her. The decree directed the payment of these sums, together with court costs and stenographer's fees, and made the same a lien upon the real estate of appellant.

The hearing on the exceptions to the master's report was taken up about 2:15 o'clock on the afternoon of June 9, 1916, and concluded about 4 o'clock that afternoon. Mary Bushnell was then residing at Norwood, Ohio, and was reported by her attorney to be in a very serious condition of health. It later developed that she died about 2 o'clock that afternoon. At the time the

hearing was had and the decree entered her death was not known to any of the solicitors in the case, nor to the court. Knowledge of Mrs. Bushnell's death came to the appellant on the evening of June 9th, the day the decree was entered; but he took no steps to bring such fact to the court's attention at that time, nor at any time until after the expiration of the term at which the decree was entered. July 15, 1916, appellant presented his petition for leave to file a bill of review. The petition set forth the fact of Mrs. Bushnell's death, as above stated, and alleged that the court was without jurisdiction to enter the decree. No further steps, however, were taken until in the fall of 1916, when solicitors for appellant asked leave to withdraw the petition filed in the original case and to begin such proceedings as an independent action. The motion was allowed, and leave granted to withdraw the petition without prejudice. This was done, and, as hereinbefore stated, the present action commenced March 6, 1917.

The questions presented are whether or not the court had jurisdiction to enter a decree in the original action after the death of one of the parties, and the method by which such a decree may be reviewed, when the fact of such death does not appear on the face of the record.

Marriage is a personal relation or status, created under the sanction of law, and an action for divorce is a proceeding brought for the purpose of effecting a dissolution of that relation. The action is one of a personal nature. In the absence of a statute to the contrary, the death of one of the parties to such action abates the action, for the reason that death has

settled the question of separation beyond all controversy, and deprived the court of jurisdiction, both over the persons of the parties to the action and of the subject-matter of the action itself. For this reason the

Abatement—
death—action
for divorce.

courts are almost unanimous in holding that the death of either party to a divorce proceeding, before final decree, abates the action. 1 C. J. 208; *Wren v. Moss*, 7 Ill. 72; *Danforth v. Danforth*, 111 Ill. 236; *Re Crandall*, 196 N. Y. 127, 134 Am. St. Rep. 830, 89 N. E. 578, 17 Ann. Cas. 874; *Wilson v. Wilson*, 73 Mich. 620, 41 N. W. 817; *Strickland v. Strickland*, 80 Ark. 452, 97 S. W. 659; *McCurley v. McCurley*, 60 Md. 185, 45 Am. Rep. 717; *Begbie v. Begbie*, 128 Cal. 155, 49 L.R.A. 141, 60 Pac. 667.

While the present action is one for separate maintenance, and differs from a divorce proceeding in that the latter is one for the dissolution of the marriage relation, while the former is one in affirmance of it and to enforce the obligations of that relation, they are both, nevertheless, similar in their nature, as the marriage relation constitutes the foundation of the action in each

—action for
separate main-
tenance.

case, and the dissolution of that relation extinguishes the subject-matter which forms the basis for such an action. Under our statute a proceeding for separate maintenance may be had in a court of equity, and by such proceeding a wife may secure her reasonable support and maintenance while she lives, or has lived, separate and apart from her husband without her fault. Alimony and solicitor's fees may be allowed the same as in divorce proceedings. The allowance of alimony pendente lite and of a reasonable amount as solicitor's fees to prosecute the suit is merely incidental to the main action. They are allowed only in furtherance of it, and cannot be recovered in an independent suit. *Dow v. Eyster*, 79 Ill. 254.

Appellee insists that a bill of review is not the proper remedy for bringing such facts aliunde before the court, and that it will not lie for matters merely in abatement of the action, or as a substitute for a writ of error or an appeal. In *Ernst Tosetti Brewing Co. v. Koehler*, 200

Ill. 369, 65 N. E. 636, we held that, where the error did not appear on the face of the record, the proper method of impeaching and setting aside a decree after the term had expired was by a bill of review to bring the matter before the court, so that the decree might be modified and corrected according to the equities of the case. If this were not the rule, a party would be without remedy where the fact of death of one of the parties was not discovered until after the decree was entered and the term passed. In our opinion the remedy pursued was the proper one to bring such matters aliunde to the attention of the court after the term had passed.

Bill of review—
decree passed
after death of
party.

Bills of review, or bills in the nature of bills of review, are divided into three general classes: Bills for error apparent on the face of the record;—classification.

bills to impeach a decree for fraud; and bills to review a decree on account of new matter or newly discovered evidence. Bills of the last class cannot be filed as a matter of right, but are only allowed in the sound discretion of the court.—discretion of court.

the court; and the same rule obtains where a bill for either of the first two causes is joined with one to review a decree on account of new matter arising since the decree was entered. *Schaefer v. Wunderle*, 154 Ill. 577, 39 N. E. 623; *Cole v. Little-dale*, 164 Ill. 630, 45 N. E. 969; *Elzas v. Elzas*, 183 Ill. 132, 55 N. E. 673; *Harrigan v. Peoria County*, 262 Ill. 36, 104 N. E. 172. Bills of this character will not lie until after the close of the term at which the decree was entered, and, when based upon newly discovered matter, must be accompanied by a showing that such fact was not discovered until after the original decree had been entered, and by the exercise of reasonable diligence could not have been discovered before that time. *Griggs v. Gear*, 8

—when may be
filed.

Ill. 2; Schaefer v. Wunderle, supra; Elzas v. Elzas, 183 Ill. 160, 55 N. E. 669; Watts v. Rice, 192 Ill. 123, 61 N. E. 337; Harrigan v. Peoria County, supra. Its function is to prevent a miscarriage of justice, and it will be allowed only in furtherance of that object. Hopkins v. Hebard, 235 U. S. 287, 59 L. ed. 232, 35 Sup. Ct. Rep. 26.

In the case before us no showing was made of any fraud practised upon the court, and appellant's right to relief rests solely upon the fact that knowledge of the death of Mary Bushnell came to him on the evening of the day the decree was rendered. The claim made does not go to the merits of the controversy, which had been fully heard and considered, and substantially disposed of, long before her death. The delay in entering the written decree was due largely, if not entirely, to the unnecessary reference to the master. Five hundred pages of testimony were taken by the master on the question of fees. Such practice cannot be approved. This reference was made over the protest of counsel for Mary Bushnell, who urged the court to fix the fee. The court had heard the case, and could easily have determined a reasonable fee. Appellant desired the reference, and ought not to benefit by his own request. The only effect per-

Judgment—
entry after
death of party—
effect.

mission to file the
bill could have
would be to relieve
appellant from an

obligation he is otherwise legally and equitably bound to pay. He bases his right to file the bill solely upon the circumstance of the death of Mary Bushnell, cross complainant in the divorce proceeding, on the day the decree for separate maintenance was rendered, and seeks relief on a technicality entirely too refined to commend itself favorably to a court of equity, which ordinarily does not concern itself with fractional parts of a day. Levy v. Chicago Nat. Bank, 158 Ill. 88, 30 L.R.A. 380, 42 N. E. 129. It affirmatively appears from his petition that he learned of Mary Bush-

nell's death, and of the hour of her death, about 9 o'clock on the evening of June 9, 1916, and that he took no steps to bring such fact to the attention of the court until after the term had expired.

In law, a term of court is regarded as but a single day or unit of time, and all acts done within that term are regarded as contemporaneous. During the term at which a decree is entered the record remains in the breast of the court, and the decree may be amended or set aside as justice or right may require (Krieger v. Krieger, 221 Ill. 479, 77 N. E. 909; People ex rel. Waber v. Wells, 255 Ill. 450, 99 N. E. 606), but after the term has expired it cannot be altered or amended, except in the manner pointed out by the statute or by a bill of review (Mooney v. Valentynovicz, 255 Ill. 118, 99 N. E. 344). No satisfactory reason is shown why the fact of Mary Bushnell's death was not brought to the attention of the court at an earlier date. Had the proper motion been made at the June term, the court, undoubtedly, would have granted appellant ample time to present the facts to support it. No such motion was made, and appellant slept on his rights until that term expired. The failure to make such motion was due entirely to his own negligence, and under such circumstances such new

Bill of review—
to set aside
decree for death
of party.

matter cannot be made the basis for a bill of review. Schaefer v. Wunderle, supra. Where it affirmatively appears that the matters relied upon as newly discovered came to the party's knowledge in ample time to have been availed of in the original cause, by motion or otherwise, it cannot be made the basis for a bill of review to set aside the decree. Griggs v. Gear, supra; Boyden v. Reed, 55 Ill. 458; Harrigan v. Peoria County, supra. Such is the situation presented by this case, and the court was right in denying leave to file the bill.

The judgment of the Appellate Court is affirmed.

ANNOTATION.

Bill of review as the proper remedy where decree is entered after the death of a party.

There seems to be very little in the books on this subject. Where the death is not discovered until after the entry of the decree, it would seem as if the situation was one where, under the definition, a bill of review is proper. In Story, Eq. Pl. § 404, it is said: "There are but two cases in which a bill of review is permitted to be brought, and these two cases are settled and declared by the first of the Ordinances in Chancery of Lord Chancellor Bacon, respecting bills of review, which Ordinances have never since been departed from; . . . upon new proof that is come to light after the decree was made, which could not possibly have been used at the time when the decree passed, a bill of review may be grounded by the special license of the court, and not otherwise."

It will be seen that it is held in the reported case (*BUSHNELL v. COOPER*, ante, 1517) that a bill of review is the proper remedy, where a decree in a suit for separate maintenance is entered after the death of a party, and the error does not appear upon the record; but that the court will not entertain the bill where the applicant might have applied for relief at the term in which the original decree was entered, particularly where delay in entering the decree was due to the action of the applicant.

In *Slingsby v. Hale* (1669) 1 Ch. Cas. 122, 22 Eng. Reprint, 723, the plaintiff, being the devisee of a mortgagor, applied for a bill of review to reverse a decree twenty years old, "wherein, the mortgagor being plaintiff against the mortgagee to have a redemption, it was decreed accordingly, paying the money to be found due on account; and for that purpose referred to a master to take the account. And it was also decreed, that if the plaintiff failed to take [pay] the money at a day to be set by the master, the defendant should hold discharged of all equity of redemption. Pending

the reference the suit abated by the death of one of the parties defendant; yet the account went on, without any notice taken to the court of the abatement." The executor was a defendant to the original bill, the master was attended on the behalf of both sides, and made up his report, and that was confirmed and decreed, and that decree was enrolled. The plaintiff claimed, *inter alia*, "that in respect of the abatement, there was no cause in the court when the account was stated, and the decree drawn up and enrolled." The court declared they saw no cause to alter the decree. The matter was later reheard in the House of Lords, "and on long debate they seemed to incline against the plaintiff, but took time to consider. And after . . . they all three delivered one uniform opinion clearly that the plaintiff, being devisee, is not entitled to a bill of review, being not in privity to the testator, against whom the decree was; as, if a judgment be against land, and the owner alien the land, the alienee cannot bring a writ of error, nor the vendor. And so dismissed the bill for this reason principally. Yet the Keeper and Chief Justice Hale were of opinion that the error assigned was no sufficient error to avoid the former decree, but notwithstanding the abatement the account ought to conclude, and stand as an account stated."

In *Neilson v. Holmes* (1827) Walk. (Miss.) 261, reversing a decision of the chancellor, overruling a demurrer to a bill of review, where one of the defendants had died before the making of the decree, the court, after pointing out various reasons for sustaining the demurrer, including the fact that it was not stated in the bill of review that the death was unknown to the parties at the time of making the decree, said: "It is not, however, intended to decide in this case, that the remedy by bill of review will not lie to reverse a decree pronounced

after the death of a party; because, where there are no parties before the court, it would be error in fact, even in a court of law, to render judgment in such a case, which might be reversed by writ of error, coram nobis. All that the decision in this suit determines is that this is not a case in which the remedy will apply: the complainants in the bill of review not having brought themselves within a single requisite necessary to entitle them to the application of the remedy to their case."

In *Arnold v. Moyers* (1878) 1 Lea (Tenn.) 308, where it was alleged that a party died before the rendition of a decree of sale of land and no proper revivor was ever had against his heirs in the case, and that the decree was subject to review for this objection, adding it was fraudulent and void, and subject to be impeached also for this cause, the court said: "The matter

charged does not make a case for a bill of review. The error, if any, does not appear on the face of the decree, that is, the death of Thomas D. Arnold before the rendition of the decree; nor does the bill show that it had been suggested and proven to the court. An inference might be drawn that it had been done, from the recitals of the bill, but we are not informed how the fact is. This being so, it is simply the case of a decree rendered after the death of a party, without his death being suggested or proven. This could not furnish the basis for a bill of review, as it is not matter that has arisen in time after the decree, but was in existence, had arisen, before the decree was made." But the court held that the bill would be entertained as a bill to remove a cloud on title, with leave to make any proper amendments.

B. B. B.

BETH VALENTINE, by Next Friend, Appt.,
v.
INDEPENDENT SCHOOL DISTRICT of Casey et al.

Iowa Supreme Court — October 23, 1919.

(— Iowa, —, 174 N. W. 334.)

Mandamus — to compel issuance of diploma.

1. Mandamus lies to compel the officers in charge of a public high school to issue a diploma to a pupil who has completed the required course and passed his examinations.

[See note on this question beginning on page 1533.]

Schools — right to diploma.

2. The completion of the required course in a public high school entitles the pupil to a diploma.

— validity of order — wearing of cap and gown.

3. An order depriving a pupil of his diploma for refusal to wear cap and gown at graduation is unreasonable.

[See 24 R. C. L. 574.]

Schools — ownership of pupil's record.

4. The records made by pupils in public schools are the property of the

district, and not the private property of the teacher or superintendent of the school.

Mandamus — duty to apply to school superintendent.

5. One deprived of his diploma upon graduation from a public high school by a rule which is unreasonable and not within the powers conferred upon the school board is not bound to apply to the county and state superintendents for redress before applying to the court for a mandamus.

APPEAL by plaintiff from a judgment of the District Court for Guthrie County (Applegate, J.) sustaining a demurrer to a petition filed for a

writ of mandamus to compel defendants to issue a diploma to plaintiff, and a true statement and certificate of the grades made by her in defendants' high school course of four years. *Reversed.*

Statement by Preston, J.:

Action for a writ of mandamus to require defendants to issue a diploma to plaintiff, also a copy of plaintiff's grades made by her in defendants' high school course of four years. Defendants demurred to the petition, which was sustained and the plaintiff appeals.

Messrs. C. E. Berry and Carl P. Knox, for appellant:

The court reserved the right to determine whether or not school boards have acted within the scope of their powers.

Kinzer v. Independent School Dist. (Kinzer v. Toms) 129 Iowa, 441, 3 L.R.A.(N.S.) 496, 105 N. W. 686, 6 Ann. Cas. 996; Benjamin v. Malaka, 50 Iowa, 648; Rummel v. Dealy, 112 Iowa, 503, 84 N. W. 526; Hancock v. Perry, 78 Iowa, 550, 43 N. W. 527.

The plaintiff has vested rights or rights vested in her by her acting upon the inducements held out by said school board, and which the board cannot, by subsequent rule or order, rescind after they are vested.

Benjamin v. Malaka, 50 Iowa, 648; Hibbs v. Adams, 110 Iowa, 308, 48 L.R.A. 535, 81 N. W. 584; Funck v. Farmers Elevator Co. 142 Iowa, 621, 24 L.R.A.(N.S.) 108, 121 N. W. 53; Ball v. Keokuk & N. W. R. Co. 62 Iowa, 751, 16 N. W. 592; Washington v. Thomas, 59 Iowa, 50, 12 N. W. 767.

The right of appeal to the county superintendent from the action of the board does not preclude an application for a writ of mandamus to determine whether or not the board, in the matter complained of, acted within the scope of their powers as defined by statute.

Kinzer v. Independent School Dist. (Kinzer v. Toms) 129 Iowa, 441, 3 L.R.A.(N.S.) 496, 105 N. W. 686, 6 Ann. Cas. 996; Perkins v. Independent School Dist. 56 Iowa, 476, 9 N. W. 356; Rodgers v. Independent School Dist. 100 Iowa, 317, 69 N. W. 544; Rummel v. Dealy, 112 Iowa, 503, 84 N. W. 526; Hancock v. Perry, 78 Iowa, 551, 43 N. W. 527.

In actions for mandamus the courts may take equitable causes into consideration in determining whether relief shall be granted.

Funck v. Farmers Elevator Co. 142

Iowa, 621, 24 L.R.A.(N.S.) 108, 121 N. W. 53.

Mr. A. M. Fagan for appellees.

Preston, J., delivered the opinion of the court:

1. It is alleged substantially by plaintiff, and admitted by the demurrer:

That plaintiff attended defendants' high school for a term of four years, complying with all of the rules and regulations of said defendant school board, and made grades in all studies pursued in said four-year course above the passing grade, or 75 per cent. That plaintiff fully completed all of said high school course and delivered her graduating oration as required by the rules of defendant corporation. That defendants issued diplomas to all of the class, including this plaintiff, and advertised that said commencement exercises would be held at the high school auditorium on May 30, 1918, at 8 o'clock P. M. That defendant procured caps and gowns prior to the commencement exercises, and had same fumigated by the board of health physician at Casey, Iowa, and demanded that the graduates wear said caps and gowns during the exercises; and that the said health physician advised this plaintiff that the danger of taking contagious disease from said caps and gowns was not eliminated by said fumigation. That plaintiff was unable to wear her cap and gown for the reason that the odor and smell from the effects of the disinfectants made her sick, and for the further reason that the likelihood of catching contagious diseases had not been eliminated by the disinfectant, and this defendant so informed the defendants, as did also the other graduates, as to what the health physician had advised her as to catching contagious disease from wearing said caps and gowns, and that the smell of said disinfectant was unbearable, but, regardless of these facts, defendants in-

sisted that plaintiff and the other graduates should wear their caps and gowns. That the fumes and odor from the effects were so strong that none of the graduates wore their caps, and but three of said graduates wore the gowns, and the three wearing the said gowns received their graduating certificate or diploma.

That defendants refused to deliver to plaintiff her graduating certificate or diploma on account of her failing to wear said cap and gown. That there had been no rule or order requiring the plaintiff to wear a cap and gown at the graduating exercises, and, had there been, it would have been illegal and void, as said defendants had no legal right to make such requirements.

That the defendant the independent school district of Casey, Iowa, is an accredited high school and is recognized as such by all of the state colleges and higher institutions of learning in the state of Iowa. That, in view of this fact, plaintiff is entitled to her grades in said school that she may take the examination for a teacher's certificate or enter any of the colleges or higher institutions of learning in the state of Iowa, as she is entitled to do were she granted her grades in said high school.

That she made a request and demand upon the defendants, and especially upon J. E. Rohrbaugh, superintendent of said school, and he refused to deliver to plaintiff her grades or copies thereof, claiming that the said grades were his private property, and that plaintiff, nor anyone for her, could have said grades nor access to same.

That plaintiff has no speedy and adequate remedy at law, and she asks that a writ of mandamus issue, compelling defendants to deliver to her her certificate of graduation or diploma and a true statement and certificate of her grades in said high school studies during her four-year course in said high school.

Defendants demurred to said petition on the grounds that plaintiff

had a plain, speedy, and adequate remedy at law by appeal to the county superintendent; that the action of the board of directors in issuing certificates of graduation or diplomas and grade reports, and all the matters complained of by said plaintiff, are matters discretionary within said board, and not legal obligations imposed upon them as such school officials.

The parties to this action seem not to be familiar with the Golden Rule, or have forgotten it. On the one side they seem to have been impressed with the idea that they were "drest in a little brief authority," and, on the other, there appears to have been present the idea of resistance to authority, so prevalent all over the world at this time. A little common sense would, it seems to us, have avoided this litigation. It may be that it would have been reasonable and proper for the school authorities to have required the graduating class to wear caps and gowns. There might be advantages in this. Some might be inclined to dress better than the others were able to do, and other reasons. And it may be that the school authorities could have properly refused to permit any of the class who refused, without sufficient reasons, to comply with the requirement, to take part in the honors of the public graduating exercises. Possibly, if the danger from disease by the use of the caps and gowns was real, this would be an excuse. It appears that none of the graduates wore their caps, and but three wore the gowns, and that such three received their diplomas. It is not shown that plaintiff was willing to do this much. But the graduating exercises are now past, and the matters just referred to are, for that reason, now out of the case, and are not determined. The public ceremonial is not a graduation, and is not what entitles a student to a certificate or diploma, but it is the completion of the prescribed course which entitles one to

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a diploma. The diploma is simply the evidence that this has been done, and evidence of graduation. Without the diploma, no one would be entitled to be called a graduate, and though one had completed the course and passed examinations, they would not be permitted to enter college.

We shall proceed now to determine whether plaintiff was entitled to a writ of mandamus in regard to her certificate or diploma and her grades. The order was much broader and more far-reaching than merely to deprive plaintiff of the right to participate in the graduating exercises. It appears to have been a mere verbal order; at least, it does not appear that there was any order, or rule, regularly adopted of record, or that there was then any penalty prescribed. So that, as far as the record shows, plaintiff did not, and could not, know the consequences to follow a failure to

comply. Even had —validity of order—wearing of cap and gown. there been such a regular order or rule, it would be arbitrary and unreasonable. The trial court, from statements in its written opinion, was reluctant to deny the writ, and stated that he followed the case of *Sweitzer v. Fisher*, 172 Iowa, 266, L.R.A.1916B, 611, 154 N. W. 465. We are satisfied that, under the facts in that case, the right conclusion was reached, and the cases are readily distinguished. In that case, the student had not passed his grades, and was therefore not entitled to be graduated. There was some circumlocution there in the use of dummy diplomas, and afterwards other diplomas were issued. But in the instant case, plaintiff had complied with all rules and regulations and completed the full four-year course, and passed all examinations required. The only reason for the attempt to deprive her, in a considerable measure, of the benefit of her four years' study, was her failure, under the circumstances given, to wear the cap and gown. This demand was subsequent to her having completed the four-year course,

passed the examinations, and complied with all rules, except the one stated. The penalty is harsh and unreasonable, and the action of the defendants arbitrary.

Appellant's propositions for reversal, stated briefly as may be, are that plaintiff was induced to complete the four-year course, and that she met all her requirements; that by the action of the board she is disqualified to enter the colleges of the state, and by a subsequent demand upon her is refused a diploma; that, the board having extended certain offers to any pupil wishing to avail themselves thereof, and by entering the high school and completing the course, she is entitled to the evidence which will show such facts, and she claims that an appeal to the higher school authorities is not an exclusive remedy, but that the courts will determine whether or not the defendants have acted within the scope of their powers; that plaintiff has vested rights and is deprived of substantial rights which the board cannot, by subsequent rule, rescind; that in an equitable action, such as this, the court may take equitable causes into consideration in determining whether relief shall be granted; that the board can exercise such powers as are conferred by statute either expressly or by reasonable implication. One or two other points are made which will be referred to later in the opinion. In support of the foregoing propositions, appellant cites *Benjamin v. Malaka*, 50 Iowa, 648; *Hibbs v. Adams*, 110 Iowa, 306, 48 L.R.A. 535, 81 N. W. 584; *Funck v. Farmers Elevator Co.* 142 Iowa, 621, 24 L.R.A.(N.S.) 108, 121 N. W. 53; Code, § 4348; *Washington Dist. Twp. v. Thomas*, 59 Iowa, 50, 12 N. W. 767.

The question of the right to a mandamus to compel the issuance of a diploma is one on which there is very little authority. We find in the case of *State ex rel. Burg v. Milwaukee Medical College*, 128 Wis. 7, 3 L.R.A.(N.S.) 1115, 116 Am. St. Rep. 21, 106 N. W. 116, 8

Ann. Cas. 407, that the supreme court of Wisconsin held that mandamus will not lie to compel a private medical college to comply with its contract to furnish a diploma to a student who has completed his course, since there is an adequate remedy by action for breach of the contract, or suit for specific performance. In the course of the discussion in the opinion, it was said that mandamus is granted usually for public purposes, to compel the performance of a public duty prescribed by statute, and to compel, in proper cases, the performance of specific duties imposed by law. But the duties arising out of contract relations will not be enforced by mandamus. It does not appear in the instant case what rules, if any, are provided by defendants in regard to issuing diplomas to those who may complete the course. True, there is no statute expressly requiring the issuance of a diploma in such a case; but our schools are maintained by taxation, and our public schools are, in a sense, public, and those in authority and who are responsible for the government of the schools are, in a sense, engaged in a public duty. And we think and hold that, even without a statute, there is an implied legal duty on the part of such officers to issue written evidence of plaintiff's graduation in the form of a certificate, a diploma, or the like, to those who have satisfactorily completed the prescribed course of study, unless for sufficient reasons they are

justified in withholding it. Defendants have adopted the method of issuing diplomas, and they may not discriminate against the plaintiff. On the other hand, in L.R.A.1916B, 616, where the Sweitzer Case is annotated, we find several cases on the subject. In *People ex rel. Jones v. New York Homœopathic Medical College & Hospital*, 47 N. Y. S. R. 395, 20 N. Y. Supp. 379, the rule governing the right to compel the issuance of diplomas by mandamus is given thus: "Stated

in general terms, the principle is that mandamus will lie to compel the performance of duties purely ministerial in their nature, and so clear and specific that no element of discretion is left in their performance; but, as to all acts or duties necessarily calling for the exercise of judgment and discretion on the part of the officer or body at whose hands their performance is required, mandamus will not lie."

Referring to that case in the note, it is said that where a college neither expressly nor impliedly agreed to issue a diploma to its students unless the latter had satisfactorily passed certain examinations and their qualifications had been approved by the faculty, a student against whose qualifications the faculty had found was held not entitled to a writ of mandamus to compel the college to issue a diploma to him, although he charged bad faith and ill will upon the part of some of the officials of the college.

In *People ex rel. O'Sullivan v. New York Law School*, 68 Hun, 118, 22 N. Y. Supp. 663, it was held that the faculty of institutions having power to recommend to the regents students deemed to be worthy of degrees are necessarily vested with broad discretion as to the persons who shall receive those honors, and that where the evidence showed that the conduct of a student at a law school had been such, between his final examinations and the time of conferring degrees, that there was a fair occasion for the exercise of discretion on the part of the faculty, and it had refused him his degree, the court would not grant a peremptory writ of mandamus to compel the law school and dean to grant him a diploma. In the instant case, outside of the question of wearing cap and gown at the graduation ceremonies, there was no fair occasion for the exercise of judgment or discretion on the part of defendants. Every other question had already been determined in favor of plaintiff.

In *State ex rel. Nelson v. Lincoln*

Medical College, 81 Neb. 533, 17 L.R.A.(N.S.) 930, 116 N. W. 294, 118 N. W. 122, where the dean of a medical college, in pursuance of his authority under the by-laws of the corporation (not under a statute), in passing upon the standing of students applying for graduation, reported to the directors that a student had fulfilled all demands of the institution and had passed all examinations, so as to entitle her to a diploma, and the board of directors arbitrarily and capriciously refused to graduate the student and issue her a diploma, it was held to be the duty of the court to issue a writ of mandamus to compel the college corporation and its directors to discharge their duty. In that case, the by-laws of the college did not, as we understand it, provide for the issuance of diplomas upon graduation; but the board of the college, under the statutes of Nebraska, had power to confer, on the recommendation of the faculty, all such degrees and honors as are conferred by colleges and universities of the United States, and such others, having reference to the course of study and the accomplishment of the student, as they may deem proper. So that it would seem that in that case there was no express requirement by the statutes, or the rules or by-laws of the college, to issue a diploma. They had power to do so. It is not questioned in the instant case, and cannot be, we think, but that defendants had the power and authority to issue diplomas. Appellant argues that they have such power, and cites Washington Dist. Twp. v. Thomas, *supra*, to the proposition that the board can exercise such powers as are conferred by statute, either expressly or by reasonable implication.

In Hamlett v. Reid, 165 Ky. 613, 177 S. W. 440, the superintendent of public instruction was, by statute, made ex officio chairman of the board of trustees of the State Normal Industrial Institute; plaintiff was awarded a diploma by the trustees, and it was signed by all of

them except the state superintendent; he refused to sign, although plaintiff had complied with all requirements; it was admitted that, although the diploma was signed by the chairman pro tem. of the board and valid without the signature of the state superintendent, yet the state authorities had refused to recognize it as valid without the signature of the state superintendent. It was held that the law would not permit the purposes for which the school was created to be thwarted by arbitrary action on the part of any member of the board, and the fact that the diploma was in fact valid would not justify the superintendent in arbitrarily refusing to sign it, and that mandamus would lie directing him to do so. It was held in that case that the answer of defendant did not give sufficient reason for a refusal. We take it that though there may appear to be, to defendants, some reason for withholding the diploma, yet it must be a sufficient reason. In other words, they may not refuse arbitrarily, under a rule or order which is itself unreasonable and arbitrary. The court further said the fact that it was not necessary for the state superintendent to sign appellee's certificate in order to give it validity does not excuse him; that county boards know that the state superintendent is chairman of the board; but they do not know from the diploma whether a chairman pro tem. has been selected or is authorized so to act. His refusal to sign it, therefore, deprives her of a certificate in regular form, and clouds her right to teach. And so in the instant case, except that here the facts are even stronger in plaintiff's favor, because she has no evidence whatever to present to any college which she may wish to enter. Plaintiff is deprived of certain rights and privileges to which she would be entitled as a graduate of an accredited high school. She has completed the prescribed course, and is deprived of the certificate or diploma, for reasons which we have before indicated

are insufficient. A somewhat similar question was involved in *Northington v. Sublette*, 114 Ky. 75, 69 S. W. 1077, where a mandamus was issued to compel a county superintendent, as a member of the board of examiners, to issue a teacher's certificate. The petitioner having passed the requisite examination and complied with all demands, the court held that the board, without special cause, had no right to withhold it. The court said: "The majority of the board of examiners were, therefore, to determine the grade of any person examined by them, and the decision of the majority was as binding as if it had been made by the whole board. When this decision was rendered, appellant became entitled to her certificate, and it was the duty of the superintendent to sign it and deliver it to her. In this she had no discretion. It was simply a ministerial duty."

2. It is further contended by appellant that under § 2776 of the Code the defendant district, through its board, is authorized and empowered to establish graded schools or high schools and determine the course of study, subject to the approval of the state superintendent, and that, this being so, it follows that, in order to have graded schools, a record should be kept by the teachers of each pupil, of the grade made in each study, and that therefore the grades or records thereof should be the property of the school district, and not the private property of the teachers or superintendent of the schools. We think there is force in appellant's contention at this point. The markings, or records, of the different pupils kept by the teachers, should be, and are, in a sense, public records, and not the private property of the teachers or the school. The school is a public school. It is necessary that the records of the different pupils should be kept for the information of other teachers and the school officers, to

know what a scholar's record in the different studies is and has been. Unless this is so, how could it be determined whether a class or pupil should be advanced, in case of the resignation or death of a teacher? The case being presented on demurrer, the record is indefinite and uncertain as to the method pursued by the defendant school in keeping plaintiff's grades, referred to in the petition. There is nothing in the record tending to show that the record of the standings of the different scholars is the private property of the school-teachers. No cases are cited by either side on this proposition. Under the statute before cited, the board had power to establish graded or schools of a higher order, and we have given some of the reasons why it would appear to be necessary to keep the markings or grading of differing scholars in order to determine the grades. It would seem, then, that such records are public records within the meaning of the law, and, if this is so, certified copies thereof could be used, under the first part of § 4635 of the Code. Of this section we said in *Austin v. Whitcher*, 135 Iowa, 733, 737, 110 N. W. 910, that it simply announces a rule which is generally recognized by all courts. As bearing upon this question, see *Thurstin v. Luce*, 61 Mich. 292, 28 N. W. 103. The school rolls were admitted in evidence to show the presence of a pupil in school when he claimed to have been elsewhere at such times, and the court said that such evidence was entitled to great weight.

The precise question now under consideration was not directly determined. In *Sanborn v. School Dist. 12 Minn.* 17, Gil. 1, the records of a school district were admitted in evidence, but the only question there was as to whether a proper foundation had been made. In *Jones on Evidence*, § 508, the rule is stated as to the admissibility in evidence of books of public officers, and the class of books is referred to, some of which are books required

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to be kept by law, and others as to which there seems to be no such requirement. See also § 514 of the same work. See also the later work by Mr. Jones, "The Blue Book of Evidence," the same section, where it is said at § 508: "The cases are numerous that the entries are competent evidence where the nature of the office seems to require them, and whether the duty to make them is enjoined by statute, or by a superior officer in the performance of official duty. So long as the one making them was in discharge of a public and official duty in so keeping the book of entry, it is sufficient. Such entries are generally made by those who can have no motive to suppress the truth, or to fabricate testimony. . . . Nor need it be kept by the public officer himself if the entries are made under his direction by a person authorized by him."

Of course, to be admissible, it will be necessary that such records should be authenticated and the proper foundation laid.

3. It is contended by appellees that under § 4341, Code Supp., where discretion is left to the inferior tribunal, mandamus can only compel it to act, but cannot control such discretion, and they cite, further, *Preston v. Board of Education*, 124 Iowa, 355, 100 N. W. 54, and other cases, to the point that where the duty imposed upon the board of tribunal involves an exercise of discretion, based upon facts to be found by it, mandamus will not lie, however erroneous the conclusion reached. But we have seen by the discussion in the first paragraph of this opinion that there was no question of discretion left. It is further contended by appellees, and this is their principal argument, that plaintiff's remedy was by appeal to the county superintendent, under § 2818, and they say that the matters complained of by the appellant are matters purely of school discipline and government. They cite § 2782c, Code Supp., as to the power of the directors to suspend or

dismiss pupils, or to prevent them from graduating or participating in school honors for a violation of the rules or regulations adopted by the board. This, of course, relates to reasonable rules. Possibly this question should have been taken up first. Doubtless plaintiff could have appealed to the county superintendent, and then, if necessary, to the state superintendent, and, if the action of the board had been reversed, a mandamus would issue to compel the board to carry out such order. For myself, I am not so sure but that this course should have been taken. And yet, the holdings are that the courts may determine whether or not school boards have acted within the scope of their powers. The rule is, briefly stated, that a party complaining of a rule is not limited to an appeal to the county superintendent if

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duty to apply to
school superintendent.**

the rule is unreasonable and not within the scope of the powers conferred upon the board. *Perkins v. Independent School Dist.* 56 Iowa, 476, 9 N. W. 356; *Hinkle v. Saddler*, 97 Iowa, 526, 66 N. W. 765; *Rodgers v. Independent School Dist.* 100 Iowa, 317, 69 N. W. 544; *Kinzer v. Independent School Dist.* (*Kinzer v. Toms*) 129 Iowa, 441, 3 L.R.A. (N.S.) 496, 105 N. W. 686, 6 Ann. Cas. 996. In *Burkhead v. Independent School Dist.* 107 Iowa, 29-31, 77 N. W. 491, it was held that the remedy is not by appeal to the county superintendent where the action of the board of directors is wrongful, and, under the circumstances of that case, the plaintiff was permitted to sue in the courts to recover under a teacher's contract. See also *Knowlton v. Baumhover*, 182 Iowa, 691-726, 5 A.L.R. 841, 166 N. W. 202, and cases cited. In the *Knowlton Case*, at page 726 of 182 Iowa, it was said: "The rule is thoroughly well settled that, while the discretion granted by statute to the board of directors can be reviewed only by appeal to the county superintendent, yet, where

(— *Iowa*, —, 174 N. W. 534.)

it 'acts without jurisdiction, or has exceeded its powers, and by some act in an official capacity has done or attempted to do that which it has not a right to do, the courts have jurisdiction to set aside the unauthorized act.'"

As before stated, we are of opinion that the order of the board was

unreasonable and arbitrary, and therefore such a rule as the board had not a right to make, and that the board exceeded its powers. We are of opinion that the trial court erred in denying the writ. The judgment is reversed.

Ladd, Ch. J., and Evans and Salinger, JJ., concur.

ANNOTATION.

Right to refuse diploma or other evidence of pupil's completion of course.

Generally.

The faculty, directors, or other governing board of a school, college, or university, which is authorized to examine the students and to determine whether they have performed all the conditions prescribed to entitle them to a diploma or other evidence of a completion of the course of study, exercises quasi judicial functions, in which capacity its decisions are conclusive, providing its action has been in good faith, and not arbitrary. *People ex rel. Pacella v. Bennett Medical College* (1917) 205 Ill. App. 324; *Sweitzer v. Fisher* (1915) 172 Iowa, 266, L.R.A.1916B, 611, 154 N. W. 465; *Niles v. Orange Training School* (1899) 63 N. J. L. 528, 42 Atl. 846; *People ex rel. Jones v. New York Homœopathic Medical College & Hospital* (1892) 47 N. Y. S. R. 395, 20 N. Y. Supp. 379; *People ex rel. O'Sullivan v. New York Law School* (1893) 68 Hun, 118, 22 N. Y. Supp. 663; *Tate v. North Pacific College* (1914) 70 Or. 160, 140 Pac. 743; *Addy v. Western Pennsylvania College* (1902) 11 Pa. Dist. R. 687.

In *People v. Bennett Medical College* (1917) 205 Ill. App. 324, in affirming a judgment dismissing a petition for mandamus to compel the defendant to issue to the petitioner a diploma of graduation as a doctor in medicine, the court said that the defendant medical college must be the judge of the qualifications of its students for the degree of doctor of medicine, and where the petitioner had not passed the required examination the court stated that it was not qualified to pass

an opinion on his attainments as a student in medical science.

Similarly, in *Sweitzer v. Fisher* (1915) 174 Iowa, 266, L.R.A.1916B, 611, 154 N. W. 465, wherein it appeared that a board of school trustees had agreed that a certain student had not attained a sufficient grade of scholarship, it was held that the board was justified in refusing to graduate that student, and that, though he had been allowed to participate in the graduation exercises, his right to a diploma was not thereby established. And, the student being an attendant of the public schools, it was held that his only right of appeal was to the county superintendent.

In *Niles v. Orange Training School* (1899) 63 N. J. L. 528, 42 Atl. 846, the plaintiff sought to enforce by mandamus a right to a diploma certifying the completion with credit of the course of study in the defendant training school. It appeared that the school authorities, after a fair consideration of the plaintiff's proficiency, had concluded that she was not entitled to the diploma, and the court held that after such a conclusion it would be absurd to order a certification by the authorities that the plaintiff had completed her course with credit.

In *People ex rel. Jones v. New York Homœopathic College & Hospital* (1892) 47 N. Y. S. R. 395, 20 N. Y. Supp. 379, wherein the relator moved for a writ of mandamus to compel the dean and faculty of the defendant college to grant him a diploma, the court said: "The college neither expressly

nor impliedly agrees to issue diplomas to its students, nor to confer upon them the right to practise medicine, unless the student has first satisfactorily passed certain preliminary studies, and his qualifications have been approved by the faculty and censors of the college, and unless he has been recommended by them to the board of trustees for graduation. The relator claims that he performed all of the duties required of him, and passed all of his examinations, and that he is entitled to his diploma under rules governing the college. These rules, in the nature of things, leave it to certain medical experts to determine whether the examination of the applicant has been satisfactorily passed or not, and these gentlemen have decided adversely to the claim of the relator. His qualifications have not been approved by the faculty and censors of the college, and they have, therefore, declined to recommend him to the trustees for graduation; and the college has, in consequence, refused to grant him the privilege of practising medicine. This seems to be a complete answer to the application. . . . Courts may be versatile, but they must be careful not to infringe upon the discretion vested in excise boards, colleges, or inferior tribunals, nor to substitute its discretion for theirs. The determination by these bodies of any questions within the scope of their jurisdictions is, as it should be, as conclusive and free from control upon mandamus as that exercised by the highest jurisdictions in the country." And further, the court said: "The relator charges bad faith and ill will upon the part of some of the officials of the college, but these allegations do not alter the underlying fundamental principle which controls. The court cannot re-examine the relator as to his qualifications to practise medicine, nor go over the studies in which he is said to be deficient. If it attempted to do so, the relator's road would be easy, for, with his experience, imperfect though it may be, he would no doubt pass a better medical examination than any court could be expected to give him.

The law wisely intended no such result. It leaves the subject where it belongs,—with those qualified to master it."

And in *People ex rel. O'Sullivan v. New York Law School* (1893) 68 Hun, 118, 22 N. Y. Supp. 663, wherein it appeared that the defendant college had refused to grant the plaintiff a diploma and degree because of his conduct between his final examination, which he successfully passed, and the date of graduation, the court held that the exercise of such discretion by the defendant college would not be reversed, saying: "The faculties of educational institutions having power to confer degrees, and the teachers of schools having the right to recommend to the regents of the university students deemed to be worthy of degrees, are necessarily vested with a broad discretion as to the persons who shall receive those honors, or be recommended for such distinctions; and when the conduct of a student has been such, between his final examination and the time of conferring degrees, that there is a fair occasion for the exercise of discretion on the part of the faculty, as there clearly was in this case, it should not be reversed by this court, and the case must be an extraordinary one to justify judicial interference. Any other rule would be subversive of all discipline in the schools, and of the educational interests of the state."

In *Tate v. North Pacific College* (1914) 70 Or. 160, 140 Pac. 743, the plaintiff sued in equity to compel the defendant college to grant him a diploma and degree. He claimed that he had successfully completed the course of study, and passed the final examination, and that the faculty of the defendant college had purposely mislaid or destroyed his final examination papers, and had insisted that he try another examination, on which latter trial he alleged that they had intentionally given him such a low grade that he could not pass. The defendant denied the plaintiff's allegations as to its bad faith, and, since the latter had entered college with knowledge that one of the requirements for a diploma and degree was

that his examination should be "satisfactory to the faculty," the court held that the action of the faculty in exercising its quasi judicial function would not, in the absence of bad faith, be reversed.

Where the trustees of a college had the final power of decision as to whether the students should receive their diplomas and degrees, the court held that the action of the trustees in refusing to approve the recommendation of the faculty that the petitioner be granted a diploma could not, in the absence of bad faith, be reviewed, saying: "This was a matter solely for them, unless, perhaps, in a case of bad faith, or so manifest a violation of the principles of right and justice as clearly to indicate that their conduct was not only wrongful, but perverse." *Addy v. Western Pennsylvania College* (1902) 11 Pa. Dist. R. 687.

Unreasonable refusal.

There must be a sufficient reason for withholding a diploma or other evidence of the completion of a course. It may not be refused arbitrarily, nor under a rule which is itself unreasonable and arbitrary. *Hamlett v. Reid* (1915) 165 Ky. 613, 177 S. W. 440; *State ex rel. Nelson v. Lincoln Medical College* (1908) 81 Neb. 533, 17 L.R.A. (N.S.) 930, 116 N. W. 294, 118 N. W. 122; *People ex rel. Cecil v. Bellevue Hospital Medical College* (1891) 60 Hun, 107, 14 N. Y. Supp. 490, affirmed in (1891) 128 N. Y. 621, 28 N. E. 253; *State ex rel. Burg v. Milwaukee Medical College* (1906) 128 Wis. 7, 3 L.R.A. (N.S.) 1115, 116 Am. St. Rep. 21, 106 N. W. 116, 8 Ann. Cas. 407.

In the reported case (*VALENTINE v. INDEPENDENT SCHOOL DIST.* ante, 1525) it is held that the refusal of a pupil to wear a cap and gown at the graduation exercises, for the reason that they smell of disinfectants and may be disease carriers, is not such an act as will justify the withholding of a diploma.

In *People ex rel. Cecil v. Bellevue Hospital Medical College* (1891) 60 Hun, 107, 14 N. Y. Supp. 490, affirmed in (1891) 128 N. Y. 621, 28 N. E. 253, it appeared that the plaintiff entered the defendant college for the purpose

of taking the regular course of study in that institution, and procuring the degree of doctor of medicine. At the end of the course, and having fulfilled all the conditions entitling him to present himself for final examination, he was informed by the secretary of the faculty that he would not be allowed to present himself for final examinations, nor would the corporation grant him the degree of doctor of medicine. On an application for a writ of mandamus to compel the defendant to permit the plaintiff to be examined, and, if qualified, to give him the degree of doctor of medicine, the defendant maintained that it had the right arbitrarily to refuse the plaintiff his examination and degree. The court, holding that the plaintiff was entitled to the writ, said: "The circulars of the respondent indicate the terms upon which students will be received, and the rights which they are to acquire by reason of their compliance with the rules and regulations of the college, in respect to qualifications, conduct, etc. When a student matriculates under such circumstances, it is a contract between the college and himself that, if he complies with the terms therein prescribed, he shall have the degree, which is the end to be obtained. This corporation cannot take the money of a student, allow him to remain and waste his time (because it would be a waste of time if he cannot get a degree), and then arbitrarily refuse, when he has completed his term of study, to confer upon him that which they have promised, namely, the degree of doctor of medicine which authorizes him to practise that so-called science. It may be true that this court will not review the discretion of the corporation in the refusal, for any reason or cause, to permit a student to be examined and receive a degree; but where there is an absolute and arbitrary refusal, there is no exercise of discretion."

In *Hamlett v. Reid* (1915) 165 Ky. 613, 177 S. W. 440, it appeared that the state superintendent of schools had refused to sign a diploma earned by and granted to a student in a normal institute. His refusal to sign de-

prived her of a proper diploma, and the court, affirming the allowance of a writ of mandamus compelling the superintendent to sign, said: "His refusal to sign it . . . deprives her of a certificate in regular form, and clouds her right to teach. After much labor and application she gained the prize, and she is entitled to have its verity certified by the state's officers, whose duty it is to award it to her. The diploma in regular form has sentimental and other values for her far in excess of any monetary returns which school-teaching may bring."

In *State ex rel. Burg v. Milwaukee Medical College* (1906) 128 Wis. 7, 3 L.R.A.(N.S.) 1115, 116 Am. St. Rep. 21, 106 N. W. 116, 8 Ann. Cas. 407, the plaintiff claimed that he had contracted with the defendant college for a course in its dental department, and that he had completed the prescribed course and paid the required fees, so that under the terms of his contract he was entitled to a diploma which the defendant refused to deliver. The court herein held that the case made was clearly one of breach of contract but the plaintiff had petitioned for a writ of mandamus, which relief could not be given.

Where, on the completion of a course of study in the defendant college, the dean thereof passed on the relator's qualifications for graduation and found that she was entitled to graduate, and so recommended to the board of directors, and it appeared that the latter body was biased and prejudiced against the relator, the

court held that the arbitrary act of the directors in refusing the diploma to which the relator was entitled was sufficient ground for the granting of a writ of mandamus to compel the directors to discharge their duty. *State ex rel. Nelson v. Lincoln Medical College* (1908) 81 Neb. 533, 17 L.R.A.(N.S.) 930, 116 N. W. 294, 118 N. W. 122.

In *People ex rel. O'Sullivan v. New York Law School* (1893) 68 Hun, 118, 22 N. Y. Supp. 663, the court held that notwithstanding the right of the faculty of the defendant college to refuse a diploma and degree to a student, because of his conduct between the time of final examination and the date of graduation, he was entitled to a certificate of attendance, and evidence that he had passed a satisfactory examination.

In *Steinhauer v. Arkins* (1902) 18 Colo. App. 49, 69 Pac. 1075, the plaintiff petitioned for a writ of mandamus to compel the board of trustees of the Colorado School of Mines to issue to him a diploma, evidencing the degree of mining engineer to which he claimed to be entitled. He alleged that the faculty were inimical to him and had wrongfully reported to the trustees that he was not entitled to graduate. The court said that "if the faculty wrongfully deprived him of an advantage to which he was entitled, possibly he had a remedy; but their conduct, whether wrongful or not, gave him no right of action against the trustees."

R. E. B.

ARIZONA COPPER COMPANY, Limited, Plff. in Err.,
v.

JOSEPH B. HAMMER. (No. 20.)

SAME

v.

RICHARD BRAY. (No. 21.)

RAY CONSOLIDATED COPPER COMPANY, Plff. in Err.,
v.

DAN VEAZEY. (No. 232.)

INSPIRATION CONSOLIDATED COPPER COMPANY, Plff. in Err.,
v.

CEFERINO MENDEZ. (No. 332.)

SUPERIOR & PITTSBURG COPPER COMPANY, Plff. in Err.,
v.

FRANK TOMICH, Sometimes Known as Frank Thomas. (No. 334.)

United States Supreme Court — June 9, 1919.

(*Arizona Employers' Liability Cases*, 250 U. S. 400, 63 L. ed. 1058, 39 Sup. Ct. Rep. 553.)

Constitutional law — employers' liability — employee's choice of remedies.

1. Employers are not deprived of property without due process of law nor denied the equal protection of the laws merely because, under the laws of the state, an employee injured in the course of his employment has open to him three avenues of redress, any one of which he may pursue according to the facts of the case; viz.: (1) The common-law liability relieved of the fellow-servant defense, and in which the defenses of contributory negligence and assumption of risk are questions to be left to the jury; (2) the Employers' Liability Law, which applies to hazardous occupations, where the injury or death is not caused by his own negligence; (3) the Compulsory Compensation Law, applicable to especially dangerous occupations, by which he may recover compensation without fault upon the part of the employer.

[See note on this question beginning on page 1562.]

Courts — review of acts of legislative department.

2. The states are left with a wide range of legislative discretion, notwithstanding the provisions of the 14th Amendment to the Federal Constitution, and their conclusions respecting the wisdom of their legislative acts are not reviewable by the courts.

[See 7 R. C. L. 1049.]

Constitutional law — due process — equal protection — police power — employers' liability.

3. The common-law rules governing
6 A.L.R.—97.

the assumption, respectively, by employer and employee, of the risk of employment and the consequences to flow therefrom, were not, by United States Const., 14th Amendment, placed beyond the reach of the state's power to alter them as rules of future conduct and tests of responsibility through legislation designed to promote the general welfare, so long as it does not interfere arbitrarily and unreasonably, and in defiance of natural justice, with the right of employers and employees to agree between themselves respecting

the terms and conditions of employment.

[See 18 R. C. L. 833.]

— employers' liability — absence of fault.

4. Neither due process of law nor the equal protection of the laws is denied by an Employers' Liability Act, which imposes upon employers, in respect of certain specified hazardous employments, without regard to the question of their fault or that of any person for whose conduct they are responsible, a liability in compensatory damages, excluding all such as are speculative or punitive, to be awarded in a judicial proceeding according to the ordinary process of law, for accidental personal injury or death of an employee arising out of and in the course of the employment, and due to its inherent conditions, in cases where such injury or

death shall not have been caused by the employee's own negligence, and declares void all contracts and regulations exempting the employer from such liability.

[See 18 R. C. L. 833.]

Statutes — who may assail validity — employers' liability.

5. Employers in hazardous industries may not raise the question whether a state Employers' Liability Act, confined on its face to certain industries denominated hazardous, is unconstitutional, if it be extended by construction to non-hazardous occupations.

— construction favoring constitutionality.

6. The Federal Supreme Court will not assume in advance that a state court will so construe a state Employers' Liability Act as to render it obnoxious to the Federal Constitution.

(Chief Justice White, Mr. Justice McKenna, Mr. Justice Van Devanter, and Mr. Justice McReynolds dissent.)

THREE WRITS of error to the District Court of the United States for the District of Arizona to review judgments in favor of plaintiffs in actions brought under the state Employers' Liability Law to recover damages for personal injuries alleged to have been sustained while in defendant's employ. *Affirmed.*

TWO WRITS of error to the Supreme Court of the state of Arizona to review judgments which affirmed judgments respectively of the Superior Court for Cochise County (Lockwood, J.) and of the Superior Court for Gila County (Shute, J.) in favor of plaintiffs in actions brought under the state Employers' Liability Law, to recover damages for personal injuries alleged to have been sustained while in the defendant's employ. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Ernest W. Lewis and John A. Garver, for plaintiff in error in Nos. 20 and 21:

Various phases of workmen's compensation legislation have been considered, and the grounds on which it may be sustained have recently been enunciated by this court in cases arising under the laws of New York, Iowa, and Washington.

New York C. R. Co. v. White, 243 U. S. 188, 61 L. ed. 667, L.R.A.1917D, 1, 37 Sup. Ct. Rep. 247, Ann. Cas. 1917D, 629, 13 N. C. C. A. 943; Hawkins v. Bleakly, 243 U. S. 210, 61 L. ed. 678, 37 Sup. Ct. Rep. 255, Ann. Cas. 1917D, 637, 13 N. C. C. A. 959; Mountain Timber Co. v. Washington, 243 U. S. 219, 61 L. ed. 685, 37 Sup. Ct. Rep. 260, Ann. Cas. 1917D, 642, 13 N. C. C. A. 927.

In reaching the conclusion that Workmen's Compensation Acts were a valid exercise of legislative power, this court was influenced by two considerations: one, involving a legal principle that, in taking away the common-law defenses, or some of them, from the employer, the legislature had substituted a substantial equivalent in limiting the liability of the employer according to a prescribed and reasonable schedule, which would probably not be any more onerous upon him than his common-law liability; and the other, involving social and economic considerations, that the legislation was a valid exercise of the police power in promoting the general welfare.

New York C. R. Co. v. White, 243 U. S. 188, 203, 61 L. ed. 667, 675, L.R.A.

(Arizona Employers' Liability Cases, 550 U. S. 400, 63 L. ed. 1058, 39 Sup. Ct. Rep. 553.)

1917D, 1, 37 Sup. Ct. Rep. 247, Ann. Cas. 1917D, 629, 13 N. C. C. A. 943; Mountain Timber Co. v. Washington, 243 U. S. 219, 234, 61 L. ed. 685, 694, 37 Sup. Ct. Rep. 260, Ann. Cas. 1917D, 642, 13 N. C. C. A. 927.

Mr. W. C. McFarland also for plaintiff in error.

Messrs. Frank E. Curley and L. Kearney, for defendant in error:

The Arizona Employers' Liability Law is constitutional.

New York C. R. Co. v. White, 243 U. S. 188, L.R.A.1917D, 1, 61 L. ed. 667, 34 Sup. Ct. Rep. 247, Ann. Cas. 1917D, 629, 13 N. C. C. A. 943; Hawkins v. Bleakly, 243 U. S. 210, 61 L. ed. 678, 37 Sup. Ct. Rep. 255, Ann. Cas. 1917D, 637, 13 N. C. C. A. 959; Mountain Timber Co. v. Washington, 243 U. S. 219, 61 L. ed. 685, 37 Sup. Ct. Rep. 260, Ann. Cas. 1917D, 642, 13 N. C. C. A. 927; Erie R. Co. v. Williams, 223 U. S. 685, 609, 58 L. ed. 1155, 1160, 51 L.R.A. (N.S.) 1097, 34 Sup. Ct. Rep. 761; Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; Northwestern Laundry v. Des Moines, 239 U. S. 486, 60 L. ed. 896, 36 Sup. Ct. Rep. 206; Angle v. Chicago, St. P. M. & O. R. Co. 151 U. S. 1, 38 L. ed. 55, 14 Sup. Ct. Rep. 240; Dow v. Beidelman, 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028; Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 569, 570, 55 L. ed. 339, 340, 31 Sup. Ct. Rep. 259; Texas & N. O. R. Co. v. Miller, 221 U. S. 413, 415, 55 L. ed. 795, 796, 31 Sup. Ct. Rep. 534; Missouri P. R. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; Minneapolis & St. L. R. Co. v. Beckwith, 129 U. S. 29, 32 L. ed. 586, 9 Sup. Ct. Rep. 207; State v. Schlenker, 112 Iowa, 642, 51 L.R.A. 347, 84 Am. St. Rep. 860, 84 N. W. 698; Barbier v. Connolly, 113 U. S. 81, 28 L. ed. 924, 5 Sup. Ct. Rep. 357; Jones v. Brim, 165 U. S. 180, 41 L. ed. 677, 17 Sup. Ct. Rep. 282, 1 Am. Neg. Rep. 547; Cunnius v. Reading School Dist. 198 U. S. 469, 49 L. ed. 1130, 25 Sup. Ct. Rep. 721, 3 Ann. Cas. 1121; Noble State Bank v. Haskell, 219 U. S. 104, 55 L. ed. 112, 32 L.R.A. (N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487; Hurtado v. California, 110 U. S. 580, 28 L. ed. 237, 4 Sup. Ct. Rep. 111, 292; Patterson v. The Eudora, 190 U. S. 169, 47 L. ed. 1002, 23 Sup. Ct. Rep. 821; Billings v. Illinois, 188 U. S. 97, 102, 47 L. ed. 400, 403, 23 Sup. Ct. Rep. 272; Clark v. Kansas City, 176 U. S. 114, 44 L. ed. 392, 20 Sup. Ct. Rep. 284;

Mobile County v. Kimball, 102 U. S. 691, 26 L. ed. 238; Jeffrey Mfg. Co. v. Blagg, 235 U. S. 577, 59 L. ed. 369, 35 Sup. Ct. Rep. 167, 7 N. C. C. A. 570; Easterling Lumber Co. v. Pierce, 235 U. S. 382, 59 L. ed. 281, 35 Sup. Ct. Rep. 133; Chicago, I. & L. R. Co. v. Hackett, 228 U. S. 562, 57 L. ed. 967, 33 Sup. Ct. Rep. 581; Munn v. Illinois, 94 U. S. 123, 126, 24 L. ed. 83, 84; New York v. Miln, 11 Pet. 138, 9 L. ed. 662; Cooley, Const. Lim. 6th ed. 192, 197, pp. 200-203; Rio Grande Lumber Co. v. Drake, 50 Utah, 114, L.R.A.1918A, 1193, 167 Pac. 242; 9 Enc. U. S. Sup. Ct. Rep. 521, 523, 524, 529; 5 Enc. U. S. Sup. Ct. Rep. 533, note 86; Seaboard Air Line R. Co. v. Lorick, 243 U. S. 572, 61 L. ed. 907, 37 Sup. Ct. Rep. 440; Taylor, Due Process of Law, ¶ 182; Wilmington Star Min. Co. v. Fulton, 205 U. S. 60, 70, 51 L. ed. 798, 714, 27 Sup. Ct. Rep. 412; Chicago Dock & Canal Co. v. Fraley, 228 U. S. 680, 57 L. ed. 1022, 33 Sup. Ct. Rep. 715; German Alliance Ins. Co. v. Lewis, 238 U. S. 389, 414, 58 L. ed. 1011, 1022, L.R.A.1915C, 1189, 34 Sup. Ct. Rep. 612; Louisville & N. R. Co. v. Melton, 218 U. S. 52-57, 54 L. ed. 927-929, 47 L.R.A. (N.S.) 84, 30 Sup. Ct. Rep. 676; Western Indemnity Co. v. Pillsbury, 170 Cal. 686, 151 Pac. 402, 10 N. C. C. A. 1; Inspiration Consol. Copper Co. v. Mendez, 19 Ariz. 166, 166 Pac. 282, 1183; St. Louis & S. F. R. Co. v. Mathews, 165 U. S. 1, 22, 41 L. ed. 611, 619, 17 Sup. Ct. Rep. 243; Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702.

Under the Arizona law, as under the Federal Safety Appliance Act, the employer is required to pay such amount as will compensate for the injury sustained, and nothing more; and that amount must be proven by the well-established rules of evidence.

Sweet v. Chicago & N. W. R. Co. 157 Wis. 400, 147 N. W. 1054; Devine v. Chicago, R. I. & P. R. Co. 266 Ill. 248, 107 N. E. 595, Ann. Cas. 1916B, 481.

Mr. Frank H. Hereford also for defendant in error.

Messrs. William H. King, Alex Britton, Evans Browne, and F. W. Clements, for plaintiff in error in No. 232:

The Employers' Liability Act of Arizona is purely in the nature of a compensation act, with the amount of such compensation entirely unlimited.

Myhra v. Chicago, M. & P. S. R. Co.

62 Wash. 1, 112 Pac. 939; *James McNeil & Bro. Co. v. Crucible Steel Co.* 207 Pa. 493, 56 Atl. 1071.

If the new right of action, given under the provisions of the Employers' Liability Law, arises when there occurs an accidental injury, in which neither the employee nor the employer may be to blame, the liability should be measured and ascertained according to rules adopted by approved compensation acts; otherwise such liability cannot conform to due process of law, or such liability act cannot afford due protection of the laws.

New York C. R. Co. v. White, 243 U. S. 188, 61 L. ed. 667, L.R.A.1917D, 1, 37 Sup. Ct. Rep. 247, Ann. Cas. 1917D, 629, 13 N. C. C. A. 943.

Mr. Edward W. Rice, amicus curiæ. No brief filed for defendant in error.

Messrs. Edward W. Rice and Harvey M. Friend, for plaintiff in error in No. 332:

The Employers' Liability Law is devoid of all of the features that characterize measures which seek to attain social justice by regulating in the interest of the public the private relation of master and servant out of which loss from industrial accidents is bound to arise.

Consolidated Arizona Smelting Co. v. Ujack, 15 Ariz. 384, 139 Pac. 465, 5 N. C. C. A. 742; *Inspiration Consol. Copper Co. v. Mendez*, 19 Ariz. 166, 166 Pac. 281, 1183; *Arizona Copper Co. v. Burciaga*, — Ariz. —, 177 Pac. 29; *Superior & P. Copper Co. v. Tomich*, 19 Ariz. 182, 165 Pac. 1104, 1185; *Calumet & A. Min. Co. v. Chambers*, — Ariz. —, 176 Pac. 842; *Superior & P. Copper Co. v. Davidovitch*, 19 Ariz. 402, 171 Pac. 127, 16 N. C. C. A. 801; *Passenger Cases*, 7 How. 283, 458, 12 L. ed. 702, 775.

The fabric of free government rests upon the inviolability of private right. The preservation of individual liberty and the protection of private property and of the right of private contract are essential to all free government.

Fletcher v. Peck, 6 Cranch, 139, 3 L. ed. 178; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 237, 41 L. ed. 979, 985, 17 Sup. Ct. Rep. 581; *Citizens Sav. & L. Asso. v. Topeka*, 20 Wall. 663, 665, 22 L. ed. 455, 461; *Holden v. Hardy*, 169 U. S. 366, 389, 42 L. ed. 780, 790, 18 Sup. Ct. Rep. 383; *New York C. R. Co. v. White*, 243 U. S. 188, 61 L. ed. 667, L.R.A.1917D, 1, 37 Sup. Ct. Rep. 247, Ann. Cas. 1917D, 629, 13 N. C. C. A. 943.

From the fact that private right must be subordinated to the public welfare, it does not follow that in those cases where the public welfare does not require the surrender of private right, the legislature, merely as between individuals, may make arbitrary distribution of private losses.

Lochner v. New York, 198 U. S. 45, 56, 49 L. ed. 937, 941, 25 Sup. Ct. Rep. 539, 8 Ann. Cas. 1133.

In the case of a mere labor law the slightest exaction would be beyond the legislative power.

Mountain Timber Co. v. Washington, 243 U. S. 219, 61 L. ed. 685, 37 Sup. Ct. Rep. 260, Ann. Cas. 1917D, 642, 13 N. C. C. A. 927.

Nothing inherent in free government or natural justice requires that one charged with negligence should be allowed to urge the defenses of assumption of risk, contributory negligence, or fellow servant, or that the conception of duties, the breach of which constitutes negligence, should not develop with the unfolding industrial life of the people. Therefore these defenses may be modified or entirely abrogated, and new duties may be created.

New York C. R. Co. v. White, 243 U. S. 188, 198, 61 L. ed. 667, 672, L.R.A. 1917D, 1, 37 Sup. Ct. Rep. 247, Ann. Cas. 1917D, 629, 13 N. C. C. A. 943; *Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.)* 223 U. S. 1, 51, 56 L. ed. 327, 346, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; *Munn v. Illinois*, 94 U. S. 113, 134, 24 L. ed. 77, 87.

If the right to defend cannot be taken away indirectly by a conclusive presumption of negligence (*Mobile, J. & K. C. R. Co. v. Turnipseed*, 219 U. S. 35, 43, 55 L. ed. 78, 80, 32 L.R.A.(N.S.) 226, 1 Sup. Ct. Rep. 136, Ann. Cas. 1912A, 463, 2 N. C. C. A. 243), it cannot be taken away directly by a departure from the principle of negligence as the basis of individual liability for injury.

Middleton v. Texas Power & Light Co. 108 Tex. 96, 185 S. W. 559, 11 N. C. C. A. 873.

If a law like this can be sustained as fair and reasonable, and as appropriate and necessary to protect the public interest, it would be difficult to conceive of lengths to which the legislature could not go.

Lawton v. Steele, 152 U. S. 133, 137, 38 L. ed. 885, 383, 14 Sup. Ct. Rep. 499; *Mountain Timber Co. v. Washington*, 243 U. S. 219, 238, 61 L. ed. 685,

(*Arizona Employers' Liability Cases*, 250 U. S. 400, 63 L. ed. 1058, 39 Sup. Ct. Rep. 553.)

696, 37 Sup. Ct. Rep. 260, Ann. Cas. 1917D, 642, 13 N. C. C. A. 927; *New York C. R. Co. v. White*, 243 U. S. 188, 207, 61 L. ed. 667, 676, L.R.A.1917D, 1, 37 Sup. Ct. Rep. 247, Ann. Cas. 1917D, 629, 13 N. C. C. A. 943; *Lochner v. New York*, 198 U. S. 45, 57, 49 L. ed. 937, 941, 25 Sup. Ct. Rep. 539, 8 Ann. Cas. 1133; *Hawkins v. Bleakly*, 243 U. S. 210, 61 L. ed. 678, 37 Sup. Ct. Rep. 255, Ann. Cas. 1917D, 637, 13 N. C. C. A. 959; *New York C. R. Co. v. Winfield*, 244 U. S. 147, 61 L. ed. 1045, L.R.A.1918C, 439, 37 Sup. Ct. Rep. 546, Ann. Cas. 1917D, 1139, 14 N. C. C. A. 680.

Messrs. Graham Foster, Hugh M. Foster, and George F. Senner, for defendant in error;

A person may be liable in damages without any fault upon his part.

New York C. R. Co. v. White, 243 U. S. 188, 61 L. ed. 667, L.R.A.1917D, 1, 37 Sup. Ct. Rep. 247, Ann. Cas. 1917D, 629, 13 N. C. C. A. 943; *Sherlock v. Alling*, 93 U. S. 99, 23 L. ed. 819; *Missouri P. R. Co. v. Castle*, 224 U. S. 541, 56 L. ed. 875, 32 Sup. Ct. Rep. 606; *St. Louis & S. F. R. Co. v. Matthews*, 165 U. S. 1, 41 L. ed. 611, 17 Sup. Ct. Rep. 243; *Chicago, R. I. & P. R. Co. v. Zernecke*, 188 U. S. 582, 46 L. ed. 339, 22 Sup. Ct. Rep. 229; *Jensen v. Southern P. Co.* 215 N. Y. 514, L.R.A.1916A, 403, 109 N. E. 600, Ann. Cas. 1916B, 276, 9 N. C. C. A. 286; *Noble State Bank v. Haskell*, 219 U. S. 104, 55 L. ed. 112, 32 L.R.A.(N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487; *Chicago v. Sturges*, 222 U. S. 313, 56 L. ed. 215, 32 Sup. Ct. Rep. 92, Ann. Cas. 1913B, 1349; *McLean v. Arkansas*, 211 U. S. 550, 53 L. ed. 321, 29 Sup. Ct. Rep. 206; *Louisville & N. R. Co. v. Melton*, 218 U. S. 86, 54 L. ed. 921, 47 L.R.A.(N.S.) 84, 30 Sup. Ct. Rep. 676; *Atlantic Coast Line R. Co. v. Riverside Mills*, 219 U. S. 186, 55 L. ed. 167, 31 L.R.A.(N.S.) 7, 31 Sup. Ct. Rep. 164; *Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.)* 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875.

The fact that the Employers' Liability Act provides for interest upon the judgment in the event that an appeal is taken does not violate any of the provisions of the United States Constitution or the Amendments thereto.

United Cent. L. Ins. Co. v. Chowning, 86 Tex. 654, 24 L.R.A. 504, 26 S. W. 982; *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct.

Rep. 1161; *Pembina Consol. Silver Min. & Mill Co. v. Pennsylvania*, 125 U. S. 181, 31 L. ed. 650, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737; *Pacific Exp. Co. v. Seibert*, 142 U. S. 353, 35 L. ed. 1039, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250; *Charlotte, C. & A. R. Co. v. Gibbes*, 142 U. S. 391, 35 L. ed. 1053, 12 Sup. Ct. Rep. 255; *New York ex rel. New York Electric Lines Co. v. Squire*, 145 U. S. 175, 36 L. ed. 666, 12 Sup. Ct. Rep. 880; *Supreme Ruling, F. M. C. v. Snyder*, 227 U. S. 497, 57 L. ed. 611, 33 Sup. Ct. Rep. 292; *Alliance Co-op. Ins. Co. v. Corbett*, 69 Kan. 564, 77 Pac. 108; *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609; *Fidelity Mut. Life Asso. v. Mettler*, 185 U. S. 308, 46 L. ed. 922, 22 Sup. Ct. Rep. 662; *Iowa L. Ins. Co. v. Lewis*, 187 U. S. 335, 47 L. ed. 204, 23 Sup. Ct. Rep. 126; *Farmers' & M. Ins. Co. v. Dobney*, 189 U. S. 301, 47 L. ed. 821, 23 Sup. Ct. Rep. 565; *Seaboard Air Line R. Co. v. Seegers*, 207 U. S. 78, 52 L. ed. 108, 28 Sup. Ct. Rep. 28; *Yazoo & M. Valley R. Co. v. Jackson Vinegar Co.* 226 U. S. 217, 57 L. ed. 193, 33 Sup. Ct. Rep. 40.

The option given the employee of accepting compensation under the Workmen's Compensation Act or recovering under the Employers' Liability Act does not affect the constitutionality of the latter act.

New York C. R. Co. v. White, 243 U. S. 188, 61 L. ed. 667, L.R.A.1917D, 1, 37 Sup. Ct. Rep. 247, Ann. Cas. 1917D, 629, 13 N. C. C. A. 943; *Ounningham v. Northwestern Improv. Co.* 44 Mont. 180, 119 Pac. 554.

Mr. Cleon T. Knapp, for plaintiff in error in No. 834:

The law imposes an unlimited liability on the employer, irrespective of fault or negligence.

Inspiration Consol. Copper Co. v. Mendez, 19 Ariz. 166, 166 Pac. 273, 1183; *Superior & P. Copper Co. v. Tomich*, 19 Ariz. 182, 165 Pac. 1101, 1185.

If there is any justification for the enactment of such a law, it must be found in the exercise of police power. The extent to which the power may be exercised is dependent largely upon industrial and social conditions, and its exercise is to promote generally the health, safety, and general welfare of the people.

Noble State Bank v. Haskell, 219 U. S. 104, 55 L. ed. 112, 32 L.R.A.(N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487; *Camfield v. United States*,

167 U. S. 518, 42 L. ed. 260, 17 Sup. Ct. Rep. 864.

The police power cannot be used in an arbitrary manner, and one calculated to deprive one of private rights. So, while that power extends to all great public needs, those same public needs place a limitation upon its valid exercise.

Hurtado v. California, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111, 292; *Hayes v. Missouri*, 120 U. S. 68, 30 L. ed. 578, 7 Sup. Ct. Rep. 350; *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; *Hallinger v. Davis*, 146 U. S. 314, 36 L. ed. 986, 13 Sup. Ct. Rep. 105; *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357.

The police power cannot be used as an excuse for unjust and oppressive legislation.

Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 615; *Yick Wo v. Hopkins*, 118 U. S. 856, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064.

The question presented, then, is whether the enactment of a law by a state, under the police power, is calculated to benefit the public needs,—whether such power is exercised to promote the health, safety, and general welfare of the people; and the test to be applied is not the mere wording of the purpose, but whether in practice it would actually accomplish an object beneficial to the health, safety, and general welfare.

Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 559, 8 Ann. Cas. 1138.

If any justification can be found for the legality of the Arizona Employers' Liability Law, it must be upon reasons supporting the legality of compulsory compensation acts. And it is solely upon such grounds that the Arizona supreme court attempted to find justification for its legality.

Inspiration Consol. Copper Co. v. Mendez, 19 Ariz. 166, 166 Pac. 278, 1188; *Superior & P. Copper Co. v. Tomich*, 19 Ariz. 182, 165 Pac. 1101, 1185; *New York C. R. Co. v. White*, 243 U. S. 188, 61 L. ed. 667, L.R.A. 1917D, 1, 37 Sup. Ct. Rep. 247, Ann. Cas. 1917D, 629, 13 N. C. C. A. 943; *Hawkins v. Bleakly*, 243 U. S. 210, 61 L. ed. 678, 37 Sup. Ct. Rep. 255, Ann. Cas. 1917D, 637, 13 N. C. C. A. 959; *Mountain Timber Co. v. Washington*, 243 U. S. 219, 61 L. ed. 686, 37 Sup.

Ct. Rep. 260, Ann. Cas. 1917D, 642, 13 N. C. C. A. 927.

States, in the valid exercise of police power, have imposed liability upon employers, regardless of fault or negligence. Such exercise of police power has been through the enactment of Workmen's Compulsory Compensation Acts. In all such enactments the liability imposed is not unlimited, and there has been in every such exercise a substituted equivalent in the form of a definite, reasonable, and limited compensation for injury or death.

McRoberts v. National Zinc Co. 93 Kan. 364, 144 Pac. 247; *Borgnis v. Falk Co.* 147 Wis. 327, 37 L.R.A. (N.S.) 489, 133 N. W. 209, 3 N. C. C. A. 549; *State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156, 37 L.R.A. (N.S.) 466, 117 Pac. 1114, 2 N. C. C. A. 823, 3 N. C. C. A. 599.

Mr. Samuel Herrick, for defendant in error:

The state of Arizona had the authority to enact legislation holding the employer liable for injuries occurring to employees without any fault or negligence on the part of the employer.

Chicago, R. I. & P. R. Co. v. Zerneck, 183 U. S. 582, 46 L. ed. 339, 22 Sup. Ct. Rep. 229; *New York C. R. Co. v. White*, 243 U. S. 187, 61 L. ed. 667, L.R.A. 1917D, 1, 37 Sup. Ct. Rep. 247, Ann. Cas. 1917D, 629, 13 N. C. C. A. 943; *Mountain Timber Co. v. Washington*, 243 U. S. 219, 61 L. ed. 686, 37 Sup. Ct. Rep. 260, Ann. Cas. 1917D, 642, 13 N. C. C. A. 927.

That the Liability Law leaves the amount of damages to be recovered to be determined by a jury cannot be ground for holding it unconstitutional.

Ives v. South Buffalo R. Co. 201 N. Y. 271, 34 L.R.A. (N.S.) 162, 94 N. E. 431, Ann. Cas. 1912B, 166, 1 N. C. C. A. 517; *Greene v. Caldwell*, 170 Ky. 571, 186 S. W. 648, Ann. Cas. 1918B, 604, 12 N. C. C. A. 520; *New York C. R. Co. v. White*, 243 U. S. 187, 61 L. ed. 667, L.R.A. 1917D, 1, 37 Sup. Ct. Rep. 247, Ann. Cas. 1917D, 629, 13 N. C. C. A. 943.

When it is once decided that compensation for injuries may be allowed, the manner of fixing compensation is purely within the power of the legislature.

Western Indemnity Co. v. Pillsbury, 170 Cal. 686, 151 Pac. 404, 10 N. C. C. A. 1.

The courts are slow to inquire into the mere wisdom of a statute. This question is so pre-eminently one for the

lawmaking branch of the government that the courts will interfere only where there can be no two opinions as to the mischievous and evil tendencies of the act.

State ex rel. Davis-Smith Co. v. Clanssen, 65 Wash. 156, 37 L.R.A.(N.S.) 466, 117 Pac. 1119, 2 N. C. C. A. 823, 3 N. C. C. A. 599.

Laws cannot be disregarded merely because they are supposed to be repugnant to some governmental principles that lie outside of constitutional limitations.

Com. v. Goldberg, 167 Ky. 96, 180 S. W. 72.

Mr. Justice Pitney delivered the opinion of the court:

In each of these cases, a workman in a hazardous industry in the state of Arizona, having received in the course of his employment a personal injury through an accident due to a condition or conditions of the occupation, not caused by his own negligence, or, so far as appears, by that of his employer or others, brought action under the Employers' Liability Law of Arizona, and recovered compensatory damages against the employer, ascertained upon a consideration of the nature, extent, and disabling effects of the injury in each particular case. And the question is raised whether the statute referred to, as applied to the facts of these cases, is repugnant to that provision of the 14th Amendment which declares that no state shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Art. 18 of the Constitution of the state of Arizona is entitled "Labor," and contains, among others, the following sections:

"Section 4. The common-law doctrine of fellow servant, so far as it affects the liability of a master for injuries to his servant resulting from the acts or omissions of any other servant or servants of the common master is forever abrogated.

"Section 5. The defense of contrib-

utory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact and shall, at all times, be left to the jury.

"Section 6. The right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation.

"Section 7. To protect the safety of employees in all hazardous occupations, in mining, smelting, manufacturing, railroad or street railway transportation, or any other industry the legislature shall enact an Employers' Liability Law, by the terms of which any employer, whether individual, association, or corporation shall be liable for the death or injury, caused by any accident due to a condition or conditions of such occupation, of any employee in the service of such employer in such hazardous occupation, in all cases in which such death or injury of such employee shall not have been caused by the negligence of the employee killed or injured.

"Section 8. The legislature shall enact a Workmen's Compulsory Compensation Law applicable to workmen engaged in manual or mechanical labor in such employments as the legislature may determine to be especially dangerous, by which compulsory compensation shall be required to be paid to any such workman by his employer, if in the course of such employment personal injury to any such workman from any accident arising out of, and in the course of, such employment is caused in whole or in part, or is contributed to, by a necessary risk or danger of such employment, or a necessary risk or danger inherent in the nature thereof, or by failure of such employer, or any of his or its officers, agents, or employee, or employees, to exercise due care, or to comply with any law affecting such employment; Provided, that it shall be optional with said employee to settle for such compensation, or retain the right to sue said employer as provided by this Constitution."

Pursuant to § 7 the Employers' Liability Law was enacted (Laws 1912, Reg. Sess. chap. 89, Ariz. Rev. Stat. 1913, §§ 3153-3162); pursuant to § 8 a Workman's Compulsory Compensation Law was enacted (Laws 1912, 1st Spec. Sess. chap. 14, Ariz. Rev. Stat. 1913, §§ 3163 et seq.).

In two of the present cases the former law was sustained by the supreme court of Arizona against attacks based upon the 14th Amendment. *Inspiration Consol. Copper Co. v. Mendez*, 19 Ariz. 151, 166 Pac. 278, 1183; *Superior & P. Copper Co. v. Tomich*, 19 Ariz. 182, 165 Pac. 1101, 1185. In the other three cases it was sustained by the United States district court for that district. And the resulting judgments in favor of the injured workmen are brought under our review by writs of error.

Some of the arguments submitted to us assail the wisdom and policy of the act because of its novelty, because of its one-sided effect in depriving the employer of defenses, while giving him (as is said) nothing in return, leaving the damages unlimited, and giving to the employee the option of several remedies; as tending not to obviate but to promote litigation; and as pregnant with danger to the industries of the state. With such considerations this court cannot concern itself. Novelty is not a constitutional objection, since, under constitutional forms of government, each state may have a legislative body endowed with authority to change the law. In what respects it shall be changed, and to what extent, is in the main confided to the several states; and it is to be presumed that their legislatures, being chosen by the people, understand and correctly appreciate their needs. The states are left with a wide range of legislative discretion, notwithstanding the provisions of the 14th Amendment; and their conclusions respecting the

wisdom of their legislative acts are not reviewable by the courts.

We have been called upon recently to deal with various forms of workmen's compensation and employers' liability statutes. Second Employers' Liability Cases (*Mondou v. New York, N. H. & H. R. Co.*) 223 U. S. 1, 47-53, 56 L. ed. 327, 345-347, 38 L.R.A. (N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; *New York C. R. Co. v. White*, 243 U. S. 188, 196, et seq., 61 L. ed. 667, 671, L.R.A. 1917D, 1, 37 Sup. Ct. Rep. 247, Ann. Cas. 1917D, 629, 13 N. C. C. A. 943; *Hawkins v. Bleakly*, 243 U. S. 210, 61 L. ed. 678, 37 Sup. Ct. Rep. 255, Ann. Cas. 1917D, 637, 13 N. C. C. A. 959; *Mountain Timber Co. v. Washington*, 243 U. S. 219, 61 L. ed. 685, 37 Sup. Ct. Rep. 260, Ann. Cas. 1917D, 642, 13 N. C. C. A. 927; *Middleton v. Texas Power & Light Co.* 249 U. S. 152, 63 L. ed. 527, 39 Sup. Ct. Rep. 227. These decisions have established the propositions that the rules of law concerning the employer's responsibility for personal injury or death of an employee, arising in the course of the employment, is not beyond alteration by legislation in the public interest; that no person has a vested right entitling him to have these any more than other rules of law remain unchanged for his benefit; and that, if we exclude arbitrary and unreasonable changes, liability may be imposed upon the employer without fault, and the rules respecting his responsibility to one employee for the negligence of another, and respecting contributory negligence and assumption of risk, are subject to legislative change.

The principal contention is that the Arizona Employers' Liability Law deprives the employer of property without due process of law, and denies to him the equal protection of the laws, because it imposes a liability without fault, and, as is said, without equivalent protection. The statute, in respect of certain speci-

Constitutional law—due process—equal protection—police power—employers' liability.

Courts—review of acts of legislative department.

fied employments designated as inherently hazardous and dangerous to workmen,—and reasonably so described,—imposes upon the employer, without regard to the question of his fault or that of any person for whose conduct he is responsible, a liability in compensatory damages—excluding all such as are speculative or punitive (*Arizona Copper Co. v. Burciaga*, — *Ariz.* —, 177 *Pac.* 29) — for accidental personal injury or death of an employee arising out of and in the course of the employment, and due to a condition or conditions of the occupation, in cases where such injury or death of the employee shall not have been caused by his own negligence. This is the substance of §§ 3154 and 3158, and they are to be read in connection with § 3156, which declares what occupations are hazardous within the meaning of the law. By § 3160, contracts and regulations exempting the employer from liability are declared to be void.

In effect, the statute requires the employer, instead of the employee, to assume the pecuniary risk of injury or death of the employee attributable to hazards inherent in the employment and due to its conditions, and not to the negligence of the employee killed or injured. In determining whether this departure from the previous rule is so arbitrary or inconsistent with the fundamental rights of the employer as to render the law repugnant to the 14th Amendment, it is to be borne in mind that the matter of the assumption of the risks of employment and the consequences to flow therefrom has been regulated time out of mind by the common law, with occasional statutory modifications. The rule existing in the absence of statute, as usually enunciated, is that all consequences of risks inherent in the occupation, and normally incident to it, are assumed by the employee, and afford no ground of action by him or those claiming under him, in the absence of negligence by the employer; and even risks arising from or increased

by the failure of the employer to take the care that he ought to take for the employee's safety are assumed by the latter if he is aware of them, or if they are so obvious that any ordinarily prudent person under the circumstances could not fail to observe and appreciate them; but if the employee, having become aware of a risk arising out of a defect attributable to the employer's negligence, makes complaint or objection and obtains a promise of reparation, the common law brings into play a new set of regulations, requiring the employer to assume the risk under certain circumstances, the employee under others. *Seaboard Air Line R. Co. v. Horton*, 233 U. S. 492, 504, 505, 58 L. ed. 1062, 1070, L.R.A.1915C, 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834; 239 U. S. 595, 598, 599, 60 L. ed. 458, 461, 36 Sup. Ct. Rep. 180, and cases cited.

But these are no more than rules of law, deduced by the courts as reasonable and just, under the conditions of our civilization, in view of the relations existing between employer and employee in the absence of legislation. They are not placed, by the 14th Amendment, beyond the reach of the state's power to alter them, as rules of future conduct and tests of responsibility, through legislation designed to promote the general welfare, so long as it does not interfere arbitrarily and unreasonably, and in defiance of natural justice, with the right of employers and employees to agree between themselves respecting the terms and conditions of employment.

We are unable to say that the Employers' Liability Law of Arizona, in requiring the employer in hazardous industries to assume—so far as pecuniary consequences go—the entire risk of injury to the employee attributable to accidents arising in the course of the employment, and due to its inherent conditions, exceeds the bounds of permissible legislation, or interferes with the constitutional

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rights of the employer. The answer that the common law makes to the hardship of requiring the employee to assume all consequences, both personal and pecuniary, of injuries arising out of the ordinary dangers of the occupation, is that the parties enter into the contract of employment with these risks in view, and that the consequences ought to be, and presumably are, taken into consideration in fixing the rate of wages. *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377, 383, 28 L. ed. 787, 789, 5 Sup. Ct. Rep. 184; *Northern P. R. Co. v. Herbert*, 116 U. S. 642, 647, 29 L. ed. 755, 758, 6 Sup. Ct. Rep. 590; *New York C. R. Co. v. White*, 243 U. S. 188, 199, 61 L. ed. 667, 673, L.R.A.1917D, 1, 37 Sup. Ct. Rep. 247, Ann. Cas. 1917D, 629, 13 N. C. C. A. 943; *Farwell v. Boston & W. R. Corp.* 4 Met. 49, 57, 38 Am. Dec. 339, 15 Am. Neg. Cas. 407. In like manner the employer, if required—as he is by this statute in some occupations—to assume the pecuniary loss arising from such injury to the employee, may take this into consideration in fixing the rate of wages; besides which he has an opportunity, which the employee has not, to charge the loss as a part of the cost of the product of the industry.

There is no question here of punishing one who is without fault. That, we may concede, would be contrary to natural justice. But, as we have seen, the statute limits the recovery strictly to compensatory damages. And there is no discrimination between employer and employee except such as necessarily arises from their different relation to the common undertaking. Both are essential to it, the one to furnish capital, organization, and guidance, the other to perform the manual work; both foresee that the occupation is of such a nature, and its conditions such, that sooner or later some of the workmen will be physically injured or maimed, occasionally one killed, without particular fault on anybody's part. See 243 U. S. 203, 61 L. ed. 675, L.R.A.

1917D, 1, 37 Sup. Ct. Rep. 247, Ann. Cas. 1917D, 629, 13 N. C. C. A. 943. The statute requires that compensation shall be paid to the injured workman or his dependents, because it is upon them that the first brunt of the loss falls; and that it shall be paid by the employer, because he takes the gross receipts of the common enterprise, and by reason of his position of control can make such adjustments as ought to be and practically can be made, in the way of reducing wages and increasing the selling price of the product, in order to allow for the statutory liability. There could be no more rational basis for a discrimination; and it is clear that in this there is no denial of the "equal protection of the laws."

Under the "due process" clause, the ultimate contention is that men have an indefeasible right to employ their fellow men to work under conditions where, as all parties know, from time to time some of the workmen inevitably will be killed or injured, but where nobody knows or can know in advance which particular man or how many will be the victims, or how serious will be the injuries, and hence no adequate compensation can be included in the wages; and to employ them thus with the legitimate object of making a profit above their wages if all goes well, but with immunity from particular loss if things go badly with the workmen through no fault of their own, and they suffer physical injury or death in the course of their employment. In view of the subject-matter, and of the public interest involved, we cannot assent to the proposition that the rights of life, liberty, and property guaranteed by the 14th Amendment prevent the states from modifying that rule of the common law which requires or permits the workingman to take the chances in such a lottery.

The act—assuming, as we must, that it be justly administered—adds no new burden of cost to industry, although it does bring to light a burden that previously exist-

ed, but perhaps was unrecognized, by requiring that its cost be taken into the reckoning. The burden is due to the hazardous nature of the industry, and is inevitable if the work of the world is to go forward. What the act does is merely to require that it shall be assumed, to the extent of a pecuniary equivalent of the actual and proximate damage sustained by the workman or those near to him, by the employer,—by him who organizes the enterprise, hires the workmen, fixes the wages, sets a price upon the product, pays the costs, and takes for his reward the net profits, if any.

The interest of the state is obvious. We declared in the White Case (248 U. S. 207): "It cannot be doubted that the state may prohibit and punish self-maiming and attempts at suicide; it may prohibit a man from bartering away his life or his personal security; indeed, the right to these is often declared, in bills of rights, to be 'natural and inalienable;' and the authority to prohibit contracts made in derogation of a lawfully established policy of the state respecting compensation for accidental death or disabling personal injury is equally clear.

. . . This statute does not concern itself with measures of prevention, which presumably are embraced in other laws. But the interest of the public is not confined to these. One of the grounds of its concern with the continued life and earning power of the individual is its interest in the prevention of pauperism, with its concomitants of vice and crime. And, in our opinion, laws regulating the responsibility of employers for the injury or death of employees arising out of the employment bear so close a relation to the protection of the lives and safety of those concerned that they properly may be regarded as coming within the category of police regulations." (Citing cases.)

And in *Mountain Timber Co. v. Washington*, 243 U. S. 219, 239, 61 L. ed. 685, 697, 37 Sup. Ct. Rep. 260, Ann. Cas. 1917D, 642, 18 N. C.

C. A. 927, it was said: "Certainly, the operation of industrial establishments that in the ordinary course of things frequently and inevitably produce disabling or mortal injuries to the human beings employed is not a matter of wholly private concern."

Having this interest, the state of Arizona reasonably might say: "The rule of the common law requiring the employee to assume all consequences of personal injuries arising out of the ordinary dangers and normal conditions of a hazardous occupation, and to secure his indemnity in advance in the form of increased wages, is incompatible with the public interest because—assuming that workmen are on an equality with employers in a negotiation about the rate of wages—the probability of injury occurring to a particular employee, and the nature and extent of such injury, are so contingent and speculative that it is impracticable for either employer or employee approximately to estimate in advance how much allowance should be made for them in the wages; and even were a proper allowance made, experience demonstrates that under our conditions of life it is not to be expected that the average workingman will set aside out of his wages a proper insurance against the time when he may be injured or killed. Hence, recognizing that injuries to workmen constitute a part of the unavoidable cost of hazardous industries, we will require that it be assumed by the one in control of the industry as employer, just as he pays other items of cost; so that he shall not take a profit from the labor of his employees while leaving the injured ones, and the dependents of those whose lives are lost, through accidents due to the conditions of the occupation, to be a burden upon the public."

Whether this or similar reasoning was employed, we have no means of knowing; whether, if employed, it ought to have been accepted as convincing, is not for us to

decide. It being incumbent upon the opponents of the law to demonstrate that it is clearly unreasonable and arbitrary, it is sufficient for us to declare, as we do, that such reasoning would be pertinent to the subject, and not so unfounded or irrational as to permit us to say that the state, if it accepted it as a basis for changing the law in a matter so closely related to the public welfare, exceeded the restrictions placed upon its action by the 14th Amendment.

It is objected that the responsibility of the employer under this statute is unlimited; but this is not true except as it is true of every action for compensatory damages where the amount awarded varies in accordance with the nature and extent of the damages for which compensation is made. It is said that in actions by employees against employers juries are prone to render extravagant verdicts. The same thing has been said, and with equal reason, concerning actions brought by individuals against railroad companies, traction companies, and other corporations. In this, as in other cases, there is a corrective in the authority of the court to set aside an exorbitant verdict. And it amounts to a contradiction of terms to say that in submitting a controversy between litigants to the established courts, there to be tried according to long-established modes and with a constitutional jury to determine the issues of fact and assess compensatory damages, there is a denial of "due process of law."

Much stress is laid upon that part of our opinion in the *White Case* where, after citing numerous previous decisions upholding the authority of the states to establish by legislation departures from the fellow-servant rule and other common-law rules affecting the employer's liability for personal injuries to the employee, we said (243 U. S. 201): "It is true that in the case of the statutes thus sustained there were reasons rendering the particular departures appropriate. Nor is

it necessary, for the purposes of the present case, to say that a state might, without violence to the constitutional guaranty of 'due process of law,' suddenly set aside all common-law rules respecting liability as between employer and employee, without providing a reasonably just substitute. . . . No such question is here presented, and we intimate no opinion upon it. The statute under consideration sets aside one body of rules only to establish another system in its place," etc.

In spite of our declaration that no opinion was intimated, this is treated as an intimation that a statute such as the one now under consideration, creating a new and additional right of action and allowing no defense (if the conditions of liability be shown) unless the accident was caused by the negligence of the injured employee, would be regarded as in conflict with the due process clause. We cannot, however, regard this statute as anything else than a substitute for the law as it previously stood; whether it be a proper substitute was for the people of the state of Arizona to determine; but we find no ground for declaring that they have acted so arbitrarily, unreasonably, and unjustly as to render their action void. They have resolved that the consequences of a personal injury to an employee, attributable to the inherent dangers of the occupation, shall be assumed, not wholly by the particular employee upon whom the personal injury happens to fall, but, to the extent of a compensation in money awarded in a judicial tribunal according to the ordinary processes of law, shall be assumed by the employer: leaving the latter to charge it up, so far as he can, as a part of the cost of his product, just as he would charge a loss by fire, by theft, by bad debts, or any other usual loss of the business; and to make allowance for it, so far as he can, in a reduced scale of wages. And they have come to this resolution, we repeat, not in a matter of indifference, or upon a question of mere economics, but in

the course of regulating the conduct of those hazardous industries in which human beings,—their own people,—in the pursuit of a livelihood, must expose themselves to death or to physical injuries more or less disabling, with consequent impoverishment, partial or total, of the workman or those dependent upon him. The statute says to the employer, in effect: "You shall not employ your fellow men in hazardous occupation for gain, you being in a position to reap a reward in money through selling the product of their toil, unless you come under an obligation to make appropriate compensation in money in case of their death or injury due to the conditions of the occupation." The rule being based upon reasonable grounds affecting the public interest, being established in advance, and applicable to all alike under similar circumstances, there is, in our opinion, no infringement of the fundamental rights protected by the 14th Amendment.

Some expressions contained in our opinion in the *White Case* (243 U. S. 203-205) are treated in argument as if they were equivalent to saying that if a state, in making a legislative adjustment of employers' liability, departs from the common-law system of basing responsibility upon fault, it must confine itself to a limited compensation, measured and ascertained according to the methods adopted in the compensation acts of the present day. Of course nothing of the kind was intended. In a previous part of the opinion (pp. 196-200) it had been shown that the employer had no constitutional right to continued immunity from liability in the absence of negligence, nor to have the fellow-servant rule and the rules respecting contributory negligence and assumption of risk remain unchanged. The statutory plan of compensation for injured workmen and the dependents of those fatally injured—an additional feature at variance with the common law—was then upheld; but, of

course, without saying that no other would be constitutional. For if, as we held in that case, the novel statutory scheme of awarding compensation according to a prearranged scale is sustainable, it follows, perhaps a fortiori, that the Arizona method of ascertaining the compensation according to the facts of each particular case—substantially the common-law method—is free from objection on constitutional grounds. Indeed, if a state recognizes or establishes a right of action for compensation to injured workmen upon grounds not arbitrary or fundamentally unjust, the question whether the award shall be measured as compensatory damages are measured at common law, or according to some prescribed scale reasonably adapted to produce a fair result, is for the state itself to determine. Whether the compensation should be paid in a single sum after judgment recovered, as is required by the Arizona Employers' Liability Law just as under the common-law system in the case of a judgment based upon negligence, or whether it would be more prudent to distribute the award by instalment payments covering the period of disability or of need, likewise is for the state to determine, and upon this the plaintiffs in error can raise no constitutional question.

To the suggestion that the act now or hereafter may be extended by construction to nonhazardous occupations, it may be replied: first, that the occupations in which these actions arose were indisputably hazardous, hence plaintiffs in error have no standing to raise the question (*Plymouth Coal v. Pennsylvania*, 232 U. S. 531, 544, 58 L. ed. 713, 719, 34 Sup. Ct. Rep. 359; *Jeffrey Mfg. Co. v. Blagg*, 235 U. S. 571, 576, 59 L. ed. 364, 368, 35 Sup. Ct. Rep. 167, 7 N. C. C. A. 570; *Hendrick v. Maryland*, 235 U. S. 610, 621, 59 L. ed. 385, 390, 35 Sup. Ct. Rep. 140; *Middleton v. Texas Power & Light Co.* 249 U. S. 152, 157, 63 L. ed. 527, 531, 39 Sup. Ct. Rep.

Statutes—
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227); and secondly, it hardly is necessary to add that employers in nonhazardous industries are in little danger from the act, since it imposes liability only for accidental injuries attributable to the inherent dangers of the occupation.

To the objection that the benefits of the act may be extended, in the case of death claims, to those not nearly related to or dependent upon the workman, or even may go by escheat to the state, it is sufficient to say that no such question is involved in these records; in *Arizona Copper Co. v. Barclaga*, — Ariz. —, 177 Pac. 29, a case of personal injuries not fatal, the supreme court of Arizona interpreted the act as limiting the recovery to compensatory damages; it reasonably may be so construed in its application to

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death claims; and it would be improper for this court to assume in advance that the state court will place such a construction upon the statute as to render it obnoxious to the Federal Constitution. *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 546, 58 L. ed. 713, 720, 34 Sup. Ct. Rep. 359; *St. Louis Southwestern R. Co. v. Arkansas*, 235 U. S. 350, 369, 59 L. ed. 265, 274, 35 Sup. Ct. Rep. 99.

It is insisted that the Arizona system deprives employers of property without due process of law and denies them equal protection because it confers upon the employee a free choice among several remedies. In *Consolidated Arizona Smelting Co. v. Ujack*, 15 Ariz. 382, 384, 139 Pac. 465, the supreme court of the state said: "Under the laws of Arizona, an employee who is injured in the course of his employ-

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ment has open to him three avenues of redress, any one of which he may pursue according to the facts of his case. They are: (1) The common-law liability relieved of the fellow-servant defense, and in which the defenses of con-

tributory negligence and assumption of risk are questions to be left to the jury. Const. §§ 4, 5, art. 18. (2) Employers' Liability Law, which applies to hazardous occupations where the injury or death is not caused by his own negligence. Const. § 7, art. 18. (3) The Compulsory Compensation Law, applicable to especially dangerous occupations, by which he may recover compensation without fault upon the part of the employer. Const. § 8, art. 18." It is said by counsel that the Compensation Act, because it limits the recovery, never is resorted to in practice unless the employee has been negligent, and hence is debarred of a remedy under the Liability Act. But it is thoroughly settled by our previous decisions that a state may abolish contributory negligence as a defense; and election of remedies is an option very frequently given by the law to a person entitled to an action,—an option normally exercised to his own advantage, as a matter of course.

Other points are suggested, but none requiring particular discussion.

Judgments affirmed.

Mr. Justice Holmes, concurring:

The plaintiff (the defendant in error) was employed in the defendant's mine, was hurt in the eye in consequence of opening a compressed air valve, and brought the present suit. The injury was found to have been due to risks inherent to the business, and so was within the Employers' Liability Law of Arizona, Rev. Stat. 1913, title 14, chap. 6. By that law, as construed, the employer is liable to damages for injuries due to such risks in specified hazardous employments when guilty of no negligence. ¶ 3158. There was a verdict for the plaintiff, judgment was affirmed by the supreme court of the state (19 Ariz. 151, 166 Pac. 278, 1183), and the case comes here on the single question whether, consistently with the 14th Amendment, such liability can be imposed. It is taken to exclude "speculative, exemplary, and punitive damages,"

(*Arizona Employers' Liability Case*, 350 U. S. 400, 68 L. ed. 1058, 39 Sup. Ct. Rep. 552.)

but to include all loss to the employee caused by the accident, not merely in the way of earning capacity, but of disfigurement and bodily or mental pain. See *Arizona Copper Co. v. Barciaga*, — Ariz. —, 177 Pac. 29, 35.

There is some argument made for the general proposition that immunity from liability when not in fault is a right inherent in free government, and the obiter dicta of Mr. Justice Miller in *Citizens' Sav. & Loan Assn. v. Topeka*, 20 Wall. 655, 22 L. ed. 455, are referred to. But if it is thought to be public policy to put certain voluntary conduct at the peril of those pursuing it, whether in the interest of safety or upon economic or other grounds, I know of nothing to hinder. A man employs a servant at the peril of what that servant may do in the course of his employment, and there is nothing in the Constitution to limit the principle to that instance. *St. Louis & S. F. R. Co. v. Mathews*, 165 U. S. 1, 22, 41 L. ed. 611, 619, 17 Sup. Ct. Rep. 243; *Chicago, R. I. & P. R. Co. v. Zerneck*, 183 U. S. 582, 586, 46 L. ed. 339, 340, 22 Sup. Ct. Rep. 229; *St. Louis, I. M. & S. R. Co. v. Taylor*, 210 U. S. 281, 295, 52 L. ed. 1061, 1068, 28 Sup. Ct. Rep. 616, 21 Am. Neg. Rep. 464. See *Guy v. Donald*, 203 U. S. 399, 406, 51 L. ed. 245, 247, 27 Sup. Ct. Rep. 63. There are cases in which even the criminal law requires a man to know facts at his peril. Indeed, the criterion which is thought to be free from constitutional objection, the criterion of fault, is the application of an external standard, the conduct of a prudent man in the known circumstances, that is, in doubtful cases, the opinion of the jury, which the defendant has to satisfy at his peril, and which he may miss after giving the matter his best thought. *The Germanic (Oceanic Steam Nav. Co. v. Aitken)* 196 U. S. 589, 596, 49 L. ed. 610, 613, 25 Sup. Ct. Rep. 317; *Nash v. United States*, 229 U. S. 373, 377, 57 L. ed. 1232, 1235, 33 Sup. Ct. Rep. 780; *Eastern States Retail Lumber Dealers' Assn. v.*

United States, 234 U. S. 600, 610, 58 L. ed. 1490, 1498, L.R.A.1915A, 788, 34 Sup. Ct. Rep. 951; *Miller v. Strahl*, 239 U. S. 426, 434, 60 L. ed. 364, 368, 36 Sup. Ct. Rep. 147. Without further amplification, so much may be taken to be established by the decisions. *New York C. R. Co. v. White*, 243 U. S. 188, 198, 204, 61 L. ed. 667, 672, 675, L.R.A.1917D, 1, 37 Sup. Ct. Rep. 247, Ann. Cas. 1917D, 629, 13 N. C. C. A. 943; *Mountain Timber Co. v. Washington*, 243 U. S. 219, 236, 61 L. ed. 685, 695, 37 Sup. Ct. Rep. 260, Ann. Cas. 1917D, 642, 13 N. C. C. A. 927.

I do not perceive how the validity of the law is affected by the fact that the employee is a party to the venture. There is no more certain way of securing attention to the safety of the men—an unquestionably constitutional object of legislation—than by holding the employer liable for accidents. Like the crimes to which I have referred, they probably will happen a good deal less often when the employer knows that he must answer for them if they do. I pass, therefore, to the other objection urged and most strongly pressed. It is that the damages are governed by the rules governing in action of tort,—that is, as we have said, that they may include disfigurement and bodily or mental pain. Natural observations are made on the tendency of juries when such elements are allowed. But if it is proper to allow them, of course no objection can be founded on the supposed foibles of the tribunal that the Constitution of the United States and the states have established. Why, then, is it not proper to allow them? It is said that the pain cannot be shifted to another. Neither can the loss of a leg. But one can be paid for as well as the other. It is said that these elements do not constitute an economic loss, in the sense of diminished power to produce. They may. *Ball v. William Hunt & Sons* [1912] A. C. 496, 81 L. J. K. B. N. S. 782, 106 L. T. N. S. 911, 28 Times L. R.

428, 56 Sol. Jo. 550, 5 B. W. C. C. 459. But whether they do or not, they are as much part of the workman's loss as the loss of a limb. The legislature may have reasoned thus. If a business is unsuccessful, it means that the public does not care enough for it to make it pay. If it is successful, the public pays its expenses and something more. It is reasonable that the public should pay the whole cost of producing what it wants, and a part of that cost is the pain and mutilation incident to production. By throwing that loss upon the employer in the first instance we throw it upon the public in the long run, and that is just. If a legislature should reason in this way and act accordingly it seems to me that it is within constitutional bounds. *Erickson v. Preuss*, 228 N. Y. 365, 119 N. E. 555, 16 N. C. C. A. 481. It is said that the liability is unlimited, but this is not true. It is limited to a conscientious valuation of the loss suffered. Apart from the control exercised by the judge, it is to be hoped that juries would realize that unreasonable verdicts would tend to make the business impossible, and thus to injure those whom they might wish to help. But whatever they may do, we must accept the tribunal, as I have said, and are bound to assume that they will act rightly and confine themselves to the proper scope of the law.

It is not urged that the provision allowing 12 per cent interest on the amount of the judgment from the date of filing the suit, in case of an unsuccessful appeal, is void. *Fidelity Mut. Life Asso. v. Mettler*, 185 U. S. 308, 325-327, 46 L. ed. 922, 932, 933, 22 Sup. Ct. Rep. 662; *Consaul v. Cummings*, 222 U. S. 262, 272, 56 L. ed. 192, 197, 32 Sup. Ct. Rep. 83. Judgment affirmed.

Mr. Justice Brandeis and Mr. Justice Clarke concur in this statement of additional reasons that lead me to agree with the opinion just delivered by my brother Pitney.

Mr. Justice McKenna, dissenting:

I find myself unable to concur, yet reluctant to dissent. The case is of the kind that, once pronounced, will be a rule in like or cognate cases forever,—indeed, may even be extended. It is said to rest on the cases sustaining the Workmen's Compensation Law of New York (243 U. S. 203, 61 L. ed. 675, L.R.A.1917D, 1, 37 Sup. Ct. Rep. 247, Ann. Cas. 1917D, 629, 13 N. C. C. A. 943), and its associated cases in the same volume, upholding like laws of other states. The present case certainly comes after those cases and has that symptom of being their sequence. They cannot be said to have been easy of judgment against the contentions and conservatism which opposed them, and there was, at least to me, no prophecy of their extent, and therefore to me the present case is a step beyond them. I hope it is something more than timidity, dread of the new, that makes me fear that it is a step from the deck to the sea,—the metaphor suggests a peril in the consequences.

But let me in a more concrete way make application of this comment. I may assume that the purpose and principle and general extent of workmen's compensation laws are known. I must rest on that assumption, for even an epitome of them or the reasons for them would unduly extend this dissent. The Arizona law has no resemblance to them. It is a direct charge of liability upon the employer for death or injury incurred in his employment, he being without fault. Its remedies are the ordinary legal remedies; its measure of relief, however, has in it something more than the ordinary measures of relief, certainly not those of the compensation laws, nor is it as considerate and guarded as they. If its validity, therefore, can be deduced from the cases explanatory of those laws, it can only be done by bringing its instances and theirs under the same generalization; that is, that it is competent for government to charge liability and exempt

from responsibility according as one is employer or employee, there being no other circumstance than that relation. Of this there can be no disguise. It may be confused by argument and attempt at historical analogies and deductions, but to that comprehensive principle the case must come at last. All else is adventitious and puts out of view the relation of the factors of production. It puts out of view that employers are as necessary to production as employees, and subjects to peril the voluntary conduct of the former, and leaves out of account as an element the voluntary conduct of the latter. In other words, there is a clear discrimination,—a class distinction with its legal circumstances, and, I may say, invidious circumstances, in view of some of the reasons adduced in its justification. And these effects cannot be concealed under any camouflage nor given the plausible and attractive gloss of public policy, justified by the different conditions of employer and employee. Unquestionably there is a difference,—it constitutes the life of the relation. But the question is, Who shall compensate the injury that may result from the relation, voluntarily assumed by both, urged by their respective interests and a calculation of advantage?

But I pass this discrimination and return to the law as a violation of the employer's rights considered absolutely and abstractly. It seems to me to be the very foundation of right—of the essence of liberty as it is of morals—to be free from liability if one is free from fault. It has heretofore been the sense of the law and the sense of the world, pervading the regulations of both, that there can be no punishment where there is no blame; and yet the court now by its decision erects the denial of these postulates of conduct into a principle of law and government policy. In other words, it is said to be a benefit to government to put the exact discharge of duty under the menace of penalty, and invert the conceptions of mankind of the

relation of right and wrong action. If the legislation does not punish without fault, what does it do? The question is pertinent. Consider what the employer does: he invests his money in productive enterprise,—mining, smelting, manufacturing, railroading; he engages employees at their request and pays them the wages they demand; he takes all the risks of the adventure. Now there is put upon him an immeasurable element that may make disaster inevitable. I find it difficult to answer the argument advanced to support or palliate this effect, or, independently of it, to justify the interference with rights. It is a certain impeachment of some rights to assume that they need justification, and a betrayal of them to make them a matter of controversy. There are precepts of constitutional law as there are precepts of moral law that reach the conviction of aphorisms and are immediately accepted by all who understand them, and comment is considered as confusing as unnecessary. I say this, not in dogmatism, but in expression of my vision of things, and I say it with deference to the contrary judgments of my brethren of the majority.

Of course, reasons may be found for the violation of rights,—advantage to somebody or something in that violation. Tyranny even may find pretexts and seldom boldly bids its will avouch its acts, and certainly there can be no accusation of bare-faced power in the Arizona law. Its motives and purposes are worthy and it requires some resolution of duty to resist them. It must be seen and is seen, however, that the difference between the position of employer and employee, simply considering the latter as economically weaker, is not a justification for the violation of the rights of the former, and that individual rights cannot be made to yield to philanthropy, and therefore the welfare of the government is brought forward and displayed. The law saves the government, is the comment, from the burden of paupers; its adminis-

tration and peace from the disturbance of criminals. The answer, I think, is immediate. Government, certainly constitutional government, cannot afford to infringe, indeed, betrays its purpose if it infringes, a right of anybody upon money considerations, or for ease in the exercise of its faculties.

But, granting that there is something in the argument, what shall be the limits of its application? Will it extend the principle of the present case to nonhazardous employments? If not, why not? The Arizona law stops with certain occupations which it calls "hazardous," but it includes in the description "manufacturing," without qualifying words. In the New York Compensation Law passed on in *New York C. R. Co. v. White*, 248 U. S. 203, 61 L. ed. 675, L.R.A. 1917D, 1, 37 Sup. Ct. Rep. 247, Ann. Cas. 1917D, 629, 13 N. C. C. A. 943, there were forty-two groups of hazardous occupations. In 248 U. S. 219, the court had quite a struggle with the provisions of the Washington Compensation Law, which was so far different from those of the other cases as to incur the dissent of members of the court. It is now, I think, of pertinent inquiry whether the quality of being hazardous is an inherent and necessary element of legality or a matter of legislative definition and policy. Besides, if there can be liability without fault in one occupation, and that can be a principle of legislation, why not in any other? Who is to determine the application, court or legislature? If the latter, a court may not even express apprehension of its exercise, and yet it cannot put out of view the drift of events, and in blind fatalism await their incidence when called upon to consider the legality of such exercise. We know things are in change,—have changed,—and a mark of it is that the drift of public opinion, and of legislation following opinion, is to alter the relation between employer and employee, and to give to the latter a particular distinction,—re-

lieve him from a responsibility which would seem to be, and which until lately it has been the sense of the world to be, as much upon him as upon his employer, not in dependence, not as a mark of subservience, but as an obligation of his freedom, and, therefore, as a consequence, that where he has liberty of action, he has responsibility for action. In a word, the drift of opinion and legislation now is to set labor apart and to withdraw it from its conditions and from the action of economic forces and their consequences,—give it immunity from the pitilessness of life. And there are appealing considerations for this drift of opinion and inevitable sympathy with it as with many other conditions, but which the law cannot relieve by a sacrifice of constitutional rights. In what legislation the drift (it is persuasion in some) may culminate cannot now be predicted, but it is very certain that, whatever it be, the judgment now delivered will be cited to justify it. Will it not be said that if one right of an employer can be made to give way, why not another?—made a condition "upon economic or other grounds" of his enterprise. Indeed, may not the question be made more general, and if in supposed benefit to a particular class, and through benefit to them to the public, there may be constraint upon or the imposition of burden upon one right of a citizen, why not upon another? There is, therefore, I think, menace in the present judgment to all rights, subjecting them unreservedly to conceptions of public policy. If, however, this general apprehension be not justified, there is threat enough in the judgment of the court to the interest of employers generally as a result of the difference in conditions.

A rather curious argument is used to support the Arizona law. It is said, in justification of its discrimination between employer and employee, that the employer may, in relief from it and rescue from its

burdens, pass them to the consumers of his products, as he does or may do in the case of other expenses of his venture, and in the long run their incidence is, as it is said it should be, on the public, and that the legislature, in so considering, was reasoning within constitutional bounds. There is attractive speciousness in the argument. The individual employer seems to be devastated of grievance and the problem the law presents to be one of economics and governmental policy; is a kind of taxation, an expense of government, the burden of which is properly laid upon the public, and over which a court can have but limited power.

If it is intended by the argument to express no more than a tendency, while it has no relevancy, I think, upon the validity of the law, there may be no danger in it. If it is intended to be erected into a principle, there is danger in it. It is certainly facile and comprehensive. What burden can be put upon industry or the activities of men that may not be justified by it?

Of course, there will be no production unless all of its costs be reimbursed by the price of the articles produced. And by costs I mean as well the burdens of government as profit to the employer,—his inducement to enterprise; and the wages of employees,—their inducement to labor. Without such reimbursement there will be no production, and cannot be beyond a certain extent and for a certain time; and there is no way to effect it but through the consuming public. But recourse to such consumption as a rescue from the law is not a justification for the law, and it is very doubtful if it had any conscious influence in the enactment of the law.

Indeed, in the present case, what could have been its influence and to what extent can it have an ameliorating effect? An employer in the indicated industries can have no relief except in the home market. If his products (where there are products) go beyond,—go to other

states,—they will meet the competition of unburdened products. But this is obvious and needs no comment.

The CHIEF JUSTICE, Mr. Justice Van Devanter, and Mr. Justice McReynolds concur in this dissent.

Mr. Justice McReynolds, dissenting:

While I earnestly join in the dissent written by Mr. Justice McKenna, it seems not inappropriate to state my own views somewhat more fully. The important and underlying question is common to the five cases. Number 232 is typical, and to detail certain facts and circumstances disclosed by the record therein may aid the discussion.

Basing his claim upon the Arizona Employers' Liability Law, Dan Veazey sued plaintiff in error in the United States district court to recover damages for personal injuries received by him February 10, 1916, while engaged as millwright and carpenter in constructing a "flotation system" at the company's mill or reduction works in Gila county, Arizona, "wherein steam, electricity, or other mechanical power was then and there used to operate machinery." He alleged that while exercising due care he "suffered severe personal and bodily injuries by an accident arising out of and in course of such labor, service, and employment and due to a condition or conditions of such occupation or employment," which injuries were not caused by his negligence, but were sustained in the manner following: "Plaintiff, in the due course of his said labor, service, and employment, was standing upon a certain timber or joist incorporated in said 'flotation system,' engaged in bolting and fastening together the timbers thereof. That the said timber or joist upon which plaintiff was then and there standing was then and there elevated above the ground or floor of said mill or reduction works a distance of approximately 10 feet. That while so engaged as aforesaid,

plaintiff slipped from said timber or joist and fell to the ground . . . with great force and violence," . . . was permanently injured, and will forever remain sick, sore, lame, and crippled.

No charge of negligence or failure to perform any duty was made against the company. It unsuccessfully set up and relied upon invalidity of the Employers' Liability Law because in conflict with the 14th Amendment; judgment went against it; and the cause is here by writ of error to the trial court (Judicial Code, § 237 [36 Stat. at L. 1156, chap. 231, Comp. Stat. 1916, § 1214, 5 Fed. Stat. Anno. 2d ed. p. 723]).

Article 18 of the Arizona Constitution provides:

"Section 4. The common-law doctrine of fellow servant, so far as it affects the liability of a master for injuries to his servants resulting from the acts or omissions of any other servant or servants of the common master is forever abrogated.

"Section 5. The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact and shall, at all times, be left to the jury.

"Section 6. The right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation.

"Section 7. To protect the safety of employees in all hazardous occupations, in mining, smelting, manufacturing, railroad or street railway transportation, or any other industry the legislature shall enact an Employers' Liability Law, by the terms of which any employer, whether individual, association, or corporation shall be liable for the death or injury, caused by any accident due to a condition or conditions of such occupation, of any employee in the service of such employer in such hazardous occupation, in all cases in which such death or injury of such employee shall not have been caused by the negligence of the employee killed or injured.

"Section 8. The legislature shall enact a Workmen's Compulsory Compensation Law applicable to workmen engaged in manual or mechanical labor in such employments as the legislature may determine to be especially dangerous, by which compulsory compensation shall be required to be paid to any such workman by his employer, if in the course of such employment personal injury to any such workman from any accident arising out of, and in the course of, such employment is caused in whole, or in part, or is contributed to, by a necessary risk or danger of such employment, or a necessary risk or danger inherent in the nature thereof, or by failure of such employer, or any of his or its officers, agents, or employee or employees, to exercise due care, or to comply with any law affecting such employment; Provided, that it shall be optional with said employee to settle for such compensation, or retain the right to sue said employer as provided by this Constitution."

Obeysing the constitutional mandate, the legislature enacted the "Employers' Liability Law," approved May 24, 1912 (chap. 89, Laws of Arizona 1912, p. 491; Ariz. Rev. Stat. 1913, §§ 3153-3162), which provides:

That to protect the safety of workmen at manual or mechanical labor in many occupations declared hazardous and enumerated in § 4,—among them all work in or about mines and in mills, shops, plants, and factories where steam or electricity is used to operate machinery,—every employer, whether individual, association, or corporation, "shall be liable for the death or injury, caused by any accident due to a condition or conditions of such occupation, of any employee in the service of such employer in such hazardous occupation, in all cases in which such death or injury of such employee shall not have been caused by the negligence of the employee killed or injured."

"Section 6. When, in the course of work in any of the employments

or occupations enumerated in § 4 of this act, personal injury or death by any accident arising out of and in the course of such labor, service, and employment, and due to a condition or conditions of such occupation or employment, is caused to or suffered by any workman engaged therein, in all cases in which such injury or death of such employee shall not have been caused by the negligence of the employee killed or injured, then the employer of such employee shall be liable in damages to employee injured, or in case death

ensues, to the personal representative of the deceased for the benefit of the surviving widow or husband and children of such employee; and, if none, then to such employee's parents; and, if none, then to the next of kin dependent upon such employee, and, if none, then to his personal representative, for the benefit of the estate of the deceased." Section 7 requires that questions of contributory negligence and assumption of risk shall be left to the jury. (The full text of the act is in the margin.¹)

¹ Laws of Arizona 1912, chap. 89, p. 491; Rev. Stat. Ariz. Civ. Code 1913, §§ 3153-3162, p. 1051.

Sec. 1. That this act is and shall be declared to be an Employers' Liability Law as prescribed in § 7 of article 18 of the state Constitution.

Sec. 2. That to protect the safety of employees in all hazardous occupations in mining, smelting, manufacturing, railroad, or street railway, transportation, or any other industry as provided in said § 7 of article 18 of the state Constitution, any employer, whether individual, association, or corporation, shall be liable for the death or injury, caused by any accident due to a condition or conditions of such occupation, of any employee in the service of such employer in such hazardous occupation, in all cases in which such death or injury of such employee shall not have been caused by the negligence of the employee killed or injured.

Sec. 3. The labor and services of workmen at manual and mechanical labor, in the employment of any person, firm, association, company, or corporation, in the occupations enumerated in § 4 of this act are hereby declared and determined to be service in a hazardous occupation within the meaning of the terms of § 2 of this act.

By reason of the nature and conditions of, and the means used and provided for doing the work in, said occupations, such service is especially dangerous and hazardous to the workmen therein, because of risks and hazards which are inherent in such occupations and which are unavoidable by the workmen therein.

Sec. 4. The occupations hereby declared and determined to be hazardous within the meaning of this act are as follows:

1. The operation of steam railroads, electrical railroads, street railroads, by locomotives, engines, trains, motors, or

cars of any kind propelled by steam, electricity, cable or other mechanical power, including the construction, use or repair of machinery, plant, tracks, switches, bridges, roadbeds, upon, over, and by which such railway business is operated.

2. All work when making, using, or necessitating dangerous proximity to gunpowder, blasting powder, dynamite, compressed air, or any other explosive.

3. The erection or demolition of any bridge, building or structure in which there is, or in which the plans and specifications require, iron or steel framework.

4. The operation of all elevators, elevating machines or derricks or hoisting apparatus used within or on the outside of any bridge, building or other structure for conveying materials in connection with the erection or demolition of such bridge, building or structure.

5. All work on ladders or scaffolds of any kind elevated twenty (20) feet or more above the ground or floor beneath in the erection, construction, repair, painting or alteration of any building, bridge, structure or other work in which the same are used.

6. All work of construction, operation, alteration or repair where wires, cables, switchboards, or other apparatus or machinery are in use charged with electrical current.

7. All work in the construction, alteration, or repair of pole lines for telegraph, telephone or other purposes.

8. All work in or about quarries, open pits, open cuts, mines, ore reduction works and smelters.

9. All work in the construction and repair of tunnels, subways and viaducts.

10. All work in mills, shops, works, yards, plants and factories where steam, electricity, or any other mechanical power is used to operate machinery and appliances in and about such premises.

Sec. 5. Every employer, whether in-

Likewise, the legislature enacted a Compulsory Compensation Law, approved June 8, 1912, applicable to workmen in the same occupations as those declared hazardous by the Employers' Liability Law (chap. 14, Laws of Ariz. Spec. Sess. 1912,

p. 23). Material portions of it are in the margin.*

In Consolidated Arizona Smelting Co. v. Ujack (1914) 15 Ariz. 382, 384, 139 Pac. 465, the supreme court declared: "Under the laws of Arizona, an employee who is injured

dividual, firm, association, company or corporation, employing workmen in such occupation, of itself or through an agent, shall by rules, regulations, or instructions, inform all employees in such occupations as to the duties and restrictions of their employment, to the end of protecting the safety of employees in such employment.

Sec. 6. When in the course of work in any of the employments or occupations enumerated in § 4 of this act, personal injury or death by any accident arising out of and in the course of such labor, service and employment, and due to a condition or conditions of such occupation or employment, is caused to or suffered by any workman engaged therein, in all cases in which such injury or death of such employee shall not have been caused by the negligence of the employee killed or injured, then the employer of such employee shall be liable in damages to employee injured, or, in case death ensues, to the personal representative of the deceased for the benefit of the surviving widow or husband and children of such employee; and, if none, then to such employee's parents; and, if none, then to the next of kin dependent upon such employee, and if none then to his personal representative, for the benefit of the estate of the deceased.

Sec. 7. In all actions hereafter brought against any such employer under or by virtue of any of the provisions of this act to recover damages for personal injuries to any employee, or where such injuries have resulted in his death, the question whether the employee may have been guilty of contributory negligence, or has assumed the risk, shall be a question of fact and shall at all times be left to the jury, as provided in § 5 of article 18 of the state Constitution.

Sec. 8. That any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any employer to exempt himself or itself from any liability created by this act, shall to that extent be void; provided, that in any action brought against any such employer under or by virtue of any of the provisions of this act, such employer may set off therein any sum it has contributed or paid to any insurance, relief benefit,

or indemnity or that may have paid to the injured employee or his personal representative on account of the injury or death for which said action was brought.

Sec. 9. In all actions for damages brought under the provisions of this act, if the plaintiff be successful in obtaining judgment; and if the defendant appeals to a higher court; and if the plaintiff in the lower court be again successful; and the judgment of the lower court be again sustained by the higher court or courts; then, and in that event the plaintiff shall have added to the amount of such judgment by such higher court or courts, interest at the rate of 12 per cent per annum on the amount of such judgment from the date of the filing of the suit in the first instance until the full amount of such judgment is paid.

Sec. 10. No action shall be maintained under this act unless commenced within two years from the day the cause of action occurred.

Sec. 11. All acts and parts of acts in conflict herewith are hereby repealed.

Whereas, the state Constitution commands the enactment of an Employers' Liability Law by the legislature at its first session; and

Whereas, this act being said Employers' Liability Law is immediately necessary for the preservation of the public peace, health and safety, an emergency is hereby declared to exist, and this act shall be in full force and effect from and after its passage and its approval by the governor, and is hereby exempt from the operation of the referendum provision of the state Constitution.

* Employers' Liability Law.

Sec. 2. That compensation graduated according to average earnings and limited to \$4,000 "shall be paid by his employer to any workman engaged in any employment declared and determined . . . to be especially dangerous, whether said employer be a person, firm, association, company, or corporation, if in the course of the employment of said employee personal injury thereto from any accident arising out of, and in the course of, such employment is caused in whole, or in part, or is contributed to, by a necessary risk or danger of such

in the course of his employment has open to him three avenues of redress, any one of which he may pursue, according to the facts of his case. They are: (1) The common-law liability relieved of the fellow-servant defense, and in which the defenses of contributory negligence and assumption of risk are questions to be left to the jury. Const. §§ 4, 5, art. 18. (2) Employers' Liability Law, which applies to hazardous occupations where the injury or death is not caused by his own negligence. Const. § 7, art. 18. (3) The Compulsory Compensation Law, applicable to especially dangerous occupations, by which he may recover compensation without fault upon the part of the employer. Const. § 8, art. 18."

In *Inspiration Consol. Copper Co. v. Mendez* (July 2, 1917) 19 Ariz. 151, 166 Pac. 281, the supreme court specifically held that the Employers' Liability Law does not conflict with the 14th Amendment, and, among other things, said: "That the liability statute must be construed as one creating a liability for accidents resulting in injuries to the workmen engaged in hazardous occupations due to the risks and hazards inherent in such occupations, without regard to the negligence of the employer, as such negligence is understood in the common law of liability; in other words, such statute creates a liability for accidents arising from the risks and hazards inherent in the occupation

without regard to the negligence or fault of the employer. . . . In other words, this statute creates a liability of the master to damages suffered from any accident befalling his servant while engaged in the performance of duties in dangerous occupations, without requiring the negligence of the master to be shown as an element of the right to recover; and it likewise takes away from the master his common-law right of defense of assumption of ordinary risk by the servant, and leaves to the master the right to defend upon the grounds that the servant assumed the ordinary risks other than risks inherent in the occupation." (This opinion was reaffirmed in *Superior & P. Copper Co. v. Tomich* (July 2, 1917) 19 Ariz. 182, 165 Pac. 1101, 1185.)

In *Arizona Copper Co. v. Burciaga* (1918) — Ariz. —, 177 Pac. 29, 31-33, the supreme court said: "As clearly intimated by this court in *Inspiration Consol. Copper Co. v. Mendez*, 19 Ariz. 151, 166 Pac. 278, 1183, the Employers' Liability Law is designed to give a right of action to the employee injured by accident occurring from risks and hazards inherent in the occupation, and without regard to the negligence on the part of the employer. Such is the clear import of the said Employers' Liability Law. . . .

"The liability incurred by the employer from a personal injury sustained by his employee from an accident arising out of and in the

employment, or a necessary risk or danger inherent in the nature thereof, or by failure of such employer, or any of his or its officers, agents, or employee or employees, to exercise due care, or to comply with any law affecting such employment."

"Sec. 4. In case such employee or his personal representative shall refuse to settle for such compensation (as provided in § 8 of article 18 of the state Constitution) and chooses to retain the right to sue said employer (as provided in any law provided for in § 7, article 18 of the state Constitution) he may so refuse to settle and may retain said right. . . .

§ 6. The common-law doctrine of no liability without fault is hereby declared and

determined to be abrogated in Arizona as far as it shall be sought to be applied to the accidents hereinbefore mentioned.

. . . § 14. . . . Provided, if, after the accident, either the employer or the workman shall refuse to make or accept compensation under this act or to proceed under or rely upon the provisions hereof for relief, then the other may pursue his remedy or make his defense under other existing statutes, the state Constitution, or the common law, except as herein provided, as his rights may at the time exist. Any suit brought by the workman for a recovery shall be held as an election to pursue such remedy exclusively."

course of labor, service, and employment in hazardous occupations specified in the statute, and due to a condition or conditions of such occupation or employment, if such shall not have been caused from the negligence of such employee, is such an amount as will compensate such employee for the injuries sustained by him directly attributable to such accident. . . . 'Liable in damages,' as used in § 8158, chap. 6, of title 14, Employers' Liability Law (Ariz. Rev. Stat. 1913), has reference to and means that the employer becomes obligated to pay to the employee injured in an accident while engaged in an occupation declared hazardous, occurring without fault of the employer, all loss to the employee which is actually caused by the accident and the amount of which is susceptible of ascertainment. . . . Of course, mental and physical suffering experienced by the employee injured, proximately resulting from the accident, the reasonable value of working time lost by the employee, necessary expenditures for the treatment of injuries, and compensation for the employee's diminished earning power, directly resulting from the injury, and perhaps other results causing direct loss, are matters of actual loss, and as such recoverable."

From the foregoing it appears that we have for consideration a statute which undertakes, in the absence of fault, to impose upon all employers (individual and corporate) engaged in enterprises essential to the public welfare, not subject to prohibition by the state, and often not attended by any extraordinary hazard, an unlimited liability to employees for damages resulting from accidental injuries,—including physical and mental pain,—which may be recovered by the injured party or his administrator for benefit of widow, children, parents, next of dependent kin, or the estate. The individual who hires only one man and works by his side is put on the same foot-

ing as a corporation which employs thousands; no attention is given to probable ability to pay the award; length of service is unimportant,—a minute seems enough; wages contracted for bear no necessary relationship to what may be recovered; and a single accident which he was powerless to prevent or provide against may pauperize the employer. And by reason of existing constitutional and statutory provisions an injured workman may claim under this act, or under the Compensation Law, or according to the common law, materially modified in his favor by exclusion of the fellow-servant rule and otherwise. On the other hand, while the employer is declared subject to new, uncertain, and greatly enlarged liability, notwithstanding the utmost care, nothing has been granted him in return.

In such circumstances, would enforcement of the challenged statute deprive employers of rights by the 14th Amendment? Plainly, I think, nothing short of an affirmative answer is compatible with well-defined constitutional guaranties.

Of course, the 14th Amendment was never intended to render immutable any particular rule of law, nor did it by fixation immortalize prevailing doctrines concerning legal rights and liabilities. Orderly and rational progress was not forestalled. *Holden v. Hardy*, 169 U. S. 366, 387, 42 L. ed. 780, 789, 18 Sup. Ct. Rep. 383. But it did strip the states of all power to deprive any person of life, liberty, or property by arbitrary or oppressive action,—such action is never due process of law.

In the last analysis it is for us to determine what is arbitrary or oppressive upon consideration of the natural and inherent principles of practical justice which lie at the base of our traditional jurisprudence and in spirit our Constitution. A legislative declaration of reasonableness is not conclusive; no more so is popular approval,—otherwise constitutional inhibitions would be futile. And plainly, I think, the in-

(*Arizona Employers' Liability Cases*, 256 U. S. 400, 63 L. ed. 1058, 39 Sup. Ct. Rep. 553.)

dividual's fundamental rights are not proper subjects for experimentation; they ought not to be sacrificed to questionable theorization.

Until now I had supposed that a man's liberty and property—with their essential incidents—were under the protection of our charter, and not subordinate to whims or caprices or fanciful ideas of those who happen for the day to constitute the legislative majority. The contrary doctrine is revolutionary and leads straight towards destruction of our well-tryed and successful system of government. Perhaps another system may be better,—I do not happen to think so,—but it is the duty of the courts to uphold the old one unless and until superseded through orderly methods.

After great consideration in *Adair v. United States*, 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764, and *Coppage v. Kansas*, 236 U. S. 1, 59 L. ed. 441, L.R.A.1915C, 960, 35 Sup. Ct. Rep. 240, this court declared that the 14th Amendment guarantees to both employer and employee the liberty of entering into contracts for service subject only to reasonable restrictions. "The principle is fundamental and vital."

In the first case an act of Congress prohibiting interstate carriers from requiring one seeking employment, as a condition of such employment, to enter into an agreement not to become or remain a member of a labor organization, was declared in conflict with the 5th Amendment. In *Coppage v. Kansas* a state statute which declared it unlawful to require one to agree not to be a member of a labor association as a condition of securing employment was held invalid under the 14th Amendment and we said: "An interference with this liberty so serious as that now under consideration and so disturbing of equality of right must be deemed to be arbitrary, unless it be supportable as a reasonable exercise of the police power of the state." In *Truax v. Raich*, 239 U. S. 33, 41, 60

L. ed. 131, 135, L.R.A.1916D, 545, 36 Sup. Ct. Rep. 7, Ann. Cas. 1917B, 283, an Arizona statute prohibiting employment of aliens except under certain conditions was struck down. We there said: "It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [14th] Amendment to secure."

The right to employ and the right to labor are correlative,—neither can be destroyed nor unduly hindered without impairing the other. The restrictions imposed by the act of Congress, struck down in the *Adair Case*, by the Kansas statute, declared invalid in the *Coppage Case*, and by the Arizona statute, held inoperative in the *Truax Case*, viewed as practical matters, seem rather trivial in comparison with the burden laid on employers by the statute before us. And the grounds suggested to support it really amount in substance to asserting that the legislature has power to protect society against the consequences of accidental injuries, and therefore it may impose the loss resulting therefrom upon those wholly without fault who have afforded others welcomed opportunities to earn an honest living under unobjectionable conditions. As a measure to stifle enterprise, produce discontent, strife, idleness, and pauperism, the outlook for the enactment seems much too good.

In *New York C. R. Co. v. White*, 243 U. S. 188, 61 L. ed. 667, L.R.A.1917D, 1, 37 Sup. Ct. Rep. 247, Ann. Cas. 1917D, 629, 13 N. C. C. A. 943, and *Mountain Timber Co. v. Washington*, 243 U. S. 219, 61 L. ed. 685, 37 Sup. Ct. Rep. 260, Ann. Cas. 1917D, 642, 13 N. C. C. A. 927, as I had supposed for reasons definitely pointed out, we held the challenged statutes not in conflict with the 14th Amendment although they imposed liability without fault and introduced a plan for compensating workmen, unknown to

the common law. The elements of those statutes regarded as adequate to save their validity we specified; if such characteristics had not been found, the result, necessarily, would have been otherwise unless we were merely indulging in harmful chatter.

Here, without fault, the statute in question imposes liability in some aspects more onerous than either the New York or Washington law prescribed; and the grounds upon which we sustained those statutes are *wholly* lacking. The employer is not exempted from any liability formerly imposed; he is given no quid pro quo for his new burdens; the common-law rules have been set aside without a reasonably just substitute; the employee is relieved from consequences of ordinary risks of the occupation and these are imposed upon the employer without defined limit to possible recovery, which may ultimately go to non-dependents, distant relatives, or, by escheat, to the state; "the act bears no fair indication of a just settlement of a difficult problem affecting one of the most important of social relations;" on the contrary, it will probably intensify the difficulties.

The liability is not restricted to the pecuniary loss of a disabled employee, or those entitled to look to him for support, but includes compensation for physical and mental pain and suffering; a recovery resulting in bankruptcy to an em-

ployer may benefit only a distant relative, financially independent; the prescribed responsibility is not "to contribute reasonable amounts according to a reasonable and definite scale, by way of compensation for the loss of earning power arising from accidental injuries," but is unlimited, unavoidable by any care, incapable of fairly definite estimation in advance, and enforceable by litigation probably acrimonious, long drawn out, and expensive. While the statute is inattentive to the employee's fault, it permits recovery in excess of the employee's pecuniary misfortune; and provides for compensation, not general, but sporadic, uncertain, conjectural, delayed, indefinite as to amount, and not distributed over such long period as to afford actual protection against loss or lessened earning capacity, with insurance to society against pauperism, etc.

I am unable to see any rational basis for saying that the act is a proper exercise of the state's police power. It is unreasonable and oppressive upon both employer and employee; to permit its enforcement will impair fundamental rights solemnly guaranteed by our Constitution, and heretofore, as I think, respected and enforced.

The CHIEF JUSTICE and Mr. Justice McKenna and Mr. Justice Van Devanter concurred in this opinion.

ANNOTATION.

Constitutionality of Workmen's Compensation Act giving choice of remedies exclusively to either employer or employee.

In many of the cases the validity of the acts has been attacked by the employer, and the fact that the acts gave an option to the employer has been relied upon as a ground for sustaining them, without any discussion of the effect of the fact that the employer's option was exclusive.

It will be observed that in the reported case (*ARIZONA COPPER Co. v. HAMMER*, ante, 1537) the optional nature of the legislation was invoked by

the employer, and that the court refused to adopt the contention that the act involved deprived the employer of property without due process of law, or denied him equal protection of the law because it conferred upon employees a free choice of three remedies. First, the common-law liability, relieved of the fellow servant and contributory negligence defenses; second, the right to proceed under the Employers' Liability Law, which is applicable where

the injury was not caused by the employee's negligence; and, third, a right to invoke the provisions of the Compulsory Compensation Law, under which he might recover without fault on the part of the employer. In upholding the validity of the act the court remarked that election of remedies is an option very frequently given by the law to a person entitled to an action.

There appears to be no other case involving the exact question under annotation.

Attention may, however, be called to a recent case (*Middleton v. Texas Power & Light Co.* (1918) 249 U. S. 152, 68 L. ed. 527, 39 Sup. Ct. Rep. 227), in which the constitutionality of the Texas Workmen's Compensation Act was attacked on the ground that it violated the equal protection and due process provisions, because, while acceptance of the act was optional with the employer, it was compulsory as to employees. The court in this case said: "Stress is laid upon the point that the Texas act, while optional to the employer, is compulsory as to the employee of a subscribing employer. Our attention is not called to any express provision prohibiting a voluntary agreement between a subscribing employer and one or more of his employees, taking them out of the operation of the act; but probably such an agreement might be held by the courts of the state to be inconsistent with the general policy of the act; the supreme court, in the case before us, did not intimate that such special agreements would be permissible; and hence it is fair to assume that all who remain in the employ of a subscribing employer, with notice that he has provided for payment of compensation by the association or by an authorized insurance company, will be bound by the provisions of the act. But a moment's reflection will show the impossibility of giving an option both to the employer and to the employee, and enabling them to exercise it in diverse ways. The provisions of the act show that the legislative purpose is that it shall take effect only upon acceptance by both employer and employee. The

former accepts by becoming a subscriber; the latter, by remaining in the service of the employer after notice of such acceptance. And we see in this no ground for holding that there is a denial of the equal protection of the laws as between employer and employee. They stand in different relations to the common undertaking, and it was permissible to recognize this in determining how they should accept or reject the new system. The employer provides the plant, the organization, the capital, the credit, and necessarily must control and manage the operation. In the nature of things his contribution has less mobility than that of the employee, who may go from place to place seeking satisfactory employment, while the employer's plant and business are comparatively, even if not absolutely, fixed in position. Again, in order that the new scheme of compensation should be a success, the legislature deemed it proper, if not essential, that the payment of compensation to the injured employees or their dependents should be rendered secure, and the losses to individual employers distributed, by a system of compensation insurance, in which it was deemed important that all employees of a given employer should be treated alike. Still further, there are reasons affecting the contentment of the employees and the discipline of the force, rendering it desirable that all serving under a common employer should be subject to a single rule as to compensation in the event of injury or death arising in the course of the employment. These and other considerations that might be suggested fully justified the legislative body of the state in determining that acceptance of the new system should rest upon the initiative of the employer, and that any particular employee, who, with notice of the employer's acceptance, dissented from the resulting arrangement, should be required to exercise his option by withdrawing from the employment. The relation of employer and employee being a voluntary relation, it was well within the power of the state to permit employers to accept or reject the new plan of compen-

sation, each for himself, as a part of the terms of employment; and in doing this there was no denial to employees

of the equal protection of the laws within the meaning of the 14th Amendment." J. T. W.

W. S. HOLMAN, Plff. in Err.,
v.
ATHENS EMPIRE LAUNDRY COMPANY.

Georgia Supreme Court — September 4, 1919.

(— Ga. —, 100 S. E. 207.)

Nuisance — smoke.

1. Smoke is not per se a nuisance.

To constitute smoke a nuisance, it must be such as to produce either actual, tangible, and substantial injury to neighboring property itself, or such as to interfere sensibly with its use and enjoyment by persons of ordinary sensibilities.

[See note on this question beginning on page 1575.]

— private redress.

2. If a public nuisance causes special damage to a private citizen, he has a right of action therefor.

If a private nuisance causes injury to the person or property, or both, of another, a cause of action accrues.

[See 20 R. C. L. 460, 463.]

Definition — nuisance.

3. "A nuisance is anything that worketh hurt, inconvenience, or damage to another; and the fact that the act done may otherwise be lawful does not keep it from being a nuisance."

[See 20 R. C. L. 380.]

Nuisance — pollution of air.

4. Every person has the right to have the air diffused over his premises, whether located in the city or country, in its natural state and free from artificial impurities.

(a) By air in its natural state and free from artificial impurities is meant pure air consistent with the locality and character of the community.

(b) The pollution of the air, so far as reasonably necessary to the enjoyment of life and indispensable to the progress of society, is not actionable.

(c) The privilege of use incident to the right of property must not be exercised in an unreasonable manner, so as to inflict injury upon another unnecessarily.

(d) The maxim "sic utere tuo ut

alienum non lædas," considered and applied.

[See 20 R. C. L. 420.]

Injunction — against nuisance — when lies.

5. The jurisdiction of equity to restrain nuisances is in aid of the legal right, when the legal right is inadequate, and to prevent a multiplicity of suits.

In cases of nuisances, the foundation for the interference of equity rests in the necessity of preventing irreparable injury and multiplicity of suits.

(a) There is in principle no distinction between any of the cases, whether it be smoke, smell, noise, or gas.

(b) The doctrines of "de minimis," "balance of injury," or "public interest," and "discretion" considered.

(c) In a suit to enjoin the continuance of a nuisance created by smoke alone, the plaintiff cannot be denied injunctive relief, his case being otherwise made out, because it would injure the defendant or the public to grant it. In such a case the chancellor has no discretion at the final trial.

(d) The injuries may be balanced, and the discretion of the chancellor exercised in the grant or refusal of an interlocutory injunction.

[See 20 R. C. L. 472.]

Appeal — direction of verdict — error.

6. Under the pleadings and evidence, the court erred in directing the jury to return a verdict for the defendant.

Headnotes by GEORGE, J.

ERROR to the Superior Court for Clarke County (Cobb, J.) to review a judgment overruling a motion for new trial after direction of a verdict for defendant, in an action brought to enjoin the continuance of a smoke nuisance. *Reversed.*

Statement by George, J.:

W. S. Holman is the owner of a nine-story brick building located on the corner of Clayton and Lumpkin streets in the city of Athens, known as the Holman Building. The building was completed in January, 1914. The exterior construction of the building is of tapestry brick. The ground floor of the building is occupied by a café and lunch room, ice cream and candy factory, cigar factory, and a gas company. The other floors are designed for office purposes. Immediately across Lumpkin street from the Holman Building, and on the corner of Clayton and Lumpkin streets, is the two-story brick building of the Athens Empire Laundry Company. This building has been occupied by a steam laundry for about eighteen years. In the building is a 35-horsepower steam boiler, used in the operation of the laundry. The smokestack on the west side of the laundry is about 140 feet away from the Holman Building. The top of the stack, which is about 60 feet in height, is on a level with the sixth floor of the Holman Building.

In July, 1917, W. S. Holman filed an equitable petition in the superior court of Clarke county, in which he alleged that until recently the laundry company had used coke for the purpose of firing its boiler; that coke did not give off any considerable quantity of smoke, and could be used for fuel without financial loss or inconvenience to the laundry company, and is obtainable in the necessary quantities in the local market. He also alleged that the laundry company, at the time of the filing of the suit, was using soft coal for fuel and emitting "a very black, dense smoke, which smoke is a nuisance to the portion of the city affected (the business section), but is especially injurious to petitioner." He charged that the smoke entered the windows of the building and

blackened the walls and casing of the building itself, to the special injury of the building, as well as to the inconvenience and discomfort of the occupants thereof. His tenants were compelled to keep the windows down on the west and north fronts of his building, during the hot weather of the summer, in order "to exclude the immense volumes of smoke blowing therein" from the stack of the laundry building. A number of the plaintiff's tenants and especially the tenant operating a millinery and hairdressing establishment, have complained and threatened to leave his building unless the smoke nuisance was abated. The defendant would continue to use soft coal, and the damage from the nuisance created thereby would be irreparable, a multiplicity of suits would result, and the intervention of a court of equity was necessary to the adequate protection of the plaintiff's rights. The prayers of the petition were for judgment for the damage sustained by the plaintiff up to the filing of the suit, for injunction restraining the defendant from operating its plant "with such coal as throws out a black, dense smoke," for general relief, and for process.

The laundry company answered, and admitted the location of the respective buildings and of its smokestack, substantially as set out in the petition. It also admitted that at the time of the filing of the suit it was using soft coal, and that it had in the past, and for some years, used coke as a fuel; but it averred that coke could be obtained in the Athens market only from a tenant (a gas company) of the plaintiff, that recently it had been unable to obtain coke except at prohibitive prices, that no more smoke was emitted from its boiler than was absolutely necessary in the proper operation of its plant, that its plant was operated by a skilled fireman

and engineer and in a proper manner, and that its use of soft coal did not work appreciable hurt or damage to the plaintiff. It denied substantial injury and damage to the plaintiff's building, denied substantial injury to the plaintiff's tenants, denied that the injury, if any, to the plaintiff's building, the plaintiff's tenants, and the property of the latter, was irreparable in damages, but, on the contrary, averred that the plaintiff had an adequate and complete remedy at law.

On the trial the plaintiff, by amendment, waived "his right to damages up to the time his suit was filed." The evidence on behalf of the plaintiff tended to show injury to the building as alleged in the petition, extreme inconvenience and discomfort to the plaintiff's tenants, and complaints and threats by the tenants to vacate the building. Whenever the wind was blowing from the laundry in the direction of the plaintiff's building, dense volumes of black smoke from the laundry's stack were blown directly into the building. Prior to the summer of 1917, at which time the defendant abandoned the use of coke as a fuel and commenced to use soft coal, some smoke came from the laundry's stack into the plaintiff's building. This smoke was, however, of a "yellowish color," was not particularly offensive to the plaintiff's tenants, and did not substantially damage the walls of the building. Since the defendant commenced to use soft coal as a fuel, the dense smoke from the defendant's stack was blown directly against the plaintiff's building whenever the wind was from the direction of the laundry, in such quantity as to necessitate the closing of the windows on both the west and north sides of the plaintiff's building. During the hot weather of the summer it was necessary to keep the windows of the building open. The tenants complained, not only on the ground of inconvenience and discomfort, but on the ground that the soot carried into the building and deposited upon

the books, papers, furniture, and merchandise discolored and permanently injured the same. Even in winter the dense volume of smoke from the defendant's stack was blown in around the windows and openings of the building. Some of the plaintiff's tenants demanded offices on the opposite side of the building and away from the laundry. The plaintiff was compelled to make these changes in order to hold his tenants, to his financial loss. Coke, of suitable quality and in sufficient quantities, and at reasonable prices, could be had and used by the defendant. There was also some evidence to the effect that the volume of smoke thrown off by soft coal could be gradually reduced and controlled by the use of modern appliances.

The defendant's evidence was to the effect that its laundry and the plaintiff's building were located in the business section of the city; that its laundry had been in operation several years before the plaintiff erected his building in close proximity thereto; that it had used coke as a fuel as long as it could reasonably obtain it in necessary quantities and quality; that in the summer of 1917 coke could only be obtained in Athens from a tenant of the plaintiff, and then at prohibitive prices. Its evidence also tended to show that the plaintiff's building, by reason of its height, caused downward eddies in the air currents; that smoke, sand, trash, and other particles were blown against the building and carried down in the air currents and thrown into the Holman Building and into the neighboring buildings, including the laundry building, to the inconvenience and injury of the defendant; that several other smokestacks in the immediate locality emitted large volumes of black smoke, and that the smoke from these stacks was also blown against and into the plaintiff's building, and carried down into the defendant's building. The witnesses for the defendant gave evidence that the boiler was fired by competent and careful persons, and that every rea-

sonable and practicable effort had been made and every practicable appliance had been used to reduce and control the smoke. It also appeared that soft coal was used as a fuel in the furnace of the Holman Building, and that dense black smoke was emitted from the plaintiff's stack, and that whenever the atmosphere was damp and humid the smoke was inclined to settle into the defendant's laundry. It further appeared that there was no state statute or city ordinance regulating the emission of smoke in the city of Athens.

At the conclusion of the evidence, briefly outlined above, and after argument of counsel, the court instructed the jury at some length, finally directing a verdict for the defendant. The plaintiff filed a motion for a new trial, and to the judgment overruling the motion he excepted.

Messrs. John J. Strickland and Roy M. Strickland, for plaintiff in error:

A public nuisance may be enjoined at the instance of a solicitor general.

Augusta v. Reynolds, 122 Ga. 754, 69 L.R.A. 564, 106 Am. St. Rep. 147, 50 S. E. 998; 1 High. Inj. § 762; *Cannon v. Merry*, 116 Ga. 291, 42 S. E. 274; *Sylvester v. Tison*, 133 Ga. 518, 66 S. E. 246; *Sammons v. Sturgis*, 145 Ga. 663, 89 S. E. 774; *Richmond Cotton Oil Co. v. Castellaw*, 134 Ga. 472, 67 S. E. 1126.

The right to an action for damages would seem to coexist with the right to abate or to enjoin, but the right to abate or enjoin may exist without a right to recover damages other than nominal.

Savannah, F. & W. R. Co. v. Gill, 118 Ga. 737, 45 S. E. 623; *Trust Co. of Georgia v. Ray*, 125 Ga. 485, 54 S. E. 145; *Tate v. Mull*, 147 Ga. 195, 3 A.L.R. 310, 93 S. E. 212; *Quitman v. Underwood*, 148 Ga. 152, 96 S. E. 178; *Russell v. Napier*, 80 Ga. 77, 4 S. E. 857; *Cunningham v. Rice*, 28 Ga. 30; *Mygatt v. Goetchins*, 20 Ga. 350; *Columbus v. Arnold*, 30 Ga. 517; *Pennoyer v. Allen*, 56 Wis. 502, 43 Am. Rep. 728, 14 N. W. 609.

Nuisances of one character and another may be enjoined.

Whitaker v. Hudson, 65 Ga. 43; *Trust Co. of Georgia v. Ray*, 125 Ga. 485, 54 S. E. 145; *Tate v. Mull*, 147 Ga. 195, 3

A.L.R. 310, 93 S. E. 212; *Quitman v. Underwood*, 148 Ga. 152, 96 S. E. 178; *Huxford v. Southern Pine Co.* 124 Ga. 181, 52 S. E. 489.

Mr. W. M. Smith also for plaintiff in error.

Messrs. Erwin, Erwin & Nix, for defendant in error:

Minor inconveniences must be remedied by actions for the recovery of damages rather than the severe process of injunction.

Gilbert v. Showerman, 23 Mich. 448;

This is not a case for equitable interference.

Ponder v. Cox, 26 Ga. 435; *Bonaparte v. Camden & A. R. Co.* Baldw. 217, Fed. Cas. No. 1,617; 29 Cyc. 1223; *Union Planters' Bank & T. Co. v. Memphis Hotel Co.* 124 Tenn. 649, 39 L.R.A. (N.S.) 580, 139 S. W. 715.

George, J., delivered the opinion of the court:

As a general rule a public nuisance gives no right of action to any individual, but must be abated by process instituted in the name of the state. Civ. Code, § 4454. If a public nuisance causes special damage to a private citizen, he has a right of action therefor. Civ. Code, § 4455; *Trust Co. of Georgia v. Ray*, 125 Ga. 485, 487, 54 S. E. 145; *Savannah, F. & W. R. Co. v. Gill*, 118 Ga. 737, 45 S. E. 623; *Richmond Cotton Oil Co. v. Castellaw*, 134 Ga. 472, 67 S. E. 1126(3). The fact that the plaintiff waived his claim to damages alleged to have been suffered prior to the filing of the suit is of no special consequence. *Tate v. Mull*, 147 Ga. 195, 197, 3 A.L.R. 310, 93 S. E. 212.

If the alleged nuisance be regarded as a public one, the evidence in the case is sufficient to authorize the jury to find special injury and damage to the plaintiff, and therefore he may maintain the action. If the alleged nuisance be considered a private one, there can be no question of the plaintiff's right to sue under § 4456 of the Code, which declares:

"A private nuisance may injure either the person or property, or both, and in either case a right of action accrues."

In *Bonner v. Welborn*, 7 Ga. 296,

311 (before the Code), Judge Nisbet, speaking for the court, said: "A private nuisance is anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another. 3 Bl. Com. 170. . . . If one does any other act, in itself lawful, which yet, being done in that place, necessarily tends to the damage of another's property, it is also a nuisance."

In *Coker v. Birge*, 9 Ga. 425, 427, 54 Am. Dec. 347 (before the Code), Judge Warner said: "Blackstone defines a nuisance to be anything that worketh hurt, inconvenience, or damage. 3 Bl. Com. 215."

Section 4457 of the Civil Code declares: "A nuisance is anything that worketh hurt, inconvenience, or damage to another; and the fact that the act done may otherwise be lawful does not keep it from being a nuisance. The inconvenience complained of must not be fanciful, or such as would affect only one of fastidious taste, but it must be such as would affect an ordinary reasonable man."

Theoretically, every person has the natural right to have the air diffused over his premises in its natural state, free from all artificial impurities. Wood, Nuisances, 3d ed. § 495. If this rule were literally applied, its application would seriously disturb business, commerce, and society itself. Hence, by air in its natural state and free from artificial impurities is meant pure air consistent with the locality and nature of the community. Wood, Nuisances, 3d ed. § 496, and cases cited; Joyce, Nuisances, § 136, and cases cited. The use of fuel in the home, the place of business, and the manufacturing establishment is necessary. In proportion as the population thickens, the impurities thrown into the air are increased. The pollution of the air, actually necessary to the reasonable enjoyment of life and indispensable to the progress of society, is not actionable; but the

right (and such it must be conceded) must not be exercised in an unreasonable manner so as to inflict injury upon another unnecessarily. *Embrey v. Owen*, 4 Eng. L. & Eq. Rep. 476, 477. Everyone has the right to use his property as he sees fit, provided that in so doing he does not invade the rights of others unreasonably, judged by the ordinary standards of life and according to the notions of reasonable men. The right to use one's property as he pleases implies a like right in every other person, and is qualified by the doctrine that the use in the first instance must be a reasonable one. The maxim is, "sic utere tuo ut alienum non lœdas." See the elaborate judgment of Blackburn, J., in *Fletcher v. Rylands*, 35 L. J. Exch. N. S. 154, L. R. 1 Exch. 265, 12 Jur. N. S. 603, 14 Week. Rep. 799, L. R. 3 H. L. 330, 37 L. J. Exch. N. S. 161, 19 L. T. N. S. 220, 6 Mor. Min. Rep. 129, 1 Eng. Rul. Cas. 235. Whether the property be a dwelling house or manufacturing enterprise is immaterial. Smoke is not per se a nuisance. *St. Paul v. Gilfillan*, 36 Minn. 298, 31 N. W. 49. In *Crump v. Lambert*, L. R. 3 Eq. 409, 412, Lord Romilly, M. R., said: "With respect to the question of law, I consider it to be established by numerous decisions that smoke, unaccompanied with noise or noxious vapor, that noise alone, that offensive vapors alone, although not injurious to health, may severally constitute a nuisance to the owner of adjoining or neighboring property."

To constitute smoke a nuisance, according to the authorities, it must be such as to produce a visible, tangible, and appreciable injury to property, or such as to render it specially uncomfortable or inconvenient, or to materially interfere with the ordinary comfort of human existence. Joyce, Nuisances, § 137; *Campbell v. Seaman*, 63 N. Y. 568, 20 Am. Rep. 567. With respect to dwelling houses, the rule is stated in Wood on Nuisances, 3d ed. § 505,

**Definition—
nuisance.**

Nuisance—pollution of air.

—smoke.

as follows: "The rule is that the comfortable enjoyment of the premises must be sensibly diminished, either by actual, tangible injury to the property itself, or by the promotion of such physical discomfort as detracts sensibly from the ordinary enjoyment of life."

See also *Ross v. Butler*, 19 N. J. Eq. 294, 97 Am. Dec. 654; *Duncan v. Hayes*, 22 N. J. Eq. 26.

That the business itself is offensive to others, or that property in the neighborhood of such business is necessarily adversely affected thereby, or that persons of fastidious taste would prefer its removal, is not sufficient. Applying the foregoing principles to the case in hand, the defendant may make use of its property, and carry on any business not per se a nuisance that produces no unnecessary, unreasonable, unusual or extraordinary impregnation of the air with smoke or soot, to the sensible inconvenience and discomfort of plaintiff's tenants, or to the actual, tangible, and substantial injury of plaintiff's realty.

Whether a nuisance in fact existed, in the circumstances of this case, was at least a question of fact for the jury. See *Hill v. McBurney Oil & Fertilizer Co.* 112 Ga. 788, 52 L.R.A. 398, 38 S. E. 42 (3), where an injunction was granted on account of noise alone. We do not understand that the trial judge acted upon a contrary view in directing a verdict for the defendant. In the course of his remarks to the jury he said: "If smoke creates a nuisance, and it can, then the party that creates the nuisance must compensate in money anyone that is damaged by the creation or maintenance of the nuisance."

While the trial judge doubtless had in mind the extent of the plaintiff's injury, he nevertheless finally concluded that a court of equity should not undertake to regulate smoke in the business districts of populous communities or cities. The judge expressly followed the rule announced in the case of *Union*

Planters' Bank & T. Co. v. Memphis Hotel Co. 124 Tenn. 649, 39 L.R.A. (N.S.) 580, 139 S. W. 715. The Tennessee supreme court in that case held that injunction will not lie to prevent a property owner in a densely populated portion of the city, from causing smoke to issue from the chimneys of his building at an elevation lower than the roofs of neighboring buildings, although permitting it to issue at a lower level constitutes a nuisance to the occupants of such buildings. In the course of the opinion by Green, J., it was said: "There can be no doubt, upon the proof before us, that complainant has sustained injury by reason of the operation of the plant of the defendants."

He then dealt with the feasibility of requiring the defendants to extend their smokestack, and concluded that this could not be practically accomplished; that the further extension of the stack "would be a greater menace to a greater number of people." He then added:

"We prefer, however, to put our decision on a broader ground than the particular facts of this case, which we have stated. The annoyance and damage which complainant sustains from this smokestack is no doubt serious, but in undertaking to find a remedy we must consider the effects and results of that remedy. The situation existing between complainant's property and the defendant's property is by no means uncommon in any city. Such conditions are the rule rather than the exception. The buildings in none of our cities are of uniform height. All buildings in this day, which house any establishments of any considerable importance, are equipped with boilers, use coal, and make smoke. This smoke has to escape, and there must be smokestacks, and wherever one building is higher than another it will suffer from the smoke issuing from the stacks of the lower, unless some means could be devised whereby all stacks could be made a uniform height, and even this would not obviate the trouble, because of

the tendency of smoke to descend in damp weather, and because of downward eddies in the air currents, which exist in the neighborhood of all high buildings.

"If the chancellor's decree were followed, it would commit the courts of this state to a policy that would prove embarrassing in the extreme. Any owner of a higher building could compel the adjacent owner of a lower building to run a smokestack up to a point on a level with the first owner's roof. The height of the extension demanded in this case is 50 feet, and we doubt if that could be safely accomplished. Suppose that, instead of being a fifteen-story building, the Tennessee Trust Building was thirty stories high. Upon the same principle, it could compel the extension of this Peabody stack up to the level of a thirty-story roof. Furthermore, both of these buildings are located in the heart of the city of Memphis, as has been stated. A fifteen-story building is hardly the limit of the architectural development of this section of the city. There will in time doubtless be buildings erected in this immediate neighborhood much higher than the Tennessee Trust Building or the Peabody Hotel. Upon the principle of the chancellor's decree, if it were adopted, when these new buildings were erected, they could compel the defendants to again extend their smokestack into the air, and could compel the Tennessee Trust Building to extend its smokestack, and so this process might be repeated indefinitely."

In the course of the opinion the court observed (and we think the observation an important one) that "it is not even urged that they [the defendants] should be required to use any fuel different from the kind which they now use. Complainant could make no such insistence as this, for the proof shows that in its own plant it uses the same character of fuel that defendants use, namely, bituminous or soft coal."

In the instant case the burden of the complaint is the use of soft coal, instead of coke. It is true that the plaintiff himself uses soft coal. He denied that he used soft coal exclusively. But, conceding that he used soft coal exclusively, the plaintiff's stack protrudes from the roof of his nine-story building, and the smoke only occasionally settles, under certain atmospheric conditions, into the defendant's laundry. If it be further conceded that such occasional infringement of the defendant's rights worked hurt and injury to it, the plaintiff is not for that reason alone, under the circumstances of this case, to be denied appropriate relief. In *Robinson v. Baugh*, 31 Mich. 290, it was held that "it is no defense to a bill to enjoin a nuisance caused by the manner in which a business is conducted in a neighborhood that some of the complainants have establishments in the same vicinity to which similar objections lie as are made to the one in question."

In the opinion by Graves, Ch. J., the case of *Gilbert v. Showerman*, 23 Mich. 448 (cited approvingly by the Tennessee supreme court in *Union Planters' Bank & T. Co. v. Memphis Hotel Co.* supra), is distinguished. *Robinson v. Baugh* involved both smoke from the use of soft coal and noise, and also jars from steam hammers, resulting in sensible inconvenience to the plaintiffs and appreciable injury to the plaintiffs' dwellings. There the right to injunctive relief was fully sustained. See also *Georgia R. & Bkg. Co. v. Berry*, 78 Ga. 744, 4 S. E. 10(3); *Brimberry v. Savannah, F. & W. R. Co.* 78 Ga. 641, 3 S. E. 274.

Is there, in case of nuisance produced by smoke alone, any satisfactory reason upon which the court of equity can withhold injunctive relief and remit the injured party to his action at law? The importance of the question justifies a further examination of the decided cases. In *Crump v. Lambert*, L. R. 3 Eq. 409, 413, Romilly, M. R., said:

"The law on this subject is, I apprehend, the same, whether it be enforced by action at law or by bill in equity. In any case

**Injunction—
against nuisance
—when lies.**

where a plaintiff could obtain substantial damages at law, he is entitled to an injunction to restrain the nuisance in this court. There is, I apprehend, no distinction between any of the cases, whether it be smoke, smell, noise, vapor, or water, or any other gas or fluid. The owner of one tenement cannot cause or permit to pass over, or flow into, his neighbor's tenement any one or more of these things in such a way as materially to interfere with the ordinary comfort of the occupier of the neighboring tenement, or so as to injure his property. . . . The owner of the adjoining or neighboring tenement, whether he has or has not previously occupied it,—in other words, whether he comes to the nuisance or the nuisance comes to him,—retains his right to have the air that passes over his land pure and unpolluted, and the soil and produce of it uninjured by the passage of gases, by the deposit of deleterious substances, or by the flow of water."

And in that case an injunction was granted to "restrain the issuing of smoke and effluvia from a factory chimney, and the making of noise in the factory, although it was situated in a manufacturing town; it being proved that such smoke, effluvia, and noise were a material addition to previously existing nuisances."

The doctrine of this case has been adopted by the English courts, and generally by the courts of this country. Wood, Nuisances, § 507, and cases cited in notes.

In Colchester v. Ellis, 2 Starkie's Ev. 538, the defendant, who was the owner of a building in London, erected a chimney in his building for the purpose of having a fire in his saddle room. The smoke from this chimney entered the plaintiff's dwelling about 50 yards distant, to the great annoyance of the plaintiff

and his family and to the injury of his furniture. It appeared that the chimney was lower than the surrounding buildings and lower than the plaintiff's building. It was held that, if the plaintiff would have a fire in his establishment, he must construct his chimney so as not to injure his neighbor's property or impair its comfortable enjoyment.

In Sampson v. Smith, 8 Sim. 272, 59 Eng. Reprint, 108, 7 L. J. Ch. N. S. 260, 2 Jur. 563, the plaintiff was the owner of a dwelling house and shop. He had valuable furniture in his dwelling house and also a stock of merchandise in the shop. The defendants owned a manufacturing establishment on the opposite of the street from the plaintiff's house and shop. In the manufacturing establishment were steam engines. Dense volumes of smoke issued from the defendants' flue, and the soot and cinders descended in volumes into the streets, and into the shop and dwelling house of the plaintiff, so as to injuriously affect the goods in the store and the furniture in the house, and to sensibly impair the comfortable enjoyment of the dwelling. It was held that the use of the steam engine with such results was a nuisance, and that the plaintiff was entitled to an injunction restraining the use of the same in the manner shown. The case is based upon the fact that the defendants' flue was not as high as the roof of the plaintiff's building and other buildings in the vicinity.

Cartwright v. Gray, 12 Grant, Ch. (U. C.) 400, is an illustrative and instructive case. It there appeared that the nuisance arose principally from the fuel used by the defendant producing large quantities of smoke which was discharged near the dwelling houses of the plaintiffs, and from the failure on the part of the defendant to employ the best known appliances for discharging the smoke. Mowat, V. C., in delivering the opinion of the court, after citing and applying the doctrine laid down in Walter v. Selfe, 4 Eng. L. & Eq.

Rep. 15, and *St. Helen's Smelting Co. v. Tipping*, 4 Best & S. 608, 122 Eng. Reprint, 588, concludes as follows: "My opinion on the whole case is that the defendant has a right to use steam for propelling his machinery, but is bound to employ such reasonable precautions in the use of it as may prevent unnecessary danger to his neighbors' property from sparks, and unnecessary annoyance or injury to them from the noise or smoke; that though he seems, since the bill was filed, to have performed this duty as respects these sparks and noise, he has done nothing in respect to the smoke; and that the plaintiffs' complaint in reference thereto is well founded. The decree will therefore require the defendant to desist from using his steam engine in such a manner as to occasion damage or annoyance to the plaintiffs, or either of them, as owning or occupying the houses mentioned in the bill."

The case of *Galbraith v. Oliver*, 3 Pittsb. 79, was an action to restrain the defendants, the proprietors of a flouring mill, from using soft coal to run their steam engine. In the course of the opinion by Johnson, J., it was said: "No occupation is more legitimate and no erection more careful than that of a flouring mill. There can be no denial of the owner's right to build one and to run it by steam. So of any other manufacturing establishment. They may not be agreeable to his next neighbor. He is not bound to consult the taste, pleasure, or preference of others; but he is bound to respect his neighbor's rights. . . . While mills and manufactories are legal and necessary, it is neither legal nor necessary that they be so located as to interfere with the rights of others in the enjoyment of their possessions. When, therefore, they create noises that prevent sleep, or taint the atmosphere with vapors prejudicial to health or nauseous to the smell, or fill it with a smudge that depreciates its use for every purpose, they trench on the rights of persons affected thereby. Just here

is where the line must be drawn. At this point they become nuisances."

In *Wood*, Nuisances, § 502, the author, after reviewing many cases, English and American, says: "Thus it will be seen that, even in the ordinary uses of buildings, the owners and occupants are bound, not only to see to it that their chimneys are so arranged as to carry off the smoke developed therein, but are also bound to use such fuel as will produce the least obnoxious smoke."

This doctrine is supported by many cases. See *Rhodes v. Dunbar*, 57 Pa. 274, 98 Am. Dec. 221; *Sullivan v. Royer*, 72 Cal. 248, 1 Am. St. Rep. 51, 13 Pac. 655; *Campbell v. Seaman*, 63 N. Y. 568, 20 Am. Rep. 567; *Ross v. Butler*, 19 N. J. Eq. 294, 97 Am. Dec. 654; *Tuebner v. California Street R. Co.* 66 Cal. 171, 4 Pac. 1162; *Hurlbut v. McKone*, 55 Conn. 31, 3 Am. St. Rep. 17, 10 Atl. 164; *Wesson v. Washburne Iron Co.* 13 Allen, 95, 90 Am. Dec. 181; *Hutchins v. Smith*, 63 Barb. 252; *Hyatt v. Myers*, 71 N. C. 271. See also *Joyce*, Nuisances, §§ 136 et seq., and cases cited in notes.

The case of *Austin v. Augusta Terminal R. Co.* 108 Ga. 671, 47 L.R.A. 755, 34 S. E. 852, was a suit by the owner of property to recover damages caused by the tracks of the railway company running in the rear of the plaintiff's premises. Injury from smoke and noise was claimed by the plaintiff. The suit really involved the construction of the clause of the Constitution which protects private property from being "taken or damaged" for public purposes without just compensation. This court held, in the majority opinion by Chief Justice Simmons, that the plaintiff's property was not "taken or damaged" within the meaning of the Constitution, under the special facts of the case. The Chief Justice was careful to note that "while holding that a lawfully constructed and lawfully operated railroad is not a nuisance, we are very far from

holding that it may not be so operated in streets or on its private property as to become a nuisance. . . . But when they do so they will get no protection from their charter; for the legislature does not legalize nuisances, whether they are maintained by manufacturing companies, railroads, municipalities, or private individuals."

In the majority opinion much is said, *arguendo*, on the question of nuisances produced by noise and smoke. It was, however, observed that "the evidence does not show any unlawful, improper, or unusual noise, smoke, or movement of cars." Two justices (Lumpkin, P. J., and Lewis, J.) dissented in that case. The dissenting opinion, by Lewis, J., discusses at length many English and American cases in line with the general doctrine laid down by Wood on Nuisances, heretofore referred to in this opinion. This court has said that "the foundation for the interference of equity in restraint of nuisances rests in the necessity of preventing irreparable mischief and multiplicity of suits."

. . . . There must be such an injury as from its nature is not susceptible of being adequately compensated at law, or such as from its continuance or permanent mischief must occasion a constantly recurring grievance, which cannot be otherwise prevented but by injunction. . . . By continuing nuisance or constantly recurring grievance or permanent injury is not meant a constant and unceasing nuisance or injury, but a nuisance which occurs so often, and is so necessarily an incident of the use of property complained of, that it can be fairly said to be continuous, although not constant or unceasing."

See *Central R. Co. v. Americus Constr. Co.* 133 Ga. 392, 397, 65 S. E. 855. See also *Farley v. Gate City Gaslight Co.* 105 Ga. 323, 337, 388, 31 S. E. 193; *Richmond Cotton Oil Co. v. Castellaw*, 134 Ga. 472, 67 S. E. 1126 (4).

"If the injury caused to the adjacent property be continuing so as

to cause a constantly recurring grievance, injunction is an available remedy." *Tate v. Mull*, 147 Ga. 195, 3 A.L.R. 310, 98 S. E. 212 (2).

The rule is well stated by Pitney, V. C., in *Hennessy v. Carmony*, 50 N. J. Eq. 616, 620, 25 Atl. 377: "The familiar ground on which the extraordinary power of the court is invoked in such cases is that it is inequitable and unjust that the injured party should be compelled to resort to repeated actions at law to recover damages for his injury, which, after all, in this class of cases, are incapable of measurement; and I presume to add the further ground that in this country" such recovery "must result in giving the wrongdoer a power not permitted by our system of constitutional government, viz., to take the injured party's property for his private purposes upon making, from time to time, such compensation as the whims of a jury may give. This ground of equitable action is of itself sufficient in those cases where the injury, though not irreparable, promises to be repeated for an indefinite period, and so is continuous in the sense that it will be persevered in indefinitely."

The English courts, it would seem, have not hesitated to grant injunctive relief in cases of nuisances produced by smoke alone. Many American courts, in such cases, have, upon various grounds, denied the right to such relief, and have remitted the complaining parties to their actions at law. The principal and usual grounds upon which injunctive relief has been denied may be referred to as the "de minimis," the "balance of injury," or the "public benefit," and the "discretionary" doctrines. With respect to the first it is sufficient if the injury be appreciable, within the meaning of the term heretofore indicated in this opinion. With respect to the second: In *Richards's Appeal*, 57 Pa. 105, 98 Am. Dec. 202, it was said: "The chancellor will consider whether he would not do a greater injury by enjoining than

would result from refusing, and leaving the party to his redress at the hands of the court and jury."

In *Campbell v. Seaman*, 2 *Thomp. & C.* 231, the supreme court of New York said of this case that it was in direct conflict with the authorities of the state of New York, and could not be there adopted as the law. The case is also criticized and explained in *Wood, Nuisances*, 3d ed. § 532. In line with *Richards's Appeal* is also *Huckenstine's Appeal*, 70 Pa. 102, 10 *Am. Rep.* 669. These cases have been distinguished and in part disapproved in the later Pennsylvania case of *Sullivan v. Jones & L. Steel Co.* 203 Pa. 540, 66 *L.R.A.* 712, 57 *Atl.* 1065. The doctrine of comparative injuries is of course clearly applicable in the grant or refusal of interlocutory injunctions to restrain nuisances. The doctrine has generally been applied in such cases, or in cases involving special facts. The weight of authority is to the effect that at the final trial the right to injunctive relief is not discretionary. See *Clark, Eq.* §§ 213-215, and numerous cases cited in notes. The discretionary doctrine is well disposed of by *Pitney, V. C.*, in *Hennessy v. Carmony*, *supra*, when he says: "I have never been able to see how the question of the right of the complainant to an injunction on final hearing could ever be a matter properly resting in the 'discretion' of the chancellor, as I understand the force of that word in that connection. If by 'discretion' is here meant that the judge must be discreet, and must act with discretion, and discriminate, and take into consideration and give weight to each circumstance in the case, in accordance with its actual value in a court of equity, then I say that that is just what he must do in every case that comes under his consideration—no more and no less. . . . But if the word 'discretion,' in this connection, is used in its secondary sense, and by it is meant that the chancellor has the liberty and power of acting, in finally settling prop-

erty rights, at his discretion, without the restraint of the legal and equitable rules governing those rights, then I deny such power. It seems to me that the true scope of the exercise of this latter sort of discretion in the judicial field is found in those matters which affect procedure merely, and not the ultimate right."

The discretionary doctrine is not peculiar to proceedings to abate or enjoin nuisances, but applies generally to the grant of injunctions and other extraordinary equitable remedies. This court has said that "the exercise of the jurisdiction of courts of equity to decree a specific performance or the rescission of a contract is not a matter of right in either party, but is a matter of sound and reasonable discretion in the court, which governs itself, as far as it may, by general rules and principles, but at the same time withholds or grants relief according to the circumstances of each particular case, when these rules and principles will not furnish any exact measure of justice between the parties."

See also *Bagwell v. Bagwell*, 72 *Ga.* 92 (2); *Swint v. Carr*, 76 *Ga.* 322, 2 *Am. St. Rep.* 44; *Kirkland v. Downing*, 106 *Ga.* 530, 32 *S. E.* 632.

However, in *Franklin v. Newsom*, 53 *Ga.* 580, it was ruled: "Whilst it is a general rule that the right to specific performance is in the sound discretion of a court of equity, yet, in this state, that power is to be exercised by the jury under the evidence and charge of the court."

This ruling was followed in *Miller v. Watson*, 139 *Ga.* 29, 31, 76 *S. E.* 585. See *Landrum v. Rivers*, 148 *Ga.* 774, 98 *S. E.* 477.

This court has applied the doctrine in cases where the plaintiff prayed for the specific performance of a fraudulent, illegal, or hard and unconscionable contract. It would seem to be a misapplication of the doctrine to deny one his equitable rights solely upon the ground of inconvenience to the opposite party or to the public. Neither the oppo-

(— Ga. —, 100 S. E. 207.)

site party nor the public has the right, legal or equitable, to invade the clear legal rights of another. It has been said that the final settlement of property rights does not lie in the broad discretion of the chancellor, but in the clear legal and equitable rules which bind the chancellor himself. The case of *Somerset Water, Light & Traction Co. v. Hyde*, 129 Ky. 402, 111 S. W. 1005, where an injunction to restrain the defendant from discharging sewerage upon the plaintiff's land was denied, and the case of *Wheeling v. Natural Gas Co.* 74 W. Va. 372, 82 S. E. 345, where the city was refused an injunction to restrain the defendant from supplying gas in violation of its franchise, because of the inconvenience it would cause to the public, forcefully illustrate what we believe to be a misconception of the extent of equitable power. The following cases, among others, support what we believe to be the true rule:

Bristol v. Palmer, 81 L.R.A. (N.S.) 881, and note (83 Vt. 54, 74 Atl. 332); *Smith v. Rochester*, 38 Hun, 612; 5 Pom. Eq. Jur. 530, 531; *Kerr Inj.* *166; 1 High. Inj. § 739.

The case in hand is purely one for injunctive relief against a nuisance in consequence. Equity is asked to do no more than to restrain the defendant from using soft coal, that is, "such coal as throws out a black, dense smoke," and the evidence in the record is such as to authorize a finding by the jury that the use of coke was at once convenient and practical. The court is not asked to abate the defendant's laundry. If a case be otherwise made out, injunctive relief cannot be denied the plaintiff, although the nuisance results from smoke alone. Whether the plaintiff was entitled to an injunction was a question for the jury.

Appeal—
direction of
verdict—error.

Judgment reversed.

All the Justices concur.

ANNOTATION.

Nuisance resulting from smoke alone as subject for injunctive relief.

I. Introductory, 1575.

II. General rule, 1575.

III. Application of rule, 1576.

IV. Limitation of rule:

a. Adequate remedy at law, 1580.

b. Slight injury, 1582.

1. Introductory.

The scope of this note is confined strictly to a discussion of those cases dealing with nuisances resulting from smoke and its natural concomitants, soot and cinders, as a subject for relief by injunction. Among the decisions which have been excluded as outside its purview are those wherein the nuisance complained of was the result of smoke in connection with other elements, as noise, vibration, poisonous gases and vapors, noisome smells, or dust. (See in this connection the note in 3 A.L.R. 312, on "Dust as nuisance.") The note being confined to injunctive relief, cases involving the right to damages, or to

recover a penalty for the violation of state or municipal ordinances, are not included.

II. General rule.

Whenever the nature of an injury resulting from a nuisance caused by smoke alone is such that it is continuous, irreparable, and the cause of real damage, and is incapable of adequate compensation by damages in an action at law, a court of equity will afford the aggrieved party relief by injunction restraining the cause of the injury.

Alabama. — See *Rouse v. Martin* (1888) 75 Ala. 510, 51 Am. Rep. 463.

California. — *Sullivan v. Royer* (1887) 72 Cal. 248, 1 Am. St. Rep. 51, 18 Pac. 655; *Melvin v. E. B. & A. L. Stone Co.* (1908) 7 Cal. App. 327, 94 Pac. 390; *Judson v. Los Angeles Suburban Gas Co.* (1910) 157 Cal. 168, 26 L.R.A. (N.S.) 183, 106 Pac. 531, 21 Ann. Cas. 1247.

Georgia.—See the reported case (HOLMAN v. ATHENS EMPIRE LAUNDRY Co. ante, 1564).

Iowa.—Daniels v. Keokuk Waterworks (1883) 61 Iowa, 549, 16 N. W. 705.

Michigan.—McMorran v. Fitzgerald (1895) 106 Mich. 649, 58 Am. St. Rep. 511, 64 N. W. 569.

New Jersey.—Ross v. Butler (1868) 19 N. J. Eq. 294, 97 Am. Dec. 654.

New York. — Hutchins v. Smith (1872) 63 Barb. 252; Beir v. Cooke (1885) 37 Hun, 38; Cogswell v. New York, N. H. & H. R. Co. (1886) 103 N. Y. 10, 57 Am. Rep. 701, 8 N. E. 537; McCarty v. Natural Carbonic Gas Co. (1907) 189 N. Y. 40, 13 L.R.A.(N.S.) 465, 81 N. E. 549, 12 Ann. Cas. 840; Abendroth v. Manhattan R. Co. (1887) 19 Abb. N. C. 247, 7 N. Y. S. R. 43, affirmed in (1890) 122 N. Y. 1, 11 L.R.A. 634, 19 Am. St. Rep. 461, 25 N. E. 496; Catlin v. Patterson (1887) 10 N. Y. S. R. 724.

North Carolina. — Hyatt v. Myers (1874) 71 N. C. 271.

Ohio.—McClung v. North Bend Coal & Coke Co. (1895) 9 Ohio C. C. 259, 6 Ohio C. D. 243.

Oregon. — Bourne v. Wilson-Case Lumber Co. (1911) 58 Or. 48, 113 Pac. 52, Ann. Cas. 1913A, 245.

Pennsylvania.—Galbraith v. Oliver (1867) 3 Pittsb. 79; McKinney v. McCullough (1885) 42 Phila. Leg. Int. 414.

Virginia. — Face v. Cherry (1915) 117 Va. 41, 84 S. E. 10, Ann. Cas. 1917E, 418.

Washington.—Lavner v. Independent Light & Water Co. (1918) 74 Wash. 373, 133 Pac. 592.

England. — Crump v. Lambert (1867) L. R. 3 Eq. 409, 15 Week. Rep. 417; Bareham v. Hall (1870) 22 L. T. N. S. 116; Saville v. Kilner (1872) 26 L. T. N. S. 277. See also Sampson v. Smith (1838) 8 Sim. 272, 59 Eng. Reprint, 108, 7 L. J. Ch. N. S. 260, 2 Jur. 563.

Canada.—Cartwright v. Gray (1866) 12 Grant, Ch. (U. C.) 400.

In Crump v. Lambert (1867) L. R. 3 Eq. (Eng.) 409, a much-quoted case, wherein the defendant contended that a nuisance resulting from smoke alone

did not entitle a person to injunctive relief, the court said: "I consider it to be established by numerous decisions that smoke unaccompanied with noise or noxious vapor, that noise alone, that offensive vapors alone, although not injurious to health, may severally constitute a nuisance to the owner of adjoining or neighboring property; that if they do so, substantial damages may be recovered at law, and that this court, if applied to, will restrain the continuance of the nuisance by injunction in all cases where substantial damages could be recovered at law." This case involved, however, a nuisance resulting from both smoke and noise proceeding from the defendant's manufactory.

III. Application of rule.

In McCarty v. Natural Carbonic Gas Co. (1907) 189 N. Y. 40, 13 L.R.A. (N.S.) 465, 81 N. E. 549, 12 Ann. Cas. 840, an action to restrain the defendant from so operating its manufactory as to cause smoke and soot emitted from its chimneys to gather and settle about the dwelling house of the plaintiff to his annoyance and injury, it appeared that the defendant maintained two smokestacks situated near the residence of the plaintiff, and that these chimneys continuously poured forth a thick black smoke of great volume, caused by the burning of soft coal in the furnaces. The evidence showed that the smoke had discolored the exterior of the plaintiff's home and had caused him and his family discomfort, annoyance, and injury. The court affirmed the granting of an injunction restraining the use of soft coal by the defendant, but modified the decree so that soft coal could be used provided modern appliances for consuming the smoke were installed.

In Bourne v. Wilson-Case Lumber Co. (1911) 58 Or. 48, 113 Pac. 52, Ann. Cas. 1913A, 245, wherein it appeared that the defendant kept a continual fire at a place near the plaintiff's premises, for the purpose of burning up the waste products of its mill, and this fire caused smoke, ashes and cinders to be deposited on the plaintiff's property and his house, fruit trees, and shade trees, continually menacing

the enjoyment of his property, the court enjoined the defendant from burning the waste material except in such a furnace or appliance as would obviate the injuries complained of.

So in *Galbraith v. Oliver* (1867) 8 Pittsb. (Pa.) 79, the court granted an injunction forbidding the respondents from using bituminous coal in the furnace of the engine in their mill so as to carry the smoke and soot emitted from their chimney over and on the premises occupied by the complainants.

In *Ross v. Butler* (1868) 19 N. J. Eq. 294, 97 Am. Dec. 654, the complainants, who were neighboring residents, sought to enjoin the proposed erection by the defendant of a building to be used as a pottery for manufacturing and burning earthenware. It appeared that in the process of defendant's business there would be burned in his furnaces pine wood, which would emit large volumes of dense and offensive smoke loaded with cinders, and that this smoke would descend on the roofs of the complainants' homes, penetrate their dwellings, injure their goods and furniture, and injure and impair the health and comfort of themselves and their families. The defendant, while admitting the proposed burning of the pine wood, alleged that the smoke would be made only about once in two weeks and would continue in large volumes less than twelve hours. The court held that the burning of the pine wood causing a great volume of smoke would constitute such a nuisance as would justify the issuance of an injunction against using the building for any manufacture using pine wood or any other fuel emitting large quantities of smoke.

In *McMorran v. Fitzgerald* (1895) 106 Mich. 649, 58 Am. St. Rep. 511, 64 N. W. 569, it appeared that the defendants were the owners of a machine and blacksmith shop, devoted to boat repairing, and situated in a neighborhood composed mostly of residences. It further appeared that the shop, and the boats which came to the locality for repairs, emitted from their several smokestacks dense smoke, laden with cinders and soot, which pene-

trated the homes of the plaintiffs, rendering them unclean, uncomfortable, and unwholesome. The court affirmed the granting of an injunction restraining the use of the defendants' premises for the purposes to which they were devoted, holding that the nuisance complained of would cause, if continued, irreparable injury to the petitioners.

In *Hyatt v. Myers* (1874) 71 N. C. 271, the court held that an injunction would issue to abate a nuisance occasioned by large quantities of smoke, laden with soot and cinders, discharged by the defendant's mill over and on the premises of the plaintiff to the latter's damage, where it appeared that the injury was such that it could not be adequately compensated by damages, or occasioned a constantly recurring grievance.

In *Cogswell v. New York, N. H. & H. R. Co.* (1886) 103 N. Y. 10, 57 Am. Rep. 701, 8 N. E. 537, wherein it appeared that smoke, soot, cinders, and coal dust were emitted in great quantities from an engine house maintained by the defendant, and these substances poured down upon and into the dwelling house of the plaintiff, "filling the house with smoke, soot, cinders, injuring the furniture and clothing therein, rendering the air offensive and unwholesome, and the house uncomfortable and unhealthy as a habitation, and greatly reducing the rental value of the premises," the court held that it was error for the court below to deny to the plaintiff injunctive relief, saying: "It is manifest that if this judgment can stand, a most serious injury is inflicted by the defendant upon the plaintiff, for which she has no redress. Her premises are subjected to a burden in the nature of a servitude in favor of the defendant, which seriously impairs the value and enjoyment of her property. The principle upon which the court below proceeded was that what the legislature has authorized the defendant to do can neither be a public nor private wrong; in other words, the legislature has authorized the maintenance of this nuisance by the defendant, and the plaintiff must bear the consequences. The

court below, in denying any relief to the plaintiff, of course assumed that the legislative authority and the act of the defendant thereunder, resulting in flooding the plaintiff's premises with soot, smoke, and noxious gases were not a taking of the plaintiff's property within the Constitution. We place our judgment in this case on the ground that the legislature has not authorized the wrong of which the plaintiff complains, and it is, therefore, unnecessary to determine whether the legislature could have authorized it consistently with the principles of the Constitution for the security of private rights, without providing for compensation."

In *Beir v. Cooke* (1885) 37 Hun (N. Y.) 38, wherein it appeared that the house occupied by the plaintiff was at times enveloped in dense smoke from the defendant's works, that soot and dust were deposited on the windows and in the rooms of the house when open, and upon clothing and things when washed and hung in the yard to dry, the court affirmed a judgment restraining the defendant from allowing smoke, cinders, and soot to issue from his manufactory so as to cause injury to the plaintiff.

In *McClung v. North Bend Coal & Coke Co.* (1895) 9 Ohio C. C. 259, 6 Ohio C. D. 243, it appeared that the premises of the plaintiff were situated in close proximity to coke ovens operated by the defendant, which gave forth great volumes of smoke, soot, and cinders, causing sickness to the plaintiff and her family, injuring the shrubbery of her homestead, filling her house with smoke, soot, and cinders, and greatly injuring the value of the same. The court held that, despite the fact that a large plant would be practically destroyed, the plaintiff was entitled to the injunctive relief she sought, saying: "In view of the large interests of the defendant company involved in this litigation, we have had much hesitation in arriving at a conclusion the result of which would be, if plaintiff's claim be true, the practical destruction of its large and valuable plant. And yet, with our views of the law and of the rights of the par-

ties, we must hold that the plaintiff is entitled to the relief she seeks. Her residence, which was the family homestead long before the coke ovens were repaired and operated by defendant, has, as a result of their use, been greatly depreciated in value, the health of the plaintiff herself has been seriously and injuriously affected, and the comfort and enjoyment of herself and the members of her family and household have been greatly lessened and interfered with by the smoke and noxious gases which almost continuously arise from these ovens when in operation, filling the house and hovering on the grounds."

In *Hutchins v. Smith* (1872) 63 Barb. (N. Y.) 252, it appeared that a dense black smoke emanated from the defendant's brick kilns, and penetrated the near-by dwelling of the plaintiff, discoloring his goods and furniture, and causing nausea and other deleterious effects to the occupants. The court held that the plaintiff was entitled to enjoy his premises free from such smoke, and granted an injunction restraining the defendant from so operating his plant as to cause the injuries complained of.

So in *Daniels v. Keokuk Waterworks* (1888) 61 Iowa, 549, 16 N. W. 705, it appeared that the plaintiffs were owners of dwelling houses situated on a bluff, and the defendant had erected an engine and pumping house at the foot of the bluff, and placed therein boilers in which was burned soft coal, which emitted dense masses of black smoke and soot. It appeared further, that the top of the defendant's smokestack was opposite the base of the plaintiffs' houses so that the smoke therefrom permeated and invaded the houses to the great damage and annoyance of the plaintiffs. The court held that a decree perpetually restraining the defendant from "using its smokestack without using a proper smoke consumer to prevent smoke, soot, etc., from escaping therefrom," was properly granted, but that the plaintiffs were entitled to no further relief.

In the reported case (*HOLMAN v. ATHENS EMPIRE LAUNDRY CO.* ante,

1564) it appears that the defendant, in the operation of its laundry, burned soft coal which gave forth dense volumes of black smoke and soot, discoloring the adjacent office building of the plaintiff and causing impairment of its rental value to his damage. The plaintiff showed that the use of coke, which was available, would obviate the nuisance, and prayed for an injunction restraining the defendant from using soft coal. The court holds that the case in hand is purely one for injunctive relief, and that such relief cannot be denied because the nuisance results from smoke alone.

So in *Sullivan v. Royer* (1887) 72 Cal. 248, 1 Am. St. Rep. 51, 13 Pac. 655, wherein it appeared that smoke issued from a smokestack on the defendant's building and entered the windows of the plaintiff's home, the court held that an injunction restraining the defendant from so using his smokestack as to cause disturbance, annoyance, and damage to the plaintiff was properly issued.

In *Catlin v. Patterson* (1887) 10 N. Y. S. R. 724, the court enjoined the defendants from burning shavings or sawdust on their premises, it appearing that the fuel so used by the defendants in their furnaces gave forth great volumes of smoke which was carried on and into the premises conducted by the plaintiffs as a dry goods store, corrupting the atmosphere, and depositing soot on the goods in the plaintiffs' store, so as to cause them irreparable injury.

In *Abendroth v. Manhattan R. Co.* (1887) 19 Abb. N. C. 247, 7 N. Y. S. R. 43, affirmed in (1890) 122 N. Y. 1, 11 L.R.A. 634, 19 Am. St. Rep. 461, 25 N. E. 496, wherein it appeared that the defendant railroad company operated an elevated railroad adjacent to the dwelling of the plaintiff, and that the engines operated on the railroad gave forth smoke, cinders, and soot which penetrated the premises of the plaintiff, causing him great injury, the court reversed the judgment below which denied to the plaintiff injunctive relief, holding that the facts showed irreparable and permanent damage to the plaintiff, and that the

trial judge should have found in his favor.

So in *Melvin v. E. B. & A. L. Stone Co.* (1908) 7 Cal. App. 327, 94 Pac. 390, it appeared that the defendants maintained and operated near the plaintiff's home certain engines, using fuel oil which emitted offensive smoke, with its accompanying disagreeable odors and black greasy dirt and soot, rendering the premises of the plaintiff untenable and causing great damage to her house and furniture. The court affirmed a decree enjoining the defendants from operating engines near the dwelling house of the plaintiff, and using fuel oil emitting smoke, dirt, and soot, holding that the damage was continuous and irreparable, and that no fair or reasonable redress could be had therefor in a court of law.

In *McKinney v. McCullough* (1885) 42 Phila. Leg. Int. (Pa.) 414, a motion to continue a preliminary injunction, the court held that the use by the defendant of a chimney flue in such a manner as to fill the plaintiff's room with smoke and heat amounted to such a nuisance as warranted the continuing of the injunction.

In *Face v. Cherry* (1915) 117 Va. 41, 84 S. E. 10, Ann. Cas. 1917E, 418, the court affirmed a decree enjoining the defendants from so operating their brick kilns as to cause dense smoke and soot to fall on the property of the plaintiffs, and further enjoined the defendants from operating a new kiln, immediately adjoining the plaintiff's business, with any other than smokeless fuel.

In *Bareham v. Hall* (1870) 22 L. T. N. S. (Eng.) 116, wherein it appeared that the defendant's brick kiln was sufficiently near the plaintiff's house to injure the same seriously by reason of the smoke discharged thereon, the court held that the plaintiff was entitled to an injunction restraining the nuisance, and that the kiln owner's right by prescription to another kiln nearer the home of the complainant, and in a line with the kiln complained of, was no defense to the granting of the injunction.

In *Cartwright v. Gray* (1866) 12

Grant, Ch. (U. C.) 400, wherein it appeared that the defendant burned pine shavings and other refuse from his sawmill in such a manner that the smoke therefrom was carried on to the plaintiff's premises in sufficient quantities to cause a nuisance, the court granted an injunction restraining the defendant from so operating his works as to cause the injury complained of, saying: "The defendant has a right to use steam for propelling his machinery, but is bound to employ such reasonable precautions in the use of it as may prevent unnecessary danger to his neighbors' property from sparks, and unnecessary annoyance or injury to them from the noise or smoke; that though he seems, since the bill was filed, to have performed this duty as respects the sparks and noise, he has done nothing in respect to the smoke; and that the plaintiff's complaint in reference thereto is well founded."

Also in *Savile v. Kilner* (1872) 26 L. T. N. S. (Eng.) 277, wherein it appeared that the owner of property adjoining the defendant's glass works had prepared and improved his property for building purposes, but in consequence of the dense smoke from the glass works he had been unable to find tenants for his land, the court held that he was entitled to an injunction restraining the defendant's use of his works in such a manner as to cause the injury complained of.

In *Lavner v. Independent Light & Water Co.* (1913) 74 Wash. 373, 183 Pac. 592, wherein it appeared that smoke, soot, and lamp black were carried by prevailing winds from the appellant's plant on the complainant's property, penetrating his houses and destroying their use for occupancy, the court held that the facts warranted a decree restraining the nuisance complained of.

In *Judson v. Los Angeles Suburban Gas Co.* (1910) 157 Cal. 168, 26 L.R.A. (N.S.) 183, 106 Pac. 581, 21 Ann. Cas. 1247, it appeared that in the operation of the defendant's gas plant quantities of dense smoke and soot were discharged over the plaintiff's premises, interfering with his quiet enjoyment

of the same, the court affirmed a decree granting an injunction enjoining the defendants "from conducting and operating the gas works and manufactory . . . in such a manner as to cause or permit smoke, gases, or offensive smells or fumes to be emitted therefrom, or to be precipitated therefrom upon the property of the plaintiff." The court said: "A gas factory does not constitute a nuisance per se. The manufacture in or near a great city of gas for illuminating and heating is not only legitimate, but is very necessary to the comfort of the people. But in this, as in any other sort of lawful business, the person conducting it is subject to the rule, "*sic utere tuo ut alienum non ledas*," even when operating under municipal permission or under public obligation to furnish a commodity. . . . Nor will the adoption of the most approved appliances and methods of production justify the continuance of that which, in spite of them, remains a nuisance."

In *Sampson v. Smith* (1888) 8 Sim. 272, 59 Eng. Reprint, 108, 7 L. J. Ch. N. S. 260, 2 Jur. 568, the court held that a party suffering injury from smoke discharged on his premises from the defendant's chimneys could maintain an action to have the nuisance enjoined, without making the attorney general a party.

See also *Rouse v. Martin* (1888) 75 Ala. 510, 51 Am. Rep. 463, wherein there is dictum to the effect that smoke may "constitute a nuisance so imperiling the comfort of one's existence, his health, or the safety of his property, as to call for injunctive relief at the hands of a court of equity." That case, however, involved the right of the plaintiff to secure an injunction restraining the proposed erection of a cotton gin near his residence, on the ground of irreparable damage caused by the increased fire hazard, noise, smoke, and particles of cotton lint, rendering the atmosphere impure and unwholesome.

IV. Limitation of rule.

a. Adequate remedy at law.

The general rule has certain well-established limitations, or rather qual-

ifications. Thus where an injury caused by smoke alone may be fully compensated for by damages in an action at law, a court of equity will not intervene to grant injunctive relief, but will remit the injured party to an action at law, there to seek his legal relief. *Johnson v. Baltimore & P. R. Co.* (1894) 4 App. D. C. 491; *Nelson v. Milligan* (1894) 151 Ill. 462, 38 N. E. 239; *Richards's Appeal* (1868) 57 Pa. 105, 98 Am. Dec. 202; *Madison v. Ducktown-Sulphur Copper & I. Co.* (1904) 113 Tenn. 331, 83 S. W. 658; *Union Planters' Bank & T. Co. v. Memphis Hotel Co.* (1911) 124 Tenn. 649, 39 L.R.A.(N.S.) 580, 139 S. W. 715.

Thus in *Nelson v. Milligan* (1894) 151 Ill. 462, 38 N. E. 239, wherein the injury sought to be enjoined was the permitting of dense smoke and soot to be emitted from the chimneys of the defendants' hotel, which was cast into the doors and windows of the complainant's dwelling house, it appeared from much conflicting evidence that the nuisance complained of was not continuous in its nature, nor was the injury such as could not be fully compensated for in an action at law. The court held that the nuisance complained of was not the proper subject for injunctive relief, for the plaintiff could be adequately compensated for his damage in an action at law, saying: "The decree in effect finds that, while using 'West Virginia coal,' no appreciable dense smoke was emitted, and there is no conflict in the evidence as to the fact that defendants proposed using that quality of fuel, and had done so when it could be obtained. While it is true that the consequences of their not being able to get, or unwillingness to use, the better and higher priced quality of coal, cannot be visited upon complainant without compensation in damages, it by no means follows that a court of equity will make them liable to its penalties for contempt, if they should be compelled to use the inferior fuel temporarily to avoid abandoning their business. The remedy for such an injury is complete and adequate at law. There is no theory of this case, conceding all that is found in the decree,

upon which it can be said an injury is shown which cannot be fully ascertained and adequately compensated by damages in an action at law, or which, from its continuance or permanent mischief, will necessarily occasion constantly recurring grievances, which cannot be otherwise prevented than by injunction."

In *Richards's Appeal* (1868) 57 Pa. 105, 98 Am. Dec. 202, an action to enjoin the use of bituminous coal by the defendants in their blast furnaces, it appeared that the plaintiff's dwelling was situated on a bluff just above the defendants' works, and, when the wind was in the direction of the complainant's house and from the furnaces, the dwelling was enveloped by a coal smoke thrown out of the chimneys of the puddling furnaces. The court found that some injury was caused the plaintiff by reason of the smoke, but that the use of soft coal was essential to the successful manufacture of iron, and no substitute could be successfully used, nor was it possible to adopt any appliance which would consume the smoke without seriously interfering with the operation of the furnaces. The court found, further, that the plaintiff could be amply compensated for his damage in an action at law, and accordingly dismissed the bill for an injunction.

So in *Huckenstine's Appeal* (1871) 70 Pa. 102, 10 Am. Rep. 669, wherein it appeared that the plaintiff's injury, caused by smoke emitted from the brick kilns operated by the defendant, was doubtful, and greater injury would result by enjoining than by refusing, the court held that the facts fell within the rule laid down in *Richards's Appeal* (Pa.) *supra*, and left the plaintiff to his redress at law.

In *Johnson v. Baltimore & P. R. Co.* (1894) 4 App. D. C. 491, an action to enjoin the operation by the defendant of a part of its railroad line adjacent to the plaintiff's property, it appeared that some annoyance and injury was caused the plaintiff by reason of smoke emitted from the defendant's engines. The court denied the prayer for an injunction on the ground that the injured party had full redress at com-

mon law, saying: "The mere existence of a nuisance does not of itself justify the intervention of a court of equity. In all ordinary cases there is ample remedy in the courts of common law by way of damages, and no more in the case of a nuisance than in any other case will a court of equity grant relief unless cause is shown for the exercise of its peculiar jurisdiction. A case of urgency or of irremediable injury must be made out, or one for the avoidance of multiplicity of suits; or the case must be brought under some other of the recognized heads of equity jurisprudence."

In *Union Planters' Bank & T. Co. v. Memphis Hotel Co.* (1911) 124 Tenn. 649, 39 L.R.A.(N.S.) 580, 139 S. W. 715, it appeared that the court below granted an injunction which, in effect, required the defendants to elevate the smokestack on their hotel some 50 feet so as to be on a level with the top of the plaintiff's building, in order to prevent the smoke emitted from the stack from entering the plaintiffs' building, soiling the walls, and seriously discommoding the plaintiff. The court overruled the decree, holding that the plaintiff's action should be in law to recover damages for the injuries sustained, for a mandatory injunction, such as was asked for in this case, could not be granted except in extreme cases, and when courts of law were unable to afford the injured party adequate redress, or when the injury complained of could not be compensated in damages.

And in *Madison v. Ducktown Sulphur, Copper & I. Co.* (1904) 118 Tenn. 331, 83 S. W. 658, three bills were instituted to restrain, on the ground of nuisance, the operation of the defendant companies' plants. It appeared that in the course of their operation the plants caused large volumes of smoke to descend on the lands and homes of the plaintiffs, injuring crops and trees, and rendering the homes less comfortable. The court found that the granting of a perpetual injunction would totally destroy a great industry, causing a loss of millions of dollars and depriving many employees of their means of livelihood; whereas

the complainants' damage was, in comparison, so inconsequential that they could be amply compensated by money damages. Accordingly, the court denied the injunction sought.

b. Slight injury.

Where the injury caused by smoke is inconsequential or temporary, injunctive relief will be refused and the injured person left to his remedy at law. *Terrell v. Wright* (1908) 87 Ark. 213, 19 L.R.A. 174, 112 S. W. 211; *Phillips v. Lawrence Vitrified Brick & Tile Co.* (1905) 72 Kan. 643, 2 L.R.A.(N.S.) 92, 82 Pac. 787; *Louisville Coffin Co. v. Warren* (1880) 78 Ky. 400; *Adams v. Michael* (1873) 38 Md. 123, 17 Am. Rep. 516; *Downing v. Elliott* (1902) 182 Mass. 28, 64 N. E. 201; *Huckentstine's Appeal* (1871) 70 Pa. 102, 10 Am. Rep. 669.

Thus in *Louisville Coffin Co. v. Warren* (1880) 78 Ky. 400, an action to enjoin the operation of the defendant's factory because of the great amount of smoke which it emitted, which invaded the plaintiffs' premises, it appeared that the defendant had adopted the most approved appliances for the consumption of the smoke and to reduce the fire hazard. The court held that the facts did not show such irreparable injury to the plaintiffs as would warrant the issuing of an injunction, saying: "In the present case, the proof shows that, with the escape of steam through the smokestack, the danger from fire is removed and the annoyance greatly lessened, and much of the testimony introduced by the appellees applies to the condition of the property previous to the making of this improvement. We think, in a case like this, where the property has been used for the same purposes for a number of years, and expenditures made that, if rendered valueless, must result in the financial ruin of the owners, the application for an injunction must be sustained by strong and convincing testimony; in other words, a plain case of nuisance, and with it irreparable injury, must be established. While the inconvenience and annoyance to the two appellees in this case must be conceded to exist, the facts

developed do not authorize an interference by the chancellor."

And in *Huckenstine's Appeal* (1871) 70 Pa. 102, 10 Am. Rep. 669, an action to enjoin the operation of a brick-kiln by the defendant, the gravamen of the plaintiff's bill was that smoke and gas from the kiln injured and partially destroyed his grape vines and fruit trees, and made his dwelling uncomfortable. But, it appeared that the plaintiff's case was doubtful, for his testimony as to the injury was outweighed by the defendant's witnesses, and it was rendered more doubtful by testimony offered by the defense that the true cause of the injury to the trees and vines was the nature and condition of the soil. The court denied the prayer for injunctive relief, holding that a plaintiff, to be entitled to an injunction, must make out a plain case of injury and damage, saying: "If the injury be doubtful, eventual, or contingent, equity will not interfere by injunction."

In *Phillips v. Lawrence Vitriified Brick & Tile Co.* (1905) 72 Kan. 643, 2 L.R.A.(N.S.) 92, 82 Pac. 787, the court found that the injury caused the plaintiff by smoke and cinders thrown off from the defendant's works was not so serious and substantial as to require the abandonment of the enterprise and warrant the issuance of an injunction, saying: "Ordinarily an owner may make a lawful and reasonable use of his property although it may cause some annoyance and discomfort to those in the vicinity, if such inconvenience and discomfort are only slight, and are the natural and necessary consequences of the exercise of the owner's right in developing the resources of his property."

In *Terrell v. Wright* (1908) 87 Ark. 213, 19 L.R.A. 174, 112 S. W. 211, an action to enjoin the operation of a planing mill, alleging that it was a nuisance and rendered the plaintiffs' homes uncomfortable by reason of smoke, soot, and cinders, the court held that while it appeared conclusively that the mill was objectionable to the plaintiffs, yet it was not shown by a preponderance of evidence that its

operation was of such a nature as to deprive a normal person, living where the plaintiffs lived, of the comforts of home, or rendered living in such homes a positive discomfort, and this was required before a lawful and useful business could be destroyed by a perpetual injunction.

In *Downing v. Elliott* (1902) 182 Mass. 28, 64 N. E. 201, an action to restrain the defendant from burning soft coal in his greenhouses, it appeared that the plaintiff was engaged in the ice business, and that the pond from which he obtained his ice was situated in close proximity to the defendant's greenhouses. The plaintiff alleged that the smoke, soot, and cinders developed on and emitted from the defendant's premises were deposited in his pond, and rendered the ice unfit for use. The court found that the portion of smoke and cinders coming from the defendant's chimney was of small importance in comparison with other causes contributing to the injury to the ice; and held that the damage done by the smoke and soot from the defendant's chimney was so slight and insignificant as not to warrant the granting of an injunction, for should an injunction issue it not only would not afford the plaintiff the relief which he sought, but would inflict great and unnecessary injury on the defendant.

In *Adams v. Michael* (1878) 38 Md. 123, 17 Am. Rep. 516, an action to enjoin the proposed erection of a factory near the complainants' dwellings on the ground that the smoke, soot, and odors which would emanate therefrom would destroy and seriously injure the homes of the plaintiffs, the court held that the bill failed to show sufficient cause for granting the relief prayed for, and dismissed the bill, but without prejudice to any new application the complainants might make, saying, *inter alia*: "To justify an injunction to restrain an existing or threatened nuisance to a dwelling house, the injury must be shown to be of such a character as to diminish materially the value of the property as a dwelling, and seriously interfere with the ordinary comfort and enjoy-

ment of it. Unless such a case is presented a court of chancery does not interfere. It must appear to be a

case of real injury, and where a court of law would award substantial damages."

W. J. K.

CITY OF CHICAGO

v.

WASHINGTONIAN HOME OF CHICAGO, Appt.

Illinois Supreme Court — June 18, 1919.

(289 Ill. 206, 124 N. E. 416.)

Municipal corporation — ordinance requiring automatic sprinklers — validity.

1. An ordinance requiring the equipment of buildings with automatic sprinklers to be valid must be within the police power of the state.

[See note on this question beginning on page 1591.]

Fire — necessity of sprinkler system — size of building.

2. To determine whether or not a home for inebriates which consists of several buildings used as one and connected by passageways has the necessary floor space to bring it within an ordinance requiring the installation of automatic sprinklers, it will be treated as one building.

— method of computing floor space.

3. The floor space on all floors of a building is included in computing the floor space to determine whether or not the building is within an ordinance requiring automatic sprinklers.

Limitation of actions — against continuing offense.

4. The Statute of Limitations does not apply in case of the maintenance of a building in a condition such that each day of such maintenance is made a separate and distinct offense.

Municipal corporation — power to pass ordinances.

5. A municipality has power to pass any ordinance which is necessary or proper to carry into effect the powers granted by the legislature.

[See 19 R. C. L. 768, 884.]

Constitutional law — police power — reasonableness — inconvenience.

6. An exercise of the police power is not necessarily unreasonable although it results in inconvenience or loss to an individual.

[See 19 R. C. L. 805.]

Definition — police power.

7. The police power is the power of

the state coextensive with self-preservation and has been termed the law of overruling necessity.

[See 6 R. C. L. 185.]

Courts — power to pass on exercise of police power.

8. Whether or not an ordinance is a proper exercise of police power is a judicial question.

[See 19 R. C. L. 805.]

Evidence — presumption — validity of ordinance.

9. Municipal ordinances are presumed to be valid.

[See 19 R. C. L. 808.]

Municipal corporation — ordinances — construction — choice.

10. Where two constructions of an ordinance are possible, one sustaining and the other defeating it, the court will adopt the former.

[See 25 R. C. L. 999.]

— ordinance — validity — submission of plans to officer.

11. An ordinance requiring installation of automatic extinguishers in certain buildings is not rendered invalid by a provision requiring the submission of plans to a municipal officer for approval, on the theory that it gives him arbitrary power.

[See 19 R. C. L. 798, 896.]

Constitutional law — police power — automatic sprinklers.

12. The police power extends to requiring the installation of automatic sprinkler systems in buildings used to house the sick and infirm.

[See 6 R. C. L. 214.]

(289 Ill. 206, 124 N. E. 416.)

Municipal corporation — reasonableness of ordinance requiring sprinklers.

13. An ordinance requiring the installation of automatic sprinklers in a building used as a home for inebriates is not oppressive as applied to a build-

ing many of the windows of which are barred by iron grates and many of the rooms of which are fastened by padlocks, where the value of the property is \$150,000, while the cost of installation will be about \$5,500.

[See 19 R. C. L. 805.]

APPEAL by defendant from a judgment of the Municipal Court of Chicago (Cook, J.) convicting it of violating the fire protection ordinance of the city of Chicago. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. A. W. Martin and Edward H. S. Martin, for appellant:

The right of action to recover a penalty on account of the failure to equip the building with a sprinkler system occurred, if at all, more than two years before the suit was started and was barred by the two-year Statute of Limitations.

Chicago v. Enright, 27 Ill. App. 559.

The ordinance was void because not within the powers delegated to the city and because it was unreasonable and in conflict with the state and Federal Constitutions.

Chicago v. Ross, 257 Ill. 76, 43 L.R.A. (N.S.) 205, 100 N. E. 159; Chicago v. M. & M. Hotel Co. 248 Ill. 264, 93 N. E. 753; Condon v. Forest Park, 278 Ill. 218, L.R.A.1917E, 314, 115 N. E. 825; Stoessand v. Frank, 283 Ill. 271, L.R.A. 1918D, 685, 119 N. E. 300; Chicago v. Weber, 246 Ill. 304, 34 L.R.A. (N.S.) 306, 92 N. E. 859, 20 Ann. Cas. 359; Chicago v. P. F. Pettibone Co. 267 Ill. 573, 108 N. E. 698; Chicago v. Gunning System, 214 Ill. 623, 70 L.R.A. 230, 73 N. E. 1035, 2 Ann. Cas. 892; People ex rel. Jenkins v. Board of Education, 234 Ill. 422, 17 L.R.A. (N.S.) 709, 84 N. E. 1046, 14 Ann. Cas. 943; Ex parte Whitwell, 98 Cal. 73, 19 L.R.A. 727, 35 Am. St. Rep. 152, 32 Pac. 870; Bessonies v. Indianapolis, 71 Ind. 189; Toledo, W. & W. R. Co. v. Jacksonville, 67 Ill. 37, 16 Am. Rep. 611; Haller Sign Works v. Physical Culture Training School, 249 Ill. 436, 34 L.R.A. (N.S.) 998, 94 N. E. 920; Haskell v. Howard, 269 Ill. 550, L.R.A.1916B, 893, 109 N. E. 992; Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565; Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465, 24 L. ed. 527; Dobbins v. Los Angeles, 195 U. S. 223, 49 L. ed. 169, 25 Sup. Ct. Rep. 18; Belleville v. St. Clair County Turnp. Co. 234 Ill. 429, 17 L.R.A. (N.S.) 1071, 84 N. E. 1049; Lake View v. Rose Hill Cemetery Co. 70 Ill. 191, 22 Am. Rep. 71; Han-

6 A.L.R.—100.

cock v. Singer Mfg. Co. 62 N. J. L. 289, 42 L.R.A. 852, 41 Atl. 846; Bessette v. People, 193 Ill. 384, 56 L.R.A. 558, 62 N. E. 215; People v. Weiner, 271 Ill. 74, L.R.A.1916C, 775, 110 N. E. 870, Ann. Cas. 1917C, 1065; Ruhstrat v. People, 185 Ill. 133, 49 L.R.A. 181, 76 Am. St. Rep. 30, 57 N. E. 41, 12 Am. Crim. Rep. 453; Chicago v. Netcher, 183 Ill. 104, 48 L.R.A. 261, 75 Am. St. Rep. 98, 55 N. E. 707; Elkhart v. Murray, 165 Ind. 304, 1 L.R.A. (N.S.) 940, 112 Am. St. Rep. 228, 75 N. E. 593, 6 Ann. Cas. 748; Cicero Lumber Co. v. Cicero, 176 Ill. 9, 42 L.R.A. 696, 68 Am. St. Rep. 155, 51 N. E. 758; Chicago v. Trotter, 136 Ill. 430, 26 N. E. 359; People ex rel. Healy v. Clean Street Co. 225 Ill. 470, 9 L.R.A. (N.S.) 455, 116 Am. St. Rep. 156, 80 N. E. 298; Board of Administration v. Miles, 278 Ill. 174, 115 N. E. 841; Yick Wo v. Hopkins, 118 U. S. 356, 80 L. ed. 220, 6 Sup. Ct. Rep. 1064; Bonnett v. Vallier, 136 Wis. 193, 17 L.R.A. (N.S.) 486, 128 Am. St. Rep. 1061, 116 N. W. 885; Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A. (N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764.

Messrs. Samuel A. Ettelson, Harry B. Miller, and Daniel Webster for appellee:

Stone, J., delivered the opinion of the court:

The appellant, the Washingtonian Home of Chicago, a corporation, was found guilty, after a trial without a jury in the municipal court of Chicago, in an action to recover a penalty for the violation of ¶ (f) of § 16, and §§ 18, 24, and 22b of the Fire Prevention Ordinance of the city of Chicago, due to and arising out of its failure to equip on July 14, 1916, its buildings at 1533 Madison street, in said city, with an approved system of automatic sprinklers. The evidence consists of a

written stipulation dated May 31, 1918, and certified portions of the Fire Prevention Ordinance of the city of Chicago, of which the municipal court took judicial notice. Said ordinance was passed July 22, 1912, and has been at all times thereafter in full force and effect. The court found appellant guilty and rendered judgment for a fine of \$5 and costs.

Paragraph (f) of § 16 of said ordinance places every building used for a hospital, for housing of the sick and infirm, imbeciles, or children, and every jail, police station, asylum, house of correction and detention, and every home for the aged and decrepit, where sleeping accommodations are provided for more than ten persons, in class II.c. Section 18 of the ordinance provides that every building specified in subsequent sections of the ordinance which is in existence at the time of the passage of the ordinance shall be equipped with an approved automatic sprinkler system within two years from and after the date of the passage of the ordinance; that the owner of such building shall submit plans for such proposed sprinkler system for approval to the chief of the fire prevention and public safety department, in which plans shall be shown the size, capacity, and location of all sprinkler heads, pumps, tanks, or pipes, and any other apparatus to be used in connection therewith, within six months from and after the passage of the ordinance, which plans, when approved, shall be stamped showing such approval before the proposed sprinkler system shall be installed by the owner. Section 24 provides for an approved automatic sprinkler system on all floors and basements of nonfireproof buildings more than two stories in height and having an area of more than 6,000 square feet, excepting certain rooms. Section 22b provides a penalty for a violation of the provisions with reference to installing a sprinkler system of not less than \$5 nor more than \$200 for each offense, and each and every day such building is occupied con-

trary to said ordinance shall be considered a separate and distinct offense.

It is stipulated that the building of the appellant is not equipped with an approved system of automatic sprinklers; that the appellant is a charitable corporation, and is not organized for profit, and in carrying out its corporate objects cares for certain inebriate patients without charge, and makes charges for the care of certain patients able to pay; that the expenses of the institution equal in amount its receipts from certain charitable trust funds and other sources; that the appellant is endowed with valuable grounds and buildings thereon; that the insurance premiums would be reduced from \$1.16 for \$100 of insurance for one year to 65 cents by the installation of the proposed sprinklers; that the plans and specifications attached shall be a part of the stipulation; that the appellant conducts in the second, third, fourth, and fifth stories in section A shown in said plan, and in all the stories of sections B and C shown therein, an institution for the care, cure, and reclamation of inebriates, and has since said building was erected; that all of the first floor of section A, except the hall and entrance, is occupied by stores, namely, a drug store, shoe store, and grocery store, including the basements of the respective stores; that the stores contain the usual and ordinary oils and inflammable materials that are incident to such business; that section A of the building was built in 1875, section B in 1880, and section C in 1883; that all are lighted with gas; that there are hallways and communications between such sections; that all of said sections are in class II.c. described in § 16a of the ordinance. The stipulation also sets out the material used in the construction of the outside walls and interior partitions. Defendant has been notified by the bureau of fire prevention and public safety to install an approved system of automatic sprinklers as provided for in

the ordinance, and has never submitted plans for such system for approval or installed such a system. The stipulation also sets out a comprehensive description of an approved system of automatic sprinklers. It is also stipulated that in section A are sleeping accommodations for sixty-one persons, in section B for seven persons, and in section C for forty-four persons; that said sections are operated as one building; that certain windows, rooms, and fire escape exits are barred with iron gratings, mostly permanent, and some locked with padlocks, to prevent the escape of patients under treatment; that there are three padded cells, with heavy doors, used for the confinement of violent patients, locked with padlocks when so used. The stipulation also contains a statement of the advantages of the use of the sprinkler system.

Appellant argues numerous assignments of error. Its principal contentions are, however, that the ordinance does not apply to the buildings and premises of the appellant, that the action is barred by the Statute of Limitations, and that the ordinance is unconstitutional and void, because not within the power of the city council to pass.

In support of the first contention appellant cites § 24 of the ordinance as follows:

"The following buildings hereinbefore referred to shall be equipped with an approved automatic sprinkler system, except as otherwise provided:

"Class II.b and II.c Buildings.—On all floors and basements of nonfireproof buildings more than two stories in height, and having an area of more than 6,000 square feet, except in sleeping rooms, reading rooms, parlors, bath rooms, dining room, smoking rooms, gymnasiums, and except hallways containing stair or elevator shafts inclosed with incombustible or fireproof material."

The evidence and stipulation in the record show that said premises

consist of three buildings used and operated as one building. Said buildings are connected by passageways, so that they form, in fact, one structure. We are of opinion that the structures in question should be treated as one building. This being true,

a computation shows the ground space occupied by said buildings amounts to more than 6,000 feet. It is contended that the space referred to in the ordinance should be construed as being floor space, and not ground space. If this contention be adopted it can avail appellant nothing, as the floor space on all floors would necessarily be computed.

In either view of the matter it is clear that the buildings occupy more than 6,000 square feet and come within the purview of § 24 of the ordinance.

As to appellant's contention that the Statute of Limitations applies, it is sufficient to say that the offense designated in the ordinance is a continuing offense; it being provided under § 22b of the ordinance that "each

and every day that said building is so occupied contrary to this ordinance shall be considered a separate, distinct offense." The Statute of Limitations, therefore does not apply.

The principal contention of appellant is that the city is without power to pass the ordinance in question. Such an ordinance, to be valid, must be within the police power of the state, which may be delegated to city councils. Biffer v. Chicago, 278 Ill. 562, 116 N. E. 182; Williams v. Chicago, 266 Ill. 267, 107 N. E. 599, Ann. Cas. 1916B, 514; Chicago v. Mandel Bros. 264 Ill. 206, 106 N. E. 181. Section 1 of article 5 of the Cities and Villages Act (Hurd's Rev. Stat. 1917, chap. 24) provides the powers of city councils. An examination of

Fire—necessity of sprinkler system—size of building.

—method of computing floor space.

Limitation of actions against continuing offense.

Municipal corporation—ordinance requiring automatic sprinklers—validity.

¶¶ 61-63, 65, 66, 71, 75, 77, 78, and 98 shows that the city council has the general power to regulate the construction and maintenance of buildings of the character of the one in question here. A municipality has power to pass any ordinance which is necessary or proper to carry into effect the powers granted by the legislature. Such powers may be expressly conferred by the statute or may be implied from the duty imposed upon the city council to protect the lives, health, and property of the public. *Chicago v. Mandel Bros. and Williams v. Chicago*, supra.

Reasonable regulations for the protection of the lives and the safety of citizens, as well as of property against destruction by fire, are within the powers delegated to the city and which may be exercised by it. *Spiegler v. Chicago*, 216 Ill. 114, 74 N. E. 718; *Gundling v. Chicago*, 176 Ill. 340, 48 L.R.A. 230, 52 N. E. 44. A power within the

Constitutional law—police power—reasonableness—inconvenience.

police power of a city may be reasonably exercised, even though such exercise may result

in inconvenience or loss to the individual. In the case of *Haller Sign Works v. Physical Culture Training School*, 249 Ill. 436, 34 L.R.A. (N.S.) 998, 94 N. E. 920, the court said: "All uses of property or courses of conduct which are injurious to the health, comfort, safety, and welfare of society may be prohibited under the sovereign power of the state, even though the exercise of such power may result in inconvenience or loss to individuals. In this respect individual rights must be subordinate to the higher rights of the public. The power that the state may exercise in this regard is the overruling law of necessity, and is founded upon the maxim, *Salus populi est suprema lex*. The existence and exercise of this power are an essential attribute of sovereignty, and the establishment of govern-

ment presupposes that the individual citizen surrenders all private rights the exercise of which would prove hurtful to the citizens generally. *Chicago v. Rogers Park Water Co.* 214 Ill. 212, 73 N. E. 375; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273. While the general principle above announced is uniformly recognized, it is equally true that the owner of property has the right to make any use of it he desires that does not endanger or threaten the safety, health, comfort, or general welfare of the public."

Mr. Cooley, in his work on *Constitutional Limitations*, states the doctrine of the police power thus: "All contracts and all rights, it is held, are subject to this power, and regulations which affect them may not be established by the state, but must also be subject to changes, from time to time, with reference to the well being of the community, as circumstances change or as experience demonstrates the necessity." *Cooley, Const. Lim.* 57.

The police power is the power of the state coextensive with self-protection, and has

Definition—police power.

been termed, not inaptly, "the law of overruling necessity." Such power is not prohibited by that clause of the Constitution of the United States which forbids the passage of laws impairing the obligation of contracts. *Lake View v. Rose Hill Cemetery Co.* 70 Ill. 191, 22 Am. Rep. 71. Whether or not an ordinance is the proper exercise of police power is a judicial question. Is this ordinance a proper exercise of police power? We approach this question under the presumption of law that the ordinance is valid, and the rule of law places upon the

Court—power to pass on exercise of police power.

Evidence—presumption—validity of ordinance.

party attacking an ordinance as an unreasonable or oppressive exercise of the police power the burden to affirmatively and clearly show

where the unreasonableness exists. People ex rel. Keller v. Oak Park, 266 Ill. 365, 107 N. E. 636. Where two constructions are possible, one which will sustain the ordinance and the other which will defeat it, the court will adopt the construction sustaining the ordinance. Chicago v. Oak Park Elev. R. Co. 261 Ill. 478, 104 N. E. 240; Benton v. Blake, 263 Ill. 358, 104 N. E. 1040.

The ordinance in question provides for the installation in buildings of the character of that of appellant of a sprinkler system, of which the evidence shows there are a number of approved makes on the market, and the plan for the installation of a sprinkler system must be submitted to and approved by the chief of the bureau of fire prevention and public safety. Counsel for appellant urge that this provision is invalid, for the reason that it gives arbitrary power to an officer of the city. We do not so view it. The chief of the bureau of fire prevention and public safety is given power to approve the plan of installation only. He has nothing whatever to say with regard to what system shall be installed. Section 18 of the ordinance provides as follows: "The owner or owners of all such buildings shall submit plans for approval to the chief of fire prevention and public safety for such proposed sprinkler system, showing the size, capacity, and location of all sprinkler heads, pumps, tanks or pipes, and any other apparatus which is to be used in connection with such sprinkler system. . . . Said plans, when approved, shall be stamped by him to that effect before such system shall be installed."

The question of approval of plans by an officer of a municipality was passed upon in the case of Arms v. Ayer, 192 Ill. 601, 58 L.R.A. 277, 85 Am. St. Rep. 357, 61 N. E. 851, the question there arising under the

Fire Escape Act of 1897. That act provides that the "number, locality, material and construction of such escapes shall be approved by the inspector of factories." This court in that case said: "The first objection made to the statute by counsel for appellees is that it imposes legislative power upon the inspector of factories, in that it authorizes him to determine how many, and in what position, fire escapes shall be placed, etc. It must be admitted that the act is loosely drawn, but the rule that it is the duty of courts to so construe statutes as to uphold their constitutionality and validity, if it can be reasonably done, is so well established that the citation of authorities is needless. In other words, if the proper construction of a statute is doubtful, courts must resolve the doubt in favor of the validity of the law. Statutes and city ordinances providing for fire escapes are usually somewhat general in their enactments, and necessarily so, for the reason that it is impossible for the legislature to describe in detail how many fire escapes shall be provided, how they shall be constructed, and where they shall be located in order to serve the purpose of protecting the lives of occupants, in view of the varied location, construction, and surroundings of buildings; and hence, so far as we have been able to ascertain, acts similar to the first section of this statute have been sustained in other states, though perhaps the question here raised has never been directly presented. Rose v. King, 49 Ohio St. 213, 15 L.R.A. 160, 30 N. E. 267; Willy v. Mulledy, 78 N. Y. 310, 34 Am. Rep. 536; Pauley v. Steam Gauge & Lantern Co. 131 N. Y. 90, 15 L.R.A. 194, 29 N. E. 999; Schott v. Harvey, 105 Pa. 222, 51 Am. Rep. 201; Cincinnati v. Steinkamp, 54 Ohio St. 284, 43 N. E. 490; Sewell v. Moore, 166 Pa. 570, 31 Atl. 370; Keely v. O'Conner, 106 Pa. 321; Re Fire Escapes, 2 Pa. Dist. R. 623. The general rule is that a statute must be complete when it leaves the legislature—as to what the law is—

Municipal
corporation—
ordinances—
construction—
choice.

—ordinance—
validity—
submission of
plans to officer.

leaving its execution to be vested in third parties. Thus it was said in *Dowling v. Lancashire Ins. Co.* 92 Wis. 63, 31 L.R.A. 112, 65 N. W. 738: 'The result of all the cases on this subject is that a law must be complete in all its terms and provisions when it leaves the legislative branch of the government, and nothing must be left to the judgment of the electors, or other appointee or delegate of the legislature, so that in form and substance it is a law in all its details in *præsenti*, but which may be left to take effect in *futuro*, if necessary, upon the ascertainment of any prescribed fact or event.' And it is said in *Sutherland on Statutory Construction* (§ 68): 'The true distinction is between a delegation of power to make the law, which involves a discretion as to what the law shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no objection can be made.' In *People ex rel. Caldwell v. Reynolds*, 10 Ill. 1, it was held that to establish the principle that whatever the legislature may do it shall do in every detail or else it shall go undone, would be almost to destroy the government. It is there said (page 13): 'Necessarily, regarding many things, especially affecting local or individual interests, the legislature may act either mediately or immediately. We see, then, that while the legislature may not divest itself of its proper functions or delegate its general legislative authority, it may still authorize others to do those things which it might properly, yet cannot understandingly or advantageously, do itself. Without this power legislation would become oppressive and yet imbecile.'

Concerning the objection that the ordinance confers judicial powers on an officer of the city, this court further said in the *Arms Case*: "Of still less force is the objection that the act confers judicial power upon the inspector of factories. The in-

spector is given no power to judicially determine any question, but acts ministerially in the supervision of the building of fire escapes. Judicial power is 'the power which adjudicates upon and protects the rights and interests of individual citizens, and to that end construes and applies the law.' The judicial power is never extended to cases of the exercise of judgment in the execution of a ministerial power. *Owners of Lands v. People*, 113 Ill. 296."

In the case of *Spiegler v. Chicago*, 216 Ill. 114, 74 N. E. 718, where it was sought to enjoin the enforcement of what was known as the "drip pan ordinance," which ordinance required the drip pans or devices used by auto vehicles shall be subject to the approval of the commissioner of public works, this court said: "The power to legislate is not conferred by said ordinance upon the commissioner of public works, but he is only given power to approve the drip pans or other devices with which the said 'tank wagons or other wagons or vehicles' are equipped. The power thus conferred upon the commissioner of public works pertains solely to the execution of the ordinance, and not to the passage thereof."

The ordinance in question is not subject to the objection urged. The sprinkler apparatus is designed to prevent the spreading of fire and to put out fires in their incipient stages, and the testimony in this record tends to establish that they are efficient in so doing. Any regulation which tends to lessen the damage and dangers of fires and prevent the spreading thereof in densely populated cities is one which tends toward the protection of life and property of the public, and is therefore, unless oppressive and unreasonable, a proper exercise of police power. The ordinance in question is not shown by the record to be oppressive in its application to appellant. It owns and is possessed of

Constitutional
law—police
power—
automatic
sprinklers.

valuable property at the corner of Madison and Ogden avenues, in the city of Chicago. This, the evidence shows, is a populous section of the city. The building is occupied by patients suffering from the effects of alcohol, making it neces-

Municipal corporation—reasonableness of ordinance requiring sprinklers.

sary to have a large portion of the windows barred with iron grates.

The evidence also shows that windows to the fire escapes are thus grated and are padlocked. The nature of the ailment of the patients in this building is such as to make them at times unruly and difficult to handle. Especially would this appear to be true in the case of fire. The cost of the installation of this system in appellant's property is shown to be about \$5,500, while the value of the property is shown by the record to be considerably over \$150,000. The record also shows that a saving in insurance premiums, owing to the installation of a sprinkler system, would pay the expense of such system in approximately thirty years. Considering these facts, together with the fact that such system is a

protection to the property of appellant, it becomes apparent that such requirement is not oppressive. The ordinance is general in its application. It applies to all buildings coming within the character of the one described by its terms, and therefore cannot be said to be discriminatory.

It is also contended that the ordinance is void on the ground that it violates the Federal Constitution. That which is recognized by the state as within the police power of the state is so recognized by the Supreme Court of the United States. *Thomas Cusack Co. v. Chicago*, 242 U. S. 526, 61 L. ed. 472, L.R.A. 1918A, 186, 37 Sup. Ct. Rep. 190, Ann. Cas. 1917C, 594.

We are of the opinion that the ordinance in question was a reasonable exercise of the police power delegated to the city council, and that it did not violate the state or Federal Constitution. The judgment of the Municipal Court will therefore be affirmed.

Petition for rehearing denied October 9, 1919.

ANNOTATION.

Validity and construction of requirement of automatic sprinklers.

The reported case (*CHICAGO v. WASHINGTONIAN HOME*, ante, 1584), which sustains an ordinance of the city of Chicago, finds support in several cases holding that an ordinance of the city of New York requiring certain buildings to be equipped with automatic fire sprinklers is a proper exercise of the police power of the state or municipality to provide regulations for the protection of life and property; and a provision in the ordinance placing the manner or plan of installation, or the decision of the necessity for the installation of the sprinklers, in the discretion of a fire commissioner, is not an invalid delegation of power. *Lantry v. Hoffman* (1907) 55 Misc. 261, 105 N. Y. Supp. 353, affirmed in (1908) 124 App. Div. 937, 109 N. Y.

Supp. 1135; *Waldo v. Christman* (1911) 72 Misc. 349, 130 N. Y. Supp. 260; *People ex rel. Adamson v. Miller* (1917) 100 Misc. 302, 165 N. Y. Supp. 790; *People v. Kaye* (1914) 212 N. Y. 407, 106 N. E. 122, affirming (1914) 160 App. Div. 644, 146 N. Y. Supp. 398; *Browning v. Adamson* (1916) 175 App. Div. 526, 162 N. Y. Supp. 164, affirmed in (1917) 220 N. Y. 585, 115 N. E. 1035; *Adamson v. American Press Asso.* (1919) 173 N. Y. Supp. 822.

Thus in *Lantry v. Hoffman* (N. Y.) *supra*, the court held that § 102 of the New York Building Code, which made provision for the installation of perforated pipes in buildings of a certain character and gave jurisdiction in this

respect to the building department of the city of New York, was not inconsistent with the provisions of § 762 of the Charter of the City of New York which required the installation of automatic sprinklers in certain specified buildings at the direction of the fire commissioner, holding that the jurisdiction conferred by the Building Code could also be exercised by other municipal authorities. The court held, also, that the order of the fire commissioner was a reasonable and valid exercise of the police power, saying: "The legislature, in the exercise of this power, may direct that certain improvements shall be made in existing houses at the owner's expense, so that the health and safety of the occupants and of the public through them may be guarded. These exactions must be regarded as legal so long as they bear equally upon all members of the same class, and their cost does not exceed what may be termed one of the conditions upon which individual property is held. It must not be an unreasonable exaction either with reference to its nature or its cost. Within this reasonable restriction, the power of the state may, by police regulations, so direct the use and enjoyment of the property of the citizen that it shall not prove pernicious to his neighbors or to the public generally."

So, in *People ex rel. Adamson v. Miller* (1917) 100 Misc. 302, 165 N. Y. Supp. 790, it was held that § 20 of article 2 of chapter 12 of the New York Code of Ordinances gave authority to the fire commissioner to make an order requiring the owner of a building used for manufacturing purposes to install an automatic sprinkler system to extinguish fires; and also that the provisions of § 580 of chapter 5 of the Code of Ordinances were not inconsistent with the section in question.

In *Waldo v. Christman* (1911) 72 Misc. 349, 130 N. Y. Supp. 260, an action brought by the fire commissioner of the city of New York to recover a penalty for the defendant's failure to install an automatic fire sprinkler system in his piano factory pursuant to the provisions of § 762 of the Char-

ter of the City of New York, it was contended that the section of the charter in question was repealed by the provisions of subdivision 2 of § 1620 of chapter 466 of the Laws of 1901 (Building Code), and, further, that the provision was unconstitutional in so far as it was discretionary for the fire commissioner to order specific individuals to install the apparatus for the protection from fire. The court held that the section of the charter in question was not included with the provisions of the repealing act. The court held further that the purpose of the charter provision (§ 762), requiring the installation of automatic sprinklers, was obviously to authorize the fire commissioner to require the installation of the apparatus where there was a necessity for its use, and as the necessity depended upon the circumstances of each particular case, the section in question did not involve an unlawful delegation of the lawmaking power in so far as it gave to the commissioner, in the first instance, the power to determine whether or not a necessity for the installation of the sprinkler existed.

In *People v. Kaye* (1914) 212 N. Y. 407, 106 N. E. 122, affirming (1914) 160 App. Div. 644, 146 N. Y. Supp. 398, wherein the question of the reasonableness of the order of a fire commissioner of the city of New York was raised, the court held that under § 775 of the New York Charter, added by chapter 899 (Laws 1911) read in connection with § 762 of the Charter, the fire commissioner of the city of New York had authority to direct the installation of automatic fire sprinklers in specified buildings and places, but the reasonableness of his order was a question of fact for the jury; and, it appearing in the present case that this question had been decided against the defendant by a jury and reviewed by the appellate division, the court held that it was not, therefore, subject to review by the court of appeals.

In *Adamson v. American Press Asso.* (1919) 178 N. Y. Supp. 822, the court construed the provisions of § 20, chapter 12, of the Code of Ordinances of the City of New York, which pro-

vides in part that the proprietors of certain manufactories, etc., "shall provide such means . . . of preventing and extinguishing fires as the fire commissioner may direct," in connection with § 774 of the Greater New York Charter (Laws 1901, chap. 466) as amended by Laws 1916, chap. 503, § 7, which provides as follows: "The commissioner [fire] is empowered to enforce all laws and ordinances and the rules and regulations of the board of standards and appeals in respect of . . . the installation and maintenance of automatic or other fire alarm systems and fire extinguishing equipment." It was held that the ordinance intended to include within its scope the proprietor of a factory regardless of his relation to the realty; that is, whether the owner or lessee thereof.

In *Browning v. Adamson* (1916) 175 App. Div. 526, 162 N. Y. Supp. 164, affirmed in (1917) 220 N. Y. 585, 115 N. E. 1035, it was held that under the

provisions of the Code of Ordinances of New York city (Code of Ordinances, chap. 12, art. 2, § 20) authorizing the fire commissioner to direct the installation of fire alarm and extinguishing appliances, including automatic sprinklers, the fire commissioner could not require the owner of a factory building "to provide an inclosure of approved fire retarding material around" a light shaft.

The reported case (*CHICAGO v. WASHINGTONIAN HOME*, ante, 1584), holds that §§ 16 and 18 of the Chicago Fire Prevention Ordinance, set forth therein, which require that certain specified buildings be equipped with automatic fire sprinklers, the plans to be submitted and approved by the chief of the bureau of fire and public safety, are not invalid as giving arbitrary power to an officer of the city, for the designated officer is only given power to approve the plan of installation; nor is the act in question invalid as an unreasonable exercise of the police power. W. J. K.

C. T. WALCHER et al., Plffs. in Err.,

v.

FIRST PRESBYTERIAN CHURCH of Norman, Oklahoma.

Oklahoma Supreme Court—September 16, 1919.

(— Okla. —, 184 Pac. 106.)

Municipal corporation — forbidding laundry near church.

1. In the instant case, plaintiffs attempted to install machinery and operate a laundry within 10 feet of the First Presbyterian Church of the city of Norman, in violation of an ordinance prohibiting the installation and operation of an oil mill, tannery, cotton gin, steam laundry, machine shop, garage, or blacksmith shop within 150 feet of a church, school, or hospital, on the theory that the ordinance was void and in violation of the 14th Amendment of the Federal Constitution. Held, that such an ordinance is of a regulatory nature and reasonable, and within the police and sanitary powers of a city to enact and enforce, and not in violation of the 14th Amendment to the Federal Constitution.

[See note on this question beginning on page 1597.]

Nuisance — laundry.

2. A laundry is not a "nuisance per se," but, acting under the police and sanitary powers, a city may regulate

the establishment and operation of same.

[See 19 R. C. L. 818; 20 R. C. L. 456.]

Headnotes by HIGGINS, J.

Constitutional law — due process — regulation of business.

8. It is not depriving one of his property without due process of law for a city, acting under its police and sanitary powers, to regulate by ordinance a business deleterious to public health, morals, safety, or welfare of its inhabitants.

[See 6 R. C. L. 217, 282.]

Municipal corporation — regulatory ordinance — contravention of rights.

4. An ordinance of a regulatory nature in contravention of the natural rights of individuals must be reason-

able, and a court must be able to see that it will tend to promote the public health, morals, safety, and welfare.

[See 19 R. C. L. 805.]

Evidence — judicial notice — living conditions.

5. A court, in passing upon an ordinance of a regulatory nature as to whether it is reasonable and will tend to promote the public health, morals, safety, or welfare, can take judicial notice of the changing conditions in manner of living and matters of common knowledge.

[See 15 R. C. L. 1125.]

ERROR to the District Court for Cleveland County (Swank, J.) to review a judgment in favor of plaintiff in an action brought to enjoin the operation of a laundry by defendants in alleged violation of an ordinance of the city. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. T. C. Whiteley for plaintiffs in error.

Mr. W. L. Eagleton, for defendant in error:

It is not necessary that a business be a nuisance per se before it can be regulated.

Ex parte Jones, 4 Okla. Crim. Rep. 74, 109 Pac. 577; Duncan Electric & Ice Co. v. Duncan, — Okla. —, 166 Pac. 1048; Ex parte Lacey, 108 Cal. 326, 38 L.R.A. 640, 49 Am. St. Rep. 93, 41 Pac. 411.

It is usual and customary to give municipalities power to regulate businesses, even though they be legitimate and necessary, and not a nuisance per se.

McMorran v. Fitzgerald, 106 Mich. 649, 58 Am. St. Rep. 511, 64 N. W. 569; Ex parte Hadacheck, 165 Cal. 416, L.R.A.1916B, 1248, 132 Pac. 584; Re Montgomery, 163 Cal. 457, 125 Pac. 1070, Ann. Cas. 1914A, 130; Little Rock v. Rienman-Wolfort Automobile Livery Co. 107 Ark. 174, 155 S. W. 105; Ex parte Quong Wo, 161 Cal. 220, 118 Pac. 714.

Courts will not interfere with the rights of a city when it determines what is a nuisance.

Re Montgomery, 163 Cal. 457, 125 Pac. 1070, Ann. Cas. 1914A, 130; State ex rel. Krittenbrink v. Withnell, 91 Neb. 101, 40 L.R.A.(N.S.) 898, 135 N. W. 376; Odd Fellows' Cemetery Asso. v. San Francisco, 140 Cal. 226, 73 Pac. 987.

A certain prescribed limit in which a laundry can be run is within the

police powers of a municipality, and can be enforced.

Barbier v. Connolly, 118 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; Re Hang Kie, 69 Cal. 149, 10 Pac. 327; Soon Hing v. Crowley, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730; Ex parte Jones; Duncan Electric & Ice Co. v. Duncan, and Ex parte Lacey, supra.

The passage of the ordinance and the applying of the ordinance to defendants are not in conflict with the 14th Amendment to the Constitution of the United States of America.

Ex parte Jones, 4 Crim. Rep. 74, 109 Pac. 577; Barbier v. Connolly; supra; Duncan Electric & Ice Co. v. Duncan, — Okla. —, 166 Pac. 1048; Mugler v. Kansas, 123 U. S. 673, 31 L. ed. 214, 8 Sup. Ct. Rep. 273; Ex parte Lacey, 108 Cal. 326, 38 L.R.A. 640, 49 Am. St. Rep. 93, 41 Pac. 411; Grumbach v. Leland, 154 Cal. 679, 98 Pac. 1059; White v. Bracelin, 144 Mich. 332, 107 N. W. 1055; Portland v. Meyer, 32 Or. 368, 67 Am. St. Rep. 538, 52 Pac. 21; Ex parte Moynier, 65 Cal. 33, 2 Pac. 728; Re Yick Wo, 68 Cal. 294, 58 Am. Rep. 12, 9 Pac. 139; Re San Chung, 11 Cal. App. 511, 105 Pac. 609.

Higgins, J., delivered the opinion of the court:

The city council of the city of Norman passed an ordinance prohibiting certain business within 150 feet of church, school or hospital, the 2d section of the ordinance being as follows: "It shall be unlaw-

ful for any person, partnership, or corporation to install, maintain, carry on, operate, or run an oil mill, tannery, cotton gin, steam laundry, machine shop, garage, or blacksmith shop within 150 feet of any church building, schoolhouse or hospital, within the limits of the city of Norman, Oklahoma, and the carrying on, maintaining, or running of any of the above-mentioned businesses within said 150 feet of any church, school building, or hospital be and the same is hereby declared to be a nuisance and subject to abatement upon suit of any citizen or organization affected thereby."

The plaintiffs in error, believing the ordinance to be void, installed machinery and began to operate a laundry within 10 feet of the First Presbyterian Church of that city. Upon suit being brought by the church, the lower court, by virtue of the ordinance, restrained the operation of the laundry, whereupon an appeal was taken to this court.

The plaintiffs in error contended that the ordinance declares a laundry a nuisance per se, which is beyond the power of the city council so to do, and is in violation of the 14th Amendment of the Constitution of the United States, and cites as authority the following opinions: *Re Tie Loy* (C. C.) 26 Fed. 611; *Re Sam Kee* (C. C.) 12 Sawy. 379, 31 Fed. 680; *Re Lee Sing* (C. C.) 43 Fed. 359; *Re Hong Wah* (D. C.) 82 Fed. 624; *Soon Hing v. Crowley*, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730; *Yick Wo v. Hopkins*, 118 U. S. 369, 30 L. ed. 226, 6 Sup. Ct. Rep. 1064.

The defendant in error contends that the ordinance does not declare a laundry a nuisance per se, but merely regulates the operation of same, and cites the following cases: *Ex parte Jones*, 4 Okla. Crim. Rep. 74, 109 Pac. 570; *Duncan Electric & Ice Co. v. Duncan*, — Okla. —, 166 Pac. 1048; *Re Lacey*, 108 Cal. 326, 38 L.R.A. 640, 49 Am. St. Rep. 93, 41 Pac. 411.

The cases cited by plaintiffs in error arose in California, where

certain cities passed ordinances apparently intended to place restrictions upon Chinese operating laundries, by either declaring the same to be a nuisance and preventing the operation of same in the city, or in certain portions of same, which was usually a major portion, or by requiring a certain percentage of the property owners to agree thereto, or that a certain permit must be first obtained, and leaving it to the arbitrary act of some city official to grant or refuse this permit.

28 Cyc. 727, lays the following law down: "Under power to regulate laundries municipalities may require as police regulations that laundries shall be confined to certain parts of the city, and that they shall be carried on only in buildings of brick or stone, and within certain reasonable hours. But it seems that an ordinance is invalid which requires the consent of a certain number of taxpayers and citizens of the vicinity for the establishment of the business."

Ex parte Lacey, supra, is a case very similar to the case at bar. The city of Los Angeles by ordinance prohibited a steam shoddy and carpet-beating machine within 100 feet of a church, schoolhouse, or residence. *Lacey* disregarded this ordinance, claiming the same to be void for the reason given by plaintiffs in error in this case, was tried, convicted, and imprisoned, and sought release on a writ of habeas corpus. In discussing the legality of the ordinance the court stated:

"We see nothing in the language of this ordinance contrary to the great principles of our government. We see nothing there depriving petitioner of any fundamental right. In the exercise of its police and sanitary power, the city has attempted to regulate the business of beating carpets by steam power. Under its constitutional grant, it had the right to regulate this business. The use of steam power of itself, within municipal territory, has always been recognized as a proper subject of regulation; and, in addition, here it

may well be assumed that the dust and other disagreeable and unhealthy matters arising in such quantities from the beating of carpets, as would naturally be indicated by the use of steam power, are a constant source of danger and menace to the good health and general welfare of the neighborhood where located.

"Conceding the business covered by the provisions of this ordinance not to constitute a nuisance per se, and to stand upon different grounds from powder factories, street obstructions, and the like, still the case is made no better for petitioner.

This is not a question of nuisance per se, and the power to regulate is in no way dependent upon such conditions. Indeed, as to nuisances per se, the general laws of the state are ample to deal with them. But the business here involved may properly be classed with livery stables, laundries, soap and glue factories, etc.,—a class of business undertaking in the conduct of which police and sanitary regulations are made to a greater or less degree by every city in the country. And in this class of cases it is no defense to the validity of regulation ordinances to say, 'I am committing no nuisance, and I insist upon being heard before a court or jury upon that question of fact.' In this class of cases a defendant has no such right.

"Neither can it be urged that petitioner is deprived of his property without due process of law, for, as is said

Constitutional law—due process—regulation of business.

by Judge Dillon in his work upon *Municipal Corporations* (§ 141), in speaking of police and sanitary regulations: 'It is well settled that law and regulations of this character, though they may disturb the enjoyment of individual rights, are not unconstitutional, though no provision is made for compensation for such disturbances.'

We find that the ordinance of the city of Norman does not declare laundries a nuisance per se, but merely regulates the same, and being within the police powers of a city, looking to the public health, safety, or welfare of the inhabitants of the city, is not a violation of the 14th Amendment to the Constitution of the United States.

An ordinance of a regulatory nature in contravention of the natural rights of individuals must be reasonable; that is,

Municipal corporation—regulatory ordinance—contravention of rights.

the court must be able to see that it will tend to promote the public health, morals, safety, or welfare. 19 R. C. L. 112. A court passing upon an ordinance of regulatory nature, in deciding whether it is reasonable, can take judicial notice of matters of common knowledge and of changing conditions in manner of living. It is within

Evidence—judicial notice—living conditions.

the memory of those of this age that the washing of clothes formerly was the work of the household, or some poor person living in the community; then the Chinese came along and opened up what was called a laundry, usually consisting of one or two rooms, the work being done by hand; and such was the fact when the opinions of the Federal court above cited were written. But, as time passed, the population became more dense, labor-saving machinery was invented, great numbers employed, and the soiled clothes of a city, from those in all walks of life, were gathered at one place to be made clean. In addition to the cleansing, there is now the noise of machinery, many voices, smoke from the steam boilers, all of which would have a tendency to greatly disturb the quietude of those at public worship, children at school, or the sick in hospitals. Consequently, we find that, under the present well-known conditions, it is within the police

powers of a city, looking to the public health, safety, and welfare of its inhabitants, to pass such regulatory ordinances as the one in question, and that such an ordinance is not unreasonable, arbitrary, or discriminating.

In the instant case, the contract for the rental of the building was let before the passage of the ordinance; but such, we find, does not

take away from a city its police and sanitary powers to regulate the business in question. The machinery was installed and operation of the laundry was begun after the passage of the ordinance, and in the face of same, as to the power of a city to regulate an established business, by requiring it to seek other locations therein, we express no opinion.

Judgment affirmed.

Petition for rehearing denied, October 14, 1919.

ANNOTATION.

Regulations concerning location of laundries.

- I. Restriction against establishment in particular locality:
 - a. Restriction held valid, 1597.
 - b. Restriction held invalid, 1598.
- II. Restriction operative in particular locality:
 - a. Restriction as to hours of work, 1599.
 - b. Restriction as to wooden buildings, 1600.
- III. Restriction against use of building otherwise occupied, 1601.

I. Restriction against establishment in particular locality.

a. Restriction held valid.

In several instances the courts have held that a municipal ordinance prohibiting the maintenance of a laundry within certain specified limits is a valid and legitimate exercise of the police power. *Re Hang Kie* (1886) 69 Cal. 149, 10 Pac. 327; *Ex parte Quong Wo* (1911) 161 Cal. 220, 118 Pac. 714. And see the reported case (*WALCHER v. FIRST PRESBY. CHURCH*, ante, 1593). See also *Glover v. Sam Kee* (1914) 22 Can. Crim. Cas. 297, stated at length, *infra*, I. b.

In the case of *Re San Chung* (1909) 11 Cal. App. 511, 105 Pac. 609, set out at length *infra*, III., the court said by way of dictum: "Within the proper exercise of the police power, the operation of public laundries within the city limits could be entirely prohibited if such a measure could reasonably be said to promote the public health."

In the reported case (*WALCHER v. FIRST PRESBY. CHURCH*) the ordinance in question forbade, *inter alia*, the operation of a steam laundry within 150 feet of any church building, schoolhouse, or hospital within the municipality. The court, determining as to the reasonableness of the statute, points out that the noise and smoke emanating from a steam laundry would have a tendency "to disturb the quietude of those at public worship, children at school, or the sick in hospitals." The ordinance is held to be within the police powers of the city, and "not unreasonable, arbitrary, or discriminating."

In the case of *Re Hang Kie* (Cal.) *supra*, the court was called on to decide the validity of an ordinance of the city of Modesto, prohibiting the maintenance of a laundry, etc., within the city, except within certain prescribed limits. It was urged that the ordinance was unreasonable, and in violation of the state Constitution, in that it was not uniform. The court held that the legislation in question was passed in valid exercise of the police power of the city, and that there was nothing unreasonable therein.

In *Ex parte Quong Wo* (Cal.) *supra*, it appeared that the petitioner had been convicted of violating an ordinance of the city of Los Angeles, forbidding the maintenance of a laundry within certain prescribed residential districts of the city. The court

said: "There can be no question that the power to regulate the carrying on of certain lawful occupations in a city includes the power to confine the carrying on of the same to certain limits, whenever such restrictions may reasonably be found necessary to subserve the ends for which the police power exists, viz., to protect the public health, morals, safety, and comfort." It was said, further, that the courts would not interfere with the legislative authority of the city unless the regulations were clearly unreasonable, with no relation to the ends alleged to be subserved thereby, but, on the contrary, were an invasion of property rights; that the city might set aside certain portions of the residential districts as excepted from the operation of the ordinance; and that the fact that large portions of the residential districts were sparsely built up did not affect the validity of the ordinance.

b. Restriction held invalid.

In some cases the courts have held invalid a municipal ordinance which prohibited the maintenance of a laundry, except within certain specified districts of the city. *Stockton Laundry Case* (1886) 26 Fed. 611; *Re Sam Kee* (1887) 12 Sawy. 379, 31 Fed. 680; *Re Hong Wah* (1897) 82 Fed. 623; *Glover v. Sam Kee* (1914) 22 Can. Crim. Cas. 297.

In the *Stockton Laundry Case* (Fed.) *supra*, it appeared that the petitioner was arrested for violating an ordinance of the city of Stockton, which provided that no public laundries might be conducted within a certain portion of the city. The court pointed out that if the harmless and necessary business of washing clothes for hire might be forbidden in the habitable portions of the city, there was no end to the power which might be exercised in a similar manner, saying: "The police power is invoked to sustain this ordinance, but the police power only extends to the regulation of the necessary pursuits of man, so that they shall not become, in their mode of exercise, unhealthy, noisome, dangerous, or otherwise destructive or injurious to the common interests of

the community. It does not extend to the destruction or driving to inconvenient and unprofitable localities of necessary or useful occupations, carried on in such manner as to be harmless." The ordinance was held to be in violation of the 14th Amendment of the Constitution, in that it abridged "the privileges or immunities of citizens of the United States," was in conflict with the clause therein "which secures the personal liberty of the citizen," and deprived people "of their property and its use without due process of law," and of the equal protection of the laws.

In *Re Sam Kee* (1887) 12 Sawy. 379, 31 Fed. 680, it appeared that the petitioner was imprisoned for violation of an ordinance of the city of Napa, which declared it to be unlawful to conduct a laundry, etc., within certain specified limits of the city. The court held that the business could not be declared to be a nuisance by the ordinance, and that the enjoyment of the privileges and immunities guaranteed by the Constitution of the United States was destroyed thereby. The result was also to deprive one of his property without due process of law, and of the equal protection of the laws.

In *Re Hong Wah* (1897) 82 Fed. 623, the petitioner was arrested for violating an ordinance of the city of San Mateo which provided that no laundry, etc., might be conducted in certain specified limits of the city, and it was contended by him that the ordinance was in violation of the Federal Constitution. The court said: "The right to use property in the prosecution of any business which is not dangerous to others, nor injurious nor offensive to persons within its vicinity, is one of the legal attributes of the ownership of property, of which the owner cannot be deprived by the arbitrary declaration of any law of the state, or municipal ordinance; nor can the right of any person to engage in any useful occupation, not a nuisance per se, at such place as he may choose for that purpose, be denied by any law or ordinance."

In *Glover v. Sam Kee* (1914) 22 Can.

Crim. Cas. 297, the appellant was convicted of violating a by-law of the city of Kamloops, in that he had constructed and used a building for a laundry within a certain portion of the city, contrary to the said by-law. The statute, by virtue of which the by-law was passed, gave power to the council of a municipality to name or define "the streets or limits, etc., on or within which laundries, etc., may be established." The court held that the maintenance of a laundry was a legitimate business, and that, while the legislature gave the power to the council to name or define the streets, etc., where laundries might be conducted, "it did not confer power of prevention so that (in the words of the by-law) 'no building or structure of any kind shall be constructed and used for a laundry or wash house' within a specified portion of the municipality." It was said, obiter, that this by-law was not unreasonable or oppressive, for the regulation was a matter of discretion with the municipal council, but it was held to be invalid because *ultra vires*.

It has been held that an ordinance which makes the right to operate a laundry within certain limits of a city dependent on the consent of a certain number of the persons residing in the vicinity is invalid. *Re Quong Woo* (1882) 7 Sawy. 526, 13 Fed. 229; *Ex parte Sing Lee* (1892) 96 Cal. 354, 24 L.R.A. 195, 31 Am. St. Rep. 218, 31 Pac. 245.

In the case of *Re Quong Woo* (Fed.) *supra*, it appeared that the board of supervisors of San Francisco had passed an ordinance prohibiting the maintenance of any laundry within a certain section of the city, unless done with the consent of the said board, to be granted only on "recommendation of not less than twelve citizens and taxpayers in the block in which the laundry is" to be carried on. A license therefor was to issue only upon consent obtained in compliance therewith. The petitioner had been arrested for violation of this ordinance, and the question of the validity thereof was brought before the court for decision. It was pointed out that since the board of supervisors was not limited in the number of per-

sons from whom the recommendation might be demanded, the result might be an effectual prohibition of the maintenance of a laundry within certain limits, which was beyond the power of the city, since "it is not offensive to the senses, or disturbing to the neighborhood where conducted, nor is it dangerous to the public safety or health."

In *Ex parte Sing Lee* (1892) 96 Cal. 354, 24 L.R.A. 195, 31 Am. St. Rep. 218, 31 Pac. 245, the court was called on to decide the validity of an ordinance of the town of Chico that no public laundry might be conducted therein, except within two blocks specified, unless by a written permit from the board of trustees, which might not be granted without the written consent of the majority of the real property owners of the block wherein the laundry was to be maintained, and also of those of the four surrounding blocks. It was held that the ordinance in question, which the petitioner was charged with violating, had "no tendency to promote the public health or in any way to secure the public comfort or safety." It was said that the right to use property in the conduct of a legitimate business could not be made to rest upon the caprice of a majority, or any number, of those owning property surrounding that which he desires to use, the court saying: "Such a condition, imposed upon the right of a person to maintain a public laundry, is not only an unauthorized interference with the inalienable right of such person to engage in a lawful occupation, but also with the right of the owner of property to devote it to a lawful purpose. The personal liberty of the citizen and his rights of property cannot be thus invaded under the disguise of a police regulation."

II. Restriction operative in particular locality.

a. Restriction as to hours of work.

An ordinance prohibiting labor in laundries within certain limits of a city, during certain hours of the day and on Sunday, has been upheld as a valid and constitutional exercise of the

city's police power. *Barbier v. Connolly* (1885) 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Soon Hing v. Crowley* (1885) 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730; *Ex parte Moynier* (1884) 65 Cal. 33, 2 Pac. 728.

In *Barbier v. Connolly* (U. S.) *supra*, the petitioner was convicted of violating an ordinance of San Francisco, which provided that no one should work in a laundry within certain prescribed limits of the city, between the hours of 10 P. M. and 6 A. M., and it was contended that this section of the ordinance was in violation of the 14th Amendment of the United States Constitution, and certain sections of the Constitution of the state of California. The court, holding the ordinance to be valid as an exercise of the police power of the city, said: "It may be a necessary measure of precaution in a city composed largely of wooden buildings, like San Francisco, that occupations in which fires are constantly required should cease after certain hours at night until the following morning; and of the necessity of such regulations the municipal bodies are the exclusive judges; at least, any correction of their action in such matters can come only from state legislation or state tribunals. The same municipal authority which directs the cessation of labor must necessarily prescribe the limits within which it shall be enforced, as it does the limits in a city within which wooden buildings cannot be constructed. There is no invidious discrimination against anyone within the prescribed limits by such regulations. There is none in the regulation under consideration."

In *Soon Hing v. Crowley* (1885) 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730, the court was called on to consider the validity of an ordinance of the city of San Francisco which provided, *inter alia*, that no one working in a laundry within certain prescribed limits of the city should wash or iron clothes between 10 P. M. and 6 A. M., or on Sunday, the petitioner having been arrested for violating the ordinance. The court pointed out that the section of the city in question con-

sisted mainly of wooden buildings, and that because of the continuous use of fire in laundries, and the high winds prevailing in San Francisco, the ordinance seemed to be a reasonable regulation made in the exercise of the city's police power.

In *Ex parte Moynier* (Cal.) *supra*, an application for a writ of habeas corpus, it appeared that an ordinance of the city of San Francisco provided that within certain limits of the city, no laundry, etc., where articles were cleansed for hire, might be conducted without a certificate from the health officer as to drainage facilities, and another from the board of fire wardens as to the condition of the heating appliances, and that the petitioner had violated another section of the same ordinance in which it was specified that no one employed in a public laundry, provided for above, should wash or iron clothes between the hours of 10 P. M. and 6 A. M., nor on any portion of Sunday. The court held that the ordinance was a proper police regulation relative to the sanitation and safety from fire of the community, that, inasmuch as the regulation applied to all who maintained a public laundry, there was no such discrimination "as to make it repugnant to the Constitution," and that the limits prescribed might be proper limits. And the court would not say that it was unnecessary that the business should not cease during the specified hours, as a measure of the police and sanitary regulations of the city.

b. Restriction as to wooden buildings.

In *Shreveport v. Robinson* (1899) 51 La. Ann. 1314, 26 So. 277, the court held to be invalid an ordinance of the city of Shreveport, providing that no laundry might be established within certain prescribed limits of the city, except in a stone or brick building, and that the defendant was sought to be enjoined from operating a laundry in a wooden building within such limits. It was shown that there were a number of wooden buildings in the district, chosen by the defendant, and that some of these were occupied as blacksmith shops, etc. The court said:

"An ordinance which would not affect a blacksmith, a carpenter, or other mechanic using boilers and other machinery in some locality has the effect (in all probability never intended) of discriminating against an occupation and business, especially if it does not appear that the business in any manner endangers public health, under proper regulation, and does not give rise to greater risks from fires."

III. Restriction against use of building otherwise occupied.

An ordinance which prohibits the operation of a laundry in any building, a portion of which is occupied as a public store, restaurant, lodging house, saloon, etc., is a proper exercise of the police power. *Re San Chung* (1909) 11 Cal. App. 511, 105 Pac. 609; *Pang Sing v. Chatham* (1909) 14 Ont. Week. Rep. 1161.

The case of *Re San Chung* (Cal.) supra, involved a question as to the validity of an ordinance of the city of Sacramento, forbidding the operation

of a laundry in any building a portion of which might be occupied as a public hall, store, etc., the petitioner having been arrested for violation thereof by conducting his laundry in a building part of which was used as a public store. The court, in considering whether the regulation was a valid exercise of the police power, pointed out that there was no obvious discrimination therein against any individual, race or occupation, and, holding in view the duty of the city to protect and safeguard the health of its inhabitants, decided that the ordinance might not be "unreasonable and unnecessarily oppressive."

In *Pang Sing v. Chatham* (Ont.) supra, involving an ordinance which prohibited the use of any "laundry premises as an eating room, living room or sleeping room," the court held that the test of the validity of the by-law was whether it was passed "in bona fide exercise of the powers conferred by the municipal act." R. S.

STATE OF LOUISIANA

v.

LOUIS WERNER, Impleaded, etc., Appt.

Louisiana Supreme Court — December 2, 1918.

(144 La. 380, 80 So. 596.)

Witness — proof of other offenses.

1. An accused becoming a witness in his own behalf may be asked concerning other offenses charged against him, particularly where such offenses, if entirely executed, would have led to the same or a similar crime for which he is being tried, for the purpose of attacking his credibility.

[See note on this question beginning on page 1608.]

— accused — credibility.

2. If an accused becomes a witness on his own behalf, he puts his credibility at issue, like any other witness. — statement as to codefendant.

3. Where two accused are being tried together, one of them, while on the witness stand, may be cross-examined concerning a statement made by him, although he may have mentioned the other defendant in such statement; particularly, where the

judge charges the jury that it must disregard all reference made to the other defendant.

Homicide — perpetration of felony — murder.

4. "A homicide, committed in the perpetration of a felony, is murder, whether there was any precedent intention of doing a malicious act or not, the engaging in the perpetration of the felony supplying the place of malice." And this rule applies with especial

force if death was the probable consequence of the felonious act. And in order to show that a killing was such as to constitute murder, it is competent to show that it was done in the commission of, or attempt to commit, a felony, whether such felony was committed or attempted as the result of a conspiracy or not. An unlawful act which would render a killing pursuant

thereto murder, however, though done without malice, should be such as to tend to the injury of another, either immediately or by necessary consequences. It must be equivalent in legal character to a criminal purpose aimed at life, and either a felony, or an act involving the wickedness of a felony."

[See 18 R. C. L. 848.]

(O'Niell, J., dissents.)

APPEAL by defendant Werner from a judgment of the Criminal District Court for the Parish of Orleans (Chretien, J.) convicting him of murder. *Judgment and sentence amended and affirmed.*

The facts are stated in the opinion of the court.

Mr. P. C. Lassalle for appellant.

Messrs. A. V. Coco, Attorney General, Chandler C. Luzenberg, A. D. Henriques, Jr., and V. A. Coco for the State.

Sommerville, J., delivered the opinion of the court:

Defendant Werner was charged with and convicted of the murder of Frank T. Connor, a police officer, on February 14, 1918, in a drug store, in the city of New Orleans. He was sentenced to be hanged. He appeals from the judgment and sentence. Fazende was found guilty without capital punishment. He has not appealed.

The state, on cross-examination of Werner, who had taken the witness stand in his own behalf, asked him: "While you were here [in New Orleans] had you not held up another man and woman in another place of business at the point of a pistol and robbed them?"

The question was objected to, but the ground of objection was not stated at the time the objection was made. This was irregular. But, in the bill reserved to the ruling of the court permitting the question to be answered, the objection is alleged to have been that "that question had no connection with the case on trial, it was an attempt to prove another crime other than the one for which the accused was being tried, not a similar crime as the crime charged, and could not show motive or intent if answered; and was therefore improper and not competent."

In the note made by the district attorney, which is attached to the bill, and adopted by the judge, it is stated that the question was asked in order to attack the credibility of the witness. It was competent for such purpose.

In the case of *State v. Suire*, 142 La. 102, 76 So. 254, it is held: "It is too well settled to require citation of authority that, although the character of the defendant in a criminal prosecution is not subject to attack by the state unless the defendant puts his character at issue, nevertheless, if he becomes a witness in his own behalf, he thereby subjects his testimony to impeachment and puts his credibility at issue, like that of any other witness." *State v. Hughes*, 141 La. 579, 75 So. 416.

"Under most, if not all, of the modern statutes, the accused may become a witness if he so desires; but he is not obliged to, and, if he does, he is, in general, subject to cross-examination and impeachment the same as any other witness, so long as his constitutional rights or privileges, not in some way expressly waived by him, are not impinged upon." *State v. Waldron*, 128 La. 559, 34 L.R.A.(N.S.) 809, 54 So. 1009; 4 Elliott, Ev. p. 6, § 2705.

It appears from an examination of Werner's testimony that he had testified before the jury that he had only gone into the drug store, where the homicide was committed, for the

Witness—
accused—
credibility.

purpose of robbing the proprietor, and not for the purpose of killing anyone, and that, if he had known that the deceased was a policeman, he would not have entered the store; that he only fired the fatal shots to save his own life, and would not have entered the place if he thought he might be resisted by a police officer; and that he had only fired upon the deceased after the latter had attempted to kill him.

The apparent object of defendant's testimony was to lead the jury to believe that he would not have entered a place where conditions might have arisen which would cause him to do violence.

A defendant whose previous conduct shows that he has no regard for human life may not take the witness stand in his own behalf, and by his testimony try to impress upon the jury that his intention was only to commit a crime which should not have resulted in the taking of a human life, and that the killing which resulted was due to circumstances which he could not have foreseen, and then object to questions asked on cross-examination which would show that, instead of being a person who was seeking to avoid the taking of human life, he was one who cared not whether, in the accomplishment of his purpose, he did or did not kill a human being.

The credibility of such a witness and his testimony may certainly be attacked by showing that he had held up others at the point of a pistol.

Immediately preceding the question objected to (all of defendant's testimony is in the transcript, attached to a bill of exceptions), defendant was asked: "How long have you been in New Orleans?" He answered: "'Bout two weeks." He was then asked: "What have you been doing while here?" And he answered: "Well, I was going around different places." Then he was asked the question objected to: "While you were here, had you not held up another man and woman in

another place of business at the point of a pistol and robbed them?"

The question had no direct connection with the case on trial, but the circumstances leading up to the murder charged in the case, where the deceased was killed because he resisted the demand of the defendant upon the owner of the property to hold up his hands and deliver it, show that the district attorney was not attempting to prove another crime than the one for which the accused was being tried; but, by the question, he was endeavoring to discredit the credibility of the testimony of the defendant, who by his evidence was trying to impress the jury with the idea that at the time he entered the drug store where the murder was committed his sole object was to commit robbery. Under such circumstances, it was proper to ask the witness if before the killing he had held up other people in a different place at the point of a pistol and robbed them. *State v. Williams*, 111 La. 179, 35 So. 505.

The witness had testified: "I went in there—I did go in on the side, you understand—there was a curtain on each side of the prescription counter that hid them from view in front of the drug store, and when I pulled that curtain back the druggist and his little boy were coming down the little step from the adjoining room in the back, and the door was in the middle by the prescription counter, and the curtain hid the back on each side, and the door was right in the middle; you see, the prescription counter is clear across the store, and on each side they have these curtains, and when I drew the curtain aside and the druggist and little boy were coming down the steps, and I told him to throw up his hands in that position, and he threw up his hands and run and grabbed the little boy and ran behind the desk. I put my gun in that position, and a voice said, in the other room, 'I've got him,' and before I knew what it was, I saw a pistol come up, and I fired three times, not knowing it

was an officer at the time. If I knew it was an officer I would not have gone in there. After I fired I ran away. Q. You say that after you got in there you told the druggist to hold up his hands, and the druggist went behind the desk? A. Yes, sir; he grabbed his little boy and went behind the desk. I followed the druggist around in the store, around the counter, and some one hollered, 'I've got him,' when I passed the door, and I saw the gun come up, and I fired right quick like that. I knew that I would be killed at the time; it was impossible for me to get away."

This testimony was given on defendant's examination in chief.

On cross-examination, defendant answered:

I went there to rob him (the druggist).

Q. You went in that place to rob and went in that place to kill if necessary?

A. No, sir.

Q. Why, if you did not intend to kill, if necessary, did you carry your pistol loaded in your hands; to keep from getting killed yourself?

A. For protection.

Q. I am trying to find out if you only intended to rob the place why you carried the pistol in your hands?

A. I did not want to hurt anyone.

Q. You pointed the pistol at the drug store man?

A. Yes, sir.

Q. At his head?

A. Yes, sir.

Q. Suppose that he had attempted to draw a pistol?

A. I do not know if I would have shot him unless he had a pistol out and drew a level at me.

Q. If he came out with a pistol to protect his property and himself you would have killed him?

A. If he tried to kill me; yes, sir.

Q. Your idea was to go in that place and rob it, and, if that man resisted you so that you might be in danger, you would take that man's life?

A. Well, if he was about to kill me; otherwise I would not.

Q. If he had a pistol you would have killed him?

A. If he tried to kill me; yes, sir.

Q. How long have you been in New Orleans?

A. About two weeks.

Q. What have you been doing while here?

A. Well I was going around different places.

Q. While you were here had you not held up another man and woman in another place of business at the point of a pistol and robbed them?

This was the question objected to, and a bill was reserved to the ruling of the court in permitting the defendant to answer:

A. Yes, sir.

Q. How long was that before the killing, about, I don't want the exact date?

A. About three days, I guess.

Q. Who was with you at the time?

A. Fazende was with me.

Q. Who was with you when this policeman was killed?

A. Fazende (the codefendant).

Q. When you held up the soldier and the woman who was with you?

A. Fazende.

The defendant further answered, on cross-examination, without objection, that he had deserted from the United States Army, in which he had enlisted under an assumed name, for fear that he would be found out as an ex-convict from Baton Rouge, where he had served a term in the penitentiary of ten years for homicide. He also answered that he had been in the United States penitentiary at Leavenworth, Kansas, for robbing interstate shipping.

Further testifying, without objection, defendant answered the question:

How close were you to the proprietor of the store where the murder was committed, when you put the pistol to him (the proprietor)?

A. I just came through the curtain.

Q. Where was Fazende?

A. Out in front.

Q. Doing what?

A. I guess he went to the register; I did not see what he was doing.

Q. If they had tried to hurt you so that you thought that you were in danger, you did not intend to be hurt?

A. I did not intend to be killed; no, sir.

Q. You would kill rather than be killed?

A. Yes, sir.

Q. You wanted to see that no one interfered with you or hurt you?

A. I did not want to be hurt; no sir.

Q. And the other man was to do the robbing?

A. Yes, sir.

Q. One to do the robbing and you to keep anyone from interfering?

A. Yes, sir.

The question objected to was entirely relevant, and the objection was properly overruled. The answer clearly discredited defendant's testimony to the effect that he only intended to rob, and not to kill if he was resisted.

—proof of other offenses.

The next bill of exceptions was taken by the defendant Werner, to a question propounded by the district attorney to Fazende, the codefendant. The two defendants were being tried jointly. Fazende had taken the stand as a witness on his own behalf. Fazende did not object to the question, and he has not appealed. Fazende was asked: "Did you not make a statement to the police that he (meaning Werner) said something to Connor (the deceased)?" The answer was: "No, sir." Fazende was testifying as to what took place at the time of the killing. It was therefore relevant, in order to attack his credibility as a witness, to ask him if he had not made a different statement of the transaction shortly after its occurrence. The defendant, Werner, not having asked for a severance, was

not in a position, on the trial of the case, to object to evidence which was relevant to impeach the testimony of his codefendant, on the ground that the question would bring out facts detrimental to him. The question asked was to impeach Fazende, and to show that he had previously made a different statement. It was not only to attack his credibility as a witness, but for the purpose of laying the foundation to impeach his testimony.

When Werner, the defendant, objected to the testimony of Fazende, his codefendant, the court instructed the jury that the statement of the witness did not apply to Werner, and not to pay any attention to what was said as to Werner. The instruction of the court fully protected Werner from the effects of the evidence as to his guilt or innocence.

—statement as to codefendant.

The third bill relates to the matter embraced in the second bill. It was reserved to the testimony of the stenographer, connected with the office of the superintendent of police, who testified in rebuttal as to what Fazende said in his statement to the superintendent of police in describing the killing, after Fazende's arrest. It was offered for the purpose of impeaching the witness Fazende. And it could have no other effect, under the instructions of the judge to the jury that they were not to consider the testimony of the witness in connection with the defendant Werner.

Bill numbered 4 was taken to a special charge requested by the state, as follows, which was given by the judge to the jury: "One in the actual perpetration of a felony by violence cannot plead self-defense when one is killed while attempting to prevent such felony."

The special charge was unobjectionable.

The defendant's evidence showed that, at the time of the killing, he was in the actual perpetration of a felony by violence; that he was

armed with a dangerous weapon, and had already assaulted the proprietor of the place with this weapon.

"When the slayer's own original act was in violation of law, the law takes that fact into consideration in limiting his right of defense and resistance while engaged in its perpetration. And if he was engaged in the commission of a felony, and to prevent its commission a person seeing it, or about to be injured by it, made a violent assault upon him, calculated to produce great bodily harm, and in resisting such attack he killed his assailant, the law imputes the original wrong to the homicide, and makes it murder." Wharton, *Homicide*, 3d ed. p. 548.

"A homicide, committed in the perpetration of a felony, is murder, whether there was any precedent intention of doing a malicious act or not, the engaging in the perpetration of the felony supplying the place of malice. And this rule applies with especial force if death was the probable consequence of the felonious act. And in order to show that a killing was such as to constitute murder, it is competent to show that it was done in the commission of, or attempt to commit, a felony, whether such felony was committed or attempted as the result of a conspiracy or not. An unlawful act which would render a killing pursuant thereto murder, however, though done without malice, should be such as to tend to the injury of another, either immediately or by necessary consequences. It must be equivalent in legal character to a criminal purpose aimed at life, and either a felony, or an act involving the wickedness of a felony." Wharton, *Homicide*, 3d ed. p. 113.

Bill numbered 5 was reserved to the refusal of the judge to give to the jury the following special charge asked for by defendant: "That if the jury find from the evidence that, although the defendant was in the act of committing a felony at the

time of the killing of the officer, but that the conduct of the officer at the time was such as to induce the defendant Werner to believe that he was about to be killed or to receive great bodily injury at the hands of the officer, and that he did not know that the person making the assault was an officer seeking to arrest him, then, under such circumstances, the killing would be manslaughter."

The per curiam of the court, attached to the bill, is: "The defendant was in the perpetration of a violent felony, and could not plead self-defense, or tender any such reason for lowering the grade of the offense."

The ruling is in line with the law quoted from Wharton in considering the bill numbered 4.

On the brief of defendant, it is argued that defendant was entitled to have the jury charged, under Rev. Stat. 785, that it might bring in a verdict of manslaughter on a trial for murder.

Defendant in the requested charge does not ask the court to charge the jury that it might bring in a verdict of manslaughter; and, it does not appear that the court refused to do so. The charge is not in the transcript; and, as it was the duty of the judge to charge the jury that it might find the prisoner guilty of manslaughter, it must be presumed that he did so charge.

As the charge is not before the court, it cannot be held to be insufficient.

The sentence pronounced against Werner, "that he be taken to the state penitentiary at Baton Rouge, Louisiana, there to be hanged by the neck until he be dead," is not in conformity with Act 133 of 1919, p. 227, and it will be amended.

It is therefore ordered, adjudged, and decreed that the judgment and sentence appealed from be amended so as to order the execution of Werner in the city of New Orleans, parish of Orleans; and, as thus amended, it is affirmed.

O'Neil, J., dissents from the ruling that evidence of another crime was admissible, and therefore dissents from the decree.

Petition for rehearing denied January 6, 1919.

NOTE.

The right to cross-examine accused as to previous prosecution for or conviction of crime, for purpose of affecting his credibility, is the subject of the annotation following MORRISON v. STATE, post, 1608.

EARLY MORRISON, Appt.,

v.

STATE OF TEXAS.

Texas Court of Criminal Appeals — March 8, 1918.

(— Tex. Crim. Rep. —, 209 S. W. 742.)

Witness — credibility — proof of other crime.

1. To affect the credibility of one accused of nonsupport as a witness, he may be asked on cross-examination as to prosecution for adultery, which is a misdemeanor involving moral turpitude.

[See note on this question beginning on page 1608.]

Criminal law — argument to jury.

2. In a prosecution for nonsupport of children, where there is evidence tending to show that accused was living in adultery, and that his children lacked shoes, remarks of the prosecut-

ing attorney that accused was living in adultery with another woman while his children were at home, barefooted and cold, do not transcend the limits of legitimate argument.

[See 2 R. C. L. 427.]

APPEAL by defendant from a judgment of the Tarrant County Court (Small, J.) convicting him of unlawfully neglecting to provide for the support and maintenance of his wife and children. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Mays & Mays for appellant.

Mr. E. A. Berry, Assistant Attorney General, for the State.

Morrow, J., delivered the opinion of the court:

The conviction is for unlawfully, wilfully, and without just cause deserting, refusing, and neglecting to provide for the support and maintenance of the wife and children of appellant.

He had a wife and four children, one sixteen, one eleven, one nine, and one six years of age. The evidence showed failure to support them. On cross-examination of the wife, the appellant proved by her that she had told him that she did not love him, and did not want to live with him, and was willing for

him to have a divorce. She testified on redirect examination that he had sued for divorce because she had charged him with being untrue; that the reason "I thought that was because he boarded with this woman and stayed there with her. He was not living with me at the time." There was evidence that the appellant's wife and children received aid of charitable institutions and that their circumstances were such as to require it. Members of the associations testified that they had visited the family; that they had found the children on a cold day wearing slippers with holes in them; that they bore the appearance of being in destitute circumstances, and claimed to be. The wife took in washing, and the members of the family were

described as being hungry on several occasions.

Appellant testified on direct examination that he had filed suit for divorce; that his wife fussed, cursed him, and told him she did not love him. On cross-examination he said that she had accused him of improper relations with a certain woman; that he had been arrested for adultery with the woman mentioned; that his wife caused the complaint to be made against him. The cross-examination concerning the charge of adultery was objected to as within the rule inhibiting the proof of other independent offenses not involving moral turpitude. We

Witness—
credibility—
proof of other
crime.

are of opinion that the record does not sustain this contention. Adultery being a misdemeanor involving moral turpitude, proof of prosecution therefor was admissible on cross-examination to affect the credibility of the appellant as a witness. Sex-

ton v. State, 48 Tex. Crim. Rep. 498, 88 S. W. 348.

Nor do we think that the remarks of the prosecuting attorney, referring to the appellant as living in adultery with another woman while his children were at home, barefooted and cold, transcend

Criminal law—
argument to
jury.

the limitations upon a legitimate argument. The appellant did not deny in his testimony that he was living in adultery, as charged by his wife, and there were circumstances proved which would at least be the proper basis for an argument drawing that inference. There was also testimony touching his failure to provide for his children, such, we think, as would not characterize the argument referring to them as barefooted and cold as one so obviously harmful as to require a reversal, in the absence of a request for its withdrawal by special charge.

The judgment is affirmed.

ANNOTATION.

Right to cross-examine accused as to previous prosecution for, or conviction of, crime, for purpose of affecting his credibility.

I. Introductory, 1608.

II. Application to accused of rules governing cross-examination generally, 1609.

III. Examination as to prosecution for crime:

a. Arrest:

1. General rule, 1611.
2. Minority rule, 1614.
3. Rule in Texas, 1614.

b. Imprisonment, 1615.

c. Indictment:

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I. Introductory.

This note discusses the right of the state, on the trial of a criminal case, to question the accused on cross-ex-

amination as to his previous prosecution for, or conviction of, crime, for the purpose of affecting his credibility. The term "prosecution" is used

in its most comprehensive sense, as including all proceedings, from the initial arrest or accusation, to conviction.

II. Application to accused of rules governing cross-examination generally.

It seems to be the general rule that when the defendant in a criminal case testifies in his own behalf, he thereby assumes the position of an ordinary witness, and may be discredited on cross-examination by inquiries as to his previous prosecution for, or conviction of, crime, in the same manner and under the same rules as any other witness.

Arkansas.—*Younger v. State* (1911) 100 Ark. 321, 140 S. W. 139; *Turner v. State* (1911) 100 Ark. 199, 139 S. W. 1124; *Benson v. State* (1912) 103 Ark. 87, 145 S. W. 883; *Hunt v. State* (1914) 114 Ark. 239, L.R.A.1915B, 131, 169 S. W. 773, Ann. Cas. 1916D, 533; *Kelley v. State* (1918) 183 Ark. 261, 202 S. W. 49.

California.—*People v. Oubridge* (1918) — Cal. App. —, 175 Pac. 276.

Indiana.—*Parker v. State* (1893) 136 Ind. 284, 35 N. E. 1106.

Indian Territory.—*Williams v. United States* (1902) 4 Ind. Terr. 269, 69 S. W. 871.

Iowa.—*State v. Dillman* (1918) — Iowa, —, 168 N. W. 204.

Kansas.—*State v. Pfefferle* (1886) 36 Kan. 90, 12 Pac. 406; *State v. Probasco* (1891) 46 Kan. 310, 26 Pac. 749.

Louisiana.—*State v. Murphy* (1893) 45 La. Ann. 958, 13 So. 229; *State v. Clark* (1906) 117 La. 920, 45 So. 425; *State v. Waldron* (1911) 128 La. 559, 34 L.R.A.(N.S.) 809, 54 So. 1009; *State v. Suire* (1917) 142 La. 102, 76 So. 254; *STATE v. WERNER* (reported herewith) ante, 1601.

Minnesota.—*State v. Kight* (1908) 106 Minn. 371, 119 N. W. 56.

Missouri.—*State v. Shanks* (1910) 150 Mo. App. 370, 130 S. W. 451.

New York.—*Brandon v. People* (1870) 42 N. Y. 265; *People v. Morrison* (1909) 195 N. Y. 116, 133 Am. St. Rep. 780, 88 N. E. 21, 16 Ann. Cas. 871.

North Carolina.—*State v. Lawhorn* (1883) 88 N. C. 634; *State v. Thomas* (1887) 98 N. C. 599, 2 Am. St. Rep. 351, 4 S. E. 518.

North Dakota.—*Territory v. O'Hare* (1890) 1 N. D. 30, 44 N. W. 1003.

Ohio.—*Hanoff v. State* (1881) 37 Ohio St. 178, 41 Am. Rep. 496.

South Carolina.—*State v. Mitchell* (1899) 56 S. C. 532, 35 S. E. 210; *State v. Williamson* (1902) 65 S. C. 242, 43 S. E. 671.

Texas.—*Jackson v. State* (1894) 33 Tex. Crim. Rep. 281, 47 Am. St. Rep. 30, 26 S. W. 194, 622; *Turner v. State* (1913) 71 Tex. Crim. Rep. 477, 160 S. W. 357.

Utah.—*People v. Larsen* (1894) 10 Utah, 143, 37 Pac. 258.

West Virginia.—*State v. White* (1918) 81 W. Va. 516, 94 S. E. 972.

Canada.—*Rex v. D'Aoust* (1902) 3 Ont. L. Rep. 653, 5 Can. Crim. Cas. 407.

The general proposition that a defendant in a criminal prosecution, when he becomes a witness, occupies the same position as any other witness, was stated in *Williams v. United States* (Ind. Terr.) supra, as follows: "In the light of authority and reason, a defendant who, at his own option, becomes a witness, occupies the same position as any other witness, is liable to cross-examination on any matters pertinent to the issue, may be contradicted and impeached as any other witness, and is subject to the same tests as other witnesses."

In *Younger v. State* (1911) 100 Ark. 321, 140 S. W. 139, the accused was questioned on cross-examination as to his previous conviction of crime, for the purpose of attacking his credibility. The court disposed of objections to this evidence by stating the rule that a defendant who takes the witness stand in his own behalf becomes subject to all the rules of examination and impeachment that apply to any other witness.

In *People v. Newman* (1913) 261 Ill. 12, 103 N. E. 589, an attempt was made to discredit the testimony of a defendant on cross-examination by showing that he had been charged with crime. The court held that this examination could not be sustained, saying: "When the [defendant] became a witness, his credibility was subject to the same tests, and his examination and cross-examination were subject to

the same rules, as in the case of other witnesses."

In *Parker v. State* (1893) 136 Ind. 284, 35 N. E. 1106, questions on the cross-examination of the accused as to previous prosecutions against him, for the purpose of discrediting him as a witness, were held proper, the court saying that "the testimony of an accused who testifies in his own behalf should be subject to the tests applied to the testimony of any other witness."

In *State v. Dillman* (1918) — Iowa, —, 168 N. W. 204, the court held that it was proper to cross-examine the accused as to past offenses to affect his credibility, since the accused, by tendering himself as a witness, became subject to all the tests of credibility applicable to other witnesses.

In *State v. Pfefferle* (1886) 36 Kan. 90, 12 Pac. 406, the court, upholding a cross-examination of the defendant as to his previous prosecution for crime, for the purpose of impugning his credibility, said: "By taking the witness stand [the defendant] changed his status, for the time being, from defendant to witness, and was entitled to the same privileges and subject to the same treatment, and to be contradicted, discredited, and impeached, the same as any other witness."

In Louisiana the court has said: "It is too well settled to require citation of authority that, although the character of the defendant in a criminal prosecution is not subject to attack by the state unless the defendant puts his character at issue, nevertheless, if he becomes a witness in his own behalf, he thereby subjects his testimony to impeachment and puts his credibility at issue, like that of any other witness." *State v. Suire* (1917) 142 La. 102, 76 So. 254.

In Minnesota it has been said that the general rule applicable to all witnesses is applied to the accused on cross-examination, and that under that rule the extent to which the cross-examination may go, for the purpose of testing his credibility, rests in the discretion of the trial court. *State v. Kight* (1908) 106 Minn. 371, 119 N. W. 56.

And in New York, it has been said:

"A party called in his own behalf is simply a witness, the same as any other witness. He is not sworn and does not testify as a party, but as a witness, and the general rules of evidence, both as to admissibility and methods of examination and cross-examination, apply to him in precisely the same way as to a witness who is not a party." *People v. Morrison* (1909) 195 N. Y. 116, 133 Am. St. Rep. 780, 88 N. E. 21, 16 Ann. Cas. 871.

The general rule in Missouri is that a defendant, by offering himself as a witness, becomes subject to the same rules of impeachment as any other witness. *State v. Shanks* (1910) 150 Mo. App. 370, 130 S. W. 451.

And where a defendant was cross-examined as to previous indictments, and objected to such examination on the question of credibility, the court, applying the general proposition, held the inquiries were proper, since when the defendant assumed the character of a witness, he became subject to every rule adopted by the courts for the purpose of testing the credibility of witnesses. *State v. Lawhorn* (1883) 88 N. C. 684.

In *State v. Thomas* (1887) 98 N. C. 599, 2 Am. St. Rep. 351, 4 S. E. 518, the accused, on his cross-examination, was asked if he had been previously charged with crime in Alabama. He answered "Yes," and then, on further questioning, stated the particular offense. This was held to be proper evidence as affecting his credibility, the court stating that, by becoming a witness in his own behalf, the accused had exposed himself to the same discrediting testimony that any other witness would have been subject to.

And in North Dakota, when an accused takes the stand to testify in his own behalf, he assumes the character of a witness, and is entitled to the same privileges and subject to the same treatment, and to be contradicted, discredited, or impeached, the same as any other witness. *Territory v. O'Hare* (1890) 1 N. D. 30, 44 N. W. 1003.

In *Hanoff v. State* (1881) 37 Ohio St. 178, 41 Am. Rep. 496, the accused was required, over his objection, to

answer questions on cross-examination as to previous arrests and indictments, for the purpose of impugning his credibility. The court held that the testimony was properly admitted, saying: "The fact that [the witness] was also a party accused of a crime clothed him with no greater rights or privileges as a witness, nor subjected him to any different rule of cross-examination, than others. The same latitude and the same limitations apply to his cross-examination as if he had not been a party."

And where, in a prosecution for assault, the defendant was cross-examined as to a previous indictment for perjury, and he objected to the admission of such testimony on the question of credibility, the court held it competent, saying: "While it may be true that a defendant, by taking the stand as a witness, does not thereby permit his general moral character to be impeached, he does thereby put in issue his character for truth and veracity, and is subject to the rules which govern the cross-examination of ordinary witnesses in testing credibility." *State v. Williamson* (1902) 65 S. C. 242, 43 S. E. 671.

In *Turner v. State* (1913) 71 Tex. Crim. Rep. 477, 160 S. W. 357, the court stated that "under our law, when an accused himself testifies, he is subject to examination and cross-examination, as any other witness."

In Canada it has been said that when an accused tenders himself as a witness, "he puts himself forward as a credible person, and except in so far as he may be shielded by some statutory protection, he is in the same situation as any other witness, as regards liability to and extent of cross-examination." *Rex v. D'Aoust* (1902) 3 Ont. L. Rep. 653, 5 Can. Crim. Cas. 407.

III. Examination as to prosecution for crime.

a. Arrest.

1. General rule.

It is generally held that inquiries of an accused on cross-examination as to prior arrests are not competent for the purpose of affecting his credibility.

California. — *People v. Hamblin* (1885) 68 Cal. 101, 8 Pac. 687.

Colorado. — *Tollifson v. People* (1910) 49 Colo. 219, 112 Pac. 794.

Illinois. — *People v. Newman* (1913) 261 Ill. 12, 103 N. E. 589.

Kentucky. — *Leslie v. Com.* (1897) 19 Ky. L. Rep. 1201, 42 S. W. 1095.

Mississippi. — *Starling v. State* (1906) 89 Miss. 328, 42 So. 798.

Missouri. — *State v. Duff* (1913) 253 Mo. 415, 161 S. W. 683.

New York. — *People v. Crapo* (1879) 76 N. Y. 288, 32 Am. Rep. 302.

North Dakota. — *State v. Nyhus* (1909) 19 N. D. 326, 27 L.R.A. (N.S.) 487, 124 N. W. 71.

Oklahoma. — *Nelson v. State* (1910) 3 Okla. Crim. Rep. 468, 106 Pac. 647; *White v. State* (1910) 4 Okla. Crim. Rep. 143, 111 Pac. 1010; *Porter v. State* (1912) 8 Okla. Crim. Rep. 64, — A.L.R. —, 126 Pac. 699; *Corliss v. State* (1916) 12 Okla. Crim. Rep. 526, 159 Pac. 1015.

South Dakota. — *Richardson v. Gage* (1911) 28 S. D. 390, 133 N. W. 692, Ann. Cas. 1914B, 534; *State v. La Mont* (1909) 23 S. D. 174, 120 N. W. 1104.

Vermont. — *State v. Sanderson* (1910) 83 Vt. 351, 75 Atl. 961; *State v. Hodgdon* (1915) 89 Vt. 148, 94 Atl. 801.

The fact that a defendant may have been previously arrested, or previously charged by someone with having committed some other offense, has no tendency to discredit his testimony. *People v. Hamblin* (1885) 68 Cal. 101, 8 Pac. 687.

In *Tollifson v. People* (1910) 49 Colo. 219, 112 Pac. 794, the court said: "As a general rule, for the purpose of affecting the credibility of a witness, it is not proper to ask the witness on cross-examination if he has been arrested . . . prior to conviction for an offense. . . . The same rule applies to a defendant himself."

In *People v. Newman* (1913) 261 Ill. 12, 103 N. E. 589, where it appeared that one of the defendants, after testifying in his own behalf, was asked on cross-examination, "Were you ever arrested before?" and he answered "Yes," this was held error, the court saying: "A witness cannot be im-

peached by showing that he has been arrested, or that he has been charged with crime."

In *Burdette v. Com.* (1892) 93 Ky. 76, 18 S. W. 1011, the accused was asked on cross-examination if he had been arrested previously for burglary. The trial judge required the defendant to answer. This was held to be proper, the court saying: "The object of testimony is to elicit the whole truth as to an issue involved, and every reasonable test should be applied that will enable the jury to fix a proper estimate upon the credit of a witness."

But since the Code of 1895, questions as to previous arrest are not competent in Kentucky. *Leslie v. Com.* (1897) 19 Ky. L. Rep. 1201, 42 S. W. 1095, wherein it was held to be prejudicial to the rights of the accused in a prosecution for murder, to ask him on cross-examination if he had not been arrested for carrying concealed weapons and discharging firearms, since this question could show only his guilt of particular acts, which is within the inhibition of the Code.

The Mississippi courts exclude questions as to prior arrest. Thus, in *Starling v. State* (1906) 89 Miss. 328, 42 So. 798, it was said that "the mere fact that the witness had been arrested . . . does not come within the recognized method of impeachment. . . . The arrest may have been wrongful."

And in *State v. Duff* (1913) 253 Mo. 415, 161 S. W. 683, it was held to be improper for the state to cross-examine a defendant as to a prior arrest on a charge of burglary.

In *State v. Nyhus* (1909) 19 N. D. 326, 27 L.R.A. (N.S.) 487, 124 N. W. 71, the accused was a witness in his own behalf. On cross-examination the state's attorney interrogated him as to former arrests, and, over his objection, he was required to answer. The purpose of the inquiries was to impeach the defendant's credibility. But saying that an arrest or an accusation is merely a charge of which the accused is presumed to be innocent, the court held that it should not be given any weight as affecting his credibility, and that the questions were improper.

But see the earlier case of *State v.*

Rozum (1899) 8 N. D. 548, 80 N. W. 477, wherein the defendant, having testified in his own behalf, was required on cross-examination, over his objection, to state whether he had been arrested charged with a similar crime, a short time before. This was urged as error on appeal, but the court held that the right of the state to cross-examine a defendant in a criminal case who had taken the stand in his own behalf, as to collateral crimes, and for the purpose of affecting his credibility, was well established.

In *Brandon v. People* (1870) 42 N. Y. 265, the accused on cross-examination was asked, "Have you ever been arrested before for theft?" This was objected to as an attack on the character of the accused, which had not been put in issue, but the objection was overruled. The court held that the question was proper, since a defendant cannot claim the advantages of the position of a witness and at the same time avoid its duties and responsibilities.

But *Brandon v. People* (N. Y.) *supra*, was distinguished in *People v. Crapo* (1879) 76 N. Y. 288, 32 Am. Rep. 302, wherein the accused was asked, on cross-examination, if he had been previously arrested on a charge of bigamy, and the question was admitted as affecting his credibility. The court held that since this testimony did not legitimately tend to impair the credibility of the prisoner as a witness, its admission was error, and added: "The discretion which courts possess, to permit questions of particular acts to be put to witnesses for the purpose of impairing credibility, should be exercised with great caution, when an accused person is a witness on his own trial. He goes upon the stand under a cloud; he stands charged with a criminal offense not only, but is under the strongest possible temptation to give evidence favorable to himself. His evidence is therefore looked upon with suspicion and distrust, and if, in addition to this, he may be subjected to a cross-examination upon every incident in his life, and every charge of vice or crime which may have been made against

him, and which have no bearing upon the charge for which he is being tried, he may be so prejudiced in the minds of the jury as frequently to induce them to convict, upon evidence which otherwise would be deemed insufficient."

In *Nelson v. State* (1910) 3 Okla. Crim. Rep. 468, 106 Pac. 647, the defendant in a prosecution for homicide took the stand as a witness in his own behalf. On his cross-examination, for the purpose of impeaching his credibility, he was asked how many times he had been arrested, and for what offenses, and further, whether he had served a sentence in jail. The court held that the action of the trial judge in compelling the defendant to answer these questions constituted prejudicial error.

In *White v. State* (1910) 4 Okla. Crim. Rep. 143, 111 Pac. 1010, the accused was asked on cross-examination how many times he had been arrested and how many times placed in jail. Objections to these questions were overruled and the witness compelled to answer. The court held that this was error, saying: "It may be regarded as the settled law in Oklahoma that a witness cannot be impeached by asking him whether he has ever been indicted, arrested, or imprisoned before conviction for any offense whatever."

In *Porter v. State* (1912) 8 Okla. Crim. Rep. 64, — A.L.R. —, 126 Pac. 699, the court re-stated the Oklahoma doctrine as follows: "It is improper to ask a witness if he has ever been indicted, arrested, or imprisoned before conviction for any offense whatsoever. . . . No man should be visited with condemnation simply because he is accused of crime. He is entitled to fair treatment on his trial, and the presumption of innocence is his legal right until he has been convicted by the jury."

In *Corliss v. State* (1916) 12 Okla. Crim. Rep. 526, 159 Pac. 1015, in a prosecution for a violation of the liquor law, the defendant was asked on cross-examination if he had previously been arrested on similar charges. The court held that this inquiry could have

no bearing on his credibility and was improper.

In *Richardson v. Gage* (1911) 28 S. D. 390, 133 N. W. 692, Ann. Cas. 1914B, 534, the defendant on cross-examination was asked, "Were you arrested five years ago for stealing a steer from Edward Kelly?" and over objection he answered, "Yes, sir." The court stated the rule as to the admissibility of this class of evidence to affect credibility, as follows: "Convictions for crime of such kinds as may be relevant to veracity character may be shown either by the record of conviction or upon cross-examination. And in this respect the rule is the same in both civil and criminal actions. But the rule has not been extended beyond these limits, and in this state it has been held that arrests on indictments or charges of crime are not competent even on cross-examination, and that the reception of such evidence over proper objection is prejudicial error, requiring a reversal of the judgment."

In *State v. La Mont* (1909) 23 S. D. 174, 120 N. W. 1104, the court, reiterating the rule, said: "The fact that a defendant may have been previously arrested . . . has no tendency to discredit his testimony."

In *State v. Sanderson* (1910) 83 Vt. 351, 75 Atl. 961, the trial court permitted the state's attorney to cross-examine the defendant as to a previous arrest for crime for the purpose of affecting his credibility. This was held to be improper, and not competent to discredit him as a witness.

In *State v. Hodgdon* (1915) 89 Vt. 148, 94 Atl. 301, the defendant was required to answer an inquiry, on cross-examination, as to a previous arrest, the purpose being to test his credibility. The information elicited was that he had been twice arrested for drunkenness. The court held that this evidence was inadmissible, saying: "It is a conviction of a witness for crime, and not an arrest, which the court, in the exercise of a reasonable and sound discretion, may ordinarily permit to be shown by way of cross-examination for the purpose of showing to the jury the sort of man the witness is."

2. *Minority rule.*

There are some jurisdictions which take the view that questions as to previous arrest are admissible on cross-examination, to affect the credibility of the accused. *Williams v. United States* (1902) 4 Ind. Terr. 269, 69 S. W. 871; *State v. Brennan* (1918) — Iowa, —, 169 N. W. 744; *State v. Murphy* (1893) 45 La. Ann. 958, 13 So. 229; *People v. Cummins* (1882) 47 Mich. 334, 11 N. W. 184, 186; *People v. Foote* (1892) 93 Mich. 38, 52 N. W. 1036; *Hanoff v. State* (1881) 37 Ohio St. 178, 41 Am. Rep. 496; *People v. Larsen* (1894) 10 Utah, 143, 37 Pac. 258.

In *Williams v. United States* (1902) 4 Ind. Terr. 269, 69 S. W. 871, the defendant, having testified in his own behalf, was asked on cross-examination if he had not previously been arrested for various offenses. The purpose of the inquiry was to affect his credibility as a witness. The court held that the evidence was properly admitted.

In *State v. Murphy* (1893) 45 La. Ann. 958, 13 So. 229, on the cross-examination of the defendant he was required to state whether he had not been previously arrested for theft. The purpose of the question was to attack his credibility; it was held to be properly put.

In *People v. Cummins* (1882) 47 Mich. 334, 11 N. W. 184, 186, the accused testified in his own behalf, and the trial judge permitted the cross-examiner to ask him whether he had been previously arrested. The court held that this testimony was competent to affect his credibility, and that its admission was a proper exercise of the discretionary power vested in the courts.

And in *People v. Foote* (1892) 93 Mich. 38, 52 N. W. 1036, wherein the prosecution was permitted to show on the cross-examination of the defendant, that he had been arrested for another crime, the court held that the testimony was proper, as tending to impeach his credibility as a witness.

In Ohio it has been held that the question may be asked, but that the court cannot compel the accused to answer. In *Coble v. State* (1876) 81

Ohio St. 100, wherein an attempt had been made to discredit the defendant by asking him on cross-examination how many times he had been under arrest, the court held that while it was proper to ask such a question for this purpose, an answer thereto could not be enforced, and if voluntarily given, the state was bound thereby.

But in a later Ohio case the court, admitting a similar question, stated that the fact that the witness was also a party accused of a crime clothed him with no greater rights or privileges as a witness, and that testimony as to previous arrests was properly elicited over his objection. *Hanoff v. State* (1881) 37 Ohio St. 178, 41 Am. Rep. 496.

In *People v. Larsen* (1894) 10 Utah, 143, 37 Pac. 258, a prosecution for an assault, the state's attorney was permitted over objection to ask the accused on cross-examination whether he had been previously arrested for a similar crime. This testimony was held to be admissible to test his credibility as a witness. The court said: "It rests within the sound discretion of the trial court to determine the limits to which a cross-examination in a criminal case may be conducted . . . for the purpose of judging the character of the witness, and of the credit which ought to be given to his testimony from his own voluntary admissions." In addition it was held that the defendant's statutory privilege of refusing to answer any question which had a tendency to disgrace him (Utah Comp. Laws 1888, § 3959) was a personal one, and an objection by counsel would not avail.

3. *Rule in Texas.*

In Texas it is competent to cross-examine the accused as to prior arrests, but such arrests must have been for a felony or some other offense involving moral turpitude. *Stewart v. State* (1897) — Tex. Crim. Rep. —, 38 S. W. 1144; *Fitzpatrick v. State* (1897) 87 Tex. Crim. Rep. 20, 38 S. W. 806; *Jones v. State* (1903) 44 Tex. Crim. Rep. 405, 71 S. W. 962; *Marks v. State* (1904) — Tex. Crim. Rep. —, 78 S. W. 512; *Miller v. State* (1916) 79 Tex. Crim. Rep. 9, 185 S. W. 29. In-

gram v. State (1918) — Tex. Crim. Rep. —, 202 S. W. 741. See *MORRISON v. STATE* (reported herewith) ante, 1607.

In *Jones v. State* (1908) 44 Tex. Crim. Rep. 405, 71 S. W. 962, wherein the accused in a prosecution for murder was asked on cross-examination if he had not at one time been arrested on a charge of abduction, the court held that this inquiry was proper as affecting his credibility as a witness, since abduction was an offense involving moral turpitude.

In *Miller v. State* (1916) 79 Tex. Crim. Rep. 9, 185 S. W. 29, it was held that, for the purpose of impeaching defendant's testimony, on cross-examination, the state had the right to prove by the accused himself that he had been arrested previously on a complaint charging him with seduction.

In *Stewart v. State* (1897) — Tex. Crim. Rep. —, 38 S. W. 1144, the court held that it was not proper on the cross-examination of the accused to question him as to a prior arrest for a violation of the local option law, with the object of impugning his credibility, since this crime did not involve moral turpitude.

And in *Marks v. State* (1904) — Tex. Crim. Rep. —, 78 S. W. 512, it was held that evidence of arrest for a violation of the excise law was not properly elicited on the cross-examination of the accused to affect his credibility, since a crime would not impute moral turpitude.

Likewise in *Fitzpatrick v. State* (1897) 37 Tex. Crim. Rep. 20, 38 S. W. 806, a question on the cross-examination of the accused as to his prior arrest on a charge of assault was held improper for the purpose of attacking his credibility, since such a crime did not involve moral turpitude.

In *MORRISON v. STATE* (reported herewith) ante, 1607, the court holds that evidence elicited on the cross-examination of the accused as to his prior arrest on a charge of adultery is proper as affecting his credibility, since adultery is a misdemeanor involving moral turpitude.

b. Imprisonment.

It seems that inquiries as to imprisonment prior to conviction are not competent for the purpose of testing the credibility of the accused on cross-examination. *Tollifson v. People* (1910) 49 Colo. 219, 112 Pac. 794; *Slater v. United States* (1908) 1 Okla. Crim. Rep. 275, 98 Pac. 110; *Keys v. United States* (1909) 2 Okla. Crim. Rep. 647, 103 Pac. 874; *White v. State* (1910) 4 Okla. Crim. Rep. 143, 111 Pac. 1010; *Porter v. State* (1912) 8 Okla. Crim. Rep. 64, — A.L.R. —, 126 Pac. 699.

In *Tollifson v. People* (Colo.) supra, the court said: "As a general rule, for the purpose of affecting the credibility of a witness, it is not proper to ask the witness on cross-examination if he has been . . . imprisoned prior to conviction for an offense. . . . The same rule applies to a defendant himself."

The Oklahoma rule was stated by the court in *Slater v. United States* (1908) 1 Okla. Crim. Rep. 275, 98 Pac. 110, as follows: "Both by statutory provisions and by the general principles of the law every person accused of crime is presumed to be innocent until his guilt is established. . . . To allow a witness to be asked if he has been . . . imprisoned for crime before conviction is to place hearsay, suspicion, and malice upon the same footing with, and to give them the same consideration . . . as is attached to, the solemn judgment of courts."

In *Keys v. United States* (1909) 2 Okla. Crim. Rep. 647, 103 Pac. 874, the accused, having testified in his own behalf, was asked on cross-examination if he had ever been in jail. Over objection he was required to answer that he had been in jail on three different occasions, the testimony being elicited to impugn his credibility. The court held that this constituted reversible error, on the reasoning of the court in *Slater v. United States* (Okla.) supra.

In *White v. State* (1910) 4 Okla. Crim. Rep. 143, 111 Pac. 1010, the accused was asked on cross-examination how many times he had been

placed in jail. An objection to the question was overruled and the accused required to answer. The court held that this was error, saying: "It may be regarded as the settled law in Oklahoma that a witness cannot be impeached by asking him whether he has ever been indicted, arrested, or imprisoned before conviction, for any offense whatever."

And in *Porter v. State (Okla.) supra*, the court said: "It is improper to ask a witness if he has ever been . . . imprisoned before conviction for any offense whatever. . . . No man should be . . . visited with condemnation simply because he is accused of crime. He is entitled to fair treatment on his trial, and the presumption of innocence is his legal right until he has been convicted by the jury."

c. Indictment.

1. General rule.

(a) Rule stated.

Inquiries on the cross-examination of an accused, as to previous indictments found against him, are generally excluded as not competent to affect his credibility.

Alabama.—*Smith v. State* (1885) 79 Ala. 21.

Arkansas.—*Bates v. State* (1895) 60 Ark. 450, 30 S. W. 890; *Benton v. State* (1906) 78 Ark. 284, 94 S. W. 688.

Colorado.—*Tollifson v. People* (1910) 49 Colo. 219, 112 Pac. 794.

Illinois.—*People v. Duggan* (1909) 150 Ill. App. 375; *People v. Newman* (1913) 261 Ill. 11, 103 N. E. 589.

Kentucky.—*Parker v. Com.* (1899) 21 Ky. L. Rep. 406, 51 S. W. 573; *Pennington v. Com.* (1899) 21 Ky. L. Rep. 542, 51 S. W. 818, 11 Am. Crim. Rep. 482; *Ashcraft v. Com.* (1901) 22 Ky. L. Rep. 1542, 60 S. W. 931; *Howard v. Com.* (1901) 110 Ky. 356, 61 S. W. 756, 13 Am. Crim. Rep. 533; *Britton v. Com.* (1906) 123 Ky. 411, 96 S. W. 556; *Sullivan v. Com.* (1914) 158 Ky. 536, 165 S. W. 696.

Mississippi.—*Starling v. State* (1906) 89 Miss. 328, 42 So. 798; *Saucier v. State* (1912) 102 Miss. 647, 59 So. 858, Ann. Cas. 1915A, 1044

New Jersey.—*Roop v. State* (1896) 58 N. J. L. 479, 34 Atl. 749.

New York.—*People v. Cascone* (1906) 185 N. Y. 317, 78 N. E. 287; *People v. Morrison* (1909) 194 N. Y. 175, 128 Am. St. Rep. 552, 80 N. E. 1120, reargument in (1909) 195 N. Y. 116, 133 Am. St. Rep. 780, 88 N. E. 21, 16 Ann. Cas. 871.

Oklahoma.—*White v. State* (1910) 4 Okla. Crim. Rep. 143, 111 Pac. 1010; *Porter v. State* (1912) 8 Okla. Crim. Rep. 64, — A.L.R. —, 126 Pac. 699.

Oregon.—*State v. Bailey* (1919) 90 Or. 627, 178 Pac. 201.

South Dakota.—*State v. La Mont* (1909) 23 S. D. 174, 120 S. W. 1104.

The reason for the rule excluding questions as to previous indictments on the cross-examination of the accused has been well stated by the supreme court of Colorado as follows: "As a general rule, for the purpose of affecting the credibility of a witness, it is not proper to ask the witness on cross-examination if he has been arrested, informed against, or imprisoned, prior to conviction for an offense. . . . The same rule applies to a defendant himself. . . . Nothing is more common than for the court to instruct the jury that the indictment or information against the defendant is a mere formal charge, and is no evidence of the guilt of the defendant of the charge therein contained, and no juror should permit himself to be in any way biased or prejudiced on account of the filing of the information against him. . . . This being so, how can it be logically or in good reason said that the mere filing of an information or indictment against a party, upon which no conviction has been had, ought to be admitted as affecting the credibility of such witness? . . . An indicted person is presumed innocent, and yet the fact of an indictment is sought to impeach him as a witness. We do not think it is a legitimate fact for that purpose." *Tollifson v. People (Colo.) supra*.

And Justice Hughes in *Bates v. State (Ark.) supra*, stated the reason of the rule as follows: "Where the defendant in a criminal case is a wit-

ness in his own behalf, it is improper and unfair to ask him if he has been indicted for felony previously. An indictment raises no legal presumption of guilt against a defendant. If it be wrong to ask such question of a witness not himself on trial, it is in our opinion much more so where the defendant is the witness himself in his own behalf. None of the infamy that attaches to conviction attaches to the mere accusation. A person charged with a crime, testifying in his own behalf, goes upon the stand under a cloud; he stands charged with criminal offense, not only, but is under the strongest possible temptation to give evidence favorable to himself. His evidence is therefore looked upon with suspicion and distrust, and if, in addition to this, he may be subjected to a cross-examination upon every incident of his life, and every charge of vice or crime which may have been made against him, and which have no bearing upon the charge for which he is being tried, he may be so prejudiced in the minds of the jury as frequently to induce them to convict, upon evidence which otherwise would be deemed insufficient. No rule of law is violated in requiring that, to entitle questions to be put to accused persons which are irrelevant to the issue, and are calculated to prejudice him with the jury, they should at least be of a character which clearly go to impeach his general moral character, and his credibility as a witness."

(b) *Application of rule.*

In *Bates v. State* (1895) 60 Ark. 450, 30 S. W. 890, it was held error to permit the defendant in a criminal case, who had taken the stand as a witness in his own behalf, to be asked on cross-examination if he had not been indicted for a felony. The court said that the fact that the defendant answered that he had been indicted but subsequently acquitted did not remove the prejudice caused by the admission of the question.

In *Smith v. State* (1885) 79 Ala. 21, it was held that where the defendant in a criminal action testifies as a witness, he cannot be cross-examined as

to a previous indictment not connected with the offense for which he is on trial.

It is the rule in Arkansas that a defendant on cross-examination cannot be questioned as to a prior accusation of, or indictment for, crime. *Benton v. State* (1906) 78 Ark. 284, 94 S. W. 688.

In *People v. Duggan* (1909) 150 Ill. App. 375, the accused, having testified in his own behalf, was required on cross-examination to answer several questions as to previous indictments for selling liquor unlawfully. The court held that the admission of this testimony was improper, saying: "In criminal cases the only charge which can be proved to affect the credibility of a witness is conviction of an infamous crime, and that conviction must be proved by the record, and cannot be proved by oral testimony."

In *People v. Newman* (1913) 261 Ill. 11, 103 N. E. 589, a prosecution for robbery, one of the defendants, having testified in his own behalf, was interrogated on cross-examination as to previous indictments for felony. This was held to be an illegal disparagement of his credibility, the court saying: "It may be shown that a witness has been convicted of a felony, but not that he has been indicted only."

The Kentucky rule was clearly stated in *Sullivan v. Com.* (1914) 158 Ky. 536, 165 S. W. 696, as follows: "The Code provides that a witness may not be impeached by evidence of particular wrongful acts. The only exception to this rule is that it may be shown by the examination of a witness or record of the judgment that he has been convicted of a felony. In construing this section it has been repeatedly held that it is not competent to impeach a witness by evidence of, or to interrogate him concerning, particular acts or crimes, or a previous indictment, but it is proper to ask him if he has been convicted of a felony; and this rule applies to parties as well as other witnesses."

In *Parker v. Com.* (1899) 21 Ky. L. Rep. 406, 51 S. W. 573, the defendant was cross-examined as to a previous

indictment, and required, over objection, to answer thereto. The court held this was improper, since the rule was well recognized that evidence of particular acts is not admissible by way of impeaching the credibility of a witness, except that it may be shown that he has been convicted of a felony.

In *Howard v. Com.* (1901) 110 Ky. 356, 61 S. W. 756, 13 Am. Crim. Rep. 533, wherein the defendant in a prosecution for murder was cross-examined as to another charge of murder which had been previously made, the examination was held improper questioning, the court stating that his credibility should not have been assailed by proof of particular facts, with the one exception of conviction for felony.

In *Britton v. Com.* (1906) 123 Ky. 411, 96 S. W. 556, the court held that it was improper to ask the accused concerning any offense for which he had been indicted, saying: "The rule announced is the settled law in this state, and evidence of particular wrongful acts is not competent, with the single exception that it may be shown that the witness has been convicted of a felony."

In *Starling v. State* (1906) 89 Miss. 328, 42 So. 798, the defendant in a prosecution for assault and battery, having testified in his own behalf, was asked on cross-examination, "Were you ever charged in any court of committing any offense before?" He answered "Yes." The court held that the admission of this testimony was error, saying: "The mere fact that the witness had been arraigned, arrested, charged, or even tried, does not come within any recognized method of impeachment. The charge may have been maliciously made, the trial may have resulted in acquittal, the arrest may have been wrongful."

Where the district attorney had asked the defendant on cross-examination if it was not true that he had been charged in ten indictments of forgery, the court held this improper for the purpose of lessening defendant's credibility. *Saucier v. State* (1912)

102 Miss. 647, 59 So. 858, Ann. Cas. 1915A, 1044.

In *Roop v. State* (1896) 58 N. J. L. 479, 84 Atl. 749, it was held error to cross-examine the defendant as to a prior indictment for crime, for the purpose of attacking his credibility.

In *People v. Cascone* (1906) 185 N. Y. 317, 78 N. E. 287, the district attorney on the cross-examination asked the accused if he had been indicted and tried for murder. In passing on the competency of this testimony for the purpose of affecting his credibility, the court held: "The defendant in an action either civil or criminal cannot be asked on cross-examination whether he has been indicted, for an indictment is merely an accusation and no evidence of guilt. He cannot be asked if he was tried for a crime, unless it appears that he was convicted, because a trial followed by acquittal is but an accusation successfully met. A conviction for crime may be proved, or, on cross-examination, actual guilt without a conviction, for either implies moral obliquity, and hence affects credibility. A trial which resulted in an acquittal, however, does not tend to discredit a witness, and is incompetent for that purpose."

In *People v. Morrison* (1909) 194 N. Y. 175, 120 Am. St. Rep. 552, 80 N. E. 1120, reversing (1908) 124 App. Div. 10, 108 N. Y. Supp. 262, the defendant in a prosecution for petit larceny, having testified in his own behalf, was required on cross-examination to answer a question as to an indictment pending against him for stealing clams. The purpose of the question was to impugn his credibility as a witness. The court held the question improper, since an indictment is merely an accusation, and no evidence of guilt. On a reargument in (1909) 195 N. Y. 116, 138 Am. St. Rep. 780, 88 N. E. 21, 16 Ann. Cas. 871, the court said: "A party called in his own behalf is simply a witness, the same as any other witness. He is not sworn and does not testify as a party, but as a witness, and the general rules of evidence, both as to admissibility and methods of examination and cross-ex-

amination, apply to him in precisely the same way as to a witness who is not a party. . . . It is well settled in this state, and it was the rule before parties were allowed to be witnesses, that a witness may not be impeached or discredited by showing on his cross-examination or in any other way that he has been indicted. An indictment is a mere accusation and raises no presumption of guilt. It is purely hearsay, for it is the conclusion or opinion of a body of men, based on *ex parte* evidence. The rule applies to criminal actions as well as civil, and to all witnesses, whether parties or not. As was said in a case decided as early as 1829: "The credibility of a witness is not to be impeached by proof of another offense, but by evidence of general bad character. If it was not competent to prove that the witness had perpetrated the offenses for which he had been indicted (of which there could be no question), it follows, of necessity, that the fact of his having been indicted was inadmissible evidence." *Jackson ex dem. Gibbs v. Osborn* (1829) 2 Wend. (N. Y.) 558, 20 Am. Dec. 649."

In *White v. State* (1910) 4 Okla. Crim. Rep. 143, 111 Pac. 1010, the court held that "it may be regarded as the settled law in Oklahoma that a witness cannot be impeached by asking him whether he has ever been indicted, arrested, or imprisoned before conviction for any offense whatever."

In *Porter v. State* (1912) 8 Okla. Crim. Rep. 64, 126 Pac. 699, the court reiterated the Oklahoma rule as follows: "It is improper to ask a witness if he has ever been indicted, arrested, or imprisoned before conviction for any offense whatever. . . . No man should be . . . visited with condemnation simply because he is accused of crime. He is entitled to fair treatment on his trial, and the presumption of innocence is his legal right until he has been convicted by the jury. . . . A verdict should be based upon evidence, and not upon suspicions and prejudice."

In *State v. La Mont* (1909) 23 S. D. 174, 120 S. W. 1104, the defendant, having testified on his own behalf,

was cross-examined relative to several alleged charges against him, other than those for which he was on trial, the purpose of the questions being to affect his credibility. The court held the evidence inadmissible, saying: "Where a defendant is merely charged on cross-examination with some alleged criminal offense, there can be no presumption of guilt arising therefrom that could possibly affect his credit as a witness, but the presumption of innocence would still prevail and leave the question of his credibility unaffected."

2. *Minority rule.*

Some jurisdictions permit inquiries on the cross-examination of the accused, as to previous indictments, on the theory that the imputation thus cast on the witness has a real bearing on his credibility, and should be considered by the jury. *Vanceleave v. State* (1898) 150 Ind. 273, 49 N. E. 1060; *State v. Southern* (1896) 48 La. Ann. 628, 19 So. 668; *State v. Barrett* (1906) 117 La. 1086, 42 So. 513; *State v. Hughes* (1917) 141 La. 579, 75 So. 416; *STATE v. WERNER* (reported herewith) ante, 1601; *State v. Lawhorn* (1888) 88 N. C. 634; *State v. Thomas* (1887) 98 N. C. 599, 2 Am. St. Rep. 351, 4 S. E. 518; *Hanoff v. State* (1881) 37 Ohio St. 178, 41 Am. Rep. 496; *State v. Williamson* (1902) 65 S. C. 242, 43 S. E. 671; *Hill v. State* (1892) 91 Tenn. 521, 19 S. W. 674; *Ryan v. State* (1896) 97 Tenn. 206, 36 S. W. 930.

In *Vanceleave v. State* (Ind.) supra, it was held to be competent to ask the accused on cross-examination if he was not under indictment for robbing another. The court expressed the opinion that this testimony would aid the jury in determining the amount of credit which they should attach to the testimony of the accused as a witness.

In *State v. Southern* (1896) 48 La. Ann. 628, 19 So. 668, the defendant, in a prosecution for larceny, was asked on cross-examination, "Are you charged with another offense at this time?" And "Are there any other bills pending against you?" The court held that this was a proper inquiry to affect his credibility as a witness.

In *State v. Barrett* (1906) 117 La.

1086, 42 So. 513, a prosecution for murder, wherein the defendants appeared as witnesses in their own behalf, it was held proper for the state to test their credibility by cross-examining them as to previous prosecutions. The court, passing on the admissibility of this testimony, said: "It is well settled in our jurisdiction that when a defendant offers himself as a witness he may be asked on cross-examination whether he has been prosecuted before for other offenses."

In *STATE v. WERNER* (reported herewith) ante, 1601, it was held that where the defendant in a criminal action offered himself as a witness in his own behalf, he became subject to inquiries as to other offenses charged against him, to affect his credibility.

In *State v. Hughes* (1917) 141 La. 579, 75 So. 416, wherein the accused was asked on cross-examination "if he had not been accused of stealing several times before," and his objections to such inquiries were overruled, the court held that this was proper, as bearing on his credibility.

In *State v. Lawhorn* (1883) 88 N. C. 634, the defendant, having testified as a witness in his own behalf, was required to state, on cross-examination, notwithstanding his objection, that he had been twice indicted for fighting and once for adultery. The purpose of the questions was to affect his credibility. The court held that the questions were proper, since the defendant, by assuming the character of a witness, became subject to every rule adopted by the courts for the purpose of testing the credibility of witnesses.

In *State v. Thomas* (1887) 98 N. C. 599, 2 Am. St. Rep. 351, 4 S. E. 518, on his cross-examination the prisoner was asked if he had previously been accused of the commission of any offense in Alabama. On answering yes, he was then required to state what the offense charged was. This was held to be proper evidence, as going to his credibility.

In *Hanoff v. State* (1881) 37 Ohio St. 178, 41 Am. Rep. 496, the defendant, on a trial for murder, was asked on cross-examination if he had not previously been indicted for assault

with intent to kill, and frequently been arrested on charges of assault and battery. Objections to these questions were overruled. The court held that it was within the discretion of the trial judge to allow the questions for the purpose of judging the defendant's credibility, and it did not appear that the discretion had been abused.

In *State v. Williamson* (1902) 65 S. C. 242, 43 S. E. 671, a prosecution for assault, it appeared that the accused, having testified in his own behalf, was cross-examined as to a previous indictment for perjury. He objected to the question as an improper attempt to impeach his credibility. The court held that the question was properly permitted under the rules of cross-examination, subject, however, to the defendant's claim of privilege in refusing to answer.

In *Hill v. State* (1892) 91 Tenn. 521, 19 S. W. 674, the defendant in a prosecution for carrying a pistol, having elected to testify in his own behalf, was asked on cross-examination if he had not been charged with stealing money from a negro. The question was propounded to affect his credibility. The court held the question incompetent for ambiguity, in that it did not state whether the charge inquired about had been legally preferred or was a mere personal accusation, saying that if the latter was meant, the inquiry was improper, but if the former, then it was competent, since to test his reliability a witness may be asked if he has been indicted for an infamous crime.

In *Ryan v. State* (1896) 97 Tenn. 206, 36 S. W. 930, wherein, to affect the credibility of the accused, he was asked on cross-examination if he had previously been indicted for "other felonies and misdemeanors," the court held that an objection to the question was properly overruled.

3. Rule in Texas.

(a) In general.

In Texas, inquiries on the cross-examination of the accused as to his previous indictment for crime must, to affect his credibility, relate to felo-

nies or crimes involving moral turpitude. *Hutchins v. State* (1894) 38 Tex. Crim. Rep. 298, 26 S. W. 89; *Warren v. State* (1894) 33 Tex. Crim. Rep. 502, 26 S. W. 1082; *Craft v. State* (1895) — Tex. Crim. Rep. —, 31 S. W. 367; *Peryda v. State* (1896) — Tex. Crim. Rep. —, 35 S. W. 981; *Clark v. State* (1897) 38 Tex. Crim. Rep. 30, 40 S. W. 992; *Bolton v. State* (1897) — Tex. Crim. Rep. —, 39 S. W. 672; *Bain v. State* (1898) 38 Tex. Crim. Rep. 635, 44 S. W. 518; *Bruce v. State* (1898) 39 Tex. Crim. Rep. 26, 44 S. W. 852; *Crockett v. State* (1899) 40 Tex. Crim. Rep. 173, 49 S. W. 392; *Payne v. State* (1899) 40 Tex. Crim. Rep. 290, 50 S. W. 863; *Mirando v. State* (1899) — Tex. Crim. Rep. —, 50 S. W. 714; *Wilborn v. State* (1901) — Tex. Crim. Rep. —, 64 S. W. 1058; *Bearden v. State* (1903) 44 Tex. Crim. Rep. 578, 73 S. W. 17; *Hays v. State* (1904) 47 Tex. Crim. Rep. 149, 82 S. W. 511; *Sexton v. State* (1905) 48 Tex. Crim. Rep. 497, 88 S. W. 348; *Davis v. State* (1909) 57 Tex. Crim. Rep. 165, 121 S. W. 1108; *Doyle v. State* (1910) 59 Tex. Crim. Rep. 39, 126 S. W. 1131; *Diseren v. State* (1910) 59 Tex. Crim. Rep. 149, 127 S. W. 1038; *Hunter v. State* (1910) 59 Tex. Crim. Rep. 439, 129 S. W. 125; *Chance v. State* (1911) 63 Tex. Crim. Rep. 602, 141 S. W. 118; *Thompson v. State* (1912) 67 Tex. Crim. Rep. 660, 150 S. W. 181; *Thompson v. State* (1913) 72 Tex. Crim. Rep. 6, 160 S. W. 685; *Ross v. State* (1914) 72 Tex. Crim. Rep. 611, 163 S. W. 433; *Girtman v. State* (1914) 73 Tex. Crim. Rep. 158, 164 S. W. 1008; *Lamb v. State* (1914) 74 Tex. Crim. Rep. 301, 168 S. W. 534; *Whitfill v. State* (1914) 75 Tex. Crim. Rep. 1, 169 S. W. 681; *Shepherd v. State* (1915) 76 Tex. Crim. Rep. 307, 174 S. W. 609; *Villareal v. State* (1915) 78 Tex. Crim. Rep. 869, 182 S. W. 322; *Johnson v. State* (1917) 80 Tex. Crim. Rep. 547, 191 S. W. 1165; *Allen v. State* (1917) — Tex. Crim. Rep. —, 199 S. W. 633; *Jennings v. State* (1918) — Tex. Crim. Rep. —, 200 S. W. 169.

The rule in Texas was stated by the court in *Johnson v. State*, supra, as follows: "It has always been held by

this court, and is the law, that the accused, when he testifies, . . . may be impeached by proving by such witness that he has been indicted . . . of a felony or a misdemeanor imputing moral turpitude, when such prosecution . . . is not too remote."

In *Craft v. State* (1895) — Tex. Crim. Rep. —, 31 S. W. 367, the accused was asked on cross-examination whether he had previously been indicted in another county for murder, to which he had replied, over objection, in the negative. This was held a proper inquiry as affecting his credibility as a witness.

In *Warren v. State* (1894) 33 Tex. Crim. Rep. 502, 26 S. W. 1082, the defendant, having taken the stand as a witness, was asked by the prosecutor if he had not been previously indicted for theft. The court held that this testimony was properly admitted as tending to impugn his credibility.

In *Clark v. State* (1897) 38 Tex. Crim. Rep. 30, 40 S. W. 992, wherein the state's attorney elicited information from the defendant on cross-examination to the effect that he had previously been indicted for, and acquitted of, a charge involving moral turpitude, the court held that this was proper as affecting his credibility.

In *Peryda v. State* (1896) — Tex. Crim. Rep. —, 35 S. W. 981, the defendant, who was on trial for burglary, was asked on cross-examination if he was not under indictment for burglary in another case. He replied that he was, but that he was not guilty of the charge against him. The court held that this evidence was admissible as affecting his credibility.

Where the defendant in a prosecution for assault was a witness in his own behalf, and on his cross-examination the state adduced testimony that he had been indicted five years previously for stealing cotton, and had also been indicted for theft, the court held that this examination was proper as going to the credit of the defendant as a witness. *Bolton v. State* (1897) — Tex. Crim. Rep. —, 39 S. W. 672.

It has been held that on the cross-examination of the accused, the state may be permitted to prove by him

that he is then under indictment for perjury. *Bruce v. State* (1898) 39 Tex. Crim. Rep. 26, 44 S. W. 352.

But in a prosecution for unlawfully carrying a pistol, it has been held not to be proper for the state's attorney to ask the defendant if he had been charged on several occasions with a like offense. The fact that a man carried a pistol has no bearing on his credibility as a witness, such an act not involving moral turpitude. *Bain v. State* (1898) 38 Tex. Crim. Rep. 635, 44 S. W. 518.

In *Mirando v. State* (1899) — Tex. Crim. Rep. —, 50 S. W. 714, wherein the defendant, on trial for burglary, took the stand in his own behalf, and the court permitted the state's attorney, over objection, to ask defendant whether he had not been indicted before on a charge of highway robbery, and the charge dismissed because of his agreement to turn state's evidence against a codefendant, the cross-examination was held to be proper as affecting the credibility of the witness.

It has been held proper, for the purpose of affecting the credibility of the defendant in a prosecution for a violation of the local option law, to ask him on cross-examination, if he had not previously been indicted for an assault with intent to murder. *Crockett v. State* (1899) 40 Tex. Crim. Rep. 173, 49 S. W. 392.

In *Payne v. State* (1899) 40 Tex. Crim. Rep. 290, 50 S. W. 363, the accused, in a prosecution for burglary, was asked on his cross-examination if he had not previously been indicted for another burglary. The ground of objection urged was that this testimony was immaterial and prejudicial to defendant, but, in accordance with the settled rule in Texas, it was admitted as affecting his credibility.

In *Wilborn v. State* (1901) — Tex. Crim. Rep. —, 64 S. W. 1058, the accused, on trial for an assault, was asked on her cross-examination if she had not been charged by indictment with a like assault a few years previously. This was held to be a proper examination, affecting her credibility as a witness.

Likewise in *Hutchins v. State* (1894) 33 Tex. Crim. Rep. 298, 26 S. W. 39, wherein the accused, while on the stand in his own behalf, was cross-examined as to a previous arraignment for a similar assault, the inquiries were held proper as being to his credibility.

In *Bearden v. State* (1903) 44 Tex. Crim. Rep. 578, 73 S. W. 17, the defendant in a prosecution for murder was asked on cross-examination whether he had been formerly indicted for theft. This question was held proper as affecting his credibility.

In *Sexton v. State* (1905) 48 Tex. Crim. Rep. 497, 88 S. W. 348, the defendant, on trial for fraudulent disposition of property, was asked on cross-examination if he had not been indicted for adultery two or three times, to which he answered, "Yes." This was held a proper questioning "because it showed the offense involved moral turpitude; and for the purpose only of affecting his credibility as a witness."

In *Davis v. State* (1909) 57 Tex. Crim. Rep. 165, 121 S. W. 1108, wherein the accused in a prosecution for manslaughter was asked on cross-examination if he had not been indicted for assault with intent to murder, the court held that this was a proper examination as affecting the credibility of certain statements made by him, and in addition, as reflecting on his general credibility as a witness.

In *Diseren v. State* (1910) 59 Tex. Crim. Rep. 149, 127 S. W. 1038, a prosecution for burglary, the accused was asked on cross-examination if he had not theretofore been indicted on similar charges. He admitted having been indicted as questioned, but stated that these cases had been dismissed. The court held that the testimony both as to the indictments and their dismissal was properly admitted on the question of credibility.

In *Doyle v. State* (1910) 59 Tex. Crim. Rep. 39, 126 S. W. 1131, the prosecuting attorney, while cross-examining the defendant, asked him if he was not under indictment for burglary in the same court. The court held that this was a proper examina-

tion for the purpose of affecting his credibility.

In *Hunter v. State* (1910) 59 Tex. Crim. Rep. 439, 129 S. W. 125, it was held that on his cross-examination in a prosecution for murder, the defendant was properly required to state that a complaint had previously been filed against him for killing a negro.

Chance v. State (1911) 63 Tex. Crim. Rep. 602, 141 S. W. 113, showed a prosecution for theft, the accused, having testified in his own behalf, was asked by the prosecutor if he had been indicted for other cases of theft in various counties, and the court required him to answer. It was held that this was a proper question, since testimony as to indictments for the same offense was admissible as affecting his credibility.

In *Thompson v. State* (1912) 67 Tex. Crim. Rep. 660, 150 S. W. 181, it was held that the fact that an indictment for seduction was pending against the accused in a prosecution for theft could be brought out on his cross-examination as affecting his credibility.

In *Thompson v. State* (1913) 72 Tex. Crim. Rep. 6, 160 S. W. 685, a question as to a previous indictment for arson was held proper.

In *Girtman v. State* (1914) 73 Tex. Crim. Rep. 158, 164 S. W. 1008, it was held that on cross-examination of the accused in a prosecution for murder the court correctly permitted the district attorney to ask him if he was not then under indictment for the felony of assault with intent to murder, for the purpose of affecting his credibility.

In *Whitfill v. State* (1914) 75 Tex. Crim. Rep. 1, 169 S. W. 681, the accused in a prosecution for burglary, having testified in his own behalf, was cross-examined as to another indictment pending against him, likewise charging him with burglary. This testimony was held admissible for the purpose of affecting his credit as a witness.

And in *Lamb v. State* (1914) 74 Tex. Crim. Rep. 801, 168 S. W. 534, it was held that where the accused on trial for assault testified in his own behalf, it was permissible to show that he had

twice been indicted for murder, to affect his credibility on the witness stand.

In *Hays v. State* (1904) 47 Tex. Crim. Rep. 149, 82 S. W. 511, the accused, on trial for a violation of the local option law, was asked on cross-examination whether he was not under indictment in other cases. The court compelled him to answer that he was under indictment in thirteen similar cases. On appeal it was contended that such testimony was not admissible to affect his credibility, as the offenses did not carry with them moral turpitude. The court upheld the appellant's contention, and remanded the cause.

And in *Shepherd v. State* (1915) 76 Tex. Crim. Rep. 807, 174 S. W. 609, it was held that the defendant should not be cross-examined as to prior indictments under the local option law, since they would not tend to show moral turpitude affecting credibility, and the offense was not a felony.

But in *Ross v. State* (1914) 72 Tex. Crim. Rep. 611, 163 S. W. 438, a prosecution for a violation of the local option law, testimony elicited from the defendant on his cross-examination, to the effect that he had been indicted for violating the local option law in other counties where the offense was a felony, was held to be admissible to affect his credit as a witness.

In *Villareal v. State* (1915) 78 Tex. Crim. Rep. 369, 182 S. W. 322, testimony elicited from the accused on trial for homicide, that he was under indictment for horse-stealing, was held to be admissible as going to his credibility.

In *Hawthorne v. State* (1916) 80 Tex. Crim. Rep. 264, 190 S. W. 184, it was held to be competent for the state to cross-examine the accused as to previous indictments for felony or crimes involving moral turpitude, for the purpose of discrediting him as a witness.

(b) *Proof of remote indictment.*

The period of time which has elapsed since the return of an indictment proof of which is sought to be introduced on the cross-examination of the accused, for the purpose of affecting his credibility, will be consid-

ered in passing on its admissibility. *Winn v. State* (1908) 54 Tex. Crim. Rep. 538, 113 S. W. 918; *Sapp v. State* (1916) 80 Tex. Crim. Rep. 373, 190 S. W. 489.

In *Sapp v. State*, supra, the court stated that it was always proper to show by the cross-examination of the accused that he had been indicted for a felony, for the purpose of impeaching his credibility, provided that the offense was not too remote in time.

In *Bowers v. State* (1902) — Tex. Crim. Rep. —, 71 S. W. 284, the court held that the accused was properly cross-examined as to a previous charge of murder, for the purpose of attacking his credibility, although returned eighteen years before.

But in the later case of *Winn v. State*, supra, where the defendant, in a prosecution for homicide, was asked on his cross-examination, for the purpose of affecting his credibility, if he had not been indicted for murder some twenty years before, and further, if he had not pleaded guilty to theft about fourteen years before the present trial, the court held that the testimony was inadmissible as too remote.

(c) *Limiting effect of testimony.*

It seems that the court must limit the effect of testimony elicited on cross-examination as to a previous indictment to the particular issue of credibility; and a failure in this respect will be considered as ground for reversal. *Warren v. State* (1894) 33 Tex. Crim. Rep. 502, 26 S. W. 1082; *Oliver v. State* (1894) 33 Tex. Crim. Rep. 541, 28 S. W. 202; *Scoville v. State* (1903) — Tex. Crim. Rep. —, 77 S. W. 792; *Webb v. State* (1904) 47 Tex. Crim. Rep. 306, 83 S. W. 394; *Simonds v. State* (1915) 76 Tex. Crim. Rep. 487, 175 S. W. 1064.

In *Warren v. State* (1894) 33 Tex. Crim. Rep. 502, 26 S. W. 1082, the accused was cross-examined as to previous indictments for theft. The accused excepted to the charge of the trial judge, which did not limit the effect of the testimony to his credibility. On this point the court on appeal said: "Where such testimony is admitted, it is only for the purpose of impeachment of the credibility of the

defendant, and it is the duty of the court to so instruct the jury, whether requested or not."

In *Oliver v. State* (1894) 33 Tex. Crim. Rep. 541, 28 S. W. 202, on his cross-examination the defendant testified to various indictments previously found against him. The court held that the questions were proper, but that the effect of such testimony should be restricted to the purpose for which it was introduced.

In *Scoville v. State* (1903) — Tex. Crim. Rep. —, 77 S. W. 792, the defendant, while on the stand as a witness, was asked if he had ever been indicted before. He answered under objection that he had been convicted of burglary about nine years before, and had subsequently been indicted for burglary and theft. The court held that the testimony was proper on the question of credibility, but that the effect of such testimony must be limited to the question of credibility, and a failure to do so was reversible error.

In *Webb v. State* (1904) 47 Tex. Crim. Rep. 306, 83 S. W. 394, the appellant raised the objection that the testimony elicited on his cross-examination as to previous indictments for felonies had not been properly limited in its effect to the question of credibility. The court held that "under the authorities this point is well taken."

In *Simonds v. State* (1915) 76 Tex. Crim. Rep. 487, 175 S. W. 1064, wherein the accused was cross-examined as to a previous indictment for felony, the court held that such inquiry was proper as affecting his credibility, but that the effect of the testimony must be limited to that purpose.

d. *Trial.*

The tendency seems to be to exclude questions as to a previous trial not resulting in a verdict of guilty. *People v. Simmons* (1916) 274 Ill. 528, 113 N. E. 887; *Starling v. State* (1906) 89 Miss. 328, 42 So. 798; *Marion v. State* (1884) 16 Neb. 349, 20 N. W. 289; *People v. Cascone* (1906) 185 N. Y. 317, 78 N. E. 287; *State v. Conway* (1897) 20 R. I. 270, 38 Atl. 656.

The New York court of appeals has laid down the rule that a defendant

on cross-examination "cannot be asked if he was tried for a crime, unless it appears that he was convicted, because a trial followed by acquittal is but an accusation successfully met. . . . A trial which resulted in an acquittal, however, does not tend to discredit a witness, and is incompetent for that purpose." *People v. Cascone* (1906) 185 N. Y. 317, 78 N. E. 287.

In *People v. Simmons* (1916) 274 Ill. 528, 113 N. E. 887, wherein the accused on cross-examination was required to answer inquiries as to a previous arrest and trial for having a gun, the court held the question improper because not showing such moral turpitude as would affect the defendant's credibility as a witness.

In *Starling v. State* (1906) 89 Miss. 328, 42 So. 798, the court, in passing on the admissibility of testimony elicited on the cross-examination of the accused for the purpose of affecting his credibility, said: "The mere fact that the witness had been arraigned, arrested, charged, or even tried, does not come within any recognized method of impeachment. The charge may have been maliciously made, the trial may have resulted in acquittal, the arrest may have been wrongful."

In *Marion v. State* (1884) 16 Neb. 349, 20 N. W. 289, the defendant was cross-examined as to his having pleaded guilty to a penitentiary offense in another state, for the purpose of attacking his credibility. The prosecution attempted to justify its inquiry by citing a statute providing that "a witness may be interrogated as to his previous conviction for felony." But the court held the evidence improper, since no conviction had been shown.

In *State v. Conway* (1897) 20 R. I. 270, 38 Atl. 656, the attorney general was permitted to ask the accused if she had not previously pleaded nolo contendere to an indictment for nuisance, and paid \$100 and costs. The trial judge, over objection, ruled in effect that this evidence was competent for the purpose of affecting the credibility of the defendant, and that her plea of nolo contendere amounted to a conviction. The court, passing

on this question, held that the evidence was inadmissible, saying that the statute declares that conviction or sentence for any crime or misdemeanor may be shown, and that while it is true that a person may be sentenced on a plea of nolo contendere as well as on a conviction, yet the fact that this plea only admits the facts stated for the purposes of the particular case prevents such admission from being used elsewhere.

But, on the other hand, some jurisdictions have admitted questions as to a prior trial. *Parker v. State* (1894) 136 Ind. 284, 35 N. E. 1105; *Ellis v. State* (1898) 152 Ind. 326, 52 N. E. 82; *State v. Dillman* (1918) — Iowa, —, 168 N. W. 204; *State v. Callian* (1908) 109 La. 346, 33 So. 363; *State v. Barrett* (1906) 117 La. 1086, 42 So. 513; *Johnson v. State* (1917) 80 Tex. Crim. Rep. 547, 191 S. W. 1165. Compare *Bullington v. State* (1915) 78 Tex. Crim. Rep. 187, 180 S. W. 679.

Thus, in *Parker v. State* (1894) 136 Ind. 284, 35 N. E. 1105, the state cross-examined the defendants as to certain arrests and prosecutions against them, for the purpose of affecting their credibility. The court held that the testimony was properly admitted, and added that the extent to which such cross-examination might go was largely in the discretion of the trial court.

In *Ellis v. State* (1898) 152 Ind. 326, 52 N. E. 82, wherein the defendant was asked on cross-examination whether there had been certain prosecutions against him for criminal offenses previously committed, with the intention of discrediting his testimony as a witness, the court stated it was well settled in Indiana that such testimony was competent.

In a prosecution for murder the defendant, on cross-examination, and for the purpose of testing his credibility, was asked if he had not been arrested and fined on several occasions for fighting and for assault. Over objections he was required to answer. The inquiries related to incidents which had taken place some nine years previous to the offense charged in the indictment, and when defendant was

nineteen or twenty years old. The court held that the questions in themselves were proper under the rule that specific acts tending to discredit a witness may be inquired into on cross-examination, but added that the inquiries related to matters too remote in time to bear on his credibility. *State v. Dillman* (1918) — Iowa, —, 168 N. W. 204.

In *State v. Callian* (1903) 109 La. 346, 33 So. 363, the court held to be proper a question to the accused on cross-examination, "How many times have you been before the court?"

In *State v. Barrett* (1906) 117 La. 1086, 42 So. 513, a prosecution for murder, wherein the defendants appeared as witnesses in their own behalf, the court held that it was proper for the state to test their credibility by asking them whether they had previously been prosecuted for other offenses, saying: "It is well settled in our jurisprudence that, when a defendant offers himself as a witness, he may be asked, on cross-examination, whether he has not been prosecuted before for other offenses."

And see *Com. v. Wells* (1918) 69 Pa. Super. Ct. 227, wherein the court held that the accused, in a prosecution for keeping a bawdyhouse, might be cross-examined as to a previous plea of guilty entered by her to a similar charge, for the purpose of lessening her credibility.

In *Johnson v. State* (1917) 80 Tex. Crim. Rep. 547, 191 S. W. 1165, the court, stating the Texas rule, said: "It has always been held by this court, . . . that the accused when he testifies . . . may be impeached by proving by such witness that he has been . . . legally prosecuted . . . of a felony or misdemeanor imputing moral turpitude, when such prosecution . . . is not too remote."

In this connection see *Turner v. State* (1917) 128 Ark. 565, 195 S. W. 5, wherein the court held that a cross-examination of the accused as to his prior killing of another was proper to affect his credibility, he later being permitted to show his acquittal of the offense named.

IV. Examination as to conviction of crime.

a. General rule.

1. Under statute.

It is generally provided by statute that a previous conviction of crime may be shown on the cross-examination of a witness for the purpose of testing his credibility, and statutes of this kind, even when not specifically made applicable to the accused in a criminal case, are held to be so applicable.

United States.—*Ball v. United States* (1906) 78 C. C. A. 126, 147 Fed. 32; *Fields v. United States* (1915) 137 C. C. A. 98, 221 Fed. 242.

Alabama.—*Wells v. State* (1901) 131 Ala. 48, 31 So. 572; *Williams v. State* (1906) 144 Ala. 14, 40 So. 405; *Hill v. Prattville* (1915) 13 Ala. App. 643, 69 So. 227; *Williams v. State* (1917) — Ala. App. —, 75 So. 703.

Arkansas.—*Turner v. State* (1911) 100 Ark. 199, 139 S. W. 1124; *Younger v. State* (1911) 100 Ark. 321, 140 S. W. 139; *Benson v. State* (1912) 103 Ark. 87, 145 S. W. 888; *Hunt v. State* (1914) 114 Ark. 239, L.R.A.1915B, 131, 169 S. W. 773, Ann. Cas. 1916D, 533; *Seibert v. State* (1915) 121 Ark. 258, 180 S. W. 990; *Conner v. State* (1918) 132 Ark. 531, 201 S. W. 285; *Kelley v. State* (1918) 138 Ark. 261, 202 S. W. 49.

California.—*People v. Chin Mook Sow* (1877) 51 Cal. 597; *People v. Johnson* (1881) 57 Cal. 571; *People v. Abbott* (1884) 2 Cal. Unrep. 383, 4 Pac. 769; *People v. Meyer* (1888) 75 Cal. 383, 17 Pac. 431; *People v. Crowley* (1893) 100 Cal. 478, 35 Pac. 84; *People v. Chin Hane* (1895) 108 Cal. 606, 41 Pac. 700; *People v. Arnold* (1897) 116 Cal. 682, 48 Pac. 803; *People v. Sears* (1897) 119 Cal. 269, 51 Pac. 325; *People v. Soeder* (1906) 150 Cal. 12, 87 Pac. 1016; *People v. Carson* (1909) 155 Cal. 164, 99 Pac. 970; *People v. Oliver* (1908) 7 Cal. App. 601, 95 Pac. 172; *People v. Herges* (1910) 14 Cal. App. 273, 111 Pac. 624; *People v. Rader* (1914) 24 Cal. App. 477, 141 Pac. 958; *People v. Moran* (1914) 25 Cal. App. 472, 144 Pac. 152; *People v. Oubridge* (1918) — Cal. App. —, 175 Pac. 276.

Colorado. — Dennison v. People (1918) — Colo. —, 174 Pac. 595.

District of Columbia.—Thompson v. United States (1908) 80 App. D. C. 352, 12 Ann. Cas. 1004.

Florida.—Wallace v. State (1899) 41 Fla. 547, 26 So. 713; Squires v. State (1900) 42 Fla. 251, 27 So. 864.

Iowa.—State v. O'Brien (1890) 31 Iowa, 93, 46 N. W. 861; State v. Carter (1908) 121 Iowa, 135, 96 N. W. 710; State v. Concord (1915) 172 Iowa, 467, 154 N. W. 763.

Kentucky.—Lockard v. Com. (1888) 87 Ky. 201, 8 S. W. 266; Pace v. Com. (1889) 89 Ky. 204, 12 S. W. 271; Burdette v. Com. (1892) 98 Ky. 76, 18 S. W. 1011; Henderson v. Com. (1906) 122 Ky. 296, 91 S. W. 1141; Ochsner v. Com. (1908) 128 Ky. 761, 109 S. W. 326; Page v. Com. (1909) — Ky. —, 119 S. W. 750; Ge Burk v. Com. (1913) 153 Ky. 264, 155 S. W. 381; Sullivan v. Com. (1914) 158 Ky. 536, 165 S. W. 696; Wilson v. Com. (1901) 23 Ky. L. Rep. 1044, 64 S. W. 457; Morgan v. Com. (1903) 24 Ky. L. Rep. 2117, 72 S. W. 1098; Farmer v. Com. (1906) 28 Ky. L. Rep. 1168, 91 S. W. 682.

Minnesota.—State v. Curtis (1888) 39 Minn. 357, 40 N. W. 263; State v. Gordon (1908) 105 Minn. 217, 117 N. W. 483, 15 Ann. Cas. 897; State v. Kight (1908) 106 Minn. 371, 119 N. W. 56.

Mississippi. — Williams v. State (1905) 87 Miss. 373, 39 So. 1006.

Missouri.—State v. Blitz (1903) 171 Mo. 530, 71 S. W. 1027; State v. Heusack (1905) 189 Mo. 295, 88 S. W. 21; State v. Spivey (1905) 191 Mo. 87, 90 S. W. 81; State v. Woodward (1905) 191 Mo. 617, 90 S. W. 90; State v. Barrington (1906) 198 Mo. 23, 95 S. W. 235; State v. Jenkins (1915) — Mo. —, 178 S. W. 91; State v. Johnson (1917) — Mo. —, 192 S. W. 441; State v. Shanks (1910) 150 Mo. App. 370, 180 S. W. 451; State v. Clement (1916) — Mo. App. —, 183 S. W. 1133.

Montana.—State v. Black (1894) 15 Mont. 143, 38 Pac. 674.

Nebraska.—Johns v. State (1910) 88 Neb. 146, 129 N. W. 247.

New Jersey.—Roope v. State (1896) 58 N. J. L. 479, 34 Atl. 749; Brown v. State (1898) 62 N. J. L. 666, 42 Atl.

811; State v. Henson (1901) 66 N. J. L. 601, 50 Atl. 468, 616; State v. Mount (1905) 72 N. J. L. 365, 61 Atl. 259.

New York.—People v. Noelke (1883) 94 N. Y. 137, 46 Am. Rep. 123; People v. Cardillo (1912) 207 N. Y. 70, 100 N. E. 715, Ann. Cas. 1914C, 255; People v. Callahan (1912) 151 App. Div. 666, 136 N. Y. Supp. 407, 27 N. Y. Crim. Rep. 491.

Oregon.—State v. Lurch (1885) 12 Or. 99, 6 Pac. 408; State v. Deal (1908) 52 Or. 568, 98 Pac. 165.

Pennsylvania.—Com. v. Garanchokis (1916) 251 Pa. 247, 96 Atl. 513.

Washington.—State v. Payne (1893) 6 Wash. 563, 34 Pac. 317; State v. Gottfreedson (1901) 24 Wash. 393, 64 Pac. 523; State v. Blaine (1911) 64 Wash. 122, 116 Pac. 660; State v. Overland (1912) 68 Wash. 566, 123 Pac. 1011; State v. Brownlow (1916) 89 Wash. 582, 154 Pac. 1099.

Wisconsin. — Thornton v. State (1903) 117 Wis. 338, 98 Am. St. Rep. 924, 93 N. W. 1107.

Canada.—Rex v. D'Aoust (1902) 3 Ont. L. Rep. 653, 5 Can. Crim. Cas. 407.

In *Ball v. United States* (1906) 78 C. C. A. 126, 147 Fed. 32, it was held that a question asked of the accused, on cross-examination, whether he had formerly been convicted in California on a charge of using the mails to defraud, was proper as affecting his credibility as a witness.

In *Fields v. United States* (1915) 137 C. C. A. 98, 221 Fed. 242, a prosecution for running an illicit still, it was held proper to compel the defendants to admit on their cross-examination that they had previously been convicted and punished for similar offenses, since this testimony tended to affect the credibility of the witnesses. The court added that such an offense involved moral delinquency, which is the test of admissibility in such case.

In *Thompson v. State* (1898) 100 Ala. 70, 14 So. 878, the court held that the previous conviction of a defendant could not be shown for the purpose of discrediting his testimony on his cross-examination, but only by production of the record of conviction.

But by the enactment of the Statute of 1897, the rule was changed so as

to admit evidence of previous conviction on the cross-examination of the accused. *Wells v. State* (1901) 131 Ala. 48, 31 So. 572, wherein it was held permissible for the state to cross-examine the accused as to a previous conviction for another offense, the purpose being to affect his credibility as a witness.

In Alabama it has been held that it is only with reference to convictions for crimes that are infamous that a witness may be examined, and that it is only that character of crimes which, under the statute, affects his credibility. *Williams v. State* (1906) 144 Ala. 14, 40 So. 405.

In *Hill v. Prattville* (1915) 13 Ala. App. 643, 69 So. 227, it was held competent for the state to prove by the defendant on his cross-examination that he had been convicted of forging a check, since this was a crime involving moral turpitude, and thus affecting his credibility as a witness.

In *Turner v. State* (1911) 100 Ark. 199, 139 S. W. 1124, wherein the defendant, on trial for grand larceny, was asked on cross-examination if he had not been previously convicted of petit larceny, the court held that the inquiry was proper, as going to his credibility as a witness.

Likewise the court in *Younger v. State* (1911) 100 Ark. 321, 140 S. W. 139, held that the defendant, having taken the witness stand in his own behalf, was subject to all the rules of examination and impeachment as any other witness; and that, for the purpose of testing his credibility, the state had the right on cross-examination to ask him if he had not been convicted of petit larceny.

And it has been held that "upon his cross-examination, therefore, [defendant] may be questioned relative to specific acts for the purpose of discrediting his testimony, and he may be asked as to whether or not he has suffered a former conviction for some crime affecting his credibility." *Benson v. State* (1912) 103 Ark. 87, 145 S. W. 883.

In *Hunt v. State* (1914) 114 Ark. 239, L.R.A.1915B, 131, 169 S. W. 773, Ann. Cas. 1916D, 533, it was held that

where the defendant in a criminal prosecution takes the witness stand, he places himself in the attitude of any other witness, and may be interrogated concerning specific acts of his own for the purpose of testing his credibility, and that under this doctrine he may be asked about a prior judgment of conviction.

In *Seibert v. State* (1915) 121 Ark. 358, 180 S. W. 990, wherein the accused, in a prosecution for unlawfully selling spirituous liquors, was required to answer inquiries on cross-examination as to prior convictions for selling whisky, the court held that this was a proper examination for the purpose of affecting his credibility.

So in *Nelson v. State* (1919) — Ark. —, 212 S. W. 93, a prosecution for selling liquor in violation of law, the court held that the accused might be cross-examined as to his commission of other offenses, for the purpose of affecting his credibility.

It has been held in California that, for the purpose of affecting his credibility, the defendant in a criminal case may be asked whether he has been convicted of a prior felony. The decision, however, is based on the statute.

Thus, in *People v. Johnson* (1881) 57 Cal. 571, wherein it appeared that defendant was asked on cross-examination whether he had been convicted of a felony prior to the present charge, the court held that the question was permissible as affecting his credibility as a witness.

Likewise in *People v. Crowley* (1893) 100 Cal. 478, 35 Pac. 84, it was held that the act of the defendant in offering himself as a witness laid him open to cross-examination as to any previous convictions for felony, for the purpose of impugning his credibility.

Under the California statute it was held in *People v. Chin Mook Sow* (1877) 51 Cal. 597, that a defendant under cross-examination as a witness might be questioned as to a previous conviction for crime, to affect his credibility.

In *People v. Meyer* (1883) 75 Cal. 383, 17 Pac. 431, the court held that an affirmative answer to the question,

"Have you ever been convicted of a felony in this city or county?" had a tendency to throw discredit on a defendant as a witness, and was properly put on cross-examination for this purpose.

And a similar holding, that the accused might be cross-examined as to his prior conviction of crime for the purpose of affecting his credibility, was made in *People v. Abbott* (1884) 2 Cal. Unrep. 383, 4 Pac. 769. These cases in effect overruled *People v. Buckner* (1884) — Cal. —, 4 Pac. 489, where the court held that the record of the judgment of conviction was necessary to show the prior conviction of a witness for the purpose of affecting his credibility, and likewise a similar holding in *People v. McDonald* (1870) 39 Cal. 697, which was decided before the statute was enacted permitting proof of previous conviction to be made on cross-examination.

In construing the California statute the court has said: "In order to impeach the credibility of a witness, including a defendant when he testifies, the witness may be asked if he has ever been convicted of a felony. . . . Beyond this the examination should not go." *People v. Chin Hane* (1895) 108 Cal. 597, 41 Pac. 700.

Likewise, in *People v. Arnold* (1897) 116 Cal. 682, 48 Pac. 803, the court said: "Under the rule established in this state, the defendant's character for truth, honesty, and integrity is in issue when he offers himself as a witness, and he thereupon becomes, as held in *People v. Hickman* (1896) 113 Cal. 80, 86, 45 Pac. 175, 'subject to the same rules for testing his credibility before the jury, by impeachment or otherwise, as any other witness.' One of the authorized methods of impeachment prescribed by the Code is 'that it may be shown by the examination of the witness or the record of the judgment that he has been convicted of a felony.'"

The rule was applied in *People v. Sears* (1897) 119 Cal. 269, 51 Pac. 325, wherein the court said: "When a defendant offers himself as a witness in his own behalf, he becomes subject to most of the rules applicable to other witnesses, and among those, and for

the purpose of impeaching his evidence, he may be asked if he has been convicted of a felony."

So in *People v. Soeder* (1906) 150 Cal. 12, 87 Pac. 1016, it was held that the defendant was properly cross-examined as to his prior conviction of a felony for the purpose of testing his credibility.

In *People v. Oliver* (1908) 7 Cal. App. 601, 95 Pac. 172, the court said: "Under the rule established in this state the defendant's character for truth, honesty, and integrity is in issue when he offers himself as a witness, and he thereupon becomes . . . 'subject to the same rules for testing his credibility before the jury, by impeachment or otherwise, as any other witness,' and a question to defendant, on cross-examination, as to whether he had ever been convicted of a felony; was held proper.

In *People v. Carson* (1909) 155 Cal. 164, 99 Pac. 970, it was held that the prosecution was properly permitted to cross-examine the accused as to how many times he had been convicted of felony.

The court applied the same rule in *People v. Herges* (1910) 14 Cal. App. 273, 111 Pac. 624, and *People v. Moran* (1914) 25 Cal. App. 472, 144 Pac. 152, wherein it appeared that the defendant was cross-examined as to his previous conviction of a felony, and further, as to how often he had been so convicted, and the questions were both held proper, the court stating that the same tests of credibility applied to accused as to any other witness on cross-examination.

In *People v. Rader* (1914) 24 Cal. App. 477, 141 Pac. 953, the defendant objected to inquiries on cross-examination as to previous convictions of felony, claiming they were wrongful and prejudicial; but the court, applying the statute, held that such inquiries were entirely justified for the purpose of affecting his credibility as a witness.

The Colorado statute provides that "the conviction of any person for any crime may be shown for the purpose of affecting the credibility of such witness." In *Dennison v. People* (1918) — Colo. —, 174 Pac. 595, the

defendant was asked whether he had been convicted of a crime, and an objection thereto was overruled. On appeal the court held that the statute had been correctly applied.

In the District of Columbia it is provided by statute that the prior conviction of a witness may be shown on his cross-examination for the purpose of affecting his credibility, and it has been held that the statute applies as well to an accused when on the stand in his own behalf. *Thompson v. United States* (1908) 30 App. D. C. 352, 12 Ann. Cas. 1004.

In *Squires v. State* (1900) 42 Fla. 251, 27 So. 864, the defendant, on trial for larceny, was sworn in his own behalf, and the state's attorney, on cross-examination, asked if he had been convicted of larceny heretofore. As the purpose of the question was to obtain an admission affecting his credibility, it was held a proper one, on the authority of *Wallace v. State* (1899) 41 Fla. 547, 26 So. 713, wherein it was held that the range of cross-examination to affect credibility is ordinarily a matter within the discretion of the trial judge, and will not be interfered with unless abused.

In *State v. O'Brien* (1890) 81 Iowa, 93, 46 N. W. 861, the defendant testified on cross-examination as to convictions for offenses previously committed, and the court held that this testimony was proper on the question of credibility, stating the same rule to be applicable to the accused as a witness, as to witnesses generally.

In *State v. Carter* (1903) 121 Iowa, 135, 96 N. W. 710, the rule was again applied, that a previous conviction of felony may be shown on the cross-examination of the accused, and legitimate bears on his credibility.

In *State v. Concord* (1915) 172 Iowa, 467, 154 N. W. 763, the accused in a prosecution for burglary was asked by the cross-examiner if he had ever been convicted of a felony. The trial court admitted this testimony. On appeal it appeared that the state's attorney had evidently intended this evidence not for impeaching purposes, but to show prior conviction for a similar offense. For this reason its

admission was held to be error. The court in explanation said of the accused: "Of course he is subject to impeachment as any other witness; but the state, in conducting the cross-examination, should be confined strictly to matters of impeachment, and not, under cover thereof, be permitted to inject prejudicial matter."

The Kentucky rule was set forth in *Sullivan v. Com.* (1914) 158 Ky. 536, 165 S. W. 696, as follows: "The Code provides that a witness may not be impeached by evidence of particular wrongful acts. The only exception to this rule is that it may be shown by the examination of a witness or record of the judgment that he has been convicted of a felony. In construing this section it has been repeatedly held that it is not competent to impeach a witness by evidence of, or to interrogate him concerning, particular acts or crimes, or a previous indictment, but it is proper to ask him if he has been convicted of a felony; and this rule applies to parties as well as other witnesses."

In *Burdette v. Com.* (1892) 93 Ky. 76, 18 S. W. 1011, wherein the accused was cross-examined as to a previous conviction for stealing, it was held that the trial judge had properly required him to answer, such testimony going to his credibility. The court added: "Every reasonable test should be applied that will enable the jury to fix a proper estimate upon the credit of a witness."

In *Wilson v. Com.* (1901) 23 Ky. L. Rep. 1044, 64 S. W. 457, the defendant, having testified in his own behalf, was cross-examined and the information was elicited that he had twice before been convicted of felony. The court held that, in accordance with the established rule in Kentucky, such testimony was competent as affecting his credibility.

In *Henderson v. Com.* (1906) 122 Ky. 296, 91 S. W. 1141, the accused complained that the trial court had required him to answer an inquiry on cross-examination as to a previous imprisonment under conviction of forgery. The court held that, under the statute, it was proper to examine a

witness as to a previous conviction of felony for the purpose of testing his credibility.

In *Ge Burk v. Com.* (1913) 153 Ky. 264, 155 S. W. 381, wherein it appeared that the accused had been cross-examined as to a previous conviction and imprisonment for felony, the court held that this was competent testimony in the issue of defendant's credibility as a witness, and was in accord with the established precedent in Kentucky.

In *State v. Curtis* (1888) 39 Minn. 357, 40 N. W. 263, the defendant was asked on cross-examination, if he had previously been convicted of a felony. Under the Minnesota statute allowing the fact of a witness's previous conviction for crime to be proved by his cross-examination for the purpose of affecting the weight of his testimony, this was held to be proper.

In *State v. Gordon* (1908) 105 Minn. 217, 17 N. W. 483, 15 Ann. Cas. 897, the court said: "It is the settled law that, on cross-examination, a defendant may be impeached by questions as to a former conviction."

In *State v. Kight* (1908) 106 Minn. 871, 119 N. W. 56, on the cross-examination of the accused he was questioned as to his conviction for other crimes for the purpose of impugning his credibility. The court held that he was subject to the same rules as other witnesses and was properly examined, saying: "The extent to which the cross-examination may go for the purpose of testing his credibility rests in the discretion of the trial court."

And in Mississippi it has been held proper under a statute for the district attorney to cross-examine the accused as to his previous conviction of crime. *Williams v. State* (1905) 87 Miss. 373, 39 So. 1006.

Before the enactment of a statute in 1895 in Missouri, it was not proper to show the prior conviction of a witness otherwise than by production of the record thereof. Thus, in *State v. Rugan* (1878) 68 Mo. 214, the defendant was asked on cross-examination if he had not been previously convicted of crime. The court held that this was improper under the best-evidence

rule, requiring the production of the record of conviction.

In *State v. Manning* (1901) 87 Mo. App. 78, the court held that under § 4680, Revised Statutes 1889, providing that, for the purpose of affecting his credibility, an accused might be cross-examined as to his prior conviction of crime, it was not proper to examine him as to a conviction for a non-infamous crime.

But in *State v. Blitz* (1903) 171 Mo. 530, 71 S. W. 1027, the court held that the conviction of any offense could be shown on the cross-examination of a defendant for the purpose of affecting his credibility, thus overruling the holding of *State v. Manning* (Mo.) *supra*.

And in *State v. Shanks* (1910) 150 Mo. App. 370, 130 S. W. 451, wherein the defendant in a prosecution for larceny was required on cross-examination to answer inquiries as to prior convictions for assault and battery and carrying a concealed weapon, and these offenses were both misdemeanors, the court held the testimony proper as going to the defendant's credibility. The court, commenting on the decision reached in *State v. Manning*, *supra*, said: "Though doubt was expressed in *State v. Manning*, . . . as to whether or not the credibility of defendant in a criminal case might be attacked by showing a conviction for anything other than an infamous crime, it is now well settled that the statute . . . authorizes such inquiries as were made of defendant here. Under repeated decisions of our supreme court, it is competent to impeach a defendant who testifies in his own behalf by showing that he had theretofore been convicted of a misdemeanor, and questions directed to such impeachment may be propounded in the cross-examination."

In *State v. Heusack* (1905) 189 Mo. 295, 88 S. W. 21, it was held proper to cross-examine the defendant as to his previous conviction of crime for the purpose of affecting his credibility, production of the record no longer being necessary.

And in *State v. Woodward* (1905) 191 Mo. 617, 90 S. W. 90, wherein the

defendant on cross-examination, and for the purpose of affecting his credibility, was asked if he had previously been convicted of any crime, the court held that this was a proper examination under the established rule.

But while it is proper, under the statute of Missouri, to cross-examine the accused as to a previous conviction for crime for the purpose of affecting his credibility, the court has held that the question must be propounded in accordance with the statute. *State v. Spivey* (1905) 191 Mo. 87, 90 S. W. 81, wherein the court said: "We are, however, of the opinion that the prosecuting attorney should propound this question in accordance with the statute; that is, to inquire of the witness if he was ever convicted in any court of a criminal offense, and not, for the purpose of influencing the jury, ask him 'if he wasn't in the penitentiary of this state for stealing cattle or burglarizing some store.'"

In *State v. Jenkins* (1915) — Mo. —, 178 S. W. 91, it was held that the Missouri statute expressly authorizes the propounding of questions as to prior convictions for crime, for the purpose of affecting the credibility of a defendant on cross-examination.

And in *State v. Johnson* (1917) — Mo. —, 192 S. W. 441, wherein the defendant in a prosecution for homicide was cross-examined as to a previous conviction for shoplifting, this inquiry was held competent for the purpose of impeaching the defendant's credibility.

In *State v. Black* (1894) 15 Mont. 143, 38 Pac. 674, the accused, on cross-examination, was asked if he had been convicted of a felony in Minnesota, an objection to the question as improper being overruled. The court held that the question was proper, saying: "We think it certainly is competent and material to show, on cross-examination, that a defendant had been convicted of felony, in order to discredit him."

In *Johns v. State* (1910) 88 Neb. 146, 129 N. W. 247, it was held that a question to the accused on cross-examination, whether he had been twice convicted of a felony, was properly

put for the purpose of disparaging his credibility.

In *State v. Henson* (1901) 66 N. J. L. 601, 50 Atl. 468, 616, it was held competent on cross-examination to ask a defendant if he had not pleaded "non vult contendere" to an indictment for petit larceny, for the purpose of affecting his credibility, the court stating that in effect this plea was equivalent to conviction. And in stating the rule that it was proper to cross-examine an accused as to his previous conviction of crime, the court said that the word "crime" included all grades of offense.

In *State v. Henson* (N. J.) *supra*, it was held proper to cross-examine a defendant as to previous convictions for crime, for the purpose of discrediting his testimony, and the word "crime" was held to include all grades of offense.

Likewise in *Brown v. State* (1898) 62 N. J. L. 666, 42 Atl. 811, the court held that it was proper to cross-examine the accused as to his conviction of grand larceny for the purpose of assisting the jury in judging of his character as a witness.

In *Roop v. State* (1896) 58 N. J. L. 479, 34 Atl. 749, the court held that an inquiry in a prosecution for keeping a disorderly house, as to a prior conviction of the same offense, was properly put to the accused on cross-examination, in disparagement of his credibility.

In *State v. Mount* (1905) 72 N. J. L. 365, 61 Atl. 259, it was held proper to cross-examine the accused as to prior convictions, to affect his credibility. The decision in *State v. Mount* (N. J.) *supra*, was reversed in (1906) 73 N. J. L. 582, 64 Atl. 124, but on other grounds.

In *People v. Noelke* (1883) 94 N. Y. 137, 46 Am. Rep. 128, wherein the defendant, in a prosecution for selling lottery tickets, took the stand in his own behalf, it was held proper for the state to ask him on cross-examination, for the purpose of testing his credibility, if he had not been convicted in the Federal court of mailing lottery circulars, since an affirmative answer thereto must necessarily have tended to discredit him.

Similarly in *People v. Callahan* (1912) 151 App. Div. 666, 136 N. Y. Supp. 407, 27 N. Y. Crim. Rep. 491, it was held that questions on the cross-examination of the accused, eliciting proof of former convictions, were properly propounded to discredit his testimony.

In *People v. Cardillo* (1912) 207 N. Y. 70, 100 N. E. 615, Ann. Cas. 1914C, 255, on cross-examination the accused admitted that he had been convicted of assault three times, and that on two of the convictions he had served terms in the penitentiary. This was held proper testimony, affecting his credibility as a witness, and expressly authorized by statute.

The Oregon statute which permits a defendant to testify in his own behalf expressly restricts cross-examination to the testimony which he has given on the direct examination. *State v. Lurch* (1885) 12 Or. 99, 6 Pac. 408.

But in *State v. Deal* (1908) 52 Or. 568, 98 Pac. 165, wherein it appeared that the defendant on his cross-examination was asked and required to answer, over objection, whether he had ever been convicted of a crime, the court explained the Oregon rule as follows: "The statute provides that a defendant who voluntarily offers himself as a witness in his own behalf 'shall be deemed to have given to the prosecution a right to cross-examination upon all the facts to which he has testified regarding his conviction or acquittal.' . . . For some time after the passage of this law, there was much discussion as to the extent to which the cross-examination of a defendant in criminal actions could be pursued, but it must now be regarded as settled that it must be confined to matters properly germane to and connected with his testimony in chief. . . . In other words, a defendant cannot, under the guise of a cross-examination, be compelled, . . . to give evidence against himself; but, when he becomes a witness in his own behalf, he . . . subjects himself to such a cross-examination thereon as may tend to explain, elucidate, or affect the credibility of his testimony, and such cross-examination may be 6 A.L.R.—103.

as vigorous and searching as that of any other witness. This rule was, we think, not violated in the case at bar."

In *State v. Payne* (1893) 6 Wash. 563, 34 Pac. 317, it appeared that the cross-examiner had been permitted to ask the accused, "Were you ever convicted of a crime before?" The answer was "No." The court held that the testimony was proper, as bearing on his credibility as a witness, but that the state was concluded by this reply, and could not contradict the witness in his answer.

In *State v. Blaine* (1911) 64 Wash. 122, 116 Pac. 660, wherein the accused in a prosecution for murder was compelled to admit on cross-examination that he had been convicted of a crime and imprisoned therefor in the state of Kentucky, this was held proper evidence, going to his credibility as a witness, and expressly authorized by statute. Crim. Code 1909, Laws 1909, p. 890. See also Rem. & Bal. Code, § 2290.

In *State v. Gottfreedson* (1901) 24 Wash. 398, 64 Pac. 523, wherein the defendant in a prosecution for horse stealing offered himself as a witness, and was compelled to testify on cross-examination that he had previously been convicted of horse stealing, for the purpose of discrediting him as a witness, the question was held not properly put. The court said that the statute permits a former conviction of crime to be shown to affect credibility, but the former conviction should be proved without parading before the jury the fact that defendant had been at one time found guilty of the exact crime for which he was then on trial, since this method would unduly prejudice him.

In *State v. Overland* (1912) 68 Wash. 566, 123 Pac. 1011, the defendant in a prosecution for grand larceny, had testified in his own behalf. For the purpose of testing his credibility he was asked on cross-examination, and compelled to answer, as to a previous conviction of crime. The court held that this was proper, since the statute expressly provides that proof of previous convictions for crime is admissible on cross-examina-

tion to affect the credibility of the witness.

In *State v. Brownlow* (1916) 89 Wash. 582, 154 Pac. 1099, the defendant in a prosecution for grand larceny was asked on a cross-examination whether she had ever suffered conviction before, to which she answered that she had. The court held that this was a proper method of attacking her credibility, adding that the defendant, having taken the stand in her own behalf, had warranted her credibility as a witness, and invited impeaching questions.

In *Thornton v. State* (1903) 117 Wis. 338, 98 Am. St. Rep. 924, 93 N. W. 1107, it appeared that the accused, having taken the stand in his own behalf, was asked on cross-examination whether he had formerly been convicted of drunkenness, to which inquiry he replied in the affirmative. This was held proper testimony for the purpose of discrediting the credibility of the witness.

In *Rex v. D'Aoust* (1902) 3 Ont. L. Rep. 653, the accused in a prosecution for robbery, having testified in his own behalf, was cross-examined by the Crown attorney, who put the following question: "You have been convicted several times of indictable offenses?" Over objection this was admitted by the trial judge as bearing on the credibility of the accused as a witness. The court held that the inquiry was proper for this purpose, since, when an accused tenders himself as a witness, "he puts himself forward as a credible person, and except in so far as he may be shielded by some statutory protection, he is in the same situation as any other witness as regards liability to and extent of cross-examination."

In *Com. v. Racco* (1909) 225 Pa. 113, 133 Am. St. Rep. 872, 73 Atl. 1067, wherein the accused in a prosecution for murder took the stand on his own behalf, it was held proper for the state to ask him on cross-examination, in order to test his credibility, whether he had not been convicted and sentenced to prison for larceny, assault and battery, and for obtaining money under false pretenses, the court say-

ing: "When he offered to testify in his own behalf his credibility as an intensely interested witness became at once a question for the jury. It was proper that they should learn whatever might aid them in determining what credit should be given to his testimony, and no one was so able to enlighten them as himself. Under our statute permitting him to testify no restriction was placed upon the limit of his cross-examination. It was, therefore, largely within the discretion of the trial judge, and, unless that discretion was so abused that substantial injury has resulted to the prisoner, the judgment will not be reversed."

But see *Com. v. Garanchoskie* (1916) 251 Pa. 247, 96 Atl. 513. By the Act of March 15, 1911, P. L. 20, § 1, it is provided as follows: "Hereafter any person charged with any crime, and called as a witness in his own behalf, shall not be asked, and, if asked, shall not be required to answer, any question tending to show that he has committed, or been charged with, or been convicted of, any offense other than the one wherewith he shall then be charged, or tending to show that he has been of bad character or reputation; unless (1), he shall have at such trial, personally or by his advocate, asked questions of the witness for the prosecution with a view to establish his own good reputation or character, or has given evidence tending to prove his own good character or reputation; or (2), he shall have testified at such trial against a co-defendant, charged with the same offense." The court stated that this act was evidently intended to change the practice as established in *Com. v. Racco* (Pa.) *supra*.

It was early declared in England that proof of conviction could be made only by a copy of the record thereof. *Rex v. Warden* (1699) 12 Mod. 337, 88 Eng. Reprint, 1363.

This first statement of the rule was departed from in *Rex v. Edwards* (1791) 4 T. R. 440, 100 Eng. Reprint, 1108, 2 Revised Rep. 427, wherein it was held that a witness's infamy could be proved by his own admissions.

But the early doctrine was reaffirmed in *Rex v. Castell Careinion* (1806) 8 East, 77, 103 Eng. Reprint, 273, wherein the Lord Chief Justice said: "It cannot be seriously argued that a record can be proved by the admission of any witness." And a similar statement was made in *Rex v. Watson* (1817) 2 Starkie (Eng.) 116.

It is now provided by statute that every person charged with an offense may testify in his own behalf, but may not be questioned as to previous conviction or charge of other offenses unless he has made an attempt to show good character in himself by examining witnesses for the prosecution, or has made imputations on the character of such witnesses. Crim. Ev. Act of 1898.

In *Charnock v. Merchant* [1900] 1 Q. B. (Eng.) 474, 69 L. J. Q. B. N. S. 221, 64 J. P. 183, 48 Week. Rep. 334, 82 L. T. N. S. 89, 16 Times L. R. 139, in view of this statute it was held that to cross-examine an accused as to a previous conviction of a similar offense, to impugn his veracity character, where he had not sought to show good character by questioning witnesses for the prosecution or by casting imputations on their character, was sufficient cause for quashing a conviction in such action.

In *Rex v. Rouse* [1904] 1 K. B. (Eng.) 184, 73 L. J. K. B. N. S. 60, 68 J. P. 14, 52 Week. Rep. 236, 89 L. T. N. S. 677, 20 Times L. R. 68, 20 Cox, C. C. 592, wherein the accused said that a certain statement of the prosecutor was a lie, the court held that this was not a sufficient imputation under the statute to warrant a cross-examination of the accused as to prior convictions for window-breaking and being quarrelsome, to affect his veracity character as a witness.

The protest of an accused against the methods employed by a police inspector in picking him as the guilty one from a row of men was held not to involve imputations on the character of the inspector within the meaning of the statute, so as to authorize cross-examination of the accused as to previous convictions suffered by him. *Rex v. Preston* [1909] 1 K. B.

(Eng.) 568, 78 L. J. K. B. N. S. 335, 100 L. T. N. S. 303, 73 J. P. 173, 25 Times L. R. 280, 53 Sol. Jo. 322.

But in *Reg. v. Marshall* (1899) 63 J. P. (Eng.) 36, wherein the prisoner, testifying in her own behalf, alleged that the deceased, with whose murder she was charged, had been killed not by her, but by her husband, who was a witness against the prisoner, this was held a sufficient imputation to justify a cross-examination of the accused as to previous convictions suffered by her, to impugn her character as a witness.

In *Rex v. Westfall* (1912) 107 L. T. N. S. (Eng.) 463, 28 Times L. R. 297, 76 J. P. 335, wherein the accused cross-examined the prosecuting witness with a view to showing that he was an habitual drunkard, and had cast imputations on an officer by accusing him of assault in making the arrest, the judge permitted a cross-examination of the prisoner as to his prior convictions of crime, to affect his credibility. But this was held improper, the imputations quoted not bringing the case within the statute.

In *Rex v. Hudson* [1912] 2 K. B. (Eng.) 464, 81 L. J. K. B. N. S. 861, 107 L. T. N. S. 31, 76 J. P. 421, 28 Times L. R. 459, 56 Sol. Jo. 574, the defendant, on trial for robbery, asked two witnesses for the prosecution if it was not they who committed the robbery. The defendant was later cross-examined as to a previous conviction, which he admitted. This was held proper in its effect on his credibility, the ground having been laid therefor by the imputations cast by him on the witnesses for the prosecution.

And where the accused made an attack on the character of a witness for the prosecution by imputing fraud to him, this was held sufficient to entitle the prosecution to cross-examine the accused as to his previous conviction of crime, for the purpose of disparaging his character. *Rex v. Cohen* (1914) 24 Cox, C. C. (Eng.) 216, 111 L. T. N. S. 77, [1914] W. N. 160.

2. In absence of statute.

Even in the absence of a statutory enactment, it is generally held proper

to show on the cross-examination of the accused, that he has previously been convicted of crime, for the purpose of lessening his credibility.

Indiana.—*Vancleave v. State* (1898) 150 Ind. 273, 49 N. E. 1060; *Dotterer v. State* (1909) 172 Ind. 357, 30 L.R.A. (N.S.) 846, 88 N. E. 689; *Pierson v. State* (1919) — Ind. —, 123 N. E. 118.

Kansas.—*State v. Pfefferle* (1886) 36 Kan. 90, 12 Pac. 406; *State v. Probasco* (1891) 46 Kan. 310, 26 Pac. 749.

Louisiana.—*State v. McCoy* (1903) 109 La. 682, 33 So. 730; *State v. Clark* (1906) 117 La. 920, 42 So. 425; *State v. Posey* (1915) 137 La. 871, 69 So. 494; *State v. Suire* (1917) 142 La. 102, 76 So. 254.

Maine.—*State v. Knowles* (1904) 98 Me. 429, 57 Atl. 588.

Michigan. — *People v. Higgins* (1901) 127 Mich. 291, 86 N. W. 812; *People v. Hoffman* (1908) 154 Mich. 145, 117 N. W. 568; *People v. Kimbrough* (1916) 193 Mich. 330, 159 N. W. 533.

Missouri.—*State v. Oliphant* (1908) 128 Mo. App. 252, 107 S. W. 32.

Nevada.—*State v. Huff* (1876) 11 Nev. 17; *State v. Lawrence* (1905) 28 Nev. 440, 82 Pac. 614.

New Hampshire.—*State v. Archer* (1874) 54 N. H. 465.

North Carolina.—*State v. Holder* (1910) 153 N. C. 606, 69 S. E. 66.

Oklahoma. — *Hyde v. Territory* (1899) 8 Okla. 69, 56 Pac. 851; *Hendrix v. State* (1911) 4 Okla. Crim. Rep. 611, 113 Pac. 244; *Busby v. State* (1913) 10 Okla. Crim. Rep. 343, 136 Pac. 598.

Rhode Island.—*State v. Ellwood* (1892) 17 R. I. 763, 24 Atl. 782; *State v. Babcock* (1903) 25 R. I. 224, 55 Atl. 685; *State v. Benjamin* (1908) — R. I. —, 71 Atl. 65.

Tennessee.—*Keith v. State* (1913) 127 Tenn. 40, 152 S. W. 1029.

In *Farley v. State* (1877) 57 Ind. 331, the defendant, after testifying in chief, was asked on cross-examination if he had been convicted of horse theft, and on his denial he was then asked if he had been convicted of some other crime, to which he had answered "Yes." The court held that

this testimony was improper, saying: "Where the question involves the fact of a previous conviction, it ought not to be asked; because there is higher and better evidence which ought to be offered."

But this rule has been departed from in later cases from the same jurisdiction, and it is now proper on the cross-examination of the accused to show a prior conviction of crime for the purpose of affecting his credibility.

Thus, in *Vancleave v. State* (Ind.) supra, it was held proper to question the accused on cross-examination as to a previous arrest and conviction for larceny.

Likewise in *Dotterer v. State* (Ind.) supra, it was held that the fact of a previous conviction for crime was properly elicited on the cross-examination of the accused, for the purpose of impugning his credibility.

In *State v. Pfefferle* (Kan.) supra, the defendant was cross-examined as to a previous trial and conviction of selling liquor, for the purpose of discrediting his testimony, and over his objection he was required to answer. The court held that this was proper, saying that the tendency now is, if the question be asked for the purpose of honestly discrediting a witness, to require an answer.

In *State v. Probasco* (Kan.) supra, during the cross-examination of the accused the state was permitted, against his objection, to ask if he had been convicted of grand larceny at the last term of court, and the answer was that he had pleaded guilty as charged. The court held that the evidence was proper as tending to discredit him.

In *State v. Oliphant* (Mo.) supra, wherein the accused, in a prosecution for violating the liquor law, took the stand in his own behalf, it was held that the prosecutor was properly permitted to cross-examine him as to other convictions for like offenses in another state, to affect his credibility as a witness.

In *State v. McCoy* (La.) supra, the accused, on cross-examination, was asked if he had ever been convicted and sent to the penitentiary. The pur-

pose of the question was to affect his credibility, and to this extent it was held proper.

In *State v. Clark* (1906) 117 La. 920, 42 So. 425, the accused was questioned on his cross-examination, as to his prior conviction for crime. The court held that, for the purpose of testing the credibility of the accused as a witness, he was subject to the same rules of cross-examination as any other witness, and the question above propounded was proper.

And in *State v. Posey* (1915) 137 La. 871, 69 So. 494, it was held competent, for the purpose of testing the defendant's credibility, to question him on cross-examination as to a previous conviction of, or prosecution for, crime.

In a case where the defendant, having testified in his own behalf, was asked on cross-examination whether he was willing to admit that he had, in a previous prosecution for petty larceny, pleaded guilty, the court held that an objection to the question was properly overruled, since it legitimately tended to affect his credibility. *State v. Suire* (1917) 142 La. 102, 76 So. 254.

In *State v. Knowles* (1904) 98 Me. 429, 57 Atl. 588, the accused, who had testified in his own behalf, was required to answer an inquiry on cross-examination as to a previous conviction of crime. The court held that this was a proper method of attacking his credibility.

In *People v. Higgins* (1901) 127 Mich. 291, 86 N. W. 812, it was held that the defendant, while on the stand, was properly required to answer questions propounded by the prosecutor as to his previous conviction of several atrocious crimes.

And in *People v. Hoffman* (1908) 154 Mich. 145, 117 N. W. 568, it was held that the accused having offered himself as a witness, it was proper to cross-examine him as to a previous conviction for assault, for the purpose of impugning his credibility.

In *State v. Archer* (1874) 54 N. H. 465, the defendant, after testifying in his own behalf, was questioned as to a former conviction for felony. The

court held that this was a proper inquiry, since tending to affect his credibility as a witness.

In *State v. Huff* (1876) 11 Nev. 17, the accused was cross-examined as to several occasions of arrest and conviction for various crimes, the purpose of the inquiries being to impugn his credibility. Most of the offenses enumerated by the state were cases of assault and battery. The court held that no legitimate inference of the untruthfulness of a witness could be drawn from the fact of his frequent conviction for such offenses, and that such inquiries were therefore unduly prejudicial to the accused.

But in *State v. Lawrence* (1905) 28 Nev. 440, 82 Pac. 614, it was held that when an accused takes the stand in his own behalf, he may be cross-examined in his capacity of witness, as to previous convictions of felonious crimes, for the purpose of affecting his credibility.

In *State v. Holder* (1910) 153 N. C. 606, 69 S. E. 66, a prosecution for throwing stones at a train, one of the defendants, who had taken the stand in his own behalf, was asked if he had theretofore been convicted and served a sentence on the roads. The purpose of the question was to affect his credibility as a witness, and the court held the testimony clearly competent for this purpose.

In *Hyde v. Territory* (1899) 8 Okla. 69, 56 Pac. 851, it appeared that the trial court had permitted the prosecution to ask the defendant the question, "Were you convicted of the crime of larceny in one of the courts of this county?" The court, in affirmance, said: "The great weight of modern authorities now hold that the prosecution has the right to ask the defendant, when he takes the witness stand in his own behalf, whether or not he has been convicted of a crime, for the purpose of affecting his credibility."

In *Hendrix v. State* (1911) 4 Okla. Crim. Rep. 611, 113 Pac. 244, wherein the accused, on trial for violating the liquor law, was cross-examined for the purpose of affecting his credibility, and the state was permitted to show in this manner that he had previously

been convicted of a violation of the prohibitory liquor law, it was held that this proof was properly admitted. The court said that a conviction of felony or crime involving moral turpitude went directly to the credibility of a witness, and since the unlawful sale of intoxicating liquor involved moral turpitude, it was therefore admissible for the purpose introduced.

In *Busby v. State* (1913) 10 Okla. Crim. Rep. 343, 136 Pac. 598, the accused was required to answer on cross-examination that he had been convicted of a felony seventeen years before. An objection to this testimony on the ground that the conviction was too remote to affect credibility was disregarded on appeal, and the court held that it was competent on the issue of credibility.

In *State v. Ellwood* (1892) 17 R. I. 763, 24 Atl. 782, wherein the accused offered himself as a witness, it was held proper to cross-examine him as to a previous conviction of burglary, for the purpose of testing his credit as a witness.

In *State v. Babcock* (1903) 25 R. I. 224, 55 Atl. 685, the accused, on trial under an indictment for a common nuisance, was asked by the state's counsel on cross-examination whether he had been convicted previously for the same offense, for the purpose of affecting his credibility. The court held that this was a proper inquiry, saying: "A defendant offering himself as a witness may be asked on cross-examination, for the purpose of affecting his credibility, whether he has previously been convicted of crime or misdemeanor."

Likewise in *State v. Benjamin* (1908) — R. I. —, 71 Atl. 65, wherein the accused, while on the stand in his own behalf, was asked by the cross-examiner whether he had been previously convicted of crime, the court held that the question was properly admitted as affecting his credibility.

In *Keith v. State* (1913) 127 Tenn. 40, 152 S. W. 1029, it was held that when a prisoner elects to become a witness in his own behalf he places his credibility in issue, and it is proper on cross-examination to question

him about special acts of moral turpitude, as affecting his credit as a witness.

And see *State v. Parks* (1919) — N. M. —, 183 Pac. 433, wherein it was held that for the purpose of affecting his credibility, the accused might be cross-examined as to crimes and specific acts of violence alleged to have been committed by him.

b. Minority rule.

Some jurisdictions have held that inquiries directed to the accused on cross-examination, as to previous conviction of crime, are not competent on the question of credibility. *Lewis v. Territory* (1900) 7 Ariz. 52, 60 Pac. 694; *State v. Burton* (1895) 2 Marv. (Del.) 446, 43 Atl. 254; *McKevitt v. People* (1904) 208 Ill. 460, 70 N. E. 693; *People v. Blevins* (1911) 251 Ill. 381, 96 N. E. 214, Ann. Cas. 1912C, 451; *Daxanbeklar v. People* (1900) 93 Ill. App. 553; *People v. Duggan* (1909) 150 Ill. App. 375; *People v. Maas* (1910) 154 Ill. App. 11; *Advocate General v. Hancock* (1769) Quincy (Mass.) 461; *Com. v. Walsh* (1907) 196 Mass. 369, 124 Am. St. Rep. 559, 82 N. E. 19, 13 Ann. Cas. 642; *Com. v. Borasky* (1913) 214 Mass. 313, 101 N. E. 377; *State v. White* (1918) 81 W. Va. 516, 94 S. E. 972.

Under the Arizona statute providing that a defendant in a criminal case, who offers himself as a witness, "shall be deemed to have given the prosecution a right to cross-examine him upon all facts to which he has testified, tending to his conviction or acquittal," it has been held that to compel the defendant to testify as to whether or not he had previously been convicted of other felonies, for the purpose of affecting his credibility, would be a clear invasion of his rights under the statute. *Lewis v. Territory* (Ariz.) *supra*.

In *State v. Burton* (1895) 2 Marv. (Del.) 446, 43 Atl. 254, the defendant, on trial for pointing a pistol at another person, was asked on cross-examination if he had "ever been convicted for pointing a pistol at a man." The court held the question improper, since a conviction therefor would not necessarily have any tendency to im-

pair the defendant's credibility as a witness.

An Illinois statute of 1874 provided that conviction of a crime might be shown in criminal cases, etc., but did not state the method in which it might be shown. In applying this statute, where it was sought to show a former conviction on the cross-examination of the accused, the court said: "In criminal cases the only charge which can be proved to affect the credibility of a witness is conviction of an infamous crime, and that conviction must be proved by the record, and cannot be proved by oral testimony." *People v. Duggan* (1909) 150 Ill. App. 375.

The rule stated in *People v. Duggan* (Ill.) *supra*, had previously been applied in *McKevitt v. People* (1904) 208 Ill. 460, 70 N. E. 693, wherein the accused was a witness in his own behalf, and a former conviction of crime was shown by introduction of the record, to affect his credibility. The court held that this was the proper and only means of showing a prior conviction.

In *Daxanbeklar v. People* (1900) 93 Ill. App. 553, the court said: "It is only conviction of an infamous crime which can be shown for the purpose of affecting the credibility of a witness, and on the trial of a criminal case such conviction can only be shown by the record." And it was held improper to question the accused as to his prior sentence to reform school.

In *People v. Maas* (1910) 154 Ill. App. 11, the court, excluding testimony as to a previous conviction for violating the excise law, held that the only proper means of discrediting the witness was by proof of conviction of an infamous crime on the production of the record thereof. *Daxanbeklar v. People* (Ill.) *supra*.

Likewise in *People v. Blevins* (1911) 251 Ill. 381, 96 N. E. 214, Ann. Cas. 1912C, 451, it was held improper on the question of credibility to cross-examine the accused as to a prior conviction and term of imprisonment, since parol proof was not sufficient for the establishment thereof.

In *Advocate General v. Hancock* (1769) Quincy (Mass.) 461, the court

laid down the rule that production of the record was necessary to show a conviction.

In *Com. v. Walsh* (1907) 196 Mass. 369, 124 Am. St. Rep. 559, 82 N. E. 19, 13 Ann. Cas. 642, the court held it was not proper to ask the accused whether he had been convicted of crime, for the purpose of affecting his credibility, since there was a higher and better method of showing conviction, and that was by the record.

And in *Com. v. Borasky* (Mass.) *supra*, the court held that a record of conviction was properly introduced to discredit the accused as a witness, and the witness might be asked if he was the person described in the record, but no attempt should be made to prove his conviction without production of the record.

c. Rule in Texas.

1. Moral turpitude.

In Texas inquiries directed to the accused on cross-examination as to his previous conviction for crime, for the purpose of affecting his credibility, must relate to offenses involving moral turpitude. *Clayton v. State* (1893) — Tex. Crim. Rep. —, 22 S. W. 404; *Goode v. State* (1893) 32 Tex. Crim. Rep. 505, 24 S. W. 102; *Hargrove v. State* (1894) 33 Tex. Crim. Rep. 431, 26 S. W. 993; *Thompson v. State* (1894) — Tex. Crim. Rep. —, 26 S. W. 1081; *Bratton v. State* (1895) 34 Tex. Crim. Rep. 477, 31 S. W. 379; *Brittain v. State* (1896) 36 Tex. Crim. Rep. 406, 37 S. W. 758; *Williford v. State* (1896) 36 Tex. Crim. Rep. 414, 37 S. W. 761; *Ray v. State* (1897) — Tex. Crim. Rep. —, 43 S. W. 77; *Gass v. State* (1900) — Tex. Crim. Rep. —, 56 S. W. 73; *McDonald v. State* (1903) — Tex. Crim. Rep. —, 72 S. W. 383; *Marks v. State* (1904) — Tex. Crim. Rep. —, 78 S. W. 512; *Pollok v. State* (1907) — Tex. Crim. Rep. —, 101 S. W. 231; *Williams v. State* (1907) 51 Tex. Crim. Rep. 361, 123 Am. St. Rep. 884, 102 S. W. 1134; *Merriwether v. State* (1909) 55 Tex. Crim. Rep. 438, 116 S. W. 1148; *Burnett v. State* (1914) 73 Tex. Crim. Rep. 477, 165 S. W. 581; *Hawthorne v. State* (1916) 80 Tex. Crim. Rep. 264, 190 S. W. 184; *Johnson v. State* (1917)

80 Tex. Crim. Rep. 547, 191 S. W. 1165; Daniels v. State (1917) — Tex. Crim. Rep. —, 198 S. W. 147; Ingram v. State (1918) — Tex. Crim. Rep. —, 202 S. W. 741.

Thus, in Goode v. State (1893) 32 Tex. Crim. Rep. 505, 24 S. W. 102, the accused in a prosecution for assault was asked on cross-examination if he had not been fined three times in city court, and the objection was made that he could not be impeached in this manner. It was held that since the convictions mentioned were not of a character showing moral turpitude, they were not admissible to affect his credibility. The court said that "where the witness is charged with or convicted of an offense carrying with it the idea of moral and legal turpitude, such fact may be shown as evidence tending to affect his credibility;" but "unless such charge or conviction shows or tends to show such turpitude, it should be excluded."

In Clayton v. State, *supra*, the accused, on trial for robbery, was cross-examined as to his previous conviction of an attempt to commit burglary, to affect his credibility as a witness. The evidence was held admissible for the purpose introduced, since the crime mentioned involved moral turpitude.

In Hargrove v. State (1894) 33 Tex. Crim. Rep. 431, 26 S. W. 993, the defendant, on cross-examination, was compelled to state that he had previously been convicted of murder, but afterwards acquitted. This evidence was held to be admissible, as affecting his credibility.

In Thompson v. State (1894) — Tex. Crim. Rep. —, 26 S. W. 1081, wherein the defendant, testifying in his own behalf, was cross-examined as to prior convictions involving moral turpitude, the court held that such questions were properly put for the purpose of affecting his credibility.

In Levine v. State (1896) 35 Tex. Crim. Rep. 647, 34 S. W. 969, the accused in a prosecution for violating the liquor law was asked on cross-examination how many times he had previously been convicted for violations of the liquor law. The court

held that the question was proper for the purpose of discrediting the defendant as a witness.

But the decision in Levine v. State, *supra*, was overruled in Merriwether v. State (1909) 55 Tex. Crim. Rep. 438, 116 S. W. 1148, on the ground that a conviction for a violation of the liquor law did not involve moral turpitude.

Evidence of arrest or conviction for violations of the local option law is not properly elicited on the cross-examination of a defendant for the purpose of attacking his credibility, such violations of the law not imputing moral turpitude. Marks v. State (1904) — Tex. Crim. Rep. —, 78 S. W. 512.

In Merriwether v. State, *supra*, a prosecution for violating the local option law, the defendant was asked on cross-examination if he had been previously arrested and convicted for a violation of the prohibition law. The defendant answered "Yes," over an objection to the admissibility of such testimony on the question of his credibility. On appeal the action of the lower court was reversed, the court saying: "We understand the rule to be that charges preferred in a legal manner, and certainly convictions of crime which imply moral turpitude, are receivable in evidence as affecting the credibility of a witness of a defendant, but this rule has not been applied, we think, and should not be applied in respect to convictions which do not involve moral obliquity or of the grade of felony, or such as are not of the class that the law recognizes as involving moral turpitude."

In Williford v. State (1896) 36 Tex. Crim. Rep. 414, 37 S. W. 761, it was held to be improper to attempt to prove by the testimony of the accused on cross-examination, that he had committed or been convicted of, assault and battery, as this was not a crime imputing moral turpitude.

In Bratton v. State (1895) 34 Tex. Crim. Rep. 477, 31 S. W. 379, for the purpose of impeaching his credibility, the defendant was asked on cross-examination if he had not been previously convicted for horse theft. The question was held proper for this pur-

pose, since the conviction implied moral turpitude.

In *Brittain v. State* (1896) 36 Tex. Crim. Rep. 406, 37 S. W. 758, it was held that an attempt to impeach the credibility of the defendant on cross-examination by eliciting the information that he had been found guilty or stood charged with certain misdemeanors which did not impute moral turpitude was improper.

In *Ray v. State* (1897) — Tex. Crim. Rep. —, 43 S. W. 77, the court held that an inquiry of the accused on trial for horse theft, as to a previous conviction for the same offense, since it involved moral turpitude, was proper as affecting his credibility.

In a prosecution for burglary, wherein the defendant was asked on cross-examination if he had not previously been convicted of a felony, the court held that it was proper to compel him to answer such question, it imputing moral turpitude and going to his credibility as a witness. *Gass v. State* (1900) — Tex. Crim. Rep. —, 56 S. W. 73.

In *Williams v. State* (1907) 51 Tex. Crim. Rep. 361, 123 Am. St. Rep. 884, 102 S. W. 1134, a prosecution for robbery, wherein the accused was a witness in his own behalf, it was held proper, on cross-examination, to question him as to a prior conviction for killing his wife, for the purpose of testing his credibility.

In *Pollok v. State* (1907) — Tex. Crim. Rep. —, 101 S. W. 231, the accused in a prosecution for assault had been forced to testify on cross-examination that he had paid three or four fines for fighting, the purpose being to discredit his testimony. The court held that the admission of such testimony was error, saying: "It is permissible to examine appellant, or any other witness, on cross-examination, about matter touching his credibility; but it is not permissible to cross-examine appellant, when a witness for himself, or any other witness, on a matter that does not involve moral turpitude. Fighting is not an offense under the laws of this state that involves moral turpitude. It follows,

therefore, that the court erred in admitting this testimony."

In *McDonald v. State* (1903) — Tex. Crim. Rep. —, 72 S. W. 383, a prosecution for theft, wherein the accused became a witness in his own behalf, it was held proper to question him as to a prior conviction of theft, such evidence imputing moral turpitude, and thus being relevant on the issue of credibility.

In *Burnett v. State* (1914) 73 Tex. Crim. Rep. 477, 165 S. W. 581, the accused, in a prosecution for the theft of cattle, was asked on cross-examination if he had not previously pleaded guilty to the theft of some turkeys. He answered that he had. For the purpose of affecting his credibility this was held proper cross-examination, since theft, even if a misdemeanor, is an offense involving moral turpitude.

In *Hawthorne v. State* (1916) 80 Tex. Crim. Rep. 264, 190 S. W. 184, it was held to be competent for the state to prove on the cross-examination of the accused, and for the purpose of affecting his credibility, that within a period not too remote he had been indicted or convicted of a felony or misdemeanor imputing moral turpitude.

The cross-examination of the accused as to pending or past cases not involving moral turpitude has been held improper on the issue of credibility. *Wrenn v. State* (1918) — Tex. Crim. Rep. —, 200 S. W. 397.

But a cross-examination of the accused in a prosecution for forgery and for passing a forged instrument, as to his conviction on a former trial of the instant case, has been held improper for purposes of impeachment. *Martin v. State* (1916) 80 Tex. Crim. Rep. 275, 189 S. W. 262.

And it has been held to be improper to ask the accused on cross-examination, and for the purpose of affecting his credibility, if he has been twice convicted of perjury and finally acquitted in the same case. *Cox v. State* (1917) 81 Tex. Crim. Rep. 90, 194 S. W. 138.

2. Proof of remote conviction.

Under the Texas rule, the accused as a witness may be compelled to tes-

tify as to his previous conviction for crimes involving moral turpitude, provided they are not too remote in time. The court has not fixed any definite time within which such testimony may be introduced, since it depends upon the circumstances of the case. *Bowers v. State* (1902) — Tex. Crim. Rep. —, 71 S. W. 284; *Wesley v. State* (1905) — Tex. Crim. Rep. —, 85 S. W. 802; *Winn v. State* (1908) 54 Tex. Crim. Rep. 539, 113 S. W. 918; *Bogus v. State* (1909) 55 Tex. Crim. Rep. 127, 131 Am. St. Rep. 804, 114 S. W. 823; *Hanks v. State* (1909) 55 Tex. Crim. Rep. 455, 117 S. W. 150; *White v. State* (1909) 57 Tex. Crim. Rep. 196, 122 S. W. 391; *Oates v. State* (1912) 67 Tex. Crim. Rep. 488, 149 S. W. 1196; *Vick v. State* (1913) 71 Tex. Crim. Rep. 50, 159 S. W. 50; *Turner v. State* (1913) 71 Tex. Crim. Rep. 477, 160 S. W. 357; *Keets v. State* (1915) 76 Tex. Crim. Rep. 384, 175 S. W. 149.

Evidence of a prior conviction is properly obtained on the cross-examination of a defendant, for the purpose of affecting his credibility, unless it is shown to be so remote in period as to be inadmissible. *Keets v. State*, supra.

In *Bowers v. State*, supra, wherein it appeared that the conviction had occurred eighteen years before, the court first held that it was admissible to affect the credibility of the witness, but that the lapse of time might go to the weight of the testimony. This was the first Texas case in point, and on a rehearing it was held that fifteen or seventeen years was too remote, and that evidence of such conviction was not admissible.

In *Winn v. State* (1908) 54 Tex. Crim. Rep. 539, 113 S. W. 918, a prosecution for murder, it appeared on the defendant's cross-examination that he had been tried for murder twenty years before, and had pleaded guilty to theft fourteen years previous to the present prosecution. This testimony was held inadmissible on the question of defendant's credibility, as being too remote to show moral turpitude. The court explained the reason for exclusion as follows: "Testimony of this character after a long lapse of years

should not have been introduced where there was nothing in the record to show that defendant has not reformed. In other words, the law will not permit the early indiscretions of a witness to be brought into requisition to besmirch and becloud his subsequent life. To do so . . . would be to preclude any possible chance of a reform and would enable state's counsel to permit the early misdeeds of a subsequently useful life to be introduced to becloud and discredit the subsequently honorable and useful life."

In *Hanks v. State* (1909) 55 Tex. Crim. Rep. 455, 117 S. W. 150, it was held that testimony elicited on the cross-examination of the accused as to his conviction of horse theft some thirty years before was too remote in time to bear on his credibility as a witness.

In *Bogus v. State* (1909) 55 Tex. Crim. Rep. 127, 131 Am. St. Rep. 804, 114 S. W. 823, the court held that a conviction fifteen years before was too remote in time to warrant its reception in evidence on the cross-examination of the accused to affect his credibility.

In *White v. State* (1909) 57 Tex. Crim. Rep. 196, 122 S. W. 391, the defendant, on his cross-examination, was asked if he had ever been in the penitentiary, and he replied that he had been, some twenty-four years before. In addition he testified that he had pleaded guilty to a charge of theft four or five years back. Both these answers were admitted over objections, as going to his credibility. On appeal the court held that the first statement was too remote in time to be admissible, but the second was held near enough in time to bear on his credibility.

In *Wesley v. State* (1905) — Tex. Crim. Rep. —, 85 S. W. 802, a conviction twenty-five years before was held too remote in time to warrant its introduction in evidence on the cross-examination of the accused for the purpose of attacking his credibility as a witness.

In *Oates v. State* (1912) 67 Tex. Crim. Rep. 488, 149 S. W. 1196, the accused, in a prosecution for homicide,

was asked on cross-examination if he had not been convicted of felony on two previous occasions. As the convictions in question had been obtained, the one nineteen, and the other twelve, years before, the defense objected to testimony thereof as too remote in time to affect his credibility. It appeared that during the last nineteen years the defendant had been imprisoned, either on his two previous convictions or under the present charge, for a total of thirteen years. The court stated that since there did not appear to have been any very successful efforts at reformation, this testimony would not be improper for the purpose of impeaching the credibility of the accused.

In *Turner v. State* (1913) 71 Tex. Crim. Rep. 477, 160 S. W. 357, the accused on cross-examination was required to testify that he had been convicted of a felony about eighteen years before. This was objected to as too remote. Under the Texas law the accused as a witness may be compelled to testify as to previous indictments or convictions for felony provided they are not too remote, but the court has not fixed any definite time within which such testimony might be introduced. It depends upon the circumstances of the case. In this instance the court held that the judgment was too remote to impute moral turpitude and to affect the defendant's credibility.

In *Vick v. State* (1913) 71 Tex. Crim. Rep. 50, 159 S. W. 50, the conviction sought to be introduced to impugn the defendant's credibility had been obtained fourteen years before, at a time when the accused was a mere boy. There was no evidence that the accused had not reformed, and the court held that the evidence was inadmissible.

8. Limiting effect of testimony.

It is the duty of the court to instruct the jury that evidence introduced on the issue of credibility must be considered for that purpose alone. *Hargrove v. State* (1894) 33 Tex. Crim. Rep. 431, 26 S. W. 993; *Scoville v. State* (1903) — Tex. Crim. Rep. —, 77 S. W. 792; *Simonds v. State* (1915) 76 Tex. Crim. Rep. 487, 175 S. W. 1064.

Testimony on the cross-examination of the accused as to previous indictments must be limited in its scope to the question of credibility. Failure of the court to limit properly the effect of such evidence is ground for reversal. *Simonds v. State* (1915) 76 Tex. Crim. Rep. 487, 175 S. W. 1064.

In *Hargrove v. State* (1894) 33 Tex. Crim. Rep. 431, 26 S. W. 993, the defendant, on cross-examination in a prosecution for murder, was required to state that he had been previously convicted of murder, but afterwards acquitted. This evidence was held admissible only as affecting his credibility, but in charging the jury the court failed to limit the effect of this testimony. On appeal it was held that the failure of the court to limit the effect thereof in his written charge was reversible error.

In *Scoville v. State* (1903) — Tex. Crim. Rep. —, 77 S. W. 792, the accused, in reply to inquiries on cross-examination, stated that he had been convicted of burglary and indicted for other offenses on prior occasions. This testimony was admitted as affecting his credibility, but the judge did not limit its effect in this respect. It was held that since it is obligatory in such cases for the court to limit the effect of the testimony to the question of credibility, a failure to do so constituted reversible error.

d. Conviction of misdemeanor.

It is provided by statute in several jurisdictions that no person shall be excluded from giving evidence by reason of his prior conviction of crime, but that such conviction may be shown to affect his credibility. The purpose of such statutes is to remove the common-law disability which prevented persons convicted of infamous crimes from testifying in the courts. Since only treason, felony, and "crimen falsi" were classed as infamous crimes, it has been held in the construction of these statutes that conviction of a noninfamous crime or misdemeanor cannot be shown to affect the defendant's credibility. *People v. Schenick* (1884) 65 Cal. 625, 4 Pac. 675; *People v. Hamblin* (1885) 68 Cal.

101, 8 Pac. 687; *Bartholomew v. People* (1882) 104 Ill. 601, 44 Am. Rep. 97; *Coble v. State* (1876) 31 Ohio St. 100.

Thus, in *People v. Schenick* (1884) 65 Cal. 625, 4 Pac. 675, wherein the defendant on cross-examination was asked if he had been previously found guilty of a misdemeanor, an objection thereto was upheld.

In *People v. Hamblin* (1885) 68 Cal. 101, 8 Pac. 687, wherein the defendant on cross-examination was asked if he had not been arrested on divers occasions for shooting at individuals, the question was held incompetent for the purpose of discrediting his testimony, the statute permitting examination only as to conviction of felony.

The supreme court of Illinois, considering a similar statute, held that its purpose was simply to remove the common-law disability, and not to enlarge the class of cases wherein convictions discredit the witness, and that evidence of a conviction of a non-infamous offense was improperly elicited on the cross-examination of the accused for the purpose of discrediting him. *Bartholomew v. People* (1882) 104 Ill. 601, 44 Am. Rep. 97.

In *Coble v. State* (1876) 31 Ohio St. 100, conviction of an offense under a city ordinance was held to be incompetent to affect the credibility of a witness, under a statute providing that "no person shall be disqualified as a witness in any criminal prosecution by reason of . . . his conviction of any crime, but such . . . conviction may be shown for the purpose of affecting his credibility." The court held that the conviction referred to here was such only as would have disqualified a person from testifying in any cause, which means infamous crimes, and that violation of a city ordinance never disqualified a witness.

In other jurisdictions the courts, in applying a statute permitting "prior convictions of crime" to be shown, have construed the word "crime" as including both felonies and misdemeanors. *State v. Blitz* (1903) 171 Mo. 530, 71 S. W. 1027; *State v. Heusack* (1905) 189 Mo. 295, 88 S. W. 21; *State v. Barrington* (1906) 198 Mo. 23, 95 S. W. 235; *State v. Shanks* (1910)

150 Mo. App. 370, 130 S. W. 451; *State v. Henson* (1901) 66 N. J. L. 601, 50 Atl. 468, 616.

Thus, in *State v. Henson* (1901) 66 N. J. L. 601, 50 Atl. 468, 616, wherein the court permitted inquiries to the defendant on cross-examination as to his prior convictions of crime, the word "crime," as used in the statute, was defined as including all grades of offense, both felonies and misdemeanors.

In *State v. Manning* (1900) 87 Mo. App. 78, the defendant was asked on cross-examination if he had been convicted of issuing an unlawful prescription for intoxicating liquors. The purpose of the question was to affect his credibility. The court held this to be improper, since the conviction was not for an infamous offense, and conviction of a penal offense not infamous was not necessarily inconsistent with a good moral character.

But *State v. Manning* (Mo.) *supra*, was in effect overruled by the decision in *State v. Blitz* (1903) 171 Mo. 530, 71 S. W. 1027, wherein it was held that, on the cross-examination of a defendant, for the purpose of affecting his credibility, he may be required to state whether he has ever been convicted of any offense, either felony or misdemeanor. This decision was arrived at by construing the words "criminal offense" as including both grades of crime.

And in *State v. Heusack* (1905) 189 Mo. 295, 88 S. W. 21, wherein the testimony elicited from the accused on his cross-examination was that he had been convicted of a misdemeanor twenty-five or thirty years before, the court held this competent as affecting his credibility.

Likewise in *State v. Barrington* (1906) 198 Mo. 23, 95 S. W. 235, it was held to be proper to cross-examine the accused as to his prior conviction of a misdemeanor for the purpose of disparaging his credibility.

In *State v. Shanks* (1910) 150 Mo. App. 370, 130 S. W. 451, it was held that questions on the cross-examination of an accused, as to his prior conviction of misdemeanor, were properly propounded to affect his credibility as a witness.

Some jurisdictions have followed the Texas rule in admitting proof of any offense which involves moral turpitude, whether it is a felony or a misdemeanor. *White v. State* (1910) 4 Okla. Crim. Rep. 143, 111 Pac. 1010; *Hendrix v. State* (1911) 4 Okla. Crim. Rep. 611, 113 Pac. 244; *Keith v. State* (1912) 127 Tenn. 40, 152 S. W. 1029.

In *White v. State* (1910) 4 Okla. Crim. Rep. 143, 111 Pac. 1010, the accused, having testified in his own behalf, was asked on cross-examination if he had ever been tried on a complaint for threatened assault, and found guilty thereon. This was objected to, but admitted. The court held that this was error, since to affect credibility the offense must have been either a felony or a crime involving moral turpitude.

This rule was repeated in *Hendrix v. State* (1911) 4 Okla. Crim. Rep. 611, 113 Pac. 244, wherein the court held that, to affect his credibility, it was proper on cross-examination to question the defendant as to previous convictions for any crime involving moral turpitude, whether felony or misdemeanor.

In *Keith v. State* (1912) 127 Tenn. 40, 152 S. W. 1029, the court held that when a prisoner testifies in his own behalf, he places his credibility in issue and may be cross-examined as to specific acts for the purpose of affecting his credibility, but such acts must involve moral turpitude.

In *Williams v. State* (1905) 87 Miss. 373, 39 So. 1006, it was held to be proper for the district attorney to elicit information on the cross-examination of the accused as to his previous conviction of a misdemeanor, for the purpose of testing his credibility.

In Rhode Island, in the absence of express statute, it has been held that "a defendant offering himself as a witness may be asked in cross-examination, for the purpose of affecting his credibility, whether he has previously been convicted of crime or misdemeanor." *State v. Babcock* (1903) 25 R. I. 224, 55 Atl. 685.

In Washington, under the express provisions of a statute (Rem. & Bal. Code, § 2290), the accused may now

be questioned on cross-examination as to previous conviction for any crime, whether felony or misdemeanor, for the purpose of affecting the weight of his testimony. *State v. Overland* (1912) 68 Wash. 566, 123 Pac. 1011.

In *Thornton v. State* (1903) 117 Wis. 338, 98 Am. St. Rep. 924, 93 N. W. 1107, a question on cross-examination as to a previous conviction of drunkenness, was held to be proper as affecting the credibility of the accused as a witness.

e. Imprisonment.

Inquiries on the cross-examination of an accused, as to previous imprisonment after conviction, are competent for the purpose of affecting his credibility as a witness.

United States.—*Lang v. United States* (1904) 66 C. C. A. 255, 133 Fed. 201.

Arkansas.—*Holder v. State* (1894) 58 Ark. 473, 25 S. W. 279; *Baker v. State* (1894) 58 Ark. 513, 25 S. W. 603, 9 Am. Crim. Rep. 455; *Younger v. State* (1911) 100 Ark. 321, 140 S. W. 139.

Kentucky.—*Williams v. Com.* (1899) 21 Ky. L. Rep. 612, 52 S. W. 843; *Henderson v. Com.* (1906) 122 Ky. 296, 91 S. W. 1141; *Ge Burk v. Com.* (1913) 153 Ky. 264, 155 S. W. 381.

Louisiana.—*State v. Waldron* (1911) 128 La. 559, 34 L.R.A.(N.S.) 809, 54 So. 1009; *State v. Alexis* (1893) 45 La. Ann. 973, 13 So. 394; *State v. McCoy* (1903) 109 La. 682, 33 So. 730.

Michigan.—*People v. Cummins* (1882) 47 Mich. 334, 11 N. W. 184, 186.

New Jersey.—*Brown v. State* (1898) 62 N. J. L. 666, 42 Atl. 811.

New York.—*People v. Hovey* (1883) 29 Hun, 382; *People v. Cardillo* (1912) 207 N. Y. 70, 100 N. E. 715, Ann. Cas. 1914C, 255.

North Dakota.—*Territory v. O'Hare* (1890) 1 N. D. 30, 44 N. W. 1003.

Texas.—*Darbyshire v. State* (1896) 36 Tex. Crim. Rep. 547, 38 S. W. 173; *Elmore v. State* (1904) — Tex. Crim. Rep. —, 78 S. W. 520; *Keets v. State* (1915) 76 Tex. Crim. Rep. 384, 175 S. W. 149; *Hill v. State* (1916) 80 Tex. Crim. Rep. 232, 189 S. W. 257.

Washington.—*State v. Payne* (1893) 6 Wash. 563, 34 Pac. 317; *State v.*

Blaine (1911) 64 Wash. 122, 116 Pac. 660.

In *Lang v. United States* (1904) 66 C. C. A. 255, 133 Fed. 201, the court held that it was within the discretion of the trial court to permit an inquiry on the cross-examination of the accused as to his previous imprisonment for crime, for the purpose of impeaching his credibility as a witness.

In *Baker v. State* (1894) 58 Ark. 513, 25 S. W. 603, 9 Am. Crim. Rep. 455, the court held that it was proper to cross-examine the accused as to a previous imprisonment for another crime, to affect his credibility as a witness, he having testified in his own behalf.

And likewise in *Holder v. State* (1894) 58 Ark. 473, 25 S. W. 279, it was held that a defendant might be questioned on cross-examination as to his confinement in the penitentiary of another state, for the purpose of impeaching his credibility.

In *Younger v. State* (1911) 100 Ark. 321, 140 S. W. 139, the court held that an inquiry as to a previous confinement in the penitentiary was proper to impeach the defendant's credibility on cross-examination.

In *Ge Burk v. Com.* (1913) 153 Ky. 264, 155 S. W. 381, wherein it appeared that the accused had been cross-examined as to a previous conviction and imprisonment for felony, the court held that the questions were proper as affecting his credibility at a witness.

In *Williams v. Com.* (1899) 21 Ky. L. Rep. 612, 52 S. W. 843, wherein the accused in a prosecution for murder was compelled to testify on cross-examination that he had been confined in the penitentiary, the court stated that such testimony had repeatedly been held competent in the courts of Kentucky for the purpose of affecting the credibility of the accused.

Likewise in *Henderson v. Com.* (1906) 122 Ky. 296, 91 S. W. 1141, the court held that it was competent, for the purpose of affecting his credibility, to show on the cross-examination of an accused that he had been previously confined in the penitentiary for crime.

In *State v. Waldron* (1911) 128 La. 559, 34 L.R.A. (N.S.) 809, 54 So. 1009,

the court held that the defendant having testified in his own behalf, it was proper to inquire on cross-examination, for the purpose of testing his credibility, whether he was not an escaped convict, or fugitive from justice.

In *State v. Alexis* (1893) 45 La. Ann. 973, 13 So. 394, the court said that the position of the defendant in a criminal case who takes the stand in his own behalf is a dual one,—that of witness and accused; and as a witness, his credibility may be attacked by cross-examination. And it was held that a question whether he had previously served a term in the penitentiary was proper.

A question to the accused on cross-examination, as to whether he had previously suffered imprisonment in the penitentiary, was held to be competent to affect his credibility. *State v. McCoy* (1903) 109 La. 682, 33 So. 730.

In *People v. Cummins* (1882) 47 Mich. 334, 11 N. W. 184, 186, wherein the accused offered himself as a witness, it was held to be proper to permit the cross-examiner to ask him whether he had been previously arrested, and whether he had been imprisoned.

In *Brown v. State* (1898) 62 N. J. L. 666, 42 Atl. 811, wherein the trial court permitted the state to show on the cross-examination of the accused, that he had been confined in the state prison of another jurisdiction, this was held proper testimony on the question of credibility.

In *People v. Hovey* (1883) 29 Hun. (N. Y.) 382, it was held to be proper to cross-examine the accused as to how many times he had previously been in prison, since this legitimately affected his credibility as a witness.

In *People v. Cardillo* (1912) 207 N. Y. 70, 100 N. E. 715, Ann. Cas. 1914C, 255, wherein the accused admitted on his cross-examination that he had served terms in the penitentiary for two of three offenses of which he had been convicted, the court held that this testimony was proper as affecting his credibility.

In *Territory v. O'Hare* (1890) 1 N. D. 30, 44 N. W. 1003, the defendant in a prosecution for murder was asked

on cross-examination whether he had been in jail on two occasions. This testimony was objected to as not proper cross-examination going to his credibility. The statute in Dakota territory which permitted parties to testify as witnesses did not limit the right of cross-examination, and the court held that the inquiry was proper, since a defendant under such circumstances occupied no better position than any other witness, and within the bounds of a sound judicial discretion he could be cross-examined as to collateral facts for the purpose of affecting his credibility.

In *Darbyshire v. State* (1896) 36 Tex. Crim. Rep. 547, 38 S. W. 173, it was held that the defendant may be asked on cross-examination if he has served a term in the penitentiary.

In *Elmore v. State* (1904) — Tex. Crim. Rep. —, 78 S. W. 520, it was held to be competent to show on the cross-examination of the accused, that he had served a term in a state penitentiary, since this testimony went to his credit as a witness.

In *Keets v. State* (1915) 76 Tex. Crim. Rep. 384, 175 S. W. 149, wherein the accused was required to testify on cross-examination that he had been convicted and confined in the penitentiary, the apparent purpose being to affect his credibility, the court held that the testimony was properly admitted.

In *State v. Payne* (1893) 6 Wash. 563, 34 Pac. 317, the trial court permitted the cross-examiner to ask the defendant, "Were you ever confined in county jail?" The reply was "No." The court held that this testimony was competent as bearing on his credibility as a witness, but that the state was concluded by the reply.

And in *State v. Blaine* (1911) 64 Wash. 122, 116 Pac. 660, wherein the accused in a prosecution for murder had been compelled to admit, on cross-examination, that he had been imprisoned following a conviction in Kentucky, the court held that the evidence was proper as affecting his credibility.

It has been held in Massachusetts that an inquiry on the cross-examina-

tion of the accused as to his previous confinement for crime may be put for the purpose of affecting his credibility as a witness, provided only that objection that the record is the best evidence is waived. *Com. v. Bonner* (1867) 97 Mass. 587.

1. Effect of appeal from conviction or grant of new trial.

On the theory that a conviction destroys any presumption of innocence, it has been held proper, on the cross-examination of the accused, to show a prior conviction of crime, for the purpose of affecting his credibility, though an appeal is then pending from the judgment. *Hackett v. Freeman* (1897) 103 Iowa, 296, 72 N. W. 528; *Manning v. State* (1912) 7 Okla. Crim. Rep. 367, 123 Pac. 1029.

In *Hackett v. Freeman* (Iowa) *supra*, the court reasoned that a judgment of conviction stood as a final determination until such time as it might be reversed on appeal, and until reversal it was properly introduced on the cross-examination as bearing on the credibility of the witness.

In *Manning v. State* (Okla.) *supra*, the defendant, on cross-examination, was asked whether he had ever been convicted of manslaughter. An objection to the question was overruled, and he answered in the affirmative. The objection to the admission of this evidence was that the defendant had appealed from the conviction mentioned. The sole purpose of the evidence was to affect the defendant's credibility. It was held that where a jury has found a defendant guilty, any previous presumption of innocence is wiped out, the court stating that conviction is thus distinguished from mere arrest or indictment, and the fact that an impartial tribunal has found him guilty of a crime which indicates a want of moral character is sufficient to affect his credibility.

But in *Jennings v. State* (1909) 55 Tex. Crim. Rep. 147, 115 S. W. 587, wherein the defendant on cross-examination was asked whether he had been convicted of an offense, the judgment of conviction for which had been

suspended pending the outcome of an appeal, it was held to be error to require an answer thereto for the purpose of discrediting his testimony.

It has been held that the reversal of a judgment of conviction so far destroys the adjudication that the judgment cannot be shown on cross-examination to affect the credibility of the accused.

In *People v. Van Zile* (1913) 159 App. Div. 61, 144 N. Y. Supp. 287, wherein an attempt was made to show on the cross-examination of the accused that he had been convicted of a crime, the conviction had been reversed on appeal. The court held that the inquiry was improper for the purpose of impeachment.

But see *Hargrove v. State* (1894) 33 Tex. Crim. Rep. 431, 26 S. W. 993, wherein the defendant on cross-examination was compelled to state that he had been previously convicted of murder, although afterwards acquitted, and this testimony was held admissible

for the purpose of affecting his credibility.

In *Thompson v. United States* (1908) 30 App. D. C. 352, 12 Ann. Cas. 1004, the accused, taking the stand as a witness, was cross-examined by the prosecuting attorney as to his former trials for crime. The witness was compelled to admit that he had been tried on an indictment for murder and twice found guilty by the jury, though in each instance a new trial had been granted and the case finally dismissed. It was provided by statute that the conviction of a witness for crime may be elicited on his cross-examination to affect his credibility, but the court, excluding this testimony, said: "Though in common parlance one may be said to be convicted when found guilty by the jury, the word in its technical, legal sense denotes the judgment of a court. If the court, in the exercise of its undoubted power, sets aside the verdict, there is no conviction." R. E. B.

COLUMBUS RAILWAY, POWER, & LIGHT COMPANY, Appt.,

v.

CITY OF COLUMBUS, Ohio, et al.

United States Supreme Court — April 14, 1919.

(249 U. S. 399, 63 L. ed. 669, P.U.R.1919D, 239, 39 Sup. Ct. Rep. 349.)

Street railways — municipal franchise — obligation — changed conditions — war.

1. Increased street railway operating costs and decreased net revenues due to war conditions and to an increased wage scale fixed by the National War Labor Board, though rendering unremunerative the street railway fares fixed by municipal franchise ordinances which, by acceptance, became valid contracts, mutually binding for the twenty-five-year term named therein, do not absolve the street railway company from the obligations of its contract so as to justify it in surrendering its franchises and excuse it from giving service at the rates so fixed,—especially where it cannot be said that, taking all the years of the term together, the contract will prove unremunerative.

[See note on this question beginning on page 1659.]

Federal courts — jurisdiction — Federal question.

2. Substantial Federal questions sufficient to sustain the original jurisdiction of a Federal district court are presented by a bill which seeks to en-

join the continued enforcement of street railway franchise ordinances fixing rates on the ground that such rates, because of increased operating costs and decreased net revenues, due to war conditions and an increased

wage scale fixed by the War Labor Board, are inadequate and confiscatory, and that to compel street railway operation at unremunerative rates is to take the property of the street railway company without due process of law.

Street railways — franchise — power of municipality.

3. A municipality acting under state authority may, by ordinance, make a valid binding contract obligating it to permit the operation of a street railway upon the city streets for twenty-five years upon the terms and conditions therein set forth.

[See 25 R. C. L. 1147.]

— municipal franchise — obligation — rates.

4. A municipal ordinance granting a twenty-five-year street railway fran-

chise obligating the grantee to furnish the contemplated service for that period, and to issue and sell eight tickets for 25 cents, and give universal free transfers, constitutes, in Ohio, when accepted by the grantee, a valid contract mutually binding for the period named.

[See 25 R. C. L. 1144.]

Contracts — excuse for nonperformance — difficulty.

5. If a party charges himself with an obligation possible to be performed, he must abide by it unless performance is rendered impossible by the act of God, the law, or the other party. Unforeseen difficulties will not excuse performance. Where the parties have made no provision for the dispensation, the terms of the contract must prevail.

[See 6 R. C. L. 997.]

APPEAL by plaintiff from a judgment of the District Court of the United States for the Southern District of Ohio (Westenhaver, District J.) dismissing a bill filed to enjoin the continued enforcement of street railway franchise ordinances fixing rates. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Joseph S. Clark, Karl E. Burr, Henry A. McCarthy, Henry J. Booth, and W. O. Henderson, for appellant:

Equity has jurisdiction to hear and determine this case.

Smyth v. Ames, 169 U. S. 466, 517, 42 L. ed. 819, 838, 18 Sup. Ct. Rep. 418; *Detroit v. Detroit Citizens' R. Co.* 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410; *Cleveland v. Cleveland City R. Co.* 194 U. S. 517, 531, 48 L. ed. 1102, 1106, 24 Sup. Ct. Rep. 756.

Although these franchise grants are properly designated contracts, accurately speaking they are legislative enactments. They are laws of the city, enacted in pursuance of authority delegated to the city by the state.

Cleveland v. Cleveland City R. Co. 194 U. S. 517, 48 L. ed. 1102, 24 Sup. Ct. Rep. 756; *Wright v. Nagle*, 101 U. S. 791, 25 L. ed. 921; *Hamilton Gaslight & Coke Co. v. Hamilton*, 146 U. S. 258, 36 L. ed. 963, 13 Sup. Ct. Rep. 90; *City R. Co. v. Citizens' Street R. Co.* 166 U. S. 557, 41 L. ed. 1114, 17 Sup. Ct. Rep. 653; *Penn Mut. L. Ins. Co. v. Austin*, 168 U. S. 685, 42 L. ed. 626, 18 Sup. Ct. Rep. 223; *Walla Walla v. Walla Walla Water Co.* 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77; *St. Paul Gaslight Co. v. St. Paul*, 181 U. S.

142, 45 L. ed. 788, 21 Sup. Ct. Rep. 575; *Home Teleph. & Teleg. Co. v. Los Angeles*, 211 U. S. 265, 53 L. ed. 176, 29 Sup. Ct. Rep. 50; *Grand Trunk Western R. Co. v. South Bend*, 227 U. S. 544, 57 L. ed. 633, 44 L.R.A. (N.S.) 405, 33 Sup. Ct. Rep. 303; *Owensboro v. Cumberland Teleph. & Teleg. Co.* 230 U. S. 58, 57 L. ed. 1389, 33 Sup. Ct. Rep. 988; *State ex rel. Atty. Gen. v. Cincinnati Gaslight & Coke Co.* 18 Ohio St. 292; *Hamilton, G. C. & Traction Co. v. Hamilton & L. Electric Transit Co.* 69 Ohio St. 402, 69 N. E. 991; *Freeport Water Co. v. Freeport*, 180 U. S. 587, 45 L. ed. 679, 21 Sup. Ct. Rep. 493; *Detroit v. Detroit Citizens' Street R. Co.* 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410; *Minneapolis v. Minneapolis Street R. Co.* 215 U. S. 417, 54 L. ed. 259, 30 Sup. Ct. Rep. 118; *Milwaukee Electric R. & Light Co. v. Railroad Commission*, 238 U. S. 174, 59 L. ed. 1254, P.U.R.1915D, 591, 35 Sup. Ct. Rep. 820; *Detroit United R. Co. v. Michigan*, 242 U. S. 238, 61 L. ed. 268, P.U.R.1917B, 1010, 37 Sup. Ct. Rep. 87; *Puget Sound Traction Light & P. Co. v. Reynolds*, 244 U. S. 574, 61 L. ed. 1325, 5 A.L.R. 13, P.U.R.1917F, 57, 37 Sup. Ct. Rep. 705.

Obligations are not raised by im-

plication unless there is something in the written instrument showing an intention to impose such an obligation.

15 Am. & Eng. Enc. Law, 2d ed. 1078; 13 C. J. 559; Caverly-Gould Co. v. Springfield, 83 Vt. 396, 76 Atl. 39; Delaware & H. Canal Co. v. Pennsylvania Coal Co. 8 Wall. 276, 19 L. ed. 349.

A street railway company operating under a permissive charter and permissive municipal franchise grants may discontinue its street railway operations and cannot be forced to continue them by mandamus or injunction.

San Antonio Street R. Co. v. State, 90 Tex. 520, 35 L.R.A. 662, 59 Am. St. Rep. 834, 39 S. W. 926; State ex rel. Knight v. Helena Power & Light Co. 22 Mont. 391, 44 L.R.A. 692, 56 Pac. 685; Savannah & O. Canal Co. v. Shuman, 91 Ga. 400, 44 Am. St. Rep. 43, 17 S. E. 937; Fellows v. Los Angeles, 151 Cal. 52, 90 Pac. 137; York & N. M. R. Co. v. Reg. 1 El. & Bl. 858, 118 Eng. Reprint, 657, 7 Eng. Ry. & C. Cas. 459, 1 C. L. R. 119, 22 L. J. Q. B. N. S. 225, 17 Jur. 630, 1 Week. Rep. 358; Northern P. R. Co. v. Washington, 142 U. S. 492, 35 L. ed. 1092, 12 Sup. Ct. Rep. 283; Sherwood v. Atlantic & D. R. Co. 94 Va. 291, 26 S. E. 943.

If the company undertook to retain the benefits of the franchises and to escape liability for their burdens, particularly the rate schedules, the city would be in a position to enforce the rates. The contracts would still continue in force, and the company would be obligated to comply with their terms and conditions.

Interurban R. & Terminal Co. v. Cincinnati, 93 Ohio St. 108, 112 N. E. 186; Interurban R. & Terminal Co. v. Public Utilities Commission, 98 Ohio St. 287, 3 A.L.R. 696, P.U.R.1919B, 212, 120 N. E. 831; Columbus v. Columbus Street R. Co. 45 Ohio St. 98, 12 N. E. 651; Cincinnati & S. R. Co. v. Carthage. 36 Ohio St. 631.

The public interest cannot be invoked as a justification for demands which pass the limits of reasonable protection, and seek to impose upon the carrier and its property burdens that are not incident to its engagement.

Northern P. R. Co. v. North Dakota, 236 U. S. 588, 595, 59 L. ed. 739, 741, L.R.A.1917F, 1148, P.U.R.1915C, 277, 35 Sup. Ct. Rep. 429, Ann. Cas. 1916A, 1.

There is undoubtedly a duty resting

upon the public to see that a public utility is allowed to charge compensatory rates.

Norfolk & W. R. Co. v. Conley, 236 U. S. 605, 608, 59 L. ed. 746, 747, P.U.R. 1915C, 293, 35 Sup. Ct. Rep. 437; Interurban R. & Terminal Co. v. Cincinnati, 93 Ohio St. 108, 112 N. E. 186; Denver v. Denver Union Water Co. 246 U. S. 178, 62 L. ed. 649, P.U.R.1918C, 640, 38 Sup. Ct. Rep. 278; State ex rel. McGhee v. Black Diamond Co. 97 Ohio St. 24, L.R.A.1918E, 352, 119 N. E. 195; Henry v. Pittsburgh, C. C. & St. L. R. Co. 2 Ohio N. P. 118; Matthews v. Southern Ohio Traction Co. 5 Ohio C. C. N. S. 179; Coe v. Columbus, P. & I. R. Co. 10 Ohio St. 372, 75 Am. Dec. 518; Port Clinton R. Co. v. Cleveland & T. R. Co. 13 Ohio St. 544; Maryland Teleph. & Teleg. Co. v. Chas. Simons' Sons Co. 103 Md. 136, 115 Am. St. Rep. 346, 63 Atl. 314.

War may have such a material and vital effect upon contract obligations that performance will not be enforced, if the party claiming relief can show that, by reason of the war, the contract which he or it is called upon to perform is a materially and vitally different contract from the one that was in the contemplation of the parties at the time the contract was signed.

The Kronprinzessin Cecillie (North German Lloyd v. Guaranty Trust Co.) 244 U. S. 12, 24, 61 L. ed. 960, 966, 37 Sup. Ct. Rep. 490; Metropolitan Water Bd. v. Dick, K. & Co. [1918] A. C. 119, 8 B. R. C. 483, 87 L. J. K. B. N. S. 370, 23 Com. Cas. 148, 34 Times L. R. 113, 16 L. G. R. 1, 117 L. T. N. S. 766, [1917] W. N. 352, 82 J. P. 61, Ann. Cas. 1918C, 390; Bailly v. De Crespigny, L. R. 4 Q. B. 485, 38 L. J. Q. B. N. S. 98, 19 L. T. N. S. 681, 17 Week. Rep. 494, 15 Eng. Rul. Cas. 799; Liston v. The Carpathian [1905] 2 K. B. 42, 84 L. J. K. B. N. S. 1135, 112 L. T. N. S. 904, 31 Times L. R. 226, 20 Com. Cas. 224; Tamplin S. S. Co. v. Anglo Mexican Petroleum Products Co. [1916] 2 A. C. 397, 85 L. J. K. B. N. S. 1389, 115 L. T. N. S. 315, 32 Times L. R. 677; Brenner v. Consumers Metal Co. 41 Ont. L. Rep. 534; Krell v. Henry [1903] 2 K. B. 740, 72 L. J. K. B. N. S. 794, 89 L. T. N. S. 328, 19 Times L. R. 711, 52 Week. Ren. 246; Chicago, M. & St. P. R. Co. v. Hoyt, 149 U. S. 1, 37 L. ed. 625, 13 Sup. Ct. Rep. 779; The Styria v. Morgan, 186 U. S. 1, 46 L. ed. 1007, 22 Sup. Ct. Pen. 731; Bradford, E. & C. R. Co. v. New York, L. E. & W. R. Co.

(849 U. S. 399, 68 L. ed. 669, P.U.R.1919D, 239, 39 Sup. Ct. Rep. 349.)

123 N. Y. 316, 11 L.R.A. 116, 25 N. E. 499; Moore & Tierney v. Roxford Knitting Co. 250 Fed. 278.

A law may be constitutional when it is passed, but, as a result of future developments, it may violate some constitutional limitation.

Castle v. Mason, 91 Ohio St. 296, 110 N. E. 464, Ann. Cas. 1917A, 164.

These grants are laws, and not business or proprietary contracts, and, being laws, the 14th Amendment applies.

Interstate Consol. Street R. Co. v. Massachusetts, 207 U. S. 79, 52 L. ed. 111, 28 Sup. Ct. Rep. 26, 12 Ann. Cas. 555; Jack v. Williams, 113 Fed. 823, 76 C. C. A. 165, 145 Fed. 281; Com. v. Fitchburg R. Co. 12 Gray, 180; Sherwood v. Atlantic & D. R. Co. 94 Va. 291, 26 S. E. 943; Ohio & M. R. Co. v. People, 120 Ill. 200, 11 N. E. 347; Northern P. R. Co. v. Washington Territory, 142 U. S. 493, 35 L. ed. 1092, 12 Sup. Ct. Rep. 283; Iowa v. Old Colony Trust Co. L.R.A.1915A, 549, 131 C. C. A. 581, 215 Fed. 307.

Even if the company derived a profit from its light and power department, the revenue so derived could not lawfully be appropriated to pay the losses sustained in its street railway department. Each branch of the business must stand upon its own basis.

Northern P. R. Co. v. North Dakota, 286 U. S. 588, 59 L. ed. 739, L.R.A. 1917F, 1148, P.U.R.1915C, 277, 35 Sup. Ct. Rep. 429, Ann. Cas. 1916A, 1; Norfolk & W. R. Co. v. Conley, 236 U. S. 607, 59 L. ed. 747, P.U.R.1915C, 293, 35 Sup. Ct. Rep. 437; Knoxville Gas Co. v. Knoxville, 253 Fed. 217.

Messrs. Henry L. Scarlett and David F. Pugh, for appellees:

There is no real and colorable, but only a fraudulent and fictitious, Federal question stated in the bill.

Penn Mut. L. Ins. Co. v. Austin, 168 U. S. 685, 42 L. ed. 626, 18 Sup. Ct. Rep. 223; Siler v. Louisville & N. R. Co. 213 U. S. 175, 191, 53 L. ed. 753, 757, 29 Sup. Ct. Rep. 451.

Even when the threatened act may be the impairment of a contract, or the deprivation of property without due process of law, still, if the only means threatened to be used are resort to the courts or to legal proceedings, a case is not stated within the jurisdiction of a Federal court.

St. Paul Gaslight Co. v. St. Paul, 181 U. S. 143, 45 L. ed. 788, 21 Sup. Ct. Rep. 575; Defiance Water Co. v. Defiance, 191 U. S. 184, 48 L. ed. 140, 24 Sup. Ct. Rep. 63; Des Moines v. Des

Moines City R. Co. 214 U. S. 179, 53 L. ed. 958, 29 Sup. Ct. Rep. 553.

This company and its privies will not be heard to complain that the considerations which the company and its predecessors agreed to give for valuable grants are unlawful, or deprive them of their property without due process of law.

Interstate Consol. Street R. Co. v. Massachusetts, 207 U. S. 79, 52 L. ed. 111, 28 Sup. Ct. Rep. 26, 12 Ann. Cas. 555.

There is no right of action whatever in these bondholders.

Old Colony Trust Co. v. Omaha, 230 U. S. 100, 57 L. ed. 1410, 33 Sup. Ct. Rep. 967; Dawson v. Columbia Ave. Sav. Fund, S. D. Title & T. Co. 197 U. S. 178, 49 L. ed. 713, 25 Sup. Ct. Rep. 420.

Under the Ohio statutes full power is delegated to cities to enter into binding street railway franchise contracts.

Cleveland v. Cleveland City R. Co. 194 U. S. 517, 529, 531, 48 L. ed. 1102, 1106, 1107, 24 Sup. Ct. Rep. 756.

These contracts were made by the city in its proprietary capacity.

Interurban R. & Terminal Co. v. Public Utilities Commission, 98 Ohio St. 287, 3 A.L.R. 696, P.U.R.1919B, 212, 120 N. E. 831; Cleveland v. Cleveland City R. Co. supra; Walla Walla v. Walla Walla Water Co. 172 U. S. 1, 48 L. ed. 341, 19 Sup. Ct. Rep. 77; Vicksburg v. Vicksburg Waterworks Co. 206 U. S. 496, 51 L. ed. 1155, 27 Sup. Ct. Rep. 762; Knoxville Gas Co. v. Knoxville, 253 Fed. 217; Cincinnati v. Public Utilities Commission, 98 Ohio St. 320, 3 A.L.R. 705, P.U.R.1919C, 119, 121 N. E. 688.

The franchise contracts are not permissive merely, but impose specific duties upon the grantees, their successors and assigns, during the entire term of twenty-five years.

Delaware & H. Canal Co. v. Pennsylvania Coal Co. 8 Wall. 276, 19 L. ed. 349.

These duly accepted franchises are binding upon both parties during their entire term of twenty-five years.

Cleveland v. Cleveland City R. Co. 194 U. S. 517, 48 L. ed. 1102, 24 Sup. Ct. Rep. 756; State ex rel. Taylor v. Columbus R. Co. 1 Ohio C. C. N. S. 160; Detroit v. Detroit Citizens Street R. Co. 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410; Knoxville Water Co. v. Knoxville, 189 U. S. 437, 47 L. ed. 891, 23 Sup. Ct. Rep. 531; City R. Co.

v. Citizens' Street R. Co. 166 U. S. 557, 41 L. ed. 1114, 17 Sup. Ct. Rep. 653; Cincinnati v. Public Utilities Commission and Interurban R. & Terminal Co. v. Public Utilities Commission, supra; Quinby v. Public Service Commission, 223 N. Y. 244, 3 A.L.R. 685, P.U.R. 1918D, 30, 119 N. E. 433; Ft. Loramie v. Gress, Ohio C. C. July 9, 1918; State ex rel. Bridgeton v. Bridgeton & M. Traction Co. 52 N. J. L. 592, 45 L.R.A. 837, 43 Atl. 715; State ex rel. Grinsfelder v. Spokane Street R. Co. 19 Wash. 518, 41 L.R.A. 515, 67 Am. St. Rep. 739, 53 Pac. 719; Loader v. Brooklyn Heights R. Co. 14 Misc. 208, 35 N. Y. Supp. 996; Loader v. Atlantic Ave. R. Co. 35 N. Y. Supp. 999; Potwin Place v. Topeka R. Co. 51 Kan. 609, 37 Am. St. Rep. 312, 33 Pac. 309; Paige v. Schenectady R. Co. 178 N. Y. 102, 70 N. E. 213; Thompson v. Schenectady R. Co. 65 C. C. A. 325, 131 Fed. 577; Amesbury v. Citizens' Electric Street R. Co. (Stiles v. Citizens' Electric Street R. Co.) 199 Mass. 394, 19 L.R.A.(N.S.) 865, 85 N. E. 419.

Operation at a loss, or possible or probable bankruptcy, does not relieve this public utility from the performance of the franchise contracts, nor warrant this court in protecting the company in the violation of the contracts.

Rutland Marble Co. v. Ripley, 10 Wall. 339, 353, 19 L. ed. 955, 960, 3 Mor. Min. Rep. 291; Gas & E. Securities Co. v. Manhattan & Q. Traction Corp. 253 Fed. 453; Ft. Loramie v. Gress, Ohio C. C. July 9, 1918; Interurban R. & Terminal Co. v. Cincinnati, 93 Ohio St. 108, 112 N. E. 186; Southern R. Co. v. Hatchett, 174 Ky. 463, L.R.A.1917D, 1105, 192 S. W. 694; Southern R. Co. v. Franklin & P. R. Co. 96 Va. 693, 44 L.R.A. 297, 32 S. E. 485; Farmers' Loan & T. Co. v. Henning, Fed. Cas. No. 4,666; Talcott v. Pine Grove Twp. 1 Flipp. 120, Fed. Cas. No. 13,735; Gates v. Boston & N. Y. Air Line R. Co. 53 Conn. 333, 5 Atl. 695; Colorado & S. R. Co. v. State R. Commission, 54 Colo. 64, 129 Pac. 506; State ex rel. Naylor v. Dodge City, M. & T. R. Co. 53 Kan. 377, 42 Am. St. Rep. 295, 36 Pac. 747; State v. Sioux City & P. R. Co. 7 Neb. 357; Atty. Gen. v. West Wisconsin R. Co. 36 Wis. 466; Brownell v. Old Colony R. Co. 164 Mass. 29, 29 L.R.A. 169, 49 Am. St. Rep. 442, 41 N. E. 107; People v. Albany & V. R. Co. 24 N. Y. 261, 82 Am. Dec. 295; People ex rel. Cantrell v. St. Louis, A. & T.

H. R. Co. 176 Ill. 512, 35 L.R.A. 656, 45 N. E. 824, 52 N. E. 292.

Neither the present high cost of operation,—an economic result of the war,—nor the wage arbitration by the National War Labor Board, terminates these contracts, nor enables the company to do so.

Knoxville Gas Co. v. Knoxville, 253 Fed. 217; Loader v. Brooklyn Heights R. Co. 14 Misc. 208, 35 N. Y. Supp. 996; Loader v. Atlantic Ave. R. Co. 35 N. Y. Supp. 999.

Appellant has not made a case within the scope of the 14th Amendment.

Lowe v. Kansas, 163 U. S. 81, 41 L. ed. 78, 16 Sup. Ct. Rep. 1031; Hurtado v. California, 110 U. S. 516, 535, 28 L. ed. 232, 238, 4 Sup. Ct. Rep. 111, 292; Dent v. West Virginia, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231; Brannon, 14th Amend. 142, 143; Guthrie, 14th Amend. 70; Interurban R. & Terminal Co. v. Cincinnati, 93 Ohio St. 108, 112 N. E. 186; Interstate Consol. Street R. Co. v. Massachusetts, 207 U. S. 79, 52 L. ed. 111, 28 Sup. Ct. Rep. 26, 12 Ann. Cas. 555; Ashley v. Ryan, 153 U. S. 436, 443, 38 L. ed. 773, 4 Inters. Com. Rep. 664, 14 Sup. Ct. Rep. 865; Wight v. Davidson, 181 U. S. 371, 377, 45 L. ed. 900, 903, 21 Sup. Ct. Rep. 616; Detroit United R. Co. v. Detroit, 229 U. S. 39, 57 L. ed. 1056, 33 Sup. Ct. Rep. 697; Cleveland v. Cleveland City R. Co. 194 U. S. 517, 48 L. ed. 1102, 24 Sup. Ct. Rep. 756; City R. Co. v. Citizens' Street R. Co. 166 U. S. 557, 41 L. ed. 1114, 17 Sup. Ct. Rep. 653; Interurban R. & Terminal Co. v. Cincinnati, 93 Ohio St. 108, 112 N. E. 186; Interurban R. & Terminal Co. v. Public Utilities Commission, 98 Ohio St. 287, 3 A.L.R. 696, P.U.R.1919B, 212, 120 N. E. 831; Cincinnati v. Public Utilities Commission, 98 Ohio St. 320, 3 A.L.R. 705, P.U.R.1919C, 119, 121 N. E. 688; Ft. Loramie v. Gress, Ohio C. C. July 9, 1918; Knoxville Gas Co. v. Knoxville, 253 Fed. 217; Gas & E. Securities Co. v. Manhattan & Q. Traction Corp. 253 Fed. 453.

Mr. Justice Day delivered the opinion of the court:

The Columbus Railway, Power & Light Company filed its complaint and amended bill of complaint in the district court of the United States for the southern district of Ohio against the city of Columbus, Ohio, and officials and members of the city council of the city, asking an in-

junction against the enforcement of ordinances concerning the operation of street railways upon certain streets in the city of Columbus. Upon motions to dismiss, and for a temporary injunction, the district court held that there was no jurisdiction, as the amended bill of complaint presented no substantial Federal question, and, considering the case upon its merits, held that the amended bill did not state facts constituting a valid cause of action in equity against the defendant, and dismissed the same. An appeal was prosecuted to this court; the case has been argued and submitted:

The amended bill of complaint alleges in substance that the company and its predecessors have, since the enactment of two ordinances, hereinafter mentioned, and until the 20th of August, 1918, operated a system of street railway lines in the city of Columbus. The two ordinances in question are referred to in the bill and attached thereto. The one, denominated the Blanket Franchise Ordinance, was passed February 4, 1901, and the other, called the Central Market Franchise Ordinance, was passed January 1, 1901. The allegations as to these two ordinances are supplemented by a statement of certain so-called perpetual franchise ordinances on certain streets. The two ordinances above referred to are each for the term of twenty-five years. The ordinances were duly accepted by the grantees thereof. Under the provisions of the Blanket Franchise Ordinance the grantee and its successors are required to issue and sell eight tickets for 25 cents, and give universal free transfers. The issue and sale of such tickets continued until August 20, 1918, when, it is alleged, the franchise under that ordinance was surrendered and canceled by the railway company. Under the Central Market Franchise Ordinance the company issued and sold eight tickets for 25 cents, and gave universal transfers, and continued so to do until August 20, 1918, when, it is alleged, the fran-

chise was surrendered and canceled by the company.

The bill sets forth allegations as to the extent of the business of the company,—that its railway system includes more than 110 miles of main track, and supplies the only street railway service in the city of Columbus, except a very limited service furnished by interurban cars running at long intervals upon certain streets; that the company also supplies power for war and industrial purposes, and is the only commercial company furnishing electricity in the city of Columbus. That Columbus and its suburbs contain a population of more than 250,000 persons, and constitute a large industrial, manufacturing, military, and railroad center. That more than 25,000 persons are employed in the manufacture of munitions, clothing, and a great variety of other war materials for use directly by the United States government, and for the use of others furnishing war supplies to the government; also large railroad shops in which are employed many thousands of persons engaged in the making and repair of railroad engines, cars, and other equipment used and to be used by the United States Railroad Administration. That a large majority of the employees of these shops do and must depend upon the street railway service of the company as their means of transportation to and from their places of employment; and in said area is located the Columbus Barracks in which are quartered more than one hundred thousand recruits per annum, who also are dependent upon said street railway service. That the discontinuance or impairment of the plaintiff's street railway service would cause irreparable harm to the government of the United States, to the city of Columbus, and to all persons dependent upon the service. That the company has more than twelve million dollars invested in the street railway lines and equipment. It has large amounts of outstanding mortgage bonds, of which the sum of

\$7,295,000 is chargeable against its street railway property, the annual interest charged being more than \$333,000. The operation and management of the company show increased and increasing costs of operation and decreased and decreasing net revenue as a result of the war in which the United States was then engaged. The bill charges increases in the cost of coal and in wages paid to the employees. The net earnings of the operations of the lines for the twelve months ending June 30, 1918, after deducting operating expenses, taxes, and a proper charge for depreciation, were \$301,987, an amount insufficient by more than \$31,000 to pay the interest on the outstanding bonds of the company, properly chargeable to the railroad property, and barely enough to pay 2½ per cent on the value of the property employed by the company in furnishing street railway service to Columbus. That in June, 1918, the street railway employees of the company demanded an increase in wages, and inaugurated a strike, which resulted in the discontinuance of the service of the company for two days. That the controversy was referred to the National War Labor Board, which Board on July 31, 1918, rendered its decision increasing the wages of the street railway employees more than 50 per cent, thereby increasing the operating expenses of the street railway line by about \$560,000 per year. It is averred that as a result of such operations for the current year ending June 30, 1919, the gross earnings will fall short of paying expenses, depreciation, and taxes by approximately \$250,000, and that there will be no earnings from which to pay its interest charges, or to yield any return to the company on the value of its property. That on August 20, 1918, the company surrendered and canceled its Blanket franchise and its Center Market franchise by notification in writing addressed to the city of Columbus, the mayor, council, and clerk thereof. The company charges that the

rates of fare prescribed by the terms and conditions of the two ordinances were not, either before or when said franchises were surrendered as above stated, and would not be, if longer enforced against the company, sufficient to enable it to maintain its street railway property in good order and repair and to perform its duty as a public utility; that the further operation of the street railway lines in the city of Columbus under the two ordinances would be not only impracticable, but impossible, and that the enforcement of the said rates of fare would violate the 14th Amendment to the Constitution of the United States. That said rates of fare are inadequate and confiscatory, and their enforcement will deprive the company of its property without due process of law. The company charges that the defendants, unless enjoined, will attempt to force it to continue to operate its street railway lines under the said Blanket and Center Market franchises in violation of rights secured to it by the 14th Amendment to the Constitution. The amended bill further sets forth that controversies, confusion, risks, and multiplicity of suits will result from the resistance of the company to the enforcement of the inadequate and confiscatory rates of fare prescribed in said ordinance. The bill prays for an injunction restraining the defendants from compelling the company, or attempting so to do, to operate its lines of street railway in the city of Columbus under the said ordinances; from in any way forcing, compelling, or attempting to compel it, to charge and collect only the rates of fare prescribed by the two ordinances for carrying passengers, and from interfering in any way with the operation by the company of the lines of street railway covered by the said perpetual franchises.

In the written notice of surrender of the franchises, attached to the bill as part thereof, the alleged facts as to the operation of the company are set forth much as stated in the

amended bill, and the award of the National War Labor Board is set out. The request of February 25, 1918, to the city council, to authorize the company to charge higher rates, is stated, which was refused, as was a later request. A recital of the recommendation of the War Labor Board for increased rates of fare is also set out in the written notice. The statement is made that the company refused to continue the issue and sale of tickets as prescribed in the Blanket franchise and Center Market ordinances and to longer operate its cars thereunder; that in order to give good street railway service to the people of Columbus the company will continue to operate the street railway lines, but not under the two franchises or either of them, upon all of the streets of the city, until notified by it to withdraw from those streets not covered by the aforesaid perpetual franchises, and the company gave notice that it would thereafter charge 5 cents for a single ride and 1 cent for each transfer.

The district court held that the bill made no case properly invoking the jurisdiction of a Federal court upon constitutional grounds; that upon the merits, which the district court considered, the bill should be dismissed for want of equity.

As to the jurisdiction of the court: If the court had decided the case upon the question of jurisdiction alone, that question should have been certified here, and none other would have been presented upon such appeal. Judicial Code, § 238 [36 Stat. at L. 1157, chap. 231, Comp. Stat. 1916, § 1215.] As we have said, the court decided the case upon the merits, and dismissed the bill. As a constitutional question is involved, the appeal brings the whole case here. We are of opinion that there was jurisdiction in the

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question.

district court to entertain the bill, as it presented questions arising under the 14th Amendment to the Federal Constitution not so wholly lacking

in merit as to afford no basis of jurisdiction. Jurisdiction does not depend upon the decision of the case, and should be entertained if the bill presents questions of a character giving the party the right to invoke the judgment of a Federal court. We think the elaborate and careful opinion of the district judge of itself shows that substantial questions arising under the Federal Constitution were presented by the bill and that the court had jurisdiction.

Upon the merits the decision of the case turns upon the nature and character of the ordinances granting the twenty-five-year franchises. The theory upon which the bill was framed and the case argued here by appellant, is that the grants were legislative in character, and gave to the railway company the right and privilege of using the streets of the city for a period of twenty-five years; that to compel their operation at unremunerative rates is to take the property of the company without due process of law, in violation of the 14th Amendment. The insistence on the part of the city is that, under the controlling laws of Ohio, in force when these ordinances were passed and accepted, and the terms of the ordinances, binding contracts were created, obligating the city, which had authority from the state for that purpose, to permit the operation by the company upon the streets of the city for the period of twenty-five years upon the terms and conditions set forth in the ordinances.

That a city, acting under state authority, may, in matters of proprietary right, make binding contracts of the nature contained in these ordinances, is well established by the adjudications of this court. *Vicksburg v. Vicksburg Waterworks Co.* 206 U. S. 496, 51 L. ed. 1155, 27 Sup. Ct. Rep. 762.

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Whether these ordinances constituted such contracts depends upon the proper construction of the stat-

utes of Ohio in force at the time, and the terms of the ordinances in question.

It is conceded that the statutes of Ohio regulating this matter are substantially the same as those set forth in the margin of the report of the decision of this court in *Cleveland v. Cleveland City R. Co.* 194 U. S. 517, 48 L. ed. 1102, 24 Sup. Ct. Rep. 756. After the consideration therein given them, it would be superfluous to state them again or to undertake to repeat the reasons which impelled the decision of the court. In the *Cleveland Case* this court held that upon acceptance of the ordinance it became a binding contract, governed by the rates of fare authorized to be charged during the period of twenty-five years for which the ordinance ran; that the rates contracted for became binding upon the city, and could not be altered by subsequent municipal action consistently with the constitutional rights of the railway company. Summing up the matter this court said: "In reason, the conclusion that contracts were engendered would seem to result from the fact that the provisions as to rates of fare were fixed in ordinances for a stated time and no reservation was made of a right to alter; that by those ordinances existing rights of the corporations were surrendered, benefits were conferred upon the public, and obligations were imposed upon the corporations to continue those benefits during the stipulated time. When, in addition, we consider the specific reference to limitations of time which the ordinances contained, and the fact that a written acceptance by the corporations of the ordinances was required, we can see no escape from the conclusion that the ordinances were intended to be agreements binding upon both parties, definitely fixing the rates of fare which might be thereafter charged." 194 U. S. 536.

While the precise question now involved was not presented to the court in *Interurban R. & Terminal Co. v. Public Utilities Commission*,

98 Ohio St. 287, 3 A.L.R. 696, P.U.R. 1919B, 212, 120 N. E. 831, it is evident that the supreme court of Ohio takes the same view of the effect of such ordinances as was declared by this court in the *Cleveland Case*. In the opinion in the *Interurban Railway Case* the previous Ohio cases, as well as the decisions of this court, are reviewed, and the conclusion as to the effect of the Ohio statutes is in accord with that announced by this court.

The ordinances involved in this case are specific in their terms, and in the so-called *Blanket Franchise Ordinance* they obligate the company, during the life of the franchise, to furnish adequate and efficient service and first-class, commodious cars for the accommodation of its patrons. The company is authorized to charge certain fares during the term named, and no more. It is required to run cars upon certain streets, not in excess of certain intervals. Upon the expiration of the franchise the company, unless a further renewal be granted, was obligated to remove its tracks, etc., from the streets of the city, leaving the same in good condition.

In the *Central Market Franchise Ordinance* the time was fixed for the running of the cars, and the size of the trains was regulated. The company was obligated to pay the city 2 per cent of the gross receipts from local passenger fares during the term of the franchise. The grant was expressly limited to twenty-five years. Upon the expiration of that period the city had a right to purchase upon giving notice two years before the expiration of the term of its intention to do so. We can have no doubt that, under the authority of the laws referred to, and in view of the terms of the ordinances in question, and the acceptances by the grantees, the city of Columbus made valid and binding contracts with the companies, binding for the term of twenty-five years. By these contracts, obligatory alike upon the city

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and the company, the city granted the right to use the streets and the company bound itself to furnish the contemplated service at the rates of fare fixed in the ordinances. We cannot agree with the contention of the appellant that these were permissive franchises, granted and accepted with the right upon the part of the company to abandon the uses and purposes for which the franchises were granted because the rates fixed became unremunerative, as alleged in the amended bill. The authority under which the city acted came from the state, and was granted by proper statutes passed for that purpose. The contracts were made between the city and the company, and became mutually binding for the period named in the ordinances. This case does not involve the remedies which may be invoked against a street railway company which is or may become insolvent because of conditions arising since it entered into a given contract. The company seeks now by its own action to terminate the contracts, still binding upon it by their terms as to rates of fare to be charged, and seeks to have the aid of a court of equity by enjoining the city from any further requirement of service under them.

There is no showing that the contracts have become impossible of performance. Nor is there any allegation establishing the fact that, taking the whole term together, the contracts will be necessarily unprofitable. This case is not like the *Denver Waterworks Case*, 246 U. S. 178, 62 L. ed. 649, P.U.R.1918C, 640, 38 Sup. Ct. Rep. 278, and the *Detroit United R. Co. Case*, 248 U. S. 429, 63 L. ed. 341, P.U.R.1919A, 929, 39 Sup. Ct. Rep. 151, in both of which the franchise to use the streets of the city had expired by limitation, and it was sought to require continued operation of a waterworks system in the one case and in the other of a street railway system, under rates which would afford no adequate return to the companies. In this case the company seeks the aid

of a court of equity to avoid contracts duly made and entered into while the same are yet in force.

We are unable to find in the allegations in this bill any statement of facts which absolves the company from the continued obligation of its contracts unless the facts to which we have referred bring the case, as is contended, within the doctrine of *vis major*, justifying the company in its attempt to surrender its franchise, and be absolved from further obligation.

We come, then, to consider whether the amended bill shows the happening of an event or events which have released the company from the obligations of the contract, and authorized it to cancel the same upon the surrender of its franchise. Justification for that course is said to exist in the conditions following the World War and resulting therefrom, particularly, in the great increase in wages by the arbitral award of the War Labor Board, which was due to the necessity of meeting the high cost of living as a direct result of war conditions. This, it is contended, presents a situation that made the subsequent keeping of the contract practically impossible except at a ruinous loss to the company. It is insisted that the principle recognized by this court in *The Kronprinzessin Cecilie* (North German Lloyd v. Guaranty Trust Co.) 244 U. S. 13, 61 L. ed. 960, 37 Sup. Ct. Rep. 490, when applied to this case, shows the existence of conditions excusing the performance of the contract. In that case it was held that the master and owner of the German steamship *Kronprinzessin Cecilie* were justified in apprehending that she would be seized as a prize if she completed her voyage to Plymouth and Cherbourg on the eve of the war, and her return to this country was a reasonable and justifiable precaution in view of the situation; that there was no liability for the shipments of gold agreed to be carried in that case; that the contract not making an exception in the event of war intervening before de-

livery of the cargo, the circumstances showing peril of belligerent capture afforded an implied exception to the carrier's undertaking.

Much reliance is had by the appellant on the language used by Mr. Justice Jackson, speaking for this court in *Chicago, M. & St. P. R. Co. v. Hoyt*, 149 U. S. 1, 14, 15, 37 L. ed. 625, 629, 630, 13 Sup. Ct. Rep. 779, wherein it was said: "There can be no question that a party may by an absolute contract bind himself or itself to perform things which subsequently become impossible, or pay damages for the nonperformance, and such construction is to be put upon an unqualified undertaking, where the event which causes the impossibility might have been anticipated and guarded against in the contract, or where the impossibility arises from the act or default of the promisor. But where the event is of such a character that it cannot be reasonably supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words, which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens."

Particular reliance is had upon the last sentence of the paragraph just quoted. This language was used in interpreting a contract of doubtful import, as the context shows. Such interpretation was made in view of the situation of the parties at the time when the contract was made, and in view of the nature of the undertaking under consideration. It certainly was not intended to question the principle, frequently declared in decisions of this court, that if a party charge

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himself with an obligation possible to be performed he must abide by it unless performance is rendered impossible by the act of God, the law, or the other party. Unforeseen difficulties will not excuse performance. Where the parties have made no provision

for a dispensation, the terms of the contract must prevail. *United States v. Gleason*, 175 U. S. 588, 602, 44 L. ed. 284, 289, 20 Sup. Ct. Rep. 228, and authorities cited; *Carnegie Steel Co. v. United States*, 240 U. S. 156, 164, 165, 60 L. ed. 576, 578, 579, 36 Sup. Ct. Rep. 342. The latest utterance of this court upon the subject is found in *Day v. United States*, 245 U. S. 159, 62 L. ed. 219, 38 Sup. Ct. Rep. 57, in which it was said: "One who makes a contract can never be absolutely certain that he will be able to perform it when the time comes, and the very essence of it is that he takes the risk within the limits of his undertaking. The modern cases may have abated somewhat the absoluteness of the older ones in determining the scope of the undertaking by the literal meaning of the words alone. The *Kronprinzessin Cecilie* (North German Lloyd v. Guaranty Trust Co.) 244 U. S. 12, 22, 61 L. ed. 960, 965, 37 Sup. Ct. Rep. 490. But when the scope of the undertaking is fixed, that is merely another way of saying that the contractor takes the risk of the obstacles to that extent."

In the present case the terms of the contract are not doubtful. The term for which the company was given the right to use the streets of the city was definitely stated, and the terms, including the rates of fare which the company might charge, were explicitly laid down. There is no occasion to interpret general terms in the light of the intention of the parties or the circumstances of the case.

In the *Kronprinzessin Cecilie* Case the unexpected event which excused performance was the imminent danger of the capture of the vessel by a belligerent, which would have ended the possibility of performing the contract.

In *Metropolitan Water Bd. v. Dick, K. & Co.* decided by the House of Lords November 26, 1917, [1918] A. C. 119, 8 B. R. C. 483, 87 L. J. K. B. N. S. 370, 28 Com. Cas. 148, 34 Times L. R. 113, 16 L. G. R. 1, 117 L. T. N. S. 766, [1917] W. N. 352,

82 J. P. 61, Ann. Cas. 1918C, 390, a firm of contractors contracted with a water board to construct a reservoir to be completed within six years, subject to a proviso that if, by reason of any difficulties, impediments or obstructions, howsoever occasioned, the contractor should, in the opinion of the engineer, have been unduly delayed or impeded in the completion of the contract, it should be lawful for the engineer to grant an extension of time for completion. By a notice given by the Ministry of Munitions in February, 1916, in exercise of the powers conferred by the Defense of the Realm Acts and Regulations, the contractors were required to cease work on their contract, which they did. It was held that the provisions for extending the time did not apply to the prohibition of the Ministry; that the interruption created by the prohibition was of such a character and duration as to make the contract when resumed a different contract from the contract when broken off, and that it had ceased to be operative. In that case there was a direct intervention of the power of the government, a feature not appearing in the case now under consideration.

It is undoubtedly true that the breaking out of the World War was not contemplated, nor was the subsequent action of the War Labor Board within the purview of the parties when the contract was made. That there might be a rise in the cost of labor, and that the contract might at some part of the period covered become unprofitable by reason of strikes or the necessity for

higher wages, might reasonably have been within their contemplation when the contract was made, and provisions made accordingly. There is no showing in the bill that the War or the award of the War Labor Board necessarily prevented the performance of the contract. Indeed, as we have said, there is no showing, as, in the nature of things, there cannot be, that the performance of the contract, taking all the years of the term together, will prove unremunerative. We are unable to find here the intervention of that superior force which ends the obligation of a valid contract

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by preventing its performance. It may be, and, taking the allegations of the bill to be true, it undoubtedly is, a case of a hard bargain. But equity does not relieve from hard bargains simply because they are such. It may be that the efficiency of the service and fairness in dealing with the company which performs such important and necessary service ought to require an advance in rates; such was the strongly announced opinion of the War Labor Board. But these and kindred considerations address themselves to the duly constituted authorities having the control of the subject-matter.

We reach the conclusion that the District Court was right in holding that this bill presented no grounds absolving the company from its contract, and justifying the surrender of its franchise. It follows that the decree is affirmed.

ANNOTATION.

Right of public service corporation to judicial relief from contract rates which have become inadequate.

The power of a Public Service Commission to increase franchise rates is discussed in the note in 3 A. L. R., at page 730. The present note is confined to the right of a public service corporation to relief from the courts.

It is uniformly held, where a valid

contract exists between a public utility company and a municipality for the furnishing of a stipulated service at a stipulated price, that the company cannot be relieved of the obligations of the contract and the rates increased because of the changed conditions ex-

isting at the present time, rendering the performance unprofitable. *COLUMBUS R. POWER & LIGHT CO. v. COLUMBUS* (reported herewith) ante, 1648; *Ottumwa R. & Light Co. v. Ottumwa* (1919) — Iowa, —, 173 N. W. 270 (street railways); *Moorhead v. Union Light, Heat & P. Co.* (1918) 255 Fed. 920 (gas company); *Michigan R. Co. v. Lansing* (1919) 260 Fed. 322.

A gas company is not relieved of the obligations of its contract to furnish gas at not above a stipulated rate, by reason of the fact that performance has become unprofitable. *Bismark Gas Co. v. District Court* (1919) — N. D. —, P.U.R.1919C, 394, 170 N. W. 878. A similar decision with reference to a railway appears in *Interurban R. & Terminal Co. v. Cincinnati* (1915) 93 Ohio St. 108, 112 N. E. 186.

It has been held that a public utility company is not entitled to be relieved of its contract with a municipality, even though by the terms of such contract the municipality reserves the right to regulate rates. *Muscatine Lighting Co. v. Muscatine* (1919) 256 Fed. 929. It was urged in this case that because the rates involved were confiscatory the utility company was deprived by the state of its property without due process of law, and that it was denied the equal protection of the law, and the 14th Amendment to the Constitution of the United States was invoked. In answer to this contention it is stated that "it must be apparent that, if the confiscatory rate is fixed not by the municipality, but by the utility company, the state has done no act 'depriving' the company of its constitutional rights. It must likewise be apparent that if the rate is the joint act of the utility company and the city, if the utility company has consented to the rate, it has waived the constitutional right which it might otherwise assert, and I am convinced that if a rate is fixed by agreement of the utility company, which at the time is a reasonable rate, but which thereafter becomes confiscatory without any act of the state, but simply as a result of industrial conditions, that the prohibition of the 14th Amendment upon the state is not

violated by the state. This is a serious business, restraining the sovereign act of a state. There is no constitutional guaranty of compensatory rates. So far as income and profits are concerned the utility corporation stands exactly in the same position as the building corporation or the street improvement company. It may make money; it may lose money; but only when the state has acted affirmatively, to the deprivation of reasonable income upon actual investment, can constitutional guaranty be invoked; and where the utility company consents to the act of the state there is not that 'deprivation' or 'denial' which the Constitution forbids. So that I am satisfied that the utility companies are bound by these contracts."

As appears from the case just discussed, the foregoing cases proceed upon the theory that changed conditions do not authorize a court to relieve the public utility company from the obligations of its contract. The court in *Moorhead v. Union Light, Heat & P. Co.* (1918) 255 Fed. 920, thus concisely states the question: "Does the fact that defendant's contract with the city has, by reason of the European War, become unprofitable, justify the court in releasing defendant from the contract? Does a public utility company which contracts to supply the public with a commodity like gas or electricity occupy a different position from other contractors who have agreed to supply articles the cost of which has been greatly enhanced by the war? Is a public utility company entitled to modify its contract whenever a change is necessary in order to make performance profitable?" Answering these questions, the court states: "It is conceded in argument that the rule in the Federal courts in actions at law is that a party is bound by his contract, though performance results in loss. That is settled by the court of appeals of this circuit in the recent case of *Berg v. Erickson* (1916) L.R.A.1917A, 648, 148 C. C. A. 415, 234 Fed. 817. From a careful review of the authorities, Judge Sanborn there states that in some of the state courts a rule has

been developed that, when conditions arise of such a character that the court can say that they were not within the contemplation of the parties at the time the contract was made, such a change of situation will excuse a violation of the contract. He concludes, however, as follows: 'But no decision of the Supreme Court or of any Federal court to this effect has been cited or discovered, which goes so far, and the rule adopted by the Supreme Court which must prevail here is otherwise.' . . . Conceding this to be the rule at law, counsel for defendants insist that the rule in equity is different, and that a court of equity will not specifically enforce a contract when a change in the situation has occurred, of such a character that the parties at the time of making the contract did not have it in contemplation. Controlling decisions of the Federal courts, however, are also fatal to this contention. The question has been directly passed upon, and contracts much more inequitable than the one here involved were enforced in the following cases: *Rutland Marble Co. v. Ripley* (1870) 10 Wall. (U. S.) 339, 19 L. ed. 955, 3 Mor. Min. Rep. 291; *Franklin Teleg. Co. v. Harrison* (1892) 145 U. S. 459, 471, 36 L. ed. 776, 780, 12 Sup. Ct. Rep. 900; *Guffey v. Smith* (1915) 237 U. S. 101, 115, 59 L. ed. 856, 864, 35 Sup. Ct. Rep. 526. These cases all decide that in determining whether equitable relief should be granted with respect to a contract the court must place itself in the position occupied by the parties at the time the contract was made, and not at the time at which it is to be performed. If at the time it was made the contract was fair, and free from fraud, mistake, or imposition, parties must be left free to make their contracts and it is the duty of courts to enforce them as made." The court in *Ottumwa R. & Light Co. v. Ottumwa* (1919) — Iowa, —, 173 N. W. 270, after sustaining the validity of the contract, states that "the company could have insisted, but did not insist, that there should be provision for meeting changed conditions. It could have refused, but did not refuse, to

enter into contract unless such provision was made. It follows that its only standing is that of the victim of an improvident contract. For that, chancery cannot interfere by injunctive relief." In *Interurban R. & Terminal Co. v. Cincinnati* (1915) 93 Ohio St. 108, 112 N. E. 186, an action by a municipality to enjoin a railway company from charging fares in excess of that provided in a contract between the municipality and the railroad company, it was insisted by the railroad company that the enforcement of the terms of the contract would work hardship and irreparable injury to the company, and in support of this proposition cases were cited to the effect that neither the state nor any of its agencies can by regulation or legislation withhold from the owners of the railroad just compensation for its services. In answer to this contention, the court states: "In this case we are dealing with the subject of contracts. It implies a meeting of minds. It is much to be regretted if the amount which the Interurban Company is required to pay to the Cincinnati company for the use of its tracks is too large a proportion of the fares received, and it is equally to be regretted if the fare provided by the contract itself does not furnish a compensatory return to the company. The presumption is that it was to the interest of the village and to every municipality to provide such a compensation for the services to be rendered by the public utility as will induce the investment of the capital necessary to the furnishing of the service. In fact, it may be said that it is the duty of the municipal and other authorities to provide sufficient compensation. It is equally the duty of the company not to contract to perform a service for less compensation than is proper. But we are not able to see how the court can alter the terms of the contract in this case, as the parties made it. The only thing the court can do is to enforce the contract as it finds it, and to hold that as long as the company continues to operate under the franchise it must submit to the terms thereof."

It has been stated that where the

obligations of a street railroad company arise out of a contract obligation voluntarily assumed by the defendant there is no law which would relieve the company from this obligation unless it is modified or abrogated by some lawful means; that "contracts of public service corporations in that regard stand on the same footing as those of individuals. . . . The mere fact that its [the street railway company's] employees demand wages which it regards as excessive does not relieve it from that duty, nor does it furnish a legal justification for its failure to fulfil its obligation because its rate of fare is inadequate to enable it to receive a fair return on its investment, and its bondholders are in no better position in that regard than its stockholders." *Public Service Commission v. International R. Co.* (1918) 185 App. Div. 220, 172 N. Y. Supp. 551. The order entered in this case directing a writ of mandamus to issue against the railroad company to compel it to perform its public duties was reversed by the court of appeals in (1918) 224 N. Y. 631, P.U.R.1919B, 210, 120 N. E. 727, upon it appearing that the resumption of the public duties required the railroad company to take back strikers who demanded a retroactive scale of wages, involving a present outlay which the company did not have and could not borrow, the court of appeals stating that under those facts mandamus would not issue, because obedience was impossible. It is further stated by the court of appeals: "We do not say that there are no remedies, where a corporation concedes itself powerless to fulfil its public duties. It is enough for our present purposes that they do not include mandamus."

It seems clear that such a contract can be modified by consent of both parties, and this is the theory of *Black v. New Orleans R. & Light Co.* (1919) — La. —, 82 So. 81.

The action of the National War Labor Board in increasing wages, which are subsequently paid by the utility company, does not entitle the company to relief from its contract. *COLUMBUS*

R. POWER & LIGHT Co. v. COLUMBUS (reported herewith) ante, 1648; *Ottumwa R. & Light Co. v. Ottumwa* (1919) — Iowa, —, 173 N. W. 270.

Under this theory relief in various forms has been denied to public utilities companies. Injunction against the municipality to restrain it from enforcing the contract has been denied. *COLUMBUS R. POWER & LIGHT Co. v. COLUMBUS* (reported herewith); *Ottumwa R. & Light Co. v. Ottumwa* (Iowa) supra; *Moorhead v. Union Light, Heat & P. Co.* (1918) 255 Fed. 920; *Michigan R. Co. v. Lansing* (1919) 260 Fed. 322. In *Interurban R. & Terminal Co. v. Cincinnati* (1915) 93 Ohio St. 108, 112 N. E. 186, an injunction was granted to a city against a street railway company which continued to operate under the terms of a franchise, to restrain it from charging fare in excess of that provided in the franchise, which had been accepted by the city and which constituted a binding contract. A writ of prohibition was denied to a gas company which, by means of the writ, was attempting to restrain a court from proceeding in an action by the city to restrain the gas company from charging higher rates than those fixed in an ordinance which was accepted by the gas company, thus creating a contract. *Bismark Gas Co. v. District Ct.* (1919) — N. D. —, P.U.R.1919C, 394, 170 N. W. 878. A street railway company which had a contract with a municipality for the furnishing of street car service at a specified rate was held not entitled to set aside an order of the Public Service Commission, forbidding it to put into effect a proposed withdrawal of the sale of tickets as specified in the contract in *Trenton & Mercer County Traction Corp. v. Trenton* (1917) 90 N. J. L. 378, P.U.R. 1918A, 10, 101 Atl. 562, affirmed without opinion in (1918) 91 N. J. L. 719, 103 Atl. 1054.

The general question of the right of parties to a contract, the performance of which is interfered with or prevented by war conditions or acts of government in the prosecution of war, is discussed in the note in 8 A.L.R. 21. W. A. E.

SNELLING STATE BANK OF ST. PAUL, Respt.,
v.
MATHIAS CLASEN, Appt.

Minnesota Supreme Court — April 28, 1916.

(132 Minn. 404, 157 N. W. 643.)

Bills and notes — fraud — burden of showing good-faith purchase.

1. When there is fraud in the inception of a note or in its negotiation, the burden is upon the indorsee of proving that he purchased before maturity, in due course, for value, and that he was without notice of equities in the maker; but the negotiation of a note given in part payment of the purchase of land, with an agreement that if the maker is dissatisfied upon inspection the payee will return it, does not constitute such fraud.

[See note on this question beginning on page 1667.]

— collateral security — value.

2. The indorsee of negotiable paper, taken as collateral security for an antecedent debt, is in the position of a purchaser for value.

[See 3 R. C. L. 1058.]

— negotiability — memorandum.

3. The words "as per contract," written on the back of a note at the time of its execution, under which the payee indorses at the time of the negotiation, do not affect the negotiability of the note.

— notice.

4. Such words cannot be overlooked by the purchaser; but when a contract

accompanies the note and passes to the purchaser, the contract not giving the maker a defense, he is not charged by such words with knowledge of another agreement giving a defense.

[See 3 R. C. L. 1076.]

Witness — officer of adverse corporation.

5. The right to call an officer of an adverse party for cross-examination under Gen. Stat. 1913, § 8377, Rev. Laws 1905, § 4662, is to be determined as the situation is at the time of the trial, and there is no right to cross-examine one not an officer at the time of the trial, though he was an officer at the time of the transaction involved.

Headnotes by DIBELL, C.

APPEAL by defendant from an order of the District Court for Hennepin County denying a new trial after a verdict in plaintiff's favor in an action brought to recover the amount alleged to be due on a promissory note. *Affirmed.*

The facts are stated in the Commissioner's opinion.

Mr. John F. Bernhagen, for appellant:

Evidence of fraud in the origin or transfer of commercial paper throws on the holder the burden of proving his good faith; and proof that the paper was negotiated contrary to an agreement before the happening of a certain future contingency is such a fraud as will shift the burden of proof.

McNight v. Parsons, 136 Iowa, 390, 22 L.R.A. (N.S.) 718, 125 Am. St. Rep. 265, 113 N. W. 858, 15 Ann. Cas. 665; Merchants' Exch. Bank v. Luckow, 37 Minn. 542, 35 N. W. 434; Cummings v. Thompson, 18 Minn. 246, Gil. 228;

Fitch v. Jones, 5 El. & Bl. 238, 119 Eng. Reprint, 470, 24 L. J. Q. B. N. S. 293, 1 Jur. N. S. 854, 3 Week. Rep. 507; Perrin v. Noyes, 39 Me. 384, 63 Am. Dec. 633; Conley v. Winsor, 41 Mich. 253, 2 N. W. 31; National Revere Bank v. Morse, 163 Mass. 384, 40 N. E. 180; Merchants' Nat. Bank v. Haverhill Iron Works, 159 Mass. 159, 34 N. E. 93; Farrar v. Mathews, 37 Iowa, 418; Graham v. Rammel, 76 Ark. 140, 88 S. W. 899, 6 Ann. Cas. 167; Vosburgh v. Diefendorf, 119 N. Y. 357, 16 Am. St. Rep. 836, 23 N. E. 801; Joy v. Diefendorf, 130 N. Y. 6, 27 Am. St. Rep. 484, 28 N. E. 602; Sistersmans v. Field, 9 Gray,

331; *Williams v. Huntington*, 68 Md. 590, 6 Am. St. Rep. 477, 13 Atl. 336; *Griswold v. Scott*, 13 Ga. 210; *Barlow v. Flemming*, 6 Ala. 146; *Labbee v. Johnson*, 66 Vt. 234, 28 Atl. 986; *Lyons v. Stills*, 97 Tenn. 514, 37 S. W. 280; *Trumbull v. O'Hara*, 71 Conn. 172, 41 Atl. 546; *Munroe v. Cooper*, 5 Pick. 412; *Smith v. Sac County*, 11 Wall. 139, 20 L. ed. 102; *Stewart v. Lansing*, 104 U. S. 505, 26 L. ed. 866; *Landauer v. Sioux Falls Improv. Co.* 10 S. D. 205, 72 N. W. 467; *Benton County Sav. Bank v. Boddicker*, 105 Iowa, 548, 45 L.R.A. 321, 67 Am. St. Rep. 310, 75 N. W. 632; *Sullivan v. Langley*, 120 Mass. 437; *First Nat. Bank v. Holan*, 63 Minn. 525, 65 N. W. 952; 2 Enc. Ev. 524, note 48; *Oakland Cemetery Asso. v. Lakins*, 3 Ann. Cas. 560, and note, 126 Iowa, 121, 101 N. W. 778.

The rule is held equally applicable whether the delivery be to a third person in escrow or to the payee or obligee.

Ware v. Allen, 128 U. S. 590, 32 L. ed. 563, 9 Sup. Ct. Rep. 174.

The bank, being an interested party, the credibility of the testimony of the cashier was a matter for the jury to pass upon, in the light of all the facts and circumstances surrounding the matter under inquiry.

Joy v. Diefendorf, 130 N. Y. 6, 27 Am. St. Rep. 484, 28 N. E. 602; *Canajoharie Nat. Bank v. Diefendorf*, 123 N. Y. 191, 10 L.R.A. 676, 25 N. E. 402; *Elwood v. Western U. Teleg. Co.* 45 N. Y. 549, 6 Am. Rep. 140; *Mendenhall v. Ulrich*, 94 Minn. 100, 101 N. W. 1057.

A notation on the back of the note is evidence of an infirmity in the paper which is apparent on its face, and is of such a character as to put the purchaser upon inquiry.

1 Dan. Neg. Inst. 6th ed. § 795a; *Stein v. Rheinstrom*, 47 Minn. 476, 50 N. W. 827; *Commercial Bank v. Maguire*, 89 Minn. 394, 95 N. W. 212; *Merchants' Nat. Bank v. Hanson*, 33 Minn. 40, 53 Am. Rep. 5, 21 N. W. 849; *Guilford v. Minneapolis, S. Ste. M. & A. R. Co.* 48 Minn. 560, 31 Am. St. Rep. 694, 51 N. W. 658; *Merchants Nat. Bank v. Sullivan*, 63 Minn. 468, 65 N. W. 924; *Tourtelot v. Reed*, 62 Minn. 384, 64 N. W. 928.

The good faith of a purchaser or holder of a promissory note is a question of fact for the jury unless the evidence is conclusive.

Yellow Medicine County Bank v. Tagley, 57 Minn. 391, 59 N. W. 486;

Drew v. Wheelihan, 75 Minn. 68, 77 N. W. 558; *First Nat. Bank v. Buchan*, 79 Minn. 322, 82 N. W. 641; *Mendenhall v. Ulrich*, 94 Minn. 100, 101 N. W. 1057; *Huntley v. Hutchinson*, 91 Minn. 244, 97 N. W. 971; *Ward v. Johnson*, 57 Minn. 301, 59 N. W. 189; 7 Cyc. 949.

No alteration will constitute constructive notice, unless it be a part of the note itself, and any divergence from the ordinary form will constitute notice only when it naturally and reasonably implies or suggests an equity of defense, and then only notice of the equity suggested.

Joyce, Defenses to Commercial Paper, § 474; *Hughes & Co. v. Flint*, 61 Wash. 460, 112 Pac. 633; 7 Cyc. 949.

The action of the trial court in holding that plaintiff's cashier could not be cross-examined under the statute was clearly error and highly prejudicial to the rights of defendant.

O'Gara v. Hansing, 88 Minn. 401, 93 N. W. 307; *Uhlman v. Farm, Stock & Home Co.* 126 Minn. 239, 148 N. W. 102, Ann. Cas. 1915D, 888.

Mr. John A. Pearson, for respondent:

A pledgee who takes collateral acquired in good faith before maturity, as security for a pre-existing debt, without notice of defenses, holds the same free from such defenses.

German American State Bank v. Lyons, 127 Minn. 390, 149 N. W. 658; *Rosemond v. Graham*, 54 Minn. 323, 40 Am. St. Rep. 336, 56 N. W. 38; 7 Cyc. 932.

A recital of the consideration for a note or bill of exchange does not render it non-negotiable, and therefore does not charge holders with any notice by reason of such recital.

7 Cyc. 580, 948; *Hillstrom v. Anderson*, 46 Minn. 382, 49 N. W. 187; *United States Nat. Bank v. Floss*, 38 Or. 68, 84 Am. St. Rep. 752, 62 Pac. 751; *McNight v. Parsons*, 136 Iowa, 390, 22 L.R.A. (N.S.) 718, 125 Am. St. Rep. 265, 113 N. W. 858, 15 Ann. Cas. 665; *Collins v. McDowell*, 65 Minn. 111, 67 N. W. 845.

As to the facts, there is nothing in the evidence to prove fraud in the inception of the note. The fraud must be actionable and give rise to a cause of action for deceit.

20 Cyc. 10.

Defendant has not shown such fraud as to throw any burden onto plaintiff, but disregarding that fact, the plaintiff has shown affirmatively that it has the qualities of a bona fide holder.

Merchants' & M. Sav. Bank v. Cross, 65 Minn. 154, 67 N. W. 1147; First Nat. Bank v. McNairy, 122 Minn. 215, 142 N. W. 139, Ann. Cas. 1914D, 977; First Nat. Bank v. Person, 101 Minn. 30, 111 N. W. 730; First Nat. Bank v. Persall, 110 Minn. 333, 136 Am. St. Rep. 499, 125 N. W. 506, 675; Conqueror Trust Co. v. Reeves Drug Co. 118 Ark. 222, 176 S. W. 119.

Defendant was not entitled to a new trial.

Immaculate Conception Church v. Curtis, 130 Minn. 111, 153 N. W. 259.

Dibell, C., filed the following opinion:

Action upon a promissory note. The court directed a verdict for the plaintiff. The defendant appeals from the order denying his motion for a new trial..

The note was made by the defendant Clasen on February 7, 1913, to one Harris. Harris indorsed it in blank. It was delivered by the holder, one McGray, who received it from Harris, to the plaintiff bank as collateral security to a note then owing to the bank and as collateral security for future advances. McGray did not indorse it. On the back of the note, and above the indorsement of Harris, appear the words "as per contract." They were put on the note at the time of its execution. This note was one of four notes of equal amount given by Clasen to Harris as a part of the consideration of a written contract for the sale of lands in British Columbia. On the same day another agreement in writing was made by Clasen and Harris, providing, in effect, that if upon inspection Clasen was not satisfied with the lands, or with other lands shown him, Harris would return the notes and pay back the cash payment made.

Afterwards Clasen demanded the return of the notes, pursuant to this agreement, and Harris failed to return them. The sale contract accompanied the note at the time McGray gave it to the bank. The other agreement did not.

1. Under our decisions the indorsee of negotiable paper, taken as 6 A.L.R.—105.

collateral security for an antecedent debt, is a purchaser for value, and has such title

Bills and notes—collateral security—value.

as a purchaser for a consideration paid at the time. Rosemond v. Graham, 54 Minn. 323, 40 Am. St. Rep. 336, 56 N. W. 38; German-American State Bank v. Lyons, 127 Minn. 390, 149 N. W. 658.

2. The presence of the words "as per contract" on the back of the note did not affect

its negotiability, ~~negotiability~~ using the word ~~memorandum~~.

"negotiability" in its large sense as including passing of title free of equities in favor of the maker and against the payee, as well as the transfer of title by indorsement; that is, the right of a bona fide purchaser for value before maturity and in due course of business was not affected. It is essential to the negotiability of an instrument that the promise be to pay a definite sum in money, absolutely and not contingently, and generally and not out of a particular fund. Hillstrom v. Anderson, 46 Minn. 382, 49 N. W. 187. A recital of the consideration does not destroy negotiability. Wright v. Traver, 73 Mich. 493, 3 L.R.A. 50, 41 N. W. 517; Clanin v. Esterly Harvesting Mach. Co. 118 Ind. 372, 3 L.R.A. 863, 21 N. E. 35; Hillstrom v. Anderson, 46 Minn. 382, 49 N. W. 187; 7 Cyc. 580. In Taylor v. Curry, 109 Mass. 86, 12 Am. Rep. 661, the words "on policy No. 33,386," written on the face of the note, were held not to affect its negotiability. To the same effect are Union Ins. Co. v. Greenleaf, 64 Me. 123; Bresee v. Crompton, 121 N. C. 122, 28 S. E. 351; Kirk v. Dodge County Mut. Ins. Co. 39 Wis. 138, 20 Am. Rep. 39. In First Nat. Bank v. Lightner, 74 Kan. 736, 8 L.R.A.(N.S.) 231, 118 Am. St. Rep. 353, 88 Pac. 59, 11 Ann. Cas. 596, the words "on account of contract," written on the face of the note, were held not to affect negotiability. We do not find a case like the one before us, but the conclusion we reach is right.

3. The words quoted, however,

are not to be disregarded. The purchaser cannot overlook them and then claim that he had no notice of what an observance of them and fair inquiry would disclose. The sale contract accompanied the note and went to the bank. The bank knew its contents. It appeared from it that the note was one of four notes given upon the purchase of the British Columbia lands. Nothing in it affected Clasen's liability on the note. The agreement relating to the return of the notes did not go to the bank, and it was not informed of it. Nothing in the situation suggested further inquiry, and it was not chargeable with notice of the agreement for a return of the notes.

4. When the maker shows that the note was procured by the fraud of the payee the indorsee cannot recover unless he proves that he purchased in good faith, before maturity, for value, and without notice, and he must sustain the burden of proof.

—fraud—burden of showing good-faith purchase.
 Cole v. Johnson, 127 Minn. 291, 149 N. W. 467; Cochran v. Stein, 118 Minn. 323, 41 L.R.A. (N.S.) 391, 136 N. W. 1037; Park v. Winsor, 115 Minn. 256, 132 N. W. 264; First Nat. Bank v. Person, 101 Minn. 30, 111 N. W. 730; Mendenhall v. Ulrich, 94 Minn. 100, 101 N. W. 1057; De Kalb Nat. Bank v. Thompson, 79 Minn. 151, 81 N. W. 765; First Nat. Bank v. Holan, 63 Minn. 525, 65 N. W. 952; Bank of Montreal v. Richter, 55 Minn. 362, 57 N. W. 61; MacLaren v. Cochran, 44 Minn. 255, 46 N. W. 408; 1 Dunnell's Dig. (Minn.) § 1040; Dunnell's Dig. Supp. (Minn.) § 1041. The early leading case is Cummings v. Thompson, 18 Minn. 246, Gil. 228, and there the doctrine is well stated.

The court directed a verdict for the plaintiff bank and did not put upon it the burden of proving the facts enumerated; and it is the contention of the defendant that in view of the agreement for the return of the notes the sale by Harris constituted fraud such as is meant by the

cases cited, and therefore the burden of affirmative proof was on the bank. We cannot so hold. The case of McNight v. Parsons, 136 Iowa, 390, 22 L.R.A. (N.S.) 718, 125 Am. St. Rep. 265, 113 N. W. 858, 15 Ann. Cas. 665, upon which the defendant relies, involved a delivery of a note upon an express agreement that it was not to be negotiated until the performance of a specified condition; and it was held that the putting of the note in circulation in violation of this agreement constituted a fraud. In effect it was a conditional delivery. In this respect it was much like Merchants' Exch. Bank v. Luckow, 37 Minn. 542, 35 N. W. 434, where a note was delivered but was not to become operative until signed by another; and there it was held that putting it in circulation was a fraud, the court saying: "The effect of the facts found is that the alleged contract . . . never became operative, never was their contract, and the delivery of it to the payees by their agent, and the use made of it by the payees in transferring it as an operative contract, were in law a fraud upon the defendants."

Mendenhall v. Ulrich, 94 Minn. 100, 101 N. W. 1057, and Robbins v. Swinburne Printing Co. 91 Minn. 491, 98 N. W. 331, 867, are similar. First Nat. Bank v. Person, 101 Minn. 30, 111 N. W. 730, recognizes the general doctrine. The case before us is not in its facts nor upon principle such a case. The agreement was that if Clasen after an inspection of the lands was dissatisfied, he might rescind. There was no express agreement nor one inferable from the facts that the note was not to be operative or that it should not be negotiated. The delivery was not conditional. There was a contingent right of rescission. Harris committed a breach of his agreement to pay back the portion of the consideration received and return the notes when Clasen rescinded; but the negotiation of the note did not constitute fraud.

5. The defendant called for cross-

examination under the statute a former officer of the plaintiff. The statute provides: "A party to the record of any civil action or proceeding, or a person for whose immediate benefit such action or proceeding is prosecuted or defended, or the directors, officers, superintendent, or managing agents of any corporation which is a party to the record, may be examined by the adverse party as if under cross-examination, subject to the rules applicable to the examination of other witnesses. . . ." Gen. Stat. 1913, § 8377 (Rev. Laws 1905, § 4662).

The witness was an officer at the time of the negotiation of the note, but not at the time of the trial. The court refused to permit his cross-examination. Whether under such circumstances a party has the right

of cross-examination was suggested but not decided in *O'Gara v. Hansing*, 88 Minn. 401, 93 N. W. 307, and *Farmers' Elevator Co. v. Great Northern R. Co.* 131 Minn. 152, 154 N. W. 954. What is given by the statute is the right to examine a party, or one for whose benefit the action is prosecuted or defended, or the directors, officers, etc., of a corporate party. This right is to be determined as the situation is at the time of the trial. The trial court ruled correctly. This holding settles the practice. Perhaps the rulings of the trial courts have not been uniform. It does not follow that contrary rulings furnish a ground for reversal. Usually they would not constitute prejudicial error.

Witness—officer
of adverse
corporation.

Order affirmed.

ANNOTATION.

Breach of agreement to return a note to maker as fraud which casts upon an indorsee the burden of showing his bona fide character.

It is a rule sustained by a multitude of authorities that a showing of fraud in the procurement of a note destroys the presumption of bona fides which operates in favor of the holder and casts upon him the burden of showing that he is a bona fide holder. Whether the breach of an agreement to return a note on certain conditions (which have happened) is fraud within the meaning of this rule, such as casts the burden of proving his bona fide character upon the holder, is the subject of investigation in this note.

If the agreement to return the note is not made as a part of the contract in which the note is given, but is made subsequently, the showing of a breach of such agreement does not bring the case within the rule, because the fraud, if any, is not in the inception of the note. Thus, where the holder of a note agreed to return it upon receiving another note from the maker, but failed to keep his agreement and transferred the note, the burden of proof was held not shifted to the transferee to prove that he was a bona

fide holder. *First Nat. Bank v. Getz* (1895) 96 Iowa, 189, 64 N. W. 799. So, where it was agreed between lessor and lessee that the lease should be surrendered and the rent notes returned to the maker, and the lessor breached his agreement and sold the notes, there was held to be no shifting of the burden of proof to the indorsee to prove his bona fide character. *Freittenberg v. Rubel* (1904) 123 Iowa, 154, 98 N. W. 624. But in *Robbins v. Swinburne Printing Co.* (1904) 91 Minn. 491, 98 N. W. 331, 867, the burden was thrown upon the indorsee to show that he was a bona fide holder where it appeared that a note which had been paid by agreement to cancel it and take back property had, in fraud of the agreement, been negotiated to the indorsee. The court states the general rule to be that when it is shown that a note has its "inception" in fraud, the burden of proof shifts to the indorsee, but does not discuss the fact that the note in question did not have its "inception" in fraud.

Where the agreement to return the

note is made as a part of the contract in which the note is given, the question whether a breach of the agreement constitutes such fraud as casts the burden upon an indorsee of showing his bona fide character depends upon the nature of the agreement.

That the negotiation of the note by the payee so that he is unable to keep his agreement to return it is not such fraud as casts the burden of showing his bona fide character upon the indorsee where the delivery was not conditional, but where a mere contingent right of rescission existed, is held in the reported case (*SNELLING STATE BANK v. CLASEN*, ante, 1663), and this is in accord with the better rule. But where the note is not to become effective, in other words, where there is a delivery on conditions precedent (which have failed), or where it is agreed that the note shall not be negotiated, there is such fraud in failing to comply with the agreement to return the note or not to use or transfer it as casts the burden upon a transferee of the note to show his bona fide character.

Alabama.—*Elmore County Bank v. Avant* (1914) 189 Ala. 418, 66 So. 509.

Arkansas.—*Tabor v. Merchants Nat. Bank* (1886) 48 Ark. 454, 3 Am. St. Rep. 241, 3 S. W. 805; *Cochran v. Shull* (1914) 115 Ark. 226, 170 S. W. 997.

Iowa.—*McNight v. Parsons* (1907) 136 Iowa, 390, 22 L.R.A.(N.S.) 718, 125 Am. St. Rep. 265, 113 N. W. 818, 15 Ann. Cas. 665.

Massachusetts. — *National Revere Bank v. Morse* (1895) 163 Mass. 388, 40 N. E. 180.

Minnesota.—*Merchants' Exch. Bank v. Luckow* (1887) 37 Minn. 542, 35 N. W. 434; *Mendenhall v. Ulrich* (1905) 94 Minn. 100, 101 N. W. 1057.

South Dakota.—*Rochford v. Barrett* (1908) 22 S. D. 83, 115 N. W. 522.

Texas. — *Rische v. Planters Nat. Bank* (1892) 84 Tex. 413, 19 S. W. 610; *Word v. Bank of Menard* (1914) — Tex. Civ. App. —, 170 S. W. 845.

This distinction, which is very clear theoretically, is very difficult of application. In fact it is impossible to distinguish between conditions of the one kind and conditions of the other

from the statement of the case. A determination of the question requires a survey of all the facts and circumstances. It seems that the courts incline toward holding that the breach of the agreement throws the burden of showing his bona fide character upon an indorsee. This is a logical position, for the merits of the case are not determined, but the indorsee is simply required to prove facts within his knowledge, whereas to require the maker to disprove an indorsee's bona fide character places upon him the burden of proving facts on which the evidence is very often difficult for him to obtain.

In *Cochran v. Shull* (1914) 115 Ark. 226, 170 S. W. 997, the holder of a promissory note was held to have the burden of showing that he was a holder in due course, where an agent of the payee, who took the note, violated his agreement to hold it until the maker should be satisfied with the contract connected with the same, and sent it immediately to his principal, who transferred it to the plaintiff.

Under the provision of the Negotiable Instruments Law that the title of any person who negotiates an instrument in breach of faith or under circumstances amounting to fraud is defective, and the burden is cast upon the holder to show that he or some person through whom he claimed acquired the paper innocently, the indorsee of a note has the burden of showing his good faith where the note was given under an agreement between the maker and payee that the instrument was not to be negotiated by the payee, but was to be retained in his possession until the happening of a certain event, and if the event did not happen, that the note was to be void and of no effect, and returned to the maker. *McNight v. Parsons* (1907) 136 Iowa, 390, 22 L.R.A.(N.S.) 718, 125 Am. St. Rep. 265, 113 N. W. 858, 15 Ann. Cas. 665.

The burden was held to be upon an indorsee to show that he was a bona fide holder, where it appeared that the note involved was left with the payee to be used by him only in a certain event, which never happened, and that

in fraud of this agreement the note was put in circulation. *National Revere Bank v. Morse* (1895) 168 Mass. 383, 40 N. E. 180.

Where a note was left with an agent of the payee to procure the signature of additional parties, with the understanding that when those signatures should be procured, and not before, the instrument should become operative, and the instrument is put into circulation without such signatures, a showing of these facts casts the burden upon the indorsee to show that he is bona fide holder. *Merchants' Exch. Bank v. Luckow* (1887) 37 Minn. 542, 35 N. W. 484.

In the later case of *Mendenhall v. Ulrich* (1905) 94 Minn. 100, 101 N. W. 1057, the rule is stated as though the fraud may be in putting the note in circulation.

Where an insurance agent, in fraud of his agreement that a note be left at a bank until an insurance policy issued by his company should be received and approved by the maker of the note, and that in case the maker rejected the policy, the note should be of no force or effect whatever and should at once be returned to him, placed the note in circulation, it has been held that a showing of these facts throws the burden upon an indorsee of showing that he is a bona fide holder. *Ibid.*

A showing that the note in suit was executed by the maker as security only upon the acceptance by him of an agency, and that it was agreed the note should not be used by the payee, but deposited in any bank selected by the maker, and that the witness designated a certain bank as the one in which he desired the note to be deposited, but that the note was negotiated in breach of this agreement, cast upon an indorsee the burden of showing that he is a bona fide holder of the note for value. *Rochford v. Barrett* (1908) 22 S. D. 83, 115 N. W. 522.

A showing of a breach of an agreement by the consignor of goods to hold a bill accepted by the consignees until the goods consigned had been sold casts upon an indorsee of the bill the burden of showing that he is a bona fide holder. *Rische v. Planters Nat. Bank* (1892) 84 Tex. 413, 19 S. W. 610.

Proof of the violation of an agreement by the payee of a note, that the note should not be negotiated, sold, or transferred, but should at all times be and remain the property of and under the control of the payee for the protection of the maker in his right under a contract for the sale of goods to return at the end of one year all of the goods so purchased and remaining unsold and receive credit therefor on the note, casts upon an indorsee of the note the burden of proving that he is a bona fide holder. A violation of the agreement not to negotiate the note makes the title of the payee defective within the meaning of the Negotiable Instrument Law. *Holdsworth v. Blyth & F. Co.* (1915) 23 Wyo. 52, 146 Pac. 603.

The fact that a note was executed and delivered upon the agreement of the person to whom it was delivered, that he would hold the note until a certain event (which never happened), has been held to throw the burden of proving his bona fide character upon an indorsee thereof. *Elmore County Bank v. Avant* (1914) 189 Ala. 418, 66 So. 509; *Word v. Bank of Menard* (1914) — Tex. Civ. App. —, 170 S. W. 845.

Proof that a note signed for the accommodation of the principal maker, upon the express agreement that the principal maker should not deliver the note to the payee until two other specified persons had signed it with them, was delivered in violation of this agreement, casts upon an indorsee of the note the burden of showing that he was a bona fide holder. *Tabor v. Merchants Nat. Bank* (1886) 48 Ark. 454, 3 Am. St. Rep. 241, 3 S. W. 805.

Proof of breach of an agreement that a note signed by a number of persons was not to become a binding obligation until signed by two other specified persons seems to be treated in *Hodge v. Smith* (1907) 130 Wis. 326, 110 N. W. 192, as casting upon the indorsee thereof the burden of showing himself to be a bona fide holder.

Some cases in which there was held to be fraud casting upon an indorsee the burden of showing his bona fide

character contain facts almost identical with those in the reported case. Upon showing an agreement between the maker and payee of a note that if a specified realty company did not make title to certain premises, the note was to be returned to the maker, the payee agreeing to hold the note until the time of taking title and to return it if title was not passed, the burden is cast upon an indorsee of the note of showing that he was a bona fide holder. *Ginsberg v. Shurman* (1911) 71 Misc. 463, 128 N. Y. Supp. 653; compare with the reported case (*SNELLING STATE BANK v. CLASEN*, ante, 1663).

The failure of the payee of a note to comply with his agreement in consideration of which the note was executed does not amount to such fraud as will throw the burden upon the indorsee of the note to show that he is a bona fide holder. *Commercial Security Co. v. Modesto Drug Co.* (1919) — Cal. App. —, 184 Pac. 964.

In *First Nat. Bank v. Person* (1907) 101 Minn. 80, 111 N. W. 730, upon the sale of certain threshing machinery, it was agreed that the purchasers might have six days in which to ascertain if the machinery fulfilled the conditions of the agreement, and that a note given in payment of the machinery should not be deemed delivered or operative in any manner or binding upon the purchasers until such test was made. It was then alleged that the machinery did not comply with the agreement, whereupon the purchasers demanded the return of the note and offered to return the machinery to the payee, an offer which was refused by the payee of the note. It does not appear, however, that the test was made within the six days, so that the case stood upon the warranty on the sale of the property. In holding that a refusal to return the note was not such fraud as cast the burden upon an indorsee of the note to show his bona fide character, the court states that "a mere warranty on the sale of property, though false, does not constitute a fraud within the meaning of the rule. A fraud within the contemplation of the law on the subject is such as would justify a re-

scission of the contract upon its discovery, the elements of which are concisely stated by Judge Collins in *Riggs v. Thorpe* (1897) 67 Minn. 217, 69 N. W. 891, where it was said 'that where one makes a false representation of a material fact susceptible of knowledge, knowing it to be false . . . with intent to induce the person to whom it is made to rely upon it, and this person does rely upon it, is deceived, and is pecuniarily damaged, it is deceit which will avoid the contract.' This is an accurate statement of law pertinent to the defense alleged in the case at bar. But the evidence contained in the offer of proof falls short of bringing the case within it. The offer at most discloses a breach of contract. It discloses an agreement between the parties that the engine was of certain capacity and in an operative condition, an agreement that defendants should have at least six days in which to test its capacity and if found defective to return it and get their notes back. The offer also shows that the engine was tested and found not in compliance with the agreement; but when this test took place does not appear. . . . It appears therefrom that the parties agreed that the defendants were to have six days within which to try the engine, to return it if it did not answer the purposes intended, and that the note was not to be considered as delivered until such trial had been made. But the offer does not show a violation of the agreement. It does not appear therefrom that defendants complied with this feature of the agreement by attempting to use or offering to return the engine within the time agreed upon."

A negotiation by the payee of a note given upon an executory consideration before the consideration has failed, under circumstances that did not amount to a breach of faith or to fraud, does not make the title of the payee defective within the meaning of the Negotiable Instruments Law so as to cast upon the indorsee the burden of proving that he is a holder in due course. *Moyses v. Bell* (1911) 62 Wash. 534, 114 Pac. 193.

The transfer of a note given by a husband to his wife solely to protect her in case of his death before the expiration of the tontine period of an insurance policy held by him (an event which did not happen) is stated to cast the burden upon an indorsee of the note to show that he was bona fide holder in *German-American Bank v. Cunningham* (1904) 97 App. Div. 244, 89 N. Y. Supp. 836.

Evidence that a note deposited in escrow has been wrongfully delivered has been held to cast upon an indorsee the burden of proving his bona fide character. Evidence that a note was delivered as an escrow, and that it was fraudulently put in circulation, throws the burden upon the holder to prove that he is the bona fide holder. *Vallett v. Parker* (1831) 6 Wend. (N. Y.) 615. A showing that the note in suit,

which had been deposited in escrow upon certain conditions, had been delivered to the payee without performance of those conditions, was held to throw the burden upon an indorsee of the note to show that he was the bona fide holder, under the rule that the proof of fraud or illegality in the inception of an instrument casts upon an indorsee the burden of showing that he is a holder in due course. *Landauer v. Sioux Falls Improv. Co.* (1897) 10 S. D. 205, 72 N. W. 467.

In *Christina v. Cusimano* (1912) 129 La. 873, 57 So. 157, the burden of proof was held to rest upon the purchaser of a note, where it was shown that the note was left in the hands of a notary to be delivered on certain conditions to a particular person, and was fraudulently disposed of. W. A. E.

T. CAMPBELL FASSITT, Guardian of Clarissa M. Veile, Minor,
v.
BELLE R. SEIP.

Pennsylvania Supreme Court — May 26, 1915.

(249 Pa. 576, 95 Atl. 273.)

Limitation of actions — infancy — effect of appointment of guardian.

1. The appointment of a guardian for a minor does not, so far as an action for an accounting of the rents and profits of real estate belonging to the infant is concerned, affect the operation of a statute providing that, if a person entitled to maintain an action is within the age of twenty-one years, he shall be entitled to bring the action within a certain time after becoming of age.

[See note on this question beginning on page 1689.]

Family settlement — acceptance of benefits — right to repudiate.

2. The acceptance by the mother of an infant of payments under an agreement attempting to settle rights under a will, which acceptance is ratified neither by the infant's guardian nor by the infant upon becoming of age, does not estop the infant from claiming his legal rights in the property notwithstanding the settlement was intended to be a family settlement.

Parent and child — authority of parent to contract for child.

3. A mother has no authority to bind her minor child by agreement as

to its rights in real estate, or the income or profits arising therefrom.

Appeal — finding of master — effect.

4. The findings of a master fixing the rental value of property, an accounting for which is sought, has the effect of a verdict of a jury unless clearly erroneous.

[See 2 R. C. L. 210.]

Tenants in common — accounting for possession — credit.

5. In an action for an accounting by an infant against a cotenant who has been in possession of the common property, the latter is entitled to credit for one half of the taxes, water

rents, insurance, and repairs which he had paid on account of the property, and for payments which have been made to the parents of the infant on its account.

[See 7 R. C. L. 824.]

— credit for improvement.

6. A tenant in common in possession of real estate is not entitled to credit upon accounting to his cotenant for expenditures for new buildings erected on the property, or for enlargements, reconstruction, or improvements.

[See 7 R. C. L. 837.]

Interest — on rentals — accounting by cotenant.

7. In an accounting by a tenant in common in possession of real estate for the rentals collected on account of

the property, interest will be allowed from the time of collection.

[See 7 R. C. L. 835, 836.]

Limitation of actions — action by guardian — waiver of exception.

8. The bringing of an action by the guardian of a minor, for an accounting of rents and profits or real estate belonging to the minor, does not waive the exception in the Statute of Limitations in favor of the minor during minority.

— waiver by agreement.

9. A cotenant in possession of real estate waives the right to plead the Statute of Limitations in a suit for an accounting by an infant cotenant, by an agreement that the accounting shall date from the time he took possession.

CROSS APPEALS from a judgment of the Court of Common Pleas for Northampton County dismissing exceptions to the report of the master in a suit for the partition of certain real estate and for an accounting of the rents and profits of the property while occupied by defendants. *Modified and affirmed.*

The facts are stated in the opinion of the court.

The master's report mentioned in the opinion was, in part, as follows:

It is the contention of counsel for the defendant that at the meeting May 8, 1894, in the office of H. W. Scott, Esq., between Mr. Cope, Mrs. Florence R. Veile, and Mr. Scott, her counsel, an agreement was reached which was in fact a compromise and family settlement, and that thereupon the receipt (finding No. 4) was drawn up and duly executed by Mrs. Florence R. Veile, who received a check for the first monthly payment of \$40. This receipt contains this clause: "And hereby, on behalf of the said Clarissa Veile, declare that I accept all the provisions contained and set forth in the said last will and testament (Theresa Veile's) and codicil thereto." The master cannot agree to this view. The only proper party to make a valid agreement or compromise affecting the estate of this minor was her duly appointed guardian. The Easton Trust Company had been appointed to that office but a few days before this meeting. This guardian had the sole authority to act in this matter,

but was not present or consulted. The testimony as to what took place at this meeting is very meager. It does not appear that there was any discussion as to the estate, no disclosure as to its value or annual income, nothing said upon which it is possible to base an idea of a fair adjustment or compromise. The amount to be paid was the exact sum which Theresa Veile directed should be paid monthly for the proper education, maintenance, and support of Clarissa M. Veile by the executor and trustee of her will. There does not seem to have been any compromise at all, certainly no mutual concessions; just the payment of the amount due Clarissa M. Veile under the will of Theresa Veile, and which Belle R. Seip was bound to make so long as she held the estate under the terms of that will. The receipt itself so describes the payment. This paper passed through the hands of careful attorneys. If it had been intended to be a written statement of an agreement to settle amicably any dispute under the will of Xavier Veile or Theresa Veile, such fact would cer-

tainly have appeared therein in terms. It may well be, as claimed by plaintiff's counsel, that counsel for Mrs. Veile permitted her to sign this receipt because he knew that the minor's estate could not be divested by it, and it was therefore harmless. Mr. James for the guardian may have had the same view, but the master regards it as significant that the receipt for the second payment, June 7, 1894, written in the same book by Mr. James, makes no reference to the previous receipt which contains Mrs. Veile's acceptance of all the provisions of Theresa Veile's will, and is in these words:

Easton, Pennsylvania,
June 7, 1894.

Received of Isabella R. Seip, executrix and trustee under the last will and testament of Theresa Veile, deceased, \$40, being the amount of monthly payment set apart for the maintenance and support of Clarissa Veile.

(Signed) Florence R. Veile
for Clarissa M. Veile.

If Mr. James had wished to take some action at this time to put the guardian on record as approving the previous receipt or the alleged family settlement, and making the guardian responsible in any degree for what Mrs. Veile had done, he would have taken advantage of this opportunity, when he had in his possession the check for the monthly payment of \$40, payable to the order of the ward, and the receipt book in which to receipt for the payment. Instead of doing anything of this kind, he drew a carefully worded receipt for Mrs. Veile to sign for the regular monthly payment due under the will of Theresa Veile, and gave her the check undorsed by the guardian. His action makes it plain that the legally constituted guardian would have nothing to do officially with the arrangement which had been entered into by the mother of the ward. The master is of the opinion that this adjustment could not be sustained

under the authorities. They speak of family settlements that, "if fair and equitable," should not be disturbed, etc. (Johnston v. Furnier, 69 Pa. 449), or, "if fairly made" (Walworth v. Abel, 52 Pa. 370), or, "when made in good faith and with full disclosure" (Bierer's Appeal, 92 Pa. 265). As the master finds the fair rental value of these three properties is now and was at that time \$4,800, it could not be claimed that a settlement based on a payment of \$480 per year, and without any disclosure as to the value of the estate and the yearly rental, complied with these essential requirements. If this is the correct view with regard to this arrangement with Mrs. Florence Veile, it necessarily follows that the plaintiff is not estopped because of the payments made by Isabella R. Seip, executrix and trustee, to plaintiff's mother from 1894 to 1911. That the plaintiff is entitled to recover from her cotenant mesne profits or rents cannot be disputed. The right of a tenant in common out of possession to recover his share of the income of the common property from his cotenant in possession was given by the English Statute of 4 Anne, chap. 16, § 27. Tenants in common being seised per my et per tout, under the common law each one was entitled to the joint possession of the whole, and therefore there was no liability to account where one was in possession and the other was not. To remedy this the Statute of 4 Anne was passed. The English courts construed this act to apply only when one tenant in common receives the money from another person, to which both parties are entitled, and keeps it all, or more than his just share. This statute is in force in Pennsylvania, and under it our courts have held that a tenant in possession need not account to his cotenant unless he had actually received rent from a third party for the premises, or had entered into a contract to pay rent to his cotenant for the property occupied and used by him. See Norris v. Gould, 15 W.

N. C. 187. This is a decision by Judge Thayer of the common pleas of Philadelphia, which Justice Mitchell in *Enterprise Oil & Gas Co. v. National Transit Co.* 172 Pa. 421, 51 Am. St. Rep. 746, 33 Atl. 687, 18 Mor. Min. Rep. 312, commends and approves as "the best summary of the law in our own books" on this subject. See also *Kline v. Jacobs*, 68 Pa. 57; *Coleman's Appeal*, 62 Pa. 252, 14 Mor. Min. Rep. 221. Under these decisions a tenant in common out of possession in this state was without redress; as against his cotenant who was occupying and using the common property, until the passage of the Act of June 24, 1895, P. L. 237. This act gives the tenant out of possession the right to sue for his share of the rental value for the time the real estate was in the possession of the cotenant. Section 1 of this act provides: "In all cases in which any real estate is now or shall be hereafter held by two or more persons as tenants in common, and one or more of said tenants shall have been or shall hereafter be in possession of said real estate, it shall be lawful for any one or more of said tenants in common, not in possession, to sue for and recover from such tenants in possession his or their proportionate part of the rental value of said real estate for the time such real estate shall have been in possession as aforesaid; and in case of partition of such real estate held in common as aforesaid the parties in possession shall have deducted from their distributive shares of said real estate the rental value thereof to which their cotenant or tenants are entitled." Upon this act and the Statute of 4 Anne is founded the right of the plaintiff to recover from the defendant mesne profits or rents, not only for the Garren and Gies properties, rented by her to third parties, but also for the brewery property occupied and used by her. These two acts are considered in *Lancaster v. Flowers*, 208 Pa. 199, 57 Atl. 526. The court said: "The English Statute of 4

Anne, chap. 16, § 27, enables one tenant in common to maintain an action of account against his cotenant as bailiff for receiving more of the income than his just share or proportion, and the English courts have held that the statute applies only where 'one tenant in common receives the money from another person to which both parties are entitled by reason of their being tenants in common and their interests as such, and of which one receives and keeps more than his just share.' *Henderson v. Eason*, 17 Q. B. 701, 117 Eng. Reprint, 1451, 21 L. J. Q. B. N. S. 82, 16 Jur. 518, 1 Eng. Rul. Cas. 449. The Act of June 24, 1895, P. L. 237, contemplates that where the property is held by tenants in common that the parties in possession shall have deducted from their distributive shares the rental value to which their cotenants may be entitled. These statutes supply the remedies not existing at common law, and cover the case where the cotenant receives the rent as bailiff, and that where a cotenant out of possession is entitled to rental values, and contemplate that these remedies shall be applied to such cases of tenancy in common." In *Dorrance v. Ryon*, 35 Pa. Super. Ct. 180, speaking of the Act of June 24, 1895, P. L. 237, the court says: "The ground upon which a tenant in common is liable to be called upon by his cotenant to account, in an action of assumpsit, for a proportionate share of the money which he has actually received as rent from a stranger, is entirely different from that which makes him liable for mere use and occupation. The Act of June 24, 1895, P. L. 237, gave to tenants in common who have been out of possession a right to recover from those who have been in exclusive possession their proportionate part of the rental value of real estate held in common. Prior to this statute one tenant in common could not maintain either trespass for mesne profits, assumpsit, or account rendered in order to compel a cotenant to pay

for mere occupation of the premises, without showing either an ouster or an express promise to account or to pay something. But prior to the Act of 1895 a tenant in common was allowed to recover in assumpsit his share of the profits received by his cotenant from a stranger." See also *Wells v. Becker*, 24 Pa. Super. Ct. 174. The question of ouster does not arise in this case. Between tenants in common ouster must be proved by decisive acts of hostile character. *Solomon v. Rogers*, 13 Pa. Super. Ct. 70. Denial of title is not of itself ouster. *Filbert v. Hoff*, 42 Pa. 97, 82 Am. Dec. 493. Ouster will not be presumed merely because cotenant takes the rents and profits. *Watson v. Gregg*, 10 Watts, 289, 36 Am. Dec. 176. It follows from these decisions that the defendant is liable to the plaintiff under the Statute of 4 Anne for the rents received by her from the Garren and Gies properties, but as to the brewery property she is liable for rental value under the Act of 1895. In the first case the courts regard her as a trustee for her cotenant of the rents collected, and hold her to a strict accountability. She cannot plead the Statute of Limitations, and is liable for interest on the annual rents. In regard to the brewery property the master is of the opinion that she can be compelled to account for rental value for a period of six years only,—that is, from April 8, 1906,—the action of ejectment having been begun April 8, 1912. In regard to the Garren and Gies properties the case of *McGowan v. Bailey*, 179 Pa. 470, 36 Atl. 1129, is directly in point. This was a dower case. The owner died in 1863, leaving a widow and children. No dower was set out. The real estate ultimately passed to defendants who, in 1884, opened a coal mine, and by 1893 had taken out most of the coal. In that year the widow filed a bill for her one third of the value of the coal with interest, as a tenant in common. The supreme court, in allowing the claim, said: "A tenant in

common exercises his undoubted right to take the common property, and he has no other means of obtaining his own just share than by taking at the same time the share of his companions." Cotenant "had a right to mine and receive the money for all the coal, including her one third. This was, therefore, not an act hostile to or in denial of her right. As to her thirds they were merely trustees for her, and long before lapse of time raised a presumption of payment she made a legal demand for an accounting. It has been held over and over again since *Dillebaugh's Estate*, 4 Watts, 177, that the 'Statute of Limitations in such cases is out of the question.'" The court also decided that she was entitled to interest for the whole period the meantime being 1890, three years before the action was commenced. It is very plain from these decisions that Mrs. Seip has received these rents as trustee, that the Statute of Limitations cannot be pleaded, and therefore she must account for them from April 8, 1894, with interest.

In the opinion of the master the right to recover rental for the brewery property is upon a different basis. It arises under the Act of 1895, giving a tenant out of possession the right to bring suit. From April 8, 1894, to June 24, 1895, Mrs. Seip was rightfully in possession of this property, and could not be called upon to pay anything. But from June, 1895, she became answerable to her cotenant for the rental value. The plaintiff, by her guardian, could have demanded at that time from the defendant a fair annual rent, and in case of failure to agree could have begun an action to protect her rights and recover the rent. Nothing of this kind was done, and the matter was permitted to remain undetermined and uncontested until after the Easton Trust Company retired from guardianship in 1912, when, on April 8th of that year, Fassitt, the then guardian, brought the action of ejectment above

mentioned. The question now to be determined is whether the plaintiff shall recover the rental value or mesne profits for the whole period from June 24, 1895, or, being barred by the Statute of Limitations, only from a time six years prior to the ejectment suit, that is, from April 8, 1906. The Statute of Limitations of March 27, 1713, 1 Smith's Laws, 76, § 5, expressly exempts infants from its operation, and if no guardian had ever been appointed for this plaintiff, it is not at all likely that this question would have been raised. But the fact that there has always been, since plaintiff's right first arose, a custodian with legal possession of her estate, and authorized and empowered to protect her rights, entirely changes the case. Is a guardian privileged to slumber upon the rights of his ward, while executors, administrators, and trustees must be alert to prevent the bar of the statute, even though the beneficiaries of the estates they administer may be minors? There is every reason why a minor, ignorant of the fact that he is the owner of property, or without capacity to take care of it, or to proceed to protect his title, should have the benefit of the exemption of this act, but there is none whatever when his estate is in the custody of a guardian. This summary of the authorities is found in 25 Cyc. 1261: "In the majority of jurisdictions, where the title or right of action vests in a personal representative, guardian, or trustee, who is under no legal disability, the Statute of Limitations begins to run, notwithstanding the minority of the beneficiary, and where the former is barred by the statute, the latter is likewise barred." In *Meeks v. Olpherts*, 100 U. S. 564, 25 L. ed. 785, the court says, page 569: "Whatever doubt may have existed at one time on the subject, there remains none at the present day, that whenever the right of action of a trustee is barred by the Statute of Limitations, the right of the cestui que trust thus represented is also barred. This doctrine

is clearly stated in *Hill on Trustees*, 267, 403, 504, and the authorities there cited fully sustain the text, both English and American." Citing *Smilie v. Biffle*, 2 Pa. St. 52; 44 Am. Dec. 156; *Couch v. Couch*, 9 B. Mon. 160; *Rosson v. Anderson*, 9 B. Mon. 423; *Darnall v. Adams*, 13 B. Mon. 273. In *Smilie v. Biffle*, supra, the court held: "The rule in a court of equity that the Statute of Limitations does not bar a trust estate holds only as between the cestui que trust and trustee, not between the cestui que trust on the one side and a stranger on the other." In *Warfield v. Fox*, 58 Pa. 382, the court says: "If it is a matter of public interest that titles to land should be quieted, it can be no hardship, comparable to the mischief of permitting judicial decrees to be indefinitely liable to attack, or trusts unexecuted, and not in writing, to be asserted, that minors, femes covert and persons non compotes mentis should be held to the same limitations as those applied to others. Ordinarily they have guardians and committees; if covert, they have husbands who may maintain their rights, whose interest and duty it is to assert them." While the court in this last case were construing the Act of April 22, 1865, P. L. 532, they recognize the general principle that where an estate is in the hands of guardians or committees this fact differentiates it from those not so protected.

The Statute of Limitations may be pleaded to all mesne profits beyond six years. *Huston v. Wickersham*, 2 Watts & S. 308. It should be borne in mind that Mrs. Seip is not a bailiff or trustee as to the brewery property; she collected no rents to hold as a trust fund. She is in fact the "stranger" whose rights were recognized and confirmed in *Smilie v. Biffle*, supra. The authorities above cited seem to be ample to sustain the conclusion that she is entitled to the benefit of the Statute of Limitations. In *Sopp v. Winpenny*, 68 Pa. 78, which was an action of trespass for mesne

profits brought in 1866, the court permitted a recovery from the time the action in ejectment was begun in 1865. Following this precedent, the action in ejectment in the present case, having been begun April 8, 1912, fixes the date from which to calculate the rental value as April 8, 1906.

It is conceded that defendant is entitled to credit for all proper items of taxes, county, city, and school, insurance, and repairs paid by her. As to the Gies property the items were readily agreed upon, as they appear in finding No. 16.

In regard to the Garren property the item of repairs stated as "Towards improvements, \$500." The facts are, briefly, that this was a contribution of 125 barrels of beer, worth at cost \$500, which Mrs. Seip and Edward S. Veile, in 1892, while they were operating the brewery, agreed to furnish to Jacob W. Garren, who had just leased the property for a term of years, as their contribution towards the cost of certain alterations and improvements to the property which Garren had undertaken to make. Mrs. Seip agreed to this only after Theresa Veile, the life tenant, had promised to pay the \$500, cost value of the beer. Edward S. Veile died two days after Garren took possession in 1893, and Theresa Veile died the following year without having paid for the beer donated to Garren. The master thinks that the objection is well taken, as this is clearly a debt of Theresa Veile and should have been collected from her estate. The credits allowed for repairs, taxes, insurance, and water tax appear in finding No. 18. As has been found above, there is a difference between the brewery and the other two properties in regard to rents. There is also a difference in the matter of liability to contribute towards the cost of maintenance, repairs, and taxes by the tenant out of possession. It would be manifestly most inequitable to require such tenant to contribute anything whatever towards these items. The

tenant in possession, having the sole occupancy without rent, using and wearing out in the operation of the plant the fixtures and appliances, and causing the rotting away of the floors and other portions of the buildings liable to decay, and generally bringing about a condition of disrepair and disintegration in the buildings themselves, is certainly not in position to ask contributions for upkeep from a cotenant who is getting nothing whatever out of the property. In *Crest v. Jack*, 3 Watts, 238, 27 Am. Dec. 353, the court says: "One joint tenant or tenant in common cannot erect buildings or make improvements on the common property without the consent of the rest." They also say in *Beaty v. Bordwell*, 91 Pa. 488: "A tenant in common is liable to his cotenant for repairs that are absolutely necessary to houses and mills already erected and in being, which fall into decay." To the same effect is *Dech's Appeal*, 57 Pa. 467. From April 8, 1906, to October 9, 1909, the statement shows expenditures for repairs totaling \$706.96, of which \$58.48 were paid in 1906, \$523.18 in 1907, \$93.07 in 1908, and \$44.03 in 1909. A further analysis shows these payments were for

Concreting material	\$80.65	
Drains	51.75	
Roof	22.28	
Repairs to floors and alterations	100.16	
Surveys	9.94	
		<hr/>
		\$264.78
Stable	\$219.93	
Unplaced (witness no recollection)	222.25	
		<hr/>
		442.18
		<hr/>
		\$706.96

The payment of over \$500 in 1907 indicates that more than "absolutely necessary" repairs were made. Expenditures upon the "stable" have already been passed upon as new construction, and not allowable. The items of which the witness, Mr. Cope, had no recollection, amounting to \$222.25, mainly for brick and iron, were not sufficiently

shown to have been used in absolutely necessary repairs on the estate brewery, and cannot be allowed. The other items, amounting to \$264.78, are allowed, as they seem to be for necessary repairs.

It appears that prior to April 8, 1906, Mrs. Seip had expended a very large amount on repairs and improvements. The amount, as appears in the statement presented, from 1896 to April 8, 1906, is \$4,543.22. The original brewhouse, a one-story brick structure, was taken down almost to the foundation, and rebuilt as a two-story structure with addition for office. A new one-story building, called the wash house, 26 feet by 47 feet, was erected of brick, iron, and concrete, with small addition known as pitch house. New floors of iron beams, hollow brick, and concrete were put into the ice house, and generally this same material was used in making repairs and replacements in the most substantial manner wherever needed. An entirely new stable was built. Repairs and improvements of this character are clearly within the inhibition of the rule in *Crest v. Jack*, *supra*, and not the kind permitted in *Beaty v. Bordwell*, *supra*. The master therefore feels that, in addition to the reasons given above, the rejection of the credits prior to April 8, 1906, is warranted by the authorities, and further, being a counterclaim against the rental value covering the same period which the master has previously found to be barred by the Statute of Limitations, it must also be barred.

In arriving at the rental value of the brewery property the master has taken into consideration the value of the property as it was in 1894, its capacity at that time and the average output, together with the testimony of A. H. Kress, who was called as an expert witness. He is a builder of large experience in Reading, Pennsylvania, who had also been in the distilling business for five years, had owned and operated a brewery for

three years, had been called upon as an expert to appraise three other breweries, one of them at Northampton, this county, and is a large owner of real estate in and near Reading. He was able and clearly competent to estimate the value and capacity of this brewery, and, with information as to its average output, give such an opinion as to the value of the property in 1894 and its rental value as is of material assistance in this inquiry. Xavier Veile bought the half interest of his partner, Christian Tacke, in this real estate in 1871 for \$10,000. He subsequently, in 1878, built the ice house, a two-and-a-half-story brick building, at a cost of \$13,000. At the time of his death the brewery was producing more than 2,800 barrels of beer, and had a capacity of more than 4,000. Cost of beer in 1894 was about \$4 and the selling price from \$5.50 to \$8. The cost has increased since then, but there is still a profit if sold at \$5.50. By 1900 the output was 5,900 barrels. In the opinion of Mr. Kress, a brewery of the capacity of 4,000 barrels was worth \$30,000, and had a rental value of \$3,000, repairs and taxes to be paid by the tenant. His valuation of the property was fully confirmed by the defendant, who, a few weeks after he testified, bought it at the figure named. The master is of the opinion that the finding of a rental value of \$3,000 per annum is fully sustained by the evidence.

The testimony in regard to the Garren and Gies properties shows that Mrs. Seip received from each tenant \$600 per year in cash; that these tenants sold Veile's beer exclusively, although they were not restrained by their leases from handling other local beer; that they paid \$7.20 per barrel up to 1898, and since then \$7.70, while the same beer was sold to other saloon keepers, a block or two further up the street, for \$6.50. This decrease of price was solely due to the fact of competition with other breweries, of which competition the lessees of the Garren and Gies properties did

not or could not avail themselves. The master is satisfied that this increase in the price of beer to her tenants was an advantage derived solely from the fact of her ownership of the properties, that it was virtually an indirect rental, a profit out of properties of which she was the trustee for her cotenant, and that she should account for it as rent. The amount of this indirect rent as found, \$300, added to the \$600 actual cash received, is \$900. Compare this with rents paid for saloon properties in this neighborhood. One just across the street from the Gies property, as well located, the building about the same size and as well suited for the business, rents for \$900, and the American Hotel, a much larger building in the same block, rents for \$1,200.

The county, city, and school taxes on the brewery are assessed upon a valuation of the whole property comprised in the Veile brewery, consisting of that portion known as the Xavier Veile estate, 80 feet by 194 feet, and the two adjacent properties on the north and south, with their improvements, owned by Mrs. Seip. As Mrs. Seip is entitled to credit for taxes paid on the Xavier Veile estate portion of the property from April 8, 1906, some apportionment must be made. A method can be devised from the city assessments. Prior to 1905 the assessment was \$20,000. From that date, about the time the improvements on Mrs. Seip's individual property were added to the plant, the assessment was raised \$15,000, representing these improvements. This gives a proportion of four sevenths as the estate's share, and three for Mrs. Seip. The calculations will be made on this basis.

In regard to defendant's seventh request, the master cannot find that the defendant, relying upon the agreement with the mother of plaintiff, expended large sums of money on the brewery and Garren properties and in buying land ad-

joining the brewery and improving it, and cannot equitably be placed in the same position as she occupied before the agreement of May 7, 1894. Was she not relying upon the will of Xavier Veile under which Theresa Veile had the right to sell all the real estate if needed for her maintenance and support; upon the decision of the court of common pleas that this gave her an estate in fee simple; upon the conveyance by Theresa Veile of all this real estate to third parties and its reconveyance to her by her grantees; upon the will of Theresa Veile, giving the defendant a life estate; upon the lease of the brewery executed by Theresa Veile to the defendant in 1894, for a period of thirty-five years, at a rental of \$260 per year? There was also the will of Xavier Veile which gave defendant a life estate in half of this property. It must be that all these contributed to the result. Besides the defendant gets the property at its value in 1894, and the fact that she gets it saves her from any loss by reason of her expenditures on the adjoining property. Such improvements as she made were essential to a modern brewery, and are just as valuable to the plant as when they were first put in. She got possession of this brewery fully equipped to produce beer. It was certainly incumbent upon her to maintain it. The renewals and replacements she made, the new equipment and enlarged facilities she provided, are all there, belong to her, and she has suffered no loss by reason of them. So far as these expenditures are concerned she is in as good a position as she was before the agreement of May 7, 1894. But aside from these considerations, how can an agreement concerning the estate of a minor, made without the sanction of the court, by a person without any authority to act, whose action has been repudiated by the minor upon attaining her majority, be of any avail to this defendant? She herself brought about this situation by making the agreement with

the mother instead of with the guardian. Certainly the plaintiff should not suffer because of a condition of affairs to which she in no wise contributed.

Messrs. James J. Cope, E. J. Fox and J. W. Fox, for defendant:

A family compromise of a dispute or a family settlement is one that is approved and recognized by courts, both at law and in equity.

Hume v. Hume, 3 Pa. St. 144; *Bispham*, Eq. p. 288, § 189; *Bierer's Appeal*, 92 Pa. 265; *Barton v. Wells*, 5 Whart. 225; *Wistar's Appeal*, 80 Pa. 484; *Shartel's Appeal*, 64 Pa. 25; *Lancaster v. Flowers*, 208 Pa. 199, 57 Atl. 526; *Follmer's Appeal*, 37 Pa. 121; *Drake v. Lacoe*, 157 Pa. 17, 27 Atl. 588; *Norris v. Crowe*, 206 Pa. 438, 98 Am. St. Rep. 783, 55 Atl. 1125; *Cowan's Appeal*, 74 Pa. 329; *Walworth v. Abel*, 52 Pa. 370.

The question of the liability of the defendant for rentals of the two properties known as the Gies and Garren properties depends wholly upon the determination of the question as to whether Mrs. Seip was in possession as a trustee under her mother's will, or whether she was in possession as a cotenant under her father's will.

Enterprise Oil & Gas Co. v. National Transit Co. 172 Pa. 421, 51 Am. St. Rep. 746, 33 Atl. 687, 18 Mor. Min. Rep. 312; *Norris v. Gould*, 15 W. N. C. 187.

The question of ouster does arise and is important, and is one of the tests which must be applied in order to properly determine whether or not the rentals must be accounted for by the defendant.

38 Cyc. 27; *Phillips v. Gregg*, 10 Watts, 158, 36 Am. Dec. 158; *Tanney v. Tanney*, 159 Pa. 277, 39 Am. St. Rep. 678, 28 Atl. 287; *Lewitzky v. Sotoloff*, 224 Pa. 610, 73 Atl. 936; *Zeller v. Eckert*, 4 How. 289, 11 L. ed. 979; *Lodge v. Patterson*, 3 Watts, 74, 27 Am. Dec. 335; *Clayton v. McCay*, 143 Pa. 225, 22 Atl. 754; *Norris v. Gould*, *supra*.

If there is a right on the part of the guardian to maintain an action for rents, it is the universal rule that the bar of the Statute of Limitations will obtain.

Cole v. Jerman, 77 Conn. 374, 59 Atl. 425; *Palmer v. Cheseboro*, 55 Conn. 114, 10 Atl. 508; *Huff v. Walker*, 1 Ind. 193; *Zirkle v. McHue*, 26 Gratt. 517.

Mr. Robert A. Stotz for plaintiff.

Mestrezat, J., delivered the opinion of the court:

This is a bill in equity filed May 1, 1913, by the plaintiff's guardian for the partition of three pieces of real estate held by the plaintiff and the defendant as tenants in common, and for an accounting of the rents and profits of the property while in the occupancy of the defendant. The plaintiff became of age on June 12, 1913. A decree was entered in favor of the plaintiff January 26, 1915, from which both parties have taken an appeal. The appeals will be disposed of in one opinion. The learned master made an exhaustive report in which he found the facts and stated his conclusions of law. His findings and report were confirmed by the court below. It would serve no good purpose to review at length either his findings of fact or his conclusions of law, so far as they relate to the defendant's appeal, as we are all satisfied that it is without merit, save in the minor details hereinafter noticed.

The principal question in the defendant's appeal is as to the validity of an alleged compromise or family settlement made by representatives of the plaintiff and the defendant, by which they agreed to accept the provisions of the will and codicil of Mrs. Theresa Veile, and that the income given to the child by the codicil to the will of Theresa Veile should be paid to her by the defendant. It is claimed on the part of the defendant that this was a family agreement which was intended to protect the defendant and also the interests of Clarissa M. Veile, the plaintiff, by giving her the income provided in the will of her grandmother. It is contended that the agreement was a compromise of possible litigation, and accepted by all the parties in interest, and that it bars the plaintiff from recovering from the defendant her share of the rental value of the property which was in the defendant's occupancy from 1894 until 1913, when it was determined by this court that the

title to the premises was in the plaintiff and defendant as tenants in common. The agreement in question is a writing signed by Florence R. Veile for her daughter, Clarissa M. Veile, in which is recited a codicil to the will of Theresa Veile, the grandmother of the plaintiff and the mother of defendant, who claimed the property, by which the defendant was required to pay the plaintiff \$40 per month, during the defendant's lifetime, and which writing acknowledged the receipt of \$40, being the first monthly payment under the codicil, and declared "that I accept all the provisions contained and set forth in said last will and testament and codicil thereto." This paper is dated May 7, 1894. At this time Clarissa Veile was not quite two years of age, and the Easton Trust Company was her guardian. It is strenuously contended by the defendant, in an elaborate argument dealing with the testimony and the law, that this was a family settlement, or compromise, which is binding on the plaintiff, and deprives her of the right to recover her share of the rental value and income of the property from the date of the death of the life tenant, Mrs. Theresa Veile, until it was determined in 1913 by the decision of this court that the plaintiff was the owner of the undivided one-half interest in the property. We, however, entirely agree with the court below and the learned master, who found that "the acceptance by plaintiff's mother during plaintiff's minority of certain payments made to her by defendant, pursuant to the terms of the will of Theresa Veile, and the acceptance by her (the mother) of the provisions contained in said will, which acceptance was ratified neither by the guardian nor by herself when she became of age, cannot be set up by defendant as a bar or defense to plaintiff's claim in this proceeding."

Limitation of actions—infancy—effect of appointment of guardian.

stated by the learned master, and it does not appear that there were any other writings bearing on the question of the alleged settlement, or that the guardian of the plaintiff signed, ratified, or approved it. The guardian was not present when the paper was executed by the mother of the child, was not consulted beforehand about it, and had no knowledge of it until the mother had signed it. It is unnecessary to discuss what took place between Mr. Scott and Mr. Cope, the attorneys alleged to have represented the interests of Mrs. Seip and the minor child and her mother, or the telephonic communication with Mr. James, the president of the Easton Trust Company, as the writing executed by the mother of the minor must be relied on to establish the family agreement. It is clear that she had no authority to bind her minor child, or to make any agreement which would affect the latter's rights in the real estate in question or the income or profits arising therefrom. *Senser v. Bower*, 1 Penr. & W. 450; *Heft v. McGill*, 3 Pa. St. 256, 263; *Groome v. Belt*, 171 Pa. 74, 32 Atl. 1182. It must be assumed that the eminent counsel acting for the parties in the transaction were fully aware, not only of the interest of the minor in the property, but also of the only legal way in which it could be affected or divested. The president of the Easton Trust Company, the guardian, was also a lawyer of high professional standing, and therefore manifestly knew that the mother's signature to the paper in question could not bind her infant child. The guardian did not sign the paper and thereby become a party to the alleged family settlement. It received none of the annual payments directed to be made by the will of Theresa Veile. The annual instalments were all paid to the mother, and receipted for by her. In fact, Mrs. Seip and her counsel dealt entirely with the mother, to

Family settlement—acceptance of benefits—right to repudiate.

The facts are found and clearly
6 A.L.R.—106.

the exclusion of the guardian. Why the guardian did not act for its ward and execute the paper in question does not appear, but may be inferred from the fact that the alleged compromise was manifestly against the interests of its ward. The guardian repudiated the alleged settlement by bringing the action of ejectment in 1912, and subsequently filing this bill for an accounting of the rents, income, and profits of the property while it was in the possession and occupancy of the defendant. The learned counsel who acted for Mrs. Seip and for the child's mother, respectively, and the president of the trust company, knew that the guardian was the only party who could legally represent the child in effecting a settlement. There could be, therefore, no reasonable ground for the defendant's belief that the paper in question was a valid legal family settlement which bound Clarissa Veile, the two-year-old child. Mrs. Seip could not have been misled as to the effect of the paper, in view of the fact that she was represented by such eminent counsel. In fact, the paper signed by the mother was not a release to Mrs. Seip, or anything but a receipt and a declaration that the mother, on behalf of her daughter, accepted all the provisions of Theresa Veile's will and codicil. The only inference that can be drawn from the whole transaction is that Mrs. Seip was willing to deal with the mother of the child instead of the guardian, and that the latter did not intend to bind itself or its ward by the paper executed by the mother. A chancellor cannot make an agreement for parties, nor enforce an agreement against one who is not a party to it. We think the learned master and the court below were clearly right in their conclusion as to the purpose and validity of the alleged agreement.

The rental value of the property during the defendant's occupancy and the application of the Statute of Limitations, raised on the defend-

ant's appeal, are fully discussed by the learned master, and require no further consideration here. An examination of the evidence does not convince us that the master erred as to the rental value for which the defendant should account. As said by the learned court below, the master fixed the rental

value of these properties upon testimony that commended itself to him, and his findings have the effect of a verdict of a jury, unless clearly erroneous.

We think, however, that the learned master and the court below should have allowed credits for one half of such taxes, water rents, insurance, and repairs on the brewery property as are shown by the evidence to have been paid by the defendant, and for the

monthly payments made by the defendant to the mother of the plaintiff during the whole period of the defendant's occupancy, to wit, since April 7, 1894, in view of the fact that we hold, as hereinafter stated, that the Statute of Limitations is not a bar to an accounting for the rental value of that property since that date. With the exception of these credits, the defendant's appeal must be dismissed. The master was right in holding that the defendant is not entitled to credit for expenditures for new build-

ings erected on the property, or for enlargements, reconstruction, or improvements on the common property. *Gregg v. Patterson*, 9 Watts & S. 197; *Crest v. Jack*, 3 Watts, 238, 27 Am. Dec. 353; *Dech's Appeal*, 57 Pa. 467; *Kelsey's Appeal*, 113 Pa. 119, 57 Am. Rep. 444, 5 Atl. 447. We think there was no error in allowing

interest on the rentals of the several properties as computed by the learned master.

The assignments filed by the

Parent and child—authority of parent to contract for child.

Appeal—finding of master—effect.

Tenants in common—accounting for possession—credit.

—credit for improvement.

plaintiff in her appeal raise but a single question, namely, whether, as the master and court below held, the Statute of Limitations is a bar to the plaintiff's right to an accounting for the rental value or mesne profits of the brewery property, beyond six years prior to the bringing of the ejectment suit. The master made a distinction between the status of the brewery property and the other two parcels of property included in the partition proceedings, on the ground that the defendant occupied and used the brewery property in person, and therefore received no rental income as such therefrom, while the other two parcels were occupied by tenants from whom the defendant received rent. As to the other two parcels he held that the Statute of Limitations could not be invoked to prevent an accounting for the whole period of the defendant's occupancy of the property, and required her to account from the death of the life tenant in 1894. The plaintiff contends that the defendant cannot set up the statute to defeat an accounting for the whole period, because (1) she was under legal disability, being a minor; and (2) because defendant both expressly and impliedly acknowledged liability to account, promised to pay the amount found due, and waived the statute.

The title to the property was in Xavier Veile, who devised it to his widow, and after her death to his two children for life, and then to his grandchildren. His widow, Theresa Veile, took possession of the property, claiming that under her husband's will she was entitled to the fee. She devised the property to her daughter, the defendant, with the provision that the devisee should pay Clarissa Veile, the plaintiff, \$40 per month during the defendant's lifetime. At the death of her mother in 1894, the defendant took possession of the property, claiming to own it in fee simple, and retained possession until it was decided by this court in *Fassitt v. Seip*, 240 Pa. 406, 87 Atl. 957, that

Theresa Veile had only a life estate, with power of consumption, and could not by will dispose of any estate derived under her husband's will remaining at her death. The title to the property was, therefore, in the plaintiff and defendant as tenants in common, the defendant having purchased the interests of her children in 1902. The adverse holding by the defendant was from the death of the life tenant in 1894 until the rights of the parties were determined by the ejectment in 1913.

We think the learned court was in error in applying the statute during the period of the minority of the plaintiff, who was about two years of age in 1894, when defendant went into possession of the premises, and had not attained her majority when this proceeding was commenced in the court below.

Section 5 of the Act of March 27, 1713, 1 Smith's Laws, 76, 2 Purdon's Dig. 2293, provides, *inter alia*, as follows: "If any person or persons who is or shall be entitled to any such action of trespass, detinue, trover, replevin, actions of account, debt, . . . be, or at the time of any cause of such action given or accrued, fallen or come, shall be within the age of twenty-one years, . . . that then such person or persons shall be at liberty to bring the same actions, so as they take the same within such times as are hereby before limited, after their coming to or being of full age." The learned court below held that this section of the act, in favor of the minor, did not apply in the present case because she had a guardian who was appointed shortly after the defendant took possession of the premises, and who could have protected her interests by an appropriate action at law or in equity. The master found that the rental value of the brewery property was \$3,000 per annum during the whole time of its occupancy by the defendant. The latter is compelled by the court below, under its ruling, to account for the rentals for only six years

prior to the institution of the action of ejectment, or from the year 1906, and not from the year 1894 when the defendant went into possession of the premises.

The section of the act just quoted makes no distinction between an infant with a guardian and without a guardian. It prevents the running of the statute in all cases where the person entitled to sue is within the age of twenty-one years, and permits such person to bring the action after he arrives at full age. The legal title to the property was in the infant, and not in her guardian, and therefore the right of action was in the infant, and not in the guardian. We can see no reason for the distinction made by the learned master and the court below between an infant without a guardian and one having a guardian. It is true that a guardian may bring an action to protect his ward's interest, but if he fail to do so the infant may institute an appropriate action for enforcing his rights after he becomes of age. If the legal title was in a trustee or in a guardian it would be different, and in such case, if the action was not brought within the statutory period, it would be barred as to the person under disability during the period of limitation. Here, however, the legal title was in the infant, and not in the guardian or in a trustee, and hence that rule cannot be invoked to deprive the beneficiary of her right of action after she has attained her majority.

In Wood on Limitations of Actions, 3d ed. § 238, the rule is announced as follows: "Persons who have not attained the age of majority are infants, and in those states where infancy is within the saving clause of the statute, the statute does not begin to run against him or her, even though he or she has a guardian who might sue the claim in question; nor even though other persons are jointly interested in the claim, who are of full age, until he

or she attains the age of majority. The fact that a guardian or the infant himself brings a suit before the disability is removed does not operate as a waiver of the saving clause in favor of the disability." In 25 Cyc. 1260, 1261, citing many authorities to sustain the text, it is said: "In many jurisdictions, by express statutory enactment, or by judicial construction, where the statute excepts persons laboring under disabilities from its operation, without mentioning infants specifically, infants are within the saving clause of the statute, and the statute does not run against them during such disability, even where such infant has a guardian who might maintain the action in his or her name, provided the title or right of action is in the infant." The rule announced in the textbooks is supported by numerous decisions: *Fink v. Campbell*, 17 C. C. A. 325, 37 U. S. App. 462, 70 Fed. 664; *Snare & T. Co. v. Friedman*, 40 L.R.A.(N.S.) 367, 94 C. C. A. 369, 169 Fed. 1, 21 Am. Neg. Rep. 311; *Henley v. Robb*, 86 Tenn. 474, 7 S. W. 190; *Frost v. Eastern R. Co.* 64 N. H. 220, 10 Am. St. Rep. 396, 9 Atl. 790; *Keating v. Michigan C. R. Co.* 94 Mich. 219, 53 N. W. 1053; *Monroe v. Simmons*, 86 Ga. 344, 346, 12 S. E. 643; *North v. James*, 61 Miss. 761. The distinction suggested above that the rule does not apply when the right of action is in a trustee who is vested with the legal estate, and is competent to sue, is adverted to and the cases sustaining it are cited in these authorities.

If, as suggested above, the legal title is in a guardian or trustee for a minor or other person under disability, the statute will run, and the action must be brought within the statutory period or it will be a bar both as to the trustee and the beneficiary. This is the doctrine of the authorities cited and relied on by the learned master. In such cases the party entitled to sue has the legal title, and labors under no disability, and hence the action must be brought within the statutory

Interest—
on rentals—
accounting by
cotenant.

period. The distinction between such cases and those where the legal title is in an infant or other person within the saving clause of the statute is pointed out in the textbooks referred to above and the numerous decisions on the subject.

In the case in hand, the title to the undivided one half of the real estate was in the plaintiff from the date of her father's death, subject only to the life estate of her grandmother. The rentals claimed were due on this real estate, and hence the right of action was in the plaintiff. The saving clause of the statute, therefore, protected her against the running of the statute until she became of age. It is true that this suit was brought by her guardian, but, as will be observed under

Limitation of
actions—action
by guardian—
waiver of
exception.

the authorities cited above, the bringing of such suit does not waive the exception to the Statute of Limitations.

The statute was, therefore, not a bar to the plaintiff's right to recover her share of the rentals of the brewery property from the date of the death of the life tenant in April, 1894. There is nothing in the Act of June 24, 1895, P. L. 237, which prevents a recovery thereunder of the rental value for the occupation of property held in common before the passage of the act.

We are also of the opinion that the defendant waived the benefit of

—waiver by
agreement.

the statute by the agreement of January 9, 1914. This

agreement refers to the brewery property, and the fourth paragraph provides, inter alia, that the master shall proceed to determine "the total amount of the net rental value of the premises for the period during which they have been in the use and occupancy of the defendant, to wit; from April 7, 1894, to the date hereof, in the same manner and to the same extent as if this agreement had not been made; and the plaintiff's share of such rental value, as thus found and deter-

mined, shall be added to her other interest in said premises as determined by the valuation herein agreed upon, to wit, one half of \$30,000, and deducted from the defendant's share or interest therein; the whole amount, to wit, the sum of \$15,000 and the sum of one half the net rental value of said premises, as thus found and determined, to be paid in cash by the defendant to the plaintiff." In paragraph 9 of the agreement reference is made to "the plaintiff's share of the net rental value, whatever the amount thereof may be." The only purpose and effect of the tenth paragraph, as disclosed by its language, was to preserve the right to claim credits for improvements, etc., made for the benefit of the property. If this right was reserved, why was not the right to plead the Statute of Limitations also reserved, if it was so intended? This action was brought prior to the date of the agreement, and the Statute of Limitations had not then been pleaded. We think the defendant by this agreement waived the benefit of the statute and agreed to pay the plaintiff one half of the net rental value of the brewery property from April 7, 1894, the date of the death of the life tenant.

The agreement of 1914 provides that there shall be deducted from the plaintiff's share of the net rental value of the brewery property the amounts of cash paid from time to time by the defendant to the plaintiff, or to her guardian and mother, since April 7, 1894. The master, however, only allowed as credits on the rentals the amounts paid within the six years, instead of allowing the total amount paid since April 7, 1894. The intention of the agreement, as disclosed by its language and as we have held, was that the master should determine the net rental value of the premises from the death of the life tenant in 1894, and award to the plaintiff her share thereof, less the total amount of cash paid to her during the same time. As suggested above in dis-

cussing the defendant's appeal, a credit should be allowed for the taxes, etc., paid by defendant on the brewery property during the same period.

Both appeals must be sustained, and the decree modified to the extent indicated. The record will be remitted to the court below for the purpose of modifying its decree in accordance with the views expressed in this opinion. As thus modified, the decree of the court below is affirmed.

NOTE.

The decision in the reported case (*FASSITT v. SEIP*, ante, 1671) that the appointment of the guardian for the minor did not start the Statute of Limitations running against the latter is in accord with the weight of authority, as shown by the annotation following *FUNK v. WINGERT*, post, 1689, on "Appointment of committee for incompetent or guardian for infant as affecting running of Statute of Limitations against him."

LOUISA M. FUNK, by Her Committee, Appt.,
v.

HENRY F. WINGERT et al., Trading as Pomeroy Brothers & Company
et al.

Maryland Court of Appeals—June 24, 1910.

(— Md. —, 107 Atl. 345.)

Limitation of actions — non compos mentis — effect of appointment of committee.

1. The appointment of a committee for a person non compos mentis does not start the running of the Statute of Limitations against claims in his favor, under a statute providing that, if at the time a cause of action accrues the one having the right to bring the action is non compos mentis, he shall be at liberty to bring it within the time specified after the disability is removed.

[See note on this question beginning on page 1689.]

Incompetent person — powers of committee.

2. The committee of a non compos does not hold the legal title to the

property of the non compos and cannot sue in his own name as committee to protect it.

[See 14 R. C. L. 574.]

APPEAL by plaintiff from a judgment of the Circuit Court for Frederick County (Worthington and Peter, JJ.) in favor of defendants in a suit on a promissory note. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Frank G. Wagaman, Jesse O. Snyder, and Reno S. Harp, for appellant:

The appointment of a committee does not start the running of the Statute of Limitations against a lunatic, who was such at the time the right of action accrued.

Wood, Limitations, § 238; 16 Am. & Eng. Enc. Law, 573-578.

No committee can sue in his own name. All suits must be brought in

name of lunatic, by his committee, when a committee has been appointed, and by next friend, before a committee is appointed.

16 Am. & Eng. Enc. Law, 600, 601; Bourne v. Hall, 10 R. I. 139; Keating v. Michigan C. R. Co. 94 Mich. 219, 53 N. W. 1053; Onions v. Covington & C. Elev. R. & Transfer & Bridge Co. 107 Ky. 154, 53 S. W. 8; Kuchenbeiser v. Beckert, 41 Ill. 172; Frost v. Eastern R. Co. 64 N. H. 220, 10 Am. St.

Rep. 396, 9 Atl. 790; Jackson ex dem. Bunt v. Ransom, 10 Johns. 408; Kennedy v. Knight, 174 Pa. 408, 34 Atl. 585; Henley v. Robb, 86 Tenn. 474, 7 S. W. 190; Alsup v. Jordan, 69 Tex. 300, 5 Am. St. Rep. 53, 6 S. W. 881; Fink v. Campbell, 17 C. C. A. 325, 37 U. S. App. 462, 70 Fed. 664; Throckmorton v. Pence, 121 Mo. 50, 25 S. W. 848; Ashley v. Rockwell, 43 Ohio St. 386, 2 N. E. 437; Alvis v. Oglesby, 87 Tenn. 172, 10 S. W. 316; Coleman v. Walker, 3 Met. (Ky.) 65, 77 Am. Dec. 163; Grimsby v. Hudnell, 76 Ga. 378, 2 Am. St. Rep. 46; Milliken v. Marlin, 66 Ill. 13; Monroe v. Simmons, 86 Ga. 344, 12 S. E. 643.

Messrs. H. F. Wingert, Harvey R. Spessard, Frank L. Stoner, and Levin Stonebraker, for appellees:

The chancellor may intrust the person of the lunatic to one person and the estate to another.

Re Colvin, 3 Md. Ch. 278; Rutledge v. Rutledge, 118 Md. 560, 85 Atl. 661.

The fact that the same person might be both trustee of the estate and committee of the person of a non compos can in no way determine that the duties and responsibilities in the several capacities are not to be and remain separate and distinct.

Wilmer v. Philadelphia & R. Coal & I. Co. 180 Md. 674, 101 Atl. 538.

Limitations attach when there is someone in being competent to sue.

Rockwell v. Young, 60 Md. 564; Dempsey v. McNabb, 73 Md. 438, 21 Atl. 378.

When there is a competent person in existence to represent the cestui que trust the statute bars as effectually as if there existed no disability in the cestui que trust.

Crook v. Glenn, 30 Md. 55.

Adkins, J., delivered the opinion of the court:

This suit was on a promissory note dated May 27, 1904, from Pomeroy Brothers & Company, Henry F. Wingert, James A. Pomeroy, and Edward L. Pomeroy to Louise M. Funk, payable sixty days after date.

The narr. was filed on the 29th day of March, 1918, by Louise M. Funk, by her committee Albert J. Long, against the makers of said note. To this narr. defendants pleaded: (1) That they never prom-

ised as alleged; (2) that they never were indebted as alleged; (3) that the alleged cause of action did not accrue within three years before this suit; and several other pleas of limitation in various forms. Subsequently all except the first three pleas were withdrawn. Plaintiff for replication joined issue on first and second pleas and traversed the third plea, and later filed a second replication to defendants' third plea as follows: "And for a second replication to the third plea of said defendants plaintiff says that, at the time said cause of action accrued, the said Louise M. Funk was non compos, and that the said Louise M. Funk has been non compos ever since said cause of action accrued."

Defendants demurred to said second replication, which demurrer was overruled, whereupon defendants filed the following rejoinder, viz.: "The defendants for rejoinder to the replication of Louise M. Funk, by her committee Albert J. Long, to the pleas of Henry F. Wingert, James A. Pomeroy, and Edward L. Pomeroy, trading as Pomeroy Brothers in the above-entitled cause, says: That the said Louise M. Funk was adjudicated a lunatic on the 4th day of May, 1911, and that on the 5th day of May, A. D. 1911, the said Albert J. Long was appointed committee and trustee of the person and estate of the said Louise M. Funk, with full power and authority to take charge of and manage the property and to assume control of the person of the said Louise M. Funk, by the circuit court for Carroll county, sitting as a court of equity, and that the said Albert J. Long qualified as such committee and trustee by giving bond in the penalty of \$5,000, with approved security, and has been acting as such committee and trustee continuously since to this date, and that the said Albert J. Long, committee and trustee as aforesaid, had full knowledge of the existence of and possession of the alleged note sued

on in this case for a period of more than five years before filing this suit."

Plaintiff demurred to said rejoinder, which demurrer was overruled by a divided court. Whereupon by agreement of parties case was heard before the court, and on motion of defendants all the evidence was stricken out, and judgment entered in favor of defendants for want of answer to the rejoinder, and judgment was entered accordingly in favor of defendants with costs of suit. From which judgment this appeal was taken. Appellant abandoned her exception to the striking out of the testimony by the lower court, so the only question before us is on the demurrer to the rejoinder. Appellant contends the demurrer should have been sustained for two reasons:

(1) Because limitations can be raised only by a plea and not by a rejoinder after the rule day for filing pleas has passed.

(2) Even if the question of limitations can be raised by rejoinder, the demurrer should have been sustained, because the appointment of a committee does not start the running of the Statute of Limitations against a lunatic, who was such at the time the right of action accrued.

As to the first point we do not understand that the rejoinder in this case is intended to serve as an original defense of limitations, but only as an answer to the replication, and to explain why the plaintiff in this case does not come within the saving clause of the statute. If the rejoinder were good in substance it would not, in our opinion, be demurrable, but it is not necessary to decide that question because we think the demurrer should have been sustained on other grounds.

Code, art. 57, § 2, provides: "If any person entitled to any of the actions mentioned in the preceding section shall be, at the time such cause of action accrues, within the age of one-and-twenty years or non

compos, he or she shall be at liberty to bring the said action within the respective times so limited after the disability is removed, as other persons having no such disability might or should have done."

It was contended by the appellee and decided by the lower court that the disability here referred to is the lack of ability to sue, and that when a committee and trustee is appointed for the non compos there is no longer such disability, and the statute starts to run.

We have been referred by appellee to several cases in Maryland, which decide that where there is a trustee or other representative of a cestui que trust holding legal title to the cause of action the statute bars. *Crook v. Glenn*, 80 Md. 55, and other cases.

But the committee of a non compos does not hold the legal title to the property of such non compos, ^{Incompetent person—powers of committee.} and cannot sue in his name as committee. Such a suit must still be brought in the name of the non compos by another, and he is under no less disability to bring suit after the appointment of a committee than he was before, the only difference being that before such appointment the suit would be by the lunatic in his own name by his next friend, and after the appointment it would be in the name of the lunatic by his committee.

It will be noted that in the saving clause of the statute infants and lunatics are put in the same class. It is not perceived why the same construction should not be given to the word "disability" whether applied to infant or lunatic.

The precise question involved in this appeal was decided in *Bourne v. Hall*, 10 R. I. 139.

And the same point as to infants was decided in *Keating v. Michigan C. R. Co.* 94 Mich. 219, 53 N. W. 1053, where the plaintiff, after becoming of age, sued on a claim which had twice been sued on dur-

ing his infancy by the infant by next friend appointed by the court to bring suit, said suits having been dismissed.

In both these cases it was held that the term "disability" used in the statutes did not mean mere disability to bring suit. In the Rhode Island case the court, speaking of a lunatic, said: "The fact that he had guardians who might have sued for him does not, in our opinion, qualify the privilege which is conferred upon him by the exceptions in those statutes, there being no words in either statute [the Statute of Limitations or the Statute of Possession] which import that the privilege is to be subject to any such qualification."

And in the Michigan case the court said: "It is evident that the disability mentioned in the statute can have no other meaning than the infancy of the party, and it is not removed until the full period of nonage shall elapse."

See also Wood, Limitations, § 238.

But apart from the persuasive

reasoning of the cases above cited, we are satisfied the lower court construed too narrowly the saving clause of our statute, for the following reasons, viz.:

Limitation of actions—non compos mentis—effect of appointment of committee.

(1) Such a construction leaves that clause without any real meaning, because a lunatic or infant is never under disability to sue substantially in the way he can sue after the appointment of a committee or guardian.

(2) The mere disability to sue was not, in our opinion, the only reason for the saving clause. It might well happen that facts necessary to maintain a suit could be proved only by the lunatic, or that information as to witnesses could be furnished only by him.

It seems clear to us that the disability meant by the legislature was the general disability of lunacy or infancy as to the care of property and the safeguarding of rights.

Judgment reversed, with costs to appellant, and new trial awarded.

ANNOTATION.

Appointment of committee for incompetent or guardian for infant as affecting running of Statute of Limitations against him.

I. Appointment of committee for incompetent, 1689.

II. Appointment of general guardian for infant:

a. Where right of action is in infant, 1690.

II.—continued.

b. Where right of action is in guardian, 1693.

c. Rule in North Carolina, 1693.

III. Appointment of guardian ad litem for infant, 1693.

I. Appointment of committee for incompetent.

The few jurisdictions which have had occasion to pass on the effect of the appointment of a committee for an incompetent on the running of the Statute of Limitations against him are in accord with the holding in *FUNK v. WINGERT* (reported herewith) ante, 1686, that such an appointment does not start the running of the statute against the incompetent. *Hervey v. Rawson* (1895) 164 Mass. 501, 41 N. E. 682; *Finney v. Speed* (1893) 71 Miss. 32, 14 So. 465; *Bourne v. Hall* (1872)

10 R. I. 139. And see *FUNK v. WINGERT* (reported herewith).

In *Hervey v. Rawson* (Mass.) supra, an action was brought in the name of an incompetent, by his guardian, for money had and received, based on an improper loan made by a former guardian. The action was not brought within the statutory period, and, although the incompetent was under guardianship continuously from the date of the transaction in question until the institution of the present suit, it was held that the Statute of Limitations was not a bar.

In *Finney v. Speed* (1893) 71 Miss. 32, 14 So. 465, an appeal was taken by the guardian and next friend of the plaintiff, an incompetent, from a decree directing the sale of lands for partition and a decree confirming the sale. It was contended by the defendant that, as the appeal was not taken within two years after the final decree, it was barred by the Statute of Limitations. But it was held that the appeal was that of the incompetent, although taken by his guardian, and the failure to take the appeal within the time prescribed did not bar the incompetent, as the guardian was not a party in interest.

In *Bourne v. Hall* (1872) 10 R. I. 139, an action was brought by the administrator of a deceased incompetent to enforce a trust, created by will, in favor of the incompetent. It appeared that the cause of action accrued many years previously, at which time, and for many years subsequent thereto, the incompetent was under guardianship. As to the defense of the Statute of Limitations and the Statute of Possessions, it was said by the court: "We deem it a sufficient reply to these pleas that the said William was non compos mentis, and, as such, was, by express exception, not within the operation of either of said statutes. The fact that he had guardians who might have sued for him does not in our opinion qualify the privilege which is conferred upon him by the exceptions in those statutes, there being no words in either statute which import that the privilege is to be subject to any such qualification."

II. Appointment of general guardian for infant.

a. Where right of action is in infant.

In most jurisdictions it is held that, where the legal title or right of action is in the infant, the Statute of Limitations does not run against him during his minority, though a general guardian has been appointed, and suit may be instituted by him within the statutory period after reaching his majority.

Alabama.—*Moore v. Wallis* (1850) 18 Ala. 458.

Georgia. — *Grimsby v. Hudnell* (1886) 76 Ga. 378, 2 Am. St. Rep. 46; *Monroe v. Simmons* (1890) 86 Ga. 344, 12 S. E. 643.

Kentucky. — *Wilson v. Hodges* (1884) 6 Ky. L. Rep. 296 (abstract); *Willson v. Hodge* (1886) 7 Ky. L. Rep. 525 (abstract).

Mississippi. — *Weir v. Monahan* (1889) 67 Miss. 434, 7 So. 291; *Learned v. Ogden* (1902) 80 Miss. 769, 92 Am. St. Rep. 621, 32 So. 278.

New York.—*Torrey v. Black* (1876) 3 N. Y. Week. Dig. 131.

Pennsylvania.—*FASSITT v. SEIP* (reported herewith) ante, 1671.

Tennessee. — *Moyers v. Kinnick* (1901) 1 Tenn. Ch. App. 65; *State use of Howard v. Parker* (1875) 8 Baxt. 495; *Henley v. Robb* (1888) 86 Tenn. 474, 7 S. W. 190; *Alvis v. Oglesby* (1889) 87 Tenn. 172, 10 S. W. 313.

In *Moore v. Wallis* (1850) 18 Ala. 458, a ward, after the death of a surety on the bond of her former guardian and the distribution of his estate, obtained a decree against the guardian, on which execution was issued and returned unsatisfied. Thereafter she filed a bill in equity to enforce the demand against the legal representatives of the deceased surety. There was no presentation of the claim on the bond to the administrators before the bill was filed, and it was claimed by the defendant that the Statute of Nonclaim consequently attached. To this contention the court said: "But the Statute of Nonclaim does not extend to persons under age; they are expressly excepted by the proviso, and, consequently, the complainant is not affected by the statute. The counsel contended that, as the complainant had a guardian to attend to her affairs, she is not within the proviso, but we cannot agree with the counsel as to that; if such were to be the construction, very few orphans, perhaps, would be within the saving of the proviso."

In *Monroe v. Simmons* (1890) 86 Ga. 344, 12 S. E. 643, the action was against a surety on an administrator's bond. Although the plaintiff was un-

der guardianship during his infancy, when the cause of action accrued, suit was not brought against the surety until nine years after the plaintiff reached his majority. It was held that since the right of action was in the minor, not in the guardian, the fact that the guardian might have sued in the name of the ward, but failed to do so, would not operate to the prejudice of the infant, who was entitled to bring his action within the statutory period after reaching his majority.

In *Grimsby v. Hudnell* (1886) 76 Ga. 378, 2 Am. St. Rep. 46, the action was by an heir at law against the administrator of her brother, another heir at law. The complainant was one of the heirs to an estate left by her father, of which estate her brother, who was her guardian, was administrator. The brother subsequently died, and an administrator was appointed who took charge of the estate, collecting notes and converting personalty into money without ever accounting to complainant therefor. At the time the cause of action accrued complainant was under guardianship, but, although demand was made on the defendant administrator, no action was brought until four years after complainant became of age. It was contended by the defendant that the claim was barred, but the court held that although the guardian might have maintained an action in behalf of his ward, the title or right of action was in the infant, and her claim would not be barred until the expiration of the period prescribed by statute after she reached her majority.

In *Willson v. Hodge* (1886) 7 Ky. L. Rep. 525 (abstract) suit was brought by an infant devisee against the sureties in the bond of an executor. Although the infant had a guardian who might have sued during the statutory period, it was held that his failure to do so did not bar the infant, and that he could maintain the action within the prescribed statutory period after reaching his majority. See to the same effect, *Wilson v. Hodges* (1884) 6 Ky. L. Rep. 296 (abstract).

In *Learned v. Ogden* (1902) 80

Miss. 769, 92 Am. St. Rep. 621, 32 So. 278, a joint action was brought by remaindermen for injury to the inheritance. One of the plaintiffs was under guardianship for more than five years, and it was contended that as more than six years had elapsed since the appointment of the guardian, and after the accrual of the right of action, the Statute of Limitations operated as a bar to the action. It was held that it is only where the legal title to the property is in the guardian that the statute begins to run against the ward.

In *Weir v. Monahan* (1889) 67 Miss. 434, 7 So. 291, the action was by the guardian and next friend of infants in their behalf against the representatives of the sureties upon an administration bond. To the plea of the Statute of Limitations it was held that although the plaintiffs were under a general guardian who might have brought action sooner, this was no bar, as the guardian had no right in himself to sue, but the right was that of the infants, to be asserted in their name, and as the legal title was in them, not in the guardian, the statute did not run against the minors during their infancy.

In *Torrey v. Black* (1876) 3 N. Y. Week. Dig. 131, action for trespass to land of a minor was brought shortly after the minor became of age, and more than six years after the cause of action accrued. In ruling against a plea of the Statute of Limitations the court said: "The plaintiff, being under the disability of infancy when the cause of action accrued, the Statute of Limitations was not a bar, notwithstanding the plaintiff had a guardian during the whole period of six years, by whom the action might have been maintained."

In *FASSITT v. SHIP* (reported herewith) ante, 1671, an action was brought for the partition of real estate and an accounting of rents and profits. The complainant was under guardianship at the time the right of action accrued, and for some time thereafter. The defendant claimed that the action was barred by the Statute of Limitations, but the court

overruled this contention, holding that as the legal title was in the infant and not in the guardian, the right of action was in the infant; and that the fact that the guardian could have protected her interests by an appropriate action in law or equity did not act to the prejudice of the infant. It was further held that the fact that suit was eventually brought by guardian, and not deferred until the infant attained his majority, did not change the rule.

In *Moyers v. Kinnick* (1901) 1 Tenn. Ch. App. 65, a bill in equity was filed by a ward against her guardian and a third person, alleged to have colluded with the guardian in converting a portion of the ward's estate, the guardian having applied some personal property as a credit on a note, notwithstanding the fact that it was amply secured. The note matured in 1892 and action was not brought until 1899. It was insisted by the defendant that the complainant's suit was barred by the six-year Statute of Limitations. It was said: "It is true that the note matured on the 1st day of January, 1892, and the suit was not brought until August 7, 1899; therefore, the guardian himself would be barred, but this does not bar the ward; she, if unmarried, would have the right to bring a suit within the three years after attaining her majority, or, upon marriage, her husband would have three years from that time in which to bring the suit."

In *Alvis v. Oglesby* (1889) 87 Tenn. 172, 10 S. W. 313, the action was by distributees of an intestate estate against the executor of the deceased administrator of the estate, to recover their several distributive shares and for the purpose of surcharging and falsifying the settlement made. It appeared that the administrator made a partial settlement in 1869, but subsequently died without completing his administration and without making a final settlement. The bill was filed in 1881, twelve years after the making of the partial settlement. One of the complainants did not reach his majority until 1879, or within three years of the filing of the bill. To the de-

fense of the Statute of Limitations it was held in his case that the fact that he was under guardianship did not operate as a bar to him, and the bill, in so far as he sought to recover his individual share, was in time.

In *Henley v. Robb* (1888) 86 Tenn. 474, 7 S. W. 190, an action was brought under a will of a testator, providing that the proceeds from the sale of his estate should go to his six children equally, and that the amount given any child who might die without issue capable of taking by inheritance should accrue to the surviving children. After the death of testator, but before the distribution of his entire estate, five of his children died, four intestate and without issue, and one leaving issue. The action was brought by that issue against the sixth and only surviving child of the testator to recover part of the estate received by her. The action was brought in 1883, within three years of the time the complainant reached his majority. The complainant was under a guardian from 1860 to 1875. The defendant pleaded the Statute of Limitations, and the contention was made that the former guardian of complainant could have sued at any time during the period of his guardianship, and, not having done so within the time prescribed by statute, was barred, and the ward was likewise barred. The court, in ruling against the plea, said: "The legal title to the property of the ward is not in his guardian. He is but the custodian of the ward's estate."

In *State use of Howard v. Parker* (1875) 8 Baxt. (Tenn.) 495, the action was against the sureties on a guardian's bond. Two of the complainants became of age more than three years before the commencement of the action, but the remaining complainant did not reach his majority until December 13, 1872, and action was commenced on March 27, 1874. It was insisted by the defendant that as that complainant's guardian could have brought action during the minority of the ward, and did not do so, the ward was barred. To this it was said: "But the legal title is not in the guardian; the ward is the owner, and the

guardian is a mere custodian. It follows, therefore, that though the statute may bar the guardian, it does not bar the ward, and under our statute he has three years in which to commence action after the removal of his disability."

b. Where right of action is in guardian.

Where the legal title to property belonging to the estate of an infant is in his general guardian, it has been held that a bar of the Statute of Limitations as to the guardian will operate so as to bar the ward of an action with respect to the property. *Coleman v. Walker* (1860) 3 Met. (Ky.) 65, 77 Am. Dec. 163; *Dignan v. Nelson* (1903) 26 Utah, 186, 72 Pac. 936.

In *Coleman v. Walker* (Ky.) *supra*, an action was brought against the principals and sureties on a note payable to the guardian of the plaintiff's wife, representing a loan of money belonging to the ward. The ward was married to the plaintiff in 1857, just before arriving at age, and in 1859 the guardian transferred the note to the husband as part of the ward's estate. No action was brought on the note until after the expiration of seven years from the date of its maturity. The principals were insolvent and made no defense; but the sureties relied on the lapse of time as exonerating them. It was held that the legal title or right of action was in the guardian, and as he was barred by lapse of time the ward was also barred.

In *Dignan v. Nelson* (Utah) *supra*, an action for ejectment, it appeared that the plaintiff's guardian, who was also their executor, failed to bring action within the statutory period of limitation. It was held that the statute was a bar to the minor heirs, since the legal title and right of action was in the guardian.

c. Rule in North Carolina.

In North Carolina the rule seems to be that the Statute of Limitations runs against the infant as to all rights of action which the guardian may and ought to enforce. But where the legal title is in the ward the guardian is under no duty to sue, and his failure

to do so will not bar the ward who may bring action within the prescribed statutory period after reaching his majority. *Culp v. Lee* (1891) 109 N. C. 676, 14 S. E. 74; *Cross v. Craven* (1897) 120 N. C. 331, 26 S. E. 940.

In the case last cited, an action for possession of land, it appeared that, although the plaintiff was under guardianship for seven years after the right of action accrued, suit was not brought until after she became of age. Overruling the defense of the Statute of Limitations, the court held that as the guardian did not hold the legal title to the land in question, and was not a trustee thereof, it was not his duty to sue for its recovery, and the fact that action was not brought within the statutory period would not bar the infant who might sue after reaching her majority.

In *Culp v. Lee* (N. C.) *supra*, an action by distributees against the executor for an alleged balance due under the will of the testator, it appeared that the plaintiffs, during their minority, were under a general guardian, who received from the executor a less sum than was due to his wards. The executor filed his final account in 1876, and action was not brought until 1891. It was held that as the defendant had been exposed to an action by the guardian for more than ten years, the wards were barred by lapse of time. It was pointed out in this connection that the guardian would be responsible on his bond for any loss resulting from his laches in failing to sue.

III. Appointment of guardian ad litem for infant.

Where the guardian ad litem of an infant can sue within the prescribed period of limitation, but fails to do so, or, having instituted an action within the statutory period, discontinues it, the rights of the infant are not prejudiced thereby, and he may still take advantage of his disability; and the action is not barred until the statutory period of limitation has elapsed after he becomes of age.

United States.—*Snare & T. Co. v. Friedman* (1909) 40 L.R.A.(N.S.) 367,

94 C. C. A. 369, 169 Fed. 1, 21 Am. Neg. Rep. 311.

Alabama. — *McLaughlin v. Beyer* (1913) 181 Ala. 427, 61 So. 62.

Illinois. — *Libby, McNeill & Libby v. Kearney* (1906) 124 Ill. App. 339.

Kentucky. — *Hopkins v. Virgin* (1876) 11 Bush, 677.

Michigan. — *Keating v. Michigan C. R. Co.* (1892) 94 Mich. 219, 53 N. W. 1053.

New Hampshire. — *Frost v. Eastern R. Co.* (1886) 64 N. H. 220, 10 Am. St. Rep. 396, 9 Atl. 790.

New York. — *Geibel v. Elwell* (1895) 91 Hun, 550, 36 N. Y. Supp. 238.

Tennessee. — *Whirley v. Whiteman* (1858) 1 Head, 610.

Texas. — *Galveston, H. & S. A. R. Co. v. Washington* (1901) 25 Tex. Civ. App. 600, 63 S. W. 538; *Nelson v. Galveston, H. & S. A. R. Co.* (1890) 78 Tex. 621, 11 L.R.A. 391, 22 Am. St. Rep. 81, 14 S. W. 1021. And see *FUNK v. WINGERT* (reported herewith) ante, 1686.

In *Snare & T. Co. v. Friedman* (Fed.) supra, the action was brought in the name of an infant by her mother as next friend for personal injuries received by the infant. Suit was originally brought shortly after the injuries in question occurred, in a state court in New Jersey, and, pending a motion for a new trial made by defendant, was discontinued. The present action was brought two years and six months after the institution of the first action, the plaintiff still being a minor. The defendant contended that the plaintiff, by bringing action in the first instance, set the Statute of Limitation in motion, and therefore the present action was barred. It was held that the institution of the first action did not start the running of the statute, and that the plaintiff would not be barred from bringing suit until the statutory period of two years had elapsed after she reached her majority.

In *McLaughlin v. Beyer* (Ala.) supra, an action for libel and slander, it was held that the plaintiff, an infant, was not barred by the act of her next friend in instituting a former suit within the period of limitation, which

he allowed to be dismissed on account of his failure to answer interrogatories propounded to the plaintiff.

In *Libby, McNeill, & Libby v. Kearney* (Ill.) supra, an action was instituted by next friend on behalf of an infant, to recover damages for personal injuries. Within two years after becoming of age the plaintiff filed additional counts to the action, and to these counts the defendant pleaded the Statute of Limitations. The court, in sustaining a demurrer to this plea, said: "But the record shows conclusively and without contradiction that Kearney, the plaintiff, did not become twenty-one years of age until July 28, 1900, and that the additional counts were filed in time before the period of limitation had expired. The bringing of a suit by next friend during the plaintiff's minority, on one cause of action, certainly does not waive the right secured by statute to the infant to sue after he comes of age on another."

In *Hopkins v. Virgin* (1876) 11 Bush (Ky.) 677, an action for slander instituted by the next friend of an infant, in her behalf, after the statutory period had elapsed, it was held that the plea of the Statute of Limitations was not available, and that the plaintiff could sue at any time after the accrual of the cause of action, and until the expiration of one year after reaching her majority.

In *Keating v. Michigan C. R. Co.* (1892) 94 Mich. 219, 53 N. W. 1053, it appeared that the plaintiff, a minor, was injured in 1876. In 1877, his father was appointed next friend, and immediately thereafter brought suit in behalf of the minor son. That action was discontinued, and in 1883 suit was again brought by the father in behalf of the infant, which suit was subsequently discontinued. Within one year after becoming of age, the plaintiff brought a suit, based on the same cause of action. The defendant pleaded the Statute of Limitations. Overruling this plea, the court said: "It is evident that the disability mentioned in the statute can have no other meaning than the infancy of the party, and it is not removed until the full

period of his nonage shall elapse. . . . The fact that suit was actually commenced in the name of the infant, by his next friend, did not set the statute in motion, so that any lapse of time would bar it short of the time fixed by the statute, which is six years after his majority."

In *Frost v. Eastern R. Co.* (1886) 64 N. H. 220, 10 Am. St. Rep. 396, 9 Atl. 790, it appeared that an infant was injured in 1877, and an action was commenced in 1884, in his name, by his father as next friend. The defendant pleaded the Statute of Limitations, contending that the plaintiff's next friend was under no legal disability, and could have brought suit at any time within six years after the right of action accrued. To this contention the court said: "It is an answer to this suggestion that it is the infant's action, and the failure of the next friend to bring suit within six years is no bar to the plaintiff's right of action."

In *Geibel v. Elwell* (1895) 91 Hun (N. Y.) 550, 36 N. Y. Supp. 238, a minor sued by guardian ad litem to recover damages for personal injuries. A suit, based on the same cause of action, had been brought by another guardian ad litem, in behalf of the minor, six years before, and was subsequently discontinued. It was held that the commencement of the original action by the guardian ad litem did not start the running of the Statute of Limitations.

In *Whirley v. Whiteman* (1858) 1 Head (Tenn.) 610, plaintiff sued after becoming of age, claiming damages for personal injuries, based on a cause of action which accrued more than eighteen years previous. The court, in holding that this delay could have no influence on his right to maintain the action, said: "The plaintiff might have sued by *prochein ami*, at any

time during minority; or he might decline doing so, and bring his suit at any time within one year after arriving at age, as he elected to do."

In *Galveston, H. & S. A. R. Co. v. Washington* (1901) 25 Tex. Civ. App. 600, 63 S. W. 538, suit was brought by the father of a minor, as next friend, to recover damages for personal injuries to the minor. It appeared that suit was brought on the same cause of action more than two years previously, and was dismissed for want of prosecution. The defendant contended that the disability of infancy was waived by the institution, prosecution, and subsequent abandonment and dismissal of the first suit, and that therefore the plaintiff was barred by the Statute of Limitations. It was held that, as the minor could assert no right in the institution, conduct, or disposition of the suit, his disabilities were not removed or suspended by the bringing of the original action, and that the second suit was not barred.

In *Nelson v. Galveston, H. & S. A. R. Co.* (1890) 78 Tex. 621, 11 L.R.A. 391, 22 Am. St. Rep. 81, 14 S. W. 1021, suit was brought in the name of an infant by his mother as next friend, to recover damages for the death of the infant's father, resulting from injuries negligently inflicted by the defendant railroad in 1882. In bar of the plaintiff's right to recover, it was pleaded that from the date of plaintiff's birth in 1882 until the institution of the present action in 1885, his mother, as natural guardian and next friend, was able and had the right to sue for his benefit; that, having failed to do so within one year after the accrual of the cause of action and plaintiff's birth, the action was barred. The court overruled this contention, and held that the action was in time. W. F. F.

W. W. LUTTON

v.

LOUIS BAKER, Impleaded, etc., Appt.

Iowa Supreme Court — November 11, 1919.

(— Iowa, —, 174 N. W. 599.)

Bills and notes — absence of revenue stamps — effect.

1. A note which lacks the revenue stamps required by law is not "complete and regular on its face" within the meaning of a statute requiring it to be so complete and regular, to enable one to purchase it in good faith so as to be an innocent purchaser.

[See note on this question beginning on page 1701.]

Equity — what necessary to give jurisdiction.

2. To give a court of equity jurisdiction of a suit, equities must be alleged and proved.

[See 10 R. C. L. 420.]

Trial — move for transfer to law side of court — when to be made.

3. Where a petition in equity states a cause of action over which equity has jurisdiction defendant cannot move to transfer to law before answering.

— motion to transfer to law side — what is.

4. A motion to continue for further hearing a suit in equity to enforce a lien upon collateral to a note and to submit to a jury the question of liability on the note is in fair effect merely a motion to transfer the case from equity to law.

Equity — jurisdiction to enforce assignment.

5. Equity has jurisdiction of a suit to enforce an assignment of an interest in a decedent's estate as collateral to a note.

[See 2 R. C. L. 637; 10 R. C. L. 352.]

Pleading — failure to attack — effect.

6. Failure to attack a petition is an agreement that plaintiff is entitled

to the relief prayed for if he proves what he has pleaded.

[See 21 R. C. L. 562.]

Evidence — burden of proof — innocent purchaser of note.

7. One seeking to enforce a promissory note as an innocent purchaser for value has the burden of proving that he is such purchaser.

[See 3 R. C. L. 1033.]

Bills and notes — agreement as to time of payment.

8. An agreement that no payment shall be made on a note unless the purchaser first performs certain acts is binding between the parties and assignees not in good faith.

[See 3 R. C. L. 863, 998.]

Estoppel — permitting payee to retain possession of conditional note.

9. That the maker permits the payee to retain possession of a conditional note does not estop him from setting up breach of the condition against an assignee who is not an innocent purchaser for value.

Pleading — judgment on bad plea — necessity of proof.

10. One seeking judgment upon a plea not good in law because it has not been attacked must show that he has strictly proven its allegation.

[See 21 R. C. L. 562.]

APPEAL by defendant Baker from a judgment of the District Court for Johnson County (Howell, J.) in favor of plaintiff in an action on a note and for the establishment of a lien to secure its payment. *Reversed.*

Statement by Salinger, J.:

The plaintiff asserts that he is an "innocent purchaser" of a note made by Baker to Le Grand, and that he is entitled to have a lien established to secure payment of said note. The trial court gave him judgment

against Baker and established the lien as prayed. Baker appeals. Le Grand made default.

Messrs. Crosby & Fordyce, for appellant:

The court erred in refusing to permit the appellant a jury trial because

the plaintiff's testimony failed to establish any right for equitable relief, although his petition alleged a cause for equity jurisdiction.

Fisher v. Trumbauer, 160 Iowa, 255, 138 N. W. 528, 141 N. W. 419; *McNight v. Parsons*, 136 Iowa, 390, 22 L.R.A. (N.S.) 718, 125 Am. St. Rep. 265, 118 N. W. 858, 15 Ann. Cas. 665.

It is against the public policy of this state to enforce payment of a note which is executed, transferred, and sought to be collected without regard to United States revenue laws.

Hugus v. Strickler, 19 Iowa, 418.

A note required by United States revenue laws to be stamped ought not to be held "complete and regular on its face" unless such stamp is attached, and plaintiff is not, therefore, a bona fide holder.

Re Philpott, 169 Iowa, 555, 151 N. W. 825, Ann. Cas. 1917B, 839; *Blackwell v. Denie*, 23 Iowa, 68; *Sperry v. Horr*, 32 Iowa, 184.

Actual knowledge of defenses by plaintiff was immaterial as the note, being uncertain in time of payment, was not negotiable.

Iowa Nat. Bank v. Carter, 144 Iowa, 715, 123 N. W. 237; *Quinn v. Bane*, 182 Iowa, 843, 164 N. W. 788; *Manhard v. First Nat. Bank*, — Iowa, —, 165 N. W. 185.

Messrs. J. L. Swift and Dutcher & Davis for appellee.

Salinger, J., delivered the opinion of the court:

I. Plaintiff filed what he styles "Petition in equity." It states his claim of title to the note. It alleges that subsequent to the making of the note Baker made a written assignment to Le Grand, assigning to him: "\$475 and interest out of my share of the estate of my father Joseph Baker, deceased, of Johnson county, the same being to secure a certain note for the amount of \$475 and interest, and hereby agree that the said amount shall be paid out of the proceeds of the estate of my said father that shall be due to me and I also agree that the administrator of the estate of my father shall pay from my portion of the said estate the amount of the note above referred to with interest."

It is further alleged that the father of Baker left surviving nine

children and heirs at law, including Louis Baker as one; that Baker by inheritance from his father became the owner of an undivided one ninth of described real estate and is still the owner thereof; that the note and the assignment are the property of the plaintiff; that the assignment was intended to convey the interest of Baker in said real estate to secure payment of said note; and that said assignment should be given the force and effect of a mortgage upon said real estate. Added to the prayer for judgment on the note, plaintiff prayed that such judgment be decreed to be a lien upon said described real estate, and that said lien be foreclosed, and for general equitable relief.

At the conclusion of the testimony for plaintiff, defendant, Baker, moved the court to continue the cause for further hearing to submit the question of liability on the note to a jury. The reason stated was that "plaintiff has failed to make out any showing for equitable relief." The overruling of this motion is now complained of.

There is no difficulty with the law. It is settled by *Fisher v. Trumbauer*, 160 Iowa, 255, 138 N. W. 528, 141 N. W. 419, that one may not plead himself into chancery. To keep a case on the equity

side equities must be alleged and proved. The petition at bar did set forth a cause of action over which the court of equity had jurisdiction. Wherefore defendant was not

called upon to move a transfer before answering. It would have been idle to address such a motion to this petition because such motion was foredoomed to be rightly overruled. There was no right to obtain a transfer while nothing existed except a good petition in equity. In such case attack must be deferred until, notwithstanding the allegations of such petition, it is made to appear that no right to equitable relief exists. Nor

Equity—what necessary to give jurisdiction.
Trial—move for transfer to law side of court—when to be made.

is it material that the form of the motion, instead of asking a transfer in so many words, asked that the cause be continued for further hearing and that the liability on the note be submitted to a jury. At the time the motion was made the jury had been excused for the term and a con-

—motion to transfer to law side—what is. tinue was necessary to get a jury.

And we are of opinion that the motion in fair effect was one to transfer the cause to the law side on the ground that, though the plaintiff had pleaded an equitable cause of action, he had failed to prove one. But presentation has not enlightened us as to why it is claimed that there was a failure "to make out any showing for equitable relief." And that is the vital question. It matters little that defendant's complaint is well taken if there be such failure, unless it be made to appear that there was such failure. It appears, too, that after the motion was overruled the defendant himself adduced evidence. It is quite doubtful whether the point made is tenable in view of the fact that the motion was not repeated at the close of all the evidence. See *Robinson v. Hawkeye Commercial Men's Asso.* — Iowa, —, 171 N. W. 118. But passing that, aside from the statement in the petition that the assignment was intended to be security for the note and should be given the effect of a mortgage, it is made plain that the assignment it-

Equity—jurisdiction to enforce assignment.

self is the basis upon which the equitable relief is sought —and it is a sufficient basis. Indeed, its sufficiency was not challenged. If it was not a proper basis for the equitable relief sought, that was as true and as apparent when the petition was filed as it was at the time when the motion was made. Under familiar

Pleading—failure to attack—effect.

rules, failure to attack the petition amounted to an agreement that plaintiff was entitled to the relief prayed if he proved what he had pleaded. He did prove

that much. He did show that such an assignment existed and that the plaintiff had become its owner. It follows that the overruling of the motion was not reversible error. See *Gardner v. Kerlin*, — Iowa, —, 169 N. W. 177. It follows that the suit must on this appeal be treated as a suit in equity.

II. It is assigned the court erred in holding that the note sued on could be enforced notwithstanding failure to attach revenue stamps as required by act of Congress (Act Oct. 3, 1917, chap. 68, § 807, 40 Stat. at L. 321, Comp. Stat. § 6318h6, Fed. Stat. Anno. Supp. 1918, p. 371) in force at the time, and argued that it is inconsistent with the policy of this state to enforce the payment of a note as to which there has been a failure to comply with said revenue laws. The appellee responds that no such issue is made in the pleadings, and must be; that there is no evidence that the failure to stamp was due to fraudulent intent; and that in the absence of such intent—inter partes, at least—such failure is of no materiality. That does not quite meet the case. The appellee asserts himself to be an innocent purchaser for value and has the burden of

Evidence—burden of proof—innocent purchaser of note.

proof on that allegation. The defendant expressly denied that plaintiff was such purchaser, and his argument is that when a note which the revenue laws require to be stamped is not stamped it ought not to be held "complete and regular on its face." In support, appellant relies on § 3060a52 of the Code Supplement 1913; *Re Philpott*, 169 Iowa, 555, 151 N. W. 825, Ann. Cas. 1917B, 839; *Blackwell v. Denie*, 23 Iowa, 63; *Sperry v. Horr*, 32 Iowa, 184; and *Hugus v. Strickler*, 19 Iowa, 413. So, appellant tenders the question whether one is an innocent purchaser where he takes a note which is not duly stamped.

In *Hugus v. Strickler*, supra, a statute was construed which required certain documents to be stamped. That statute provided a

penalty for failure to stamp if there was "intent to evade the provisions of this act." It was contended that failure to stamp was not fatal to the validity of an instrument because there was no "intention to evade." We held that this intent was necessary only to the infliction of the penalty; that such intent was immaterial so far as the validity of the instrument is concerned; and it was held that the paper was void. The *Hugus* Case was approved in *O'Hare v. Leonard*, 19 Iowa, 516; *Miller v. Bone*, 19 Iowa, 571; *Botkins v. Spurgeon*, 20 Iowa, 598; *Barney v. Ivins*, 22 Iowa, 165; and *Muscatine v. Sterneman*, 30 Iowa, 528, 6 Am. Rep. 685. Then the Supreme Court of the United States held in *Campbell v. Wilcox*, 10 Wall. 421, 19 L. ed. 978, that the fraudulent intent was essential to declaring the unstamped instrument to be void. In deference to this, the *Hugus* Case was overruled in *Mitchell v. Home Ins. Co.* 32 Iowa, 425. Later case of *Ricord v. Jones*, 33 Iowa, 27, overruled the *Hugus* Case and all cases that had followed it. The overruling is approved in *State v. Shields*, 112 Iowa, 29, 83 N. W. 807, and is recognized in *State v. Glucose Sugar Ref. Co.* 117 Iowa, 530, 91 N. W. 794. But it does not appear that cases upon which we shall presently comment have been overruled. In *McBride v. Doty*, 23 Iowa, 122, we held that the record of an instrument insufficiently stamped does not give constructive notice to third parties. In *Blackwell v. Denie*, 23 Iowa, 63, in *Gage v. Sharp*, 24 Iowa, 18, and in *Anderson v. Starkweather*, 28 Iowa, 409, it is ruled that a buyer of paper is protected if the same was duly stamped when bought and the buyer was ignorant that it was not stamped when issued. We held in *Sperry v. Horr*, 32 Iowa, 187, that the buyer is protected if it does not appear the buyer knew the paper had not been duly stamped by the maker; in *First Nat. Bank v. Dougherty*, 29 Iowa, 260, that he is not protected if he admits he knew the

maker did not stamp and had authorized no other to stamp.

The effect of all these is that a buyer is not protected if he knew that the stamp law had been disobeyed. All that is not done is determining who has the burden of proof. But that is settled by the statute which governs this case. It has been construed time and again to require that the holder must prove he bought in good faith without notice. See *Arnd v. Aylesworth*, 145 Iowa, 185, 29 L.R.A. (N.S.) 638, 123 N. W. 1000. The stamping is not as much as referred to in the evidence. The only thing that could possibly be a reference to it is the following statement of plaintiff: "I just took the note as it was without asking Le Grand who signed the note. I didn't ask who signed it. All I knew is what I seen on the paper; it was on the note I seen that name there."

It seems clear that the testimony, "All I knew is what I seen on the paper," is not testimony that plaintiff bought in ignorance of any violation of the Stamp Act (Comp. Stat. § 6818h6). Indeed, the note set out in the abstract does not purport to be stamped. And, so, the buyer must have known that the stamp law had been disregarded. And the sole question is the effect of such knowledge. Section 3060a52, Code Supplement 1913, defines a holder in due course to be, among other things, one who has taken an instrument which "is complete and regular upon its face." We held in the case of *Re Philpott*, 169 Iowa, 555, 151 N. W. 825, Ann. Cas. 1917B, 839, that a note payable "on or before four — after date" is not "complete and regular on its face," is not negotiable, and he who takes the same is not a "holder in due course." We now hold that a note which lacks the stamping required by law is not "complete and regular on its face," and that therefore plaintiff is not a holder in due course, and must meet any defense that is good

Bills and notes—
absence of
revenue stamps
—effect.

against the payee who transferred to plaintiff.

III. The defendant maker does interpose defenses which, if proved, will defeat the payee who transferred to plaintiff. One of them is that when the note was signed he and Le Grand also signed a contract that no payment should be made unless Le Grand first performed certain things that he agreed to perform. Assume that all defenses but this last one have not been established. That will not destroy this last defense if that be proved. Is it proved? The testimony, including that of Humphrey, a witness for plaintiff, clearly establishes that such a contract was made. The evidence that it was never performed or offered to be performed is undisputed. If Le Grand had not sold the

—agreement as
to time of
payment.

note, this defense would prevent his collecting the note. As said, this plaintiff is in no better position than Le Grand. If this were all, it was error to give judgment against Baker.

IV. The sole remaining question is one created by a plea of estoppel made in the reply of the plaintiff. That plea asserts that Baker "is barred and estopped from now alleging or setting up the defense that said Le Grand had no authority to negotiate said note or to avoid payment of same." The bases for this conclusion are:

(1) "Baker had actual knowledge that Le Grand had possession of said note long before he negotiated same to plaintiff, and had actual knowledge that Le Grand was attempting to negotiate same."

(2) "Baker took no steps to prevent Le Grand from disposing of said note or to have it called in and canceled, but permitted him to retain possession and to negotiate it to plaintiff."

Manifestly, none of these matters would estop Baker if Le Grand had kept the note or had parted with it to someone who had knowledge of the conditional contract between Le Grand and Baker and of the breach

of such contract. Indeed, the plea states in terms that Baker is estopped to assert want of authority to negotiate or to avoid payment "of same when in the hands of this plaintiff, who is an innocent holder of same." It follows that on fair construction the plea is that, since either Baker or an innocent purchaser must suffer on account of acts and omissions by Baker, it is Baker rather than the innocent purchaser who should suffer. That appellee so construes it is shown by his citing *Marshall Field & Co. v. Sutherland*, 136 Iowa, 220, 13 L.R.A. (N.S.) 576, 113 N. W. 770. Fairly construed, the plea is wholly based on the claim that plaintiff is an innocent purchaser. While appellee does argue that Baker has no defense even if plaintiff be not an innocent purchaser, the whole of his argument makes plain that he rests his plea of estoppel on the claim that he is such purchaser. It is more than doubtful whether plaintiff has established the alleged acts and omissions by Baker by a preponderance of the testimony. But whether he has or not requires no extended consideration, for we have held that as matter of law plaintiff is not an innocent purchaser. And on a plea that certain things constitute an estoppel because plaintiff is such purchaser plaintiff must be defeated no matter what were the acts and omissions of Baker where plaintiff fails to prove that he is an innocent purchaser. These acts and omissions do not concern plaintiff unless he has the standing of such a purchaser.

Estoppel—
permitting
payee to retain
possession of
conditional
note.

We have strictly held the loser below to the rule that an unchallenged bad plea becomes a good plea, if what is pleaded is proven. But we have always stopped short of permitting the rule to apply unless the one who urged the estoppel had proved all the fact allegations of the unchallenged pleading. See *Garland Corp. v. Waterloo Loan & T. Co.* —

Iowa, —, 170 N. W. 873. This much must be demanded.

Pleading—
judgment on
bad plea—
necessity of
proof.

Where one seeks judgment upon a plea which is not good in law because such plea has not been attacked and that he has proved it as written, he should see to it that he strictly proves the bad plea. Plaintiff has

failed to establish his plea of estoppel.

The decree below will be reversed. The trial court is directed to dismiss the petition and enter judgment for costs in favor of appellant, Louis Baker.

Ladd, Ch. J., and Evans and Preston, JJ., concur.

ANNOTATION.

Absence of revenue stamp as affecting bona fides of purchaser of bill or note.

The direct authority upon the question under annotation herein is very limited. In *Ebert v. Gitt* (1902) 95 Md. 186, 52 Atl. 900, the fact that a promissory note bore insufficient revenue stamps when purchased was held not to preclude the purchaser from becoming a bona fide holder where there was no intent to defraud the government, and it appeared that at the time of the transfer the purchaser overlooked the fact that the note was insufficiently stamped. The court in this case adheres to the rule that where the purchaser of a note has no actual knowledge of defenses, merely suspicious circumstances sufficient to put a prudent man upon inquiry, or even gross negligence on the part of the purchaser at the time of the purchase and delivery of the note, are not sufficient of themselves to prevent a recovery by the plaintiff unless it appears from the evidence that in taking the note the purchaser acted in bad faith. The court states that in the case at bar the proof showed that the purchaser "acquired title to the note in suit in the usual course of business before maturity for a valuable consideration and without any actual notice of any infirmity in the title of Alleman, the payee, who transferred it to him. It also appears from the proof that the omission of the proper amount of stamps from the note was not due to any attempted fraud upon the Revenue Act of the United States government. In the bill filed by the appellant in the equity case which has been referred to there appears the express averment that

"through mistake or inadvertence and without any intent to defraud the government of the United States an insufficient amount of stamps were put on said note." It is further admitted as a fact that at the time of the transfer of the note in suit to him the appellee 'overlooked the fact that the note was insufficiently stamped.' There was therefore proof going to establish every requisite to sustain the title of the appellee to the note in controversy. The prayer under consideration ignored all of this proof and in effect asserted that in spite of it, if the note in suit was insufficiently stamped at the time of its transfer to the appellee, this single circumstance disentitled him to recover because he was thereby charged 'with notice of the equities attaching to the note in the hands of Alleman,' the payee. This legal proposition is plainly at variance with the law as we have found it to be."

It is stated in *Burson v. Huntington* (1870) 21 Mich. 415, 4 Am. Rep. 497, that the want of a revenue stamp on a promissory note would not be such a circumstance of suspicion as to put an indorsee upon inquiry in taking the note. It is further stated that under the Michigan decision the note would be valid and could be enforced without a stamp.

The cancelation of a revenue stamp by one other than the maker, whose initials were used, was held not to be a suspicious circumstance in *Martindale v. Stotler* (1909) 80 Kan. 87, 101 Pac. 629.

The court in the reported case (*LUTTON v. BAKER*, ante, 1696) seems to regard its decision as supported by earlier Iowa decisions to the effect that where the purchaser of a bill or note bearing a revenue stamp knew that such stamp was placed on the note after it was executed and delivered, the omission of the stamp could be pleaded against him (*First Nat. Bank v. Dougherty* (1810) 29 Iowa, 260), and by other cases in which a purchaser of a post-stamped note has been held to be a bona fide holder, and in which his character as such is expressly based upon the fact that he had no knowledge that the note was not stamped until after it was issued

(*Blackwell v. Denie* (1867) 23 Iowa, 63; *Gage v. Sharp* (1867) 24 Iowa, 15; *Anderson & Co. v. Starkweather* (1869) 28 Iowa, 409; *Speery v. Horr* (1871) 32 Iowa, 184; and see *Robinson v. Lair* (1870) 31 Iowa, 9), notwithstanding that the view in force in Iowa at the time these cases were decided, that the omission of the stamp, even if inadvertent, invalidated the instrument, was overruled by later cases. It is to be observed that the omission of the stamp was relied upon in the *LUTTON CASE*, not as a ground of defense to the note, but as defeating the bona fides of the purchaser and thus letting in an independent defense.
W. A. E.

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